

SPEAK UP!  
“CHILD FRIENDLY” REPRESENTATION FOR MICHIGAN’S LAWYER/GUARDIAN AD LITEM  
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Submitted in partial fulfillment of the requirements of the  
King Scholars Program  
Michigan State University College of Law  
under the direction of  
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Spring 2008

*THESE ARE MY BABIES NOW? WHAT KIND OF AUTHORITY DOES SHE THINK SHE HAS?*

My boss slapped a new file on my desk and angrily walked away, huffing. I knew without a glance that it was another family law case. He specializes in criminal defense. After I told him that I enjoyed studying family law in law school, he started shuttling all of the family law files to my desk. No bother. I would rather advocate to keep families together than fret about how much cocaine qualifies for a such-and-such felony.

I admit that now because you should know two things. One is that I am bias. As a practicing lawyer, I will be a child advocate. The other is that I have immersed myself in this area of the law. I must should my boss represent his clients effectively. I encourage you, my reader, to keep those two things in mind as we explore the theory for and practice of representing children in termination of parental rights cases. You can trust me to present a detailed analysis of the law. More importantly, you can trust me to present real proof (not mere rhetoric) of my point: Michigan lawyer/guardians ad litem can work practical changes in what is a confusing, child-neglecting system.

Back to the new client. Call him Eddy. I flipped the file open. The State wanted to terminate Eddy's parental rights because he has a lengthy criminal record. I scanned two inches of his "rap sheet." Drugs. Domestic violence. Prison. "How're you gonna explain that this man deserves his kids?," a fellow law clerk asked. I stuttered. But then I saw a family photo in his file. Eddy and three beautiful boys, smiling. "He's still a dad," I replied.

The lawyer/guardian ad litem refused to let Eddy visit his boys, who were temporarily living with a foster family. She claimed that his visits were not in the children's best interests. But she did not explain why. Instead, she said that she was too busy to go to the foster home to supervise, too busy to ask the children, just too busy. "These kids are all alike," she said, "so I know what they need." My boss's mantra (*I always win -- no one pushes me around*) echoed as I searched for the laws that give her the right to deny Eddy's visits. My boss wanted a detailed memorandum and a motion and brief to the court to get this father visiting his children -- *now*.

I immediately assumed student-researcher mode. I hoped to find clear, concise rules of law. But, *alas*, there is no clear rule! The ethics treatises are silent. The codes of professional conduct are ambiguous. Michigan's statutes are vague. For example, the statutory definition of abuse and neglect for termination of parental rights is broad, and many attorneys glance over a small provision stating the statute's true focus: the child.

Sadly, the attorneys arguing over Eddy's children did just that. The prosecutor spoke about the public's rights. The parents' attorneys spoke about the parents' rights. No one, not even the lawyer/guardian ad litem, spoke for the children. The result was a weeks-long battle about whose rights mattered most. And it failed the children. *TERMINATED* in the court order sneered at me a few weeks later. My heart sank. Why did no one speak for them?

This paper proposes a remedy: a new, "child friendly" model for representing children. Part I discusses national theories for terminating parental rights and how Michigan applies them. Part II explores the theories' problems in practice. Part III looks abroad to Switzerland, South Africa and Israel for alternative models for representing children. Part IV applies those countries' experiences in a new model that demands that the child's representative advocate above the parents' rights battle -- and give each child a voice.

## PART I: THE SYSTEM

This Part gets us familiar with our topic. First, we analyze the theories for terminating parental rights. Second, we examine how Michigan implements the theories. Finally, we pause, before departing to Part II, to consider whether the theories work well in practice.

### I. National Theory for Termination of Parental Rights

Termination of parental rights is a civil proceeding, not a criminal trial. Seems obvious, but parties in the courtroom frequently forget it. They focus on the parents' bad, criminal-like behavior. The court loses sight of what matters most: the child. The lawyer/guardian ad litem must prevent that. Before discussing how, we must take a step back and examine the law she navigates. This section explains.

#### *A. Why Terminate Parental Rights?*

The law defers to parents. In the early *Meyer-Pierce* line of decisions, discussed below, the United States Supreme Court declared that a parent holds the primary power to direct her child's upbringing. Legal scholars read these decisions to firmly establish parents' almost unbounded freedom over their children.<sup>1</sup>

Nevertheless, recent scholarship did trigger judicial reaction. Dismayed judges in these courts cannot stomach statistics like those in David Finkelhour and Richard Ormrod's 2001 child abuse study. Finkelhour and Ormrod report that "in the name of discipline[,] children are beaten with belts, electrical cords, sticks, coat hangers, bats and studded weapons. They are locked in rooms . . . They are injured, they are scared, and they die."<sup>2</sup> The law steps in when this happens to terminate parental rights.

#### *B. The National Response*

Child abuse and neglect is a nationwide epidemic. The United States Department of Health and Human Services' Administration on Children and Families reports that approximately 899,000 children were victims of abuse and neglect in 2005 alone.<sup>3</sup> That is just the number of discovered abused or neglected children. Of those children, only 29% had independent legal representation like a lawyer/guardian ad litem. Instead, states rely on lay advocates, guardians ad litem or no one at all. Rarely does anyone speak for the child.

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<sup>1</sup> David Orentlicher, *Spanking and Other Corporal Punishment of Children By Parents*, 35 HOUS. L. REV. 147 (1998) (The "decisions give[] parents considerable leeway by conferring on them a fundamental right to direct their children's upbringing free from unreasonable state interference.").

<sup>2</sup> David Finkelhour and Richard Ormrod, *Child Abuse Report to the Police 2* (OJJDP 2001) (citations omitted).

<sup>3</sup> *Child Maltreatment 2005*

The federal government is combating this epidemic – or, more correctly, trying. In 1974, the United States Congress passed the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA provides funding for states to develop and streamline their termination of parental rights systems. Funding is available only to states that comply with CAPTA’s demanding guidelines. Among those guidelines are a list of mandatory abuse reporters, a new definition for abuse and neglect that includes psychological and sexual injuries, and court rules requiring attorneys to represent the child.<sup>4</sup> For some states, the guidelines are too demanding. There is just not enough money to do all that the federal government demands.

Congress did pass additional funding legislation for further incentive. A detailed analysis of this legislation is beyond the scope of our discussion, but please note that additional funding may appear in the next federal budget. In 2007, the United States House of Representatives passed H.R. 299, which “express[es] the sense that Congress should increase public awareness of child abuse and neglect and continue to work with the [s]tates to reduce the incidence of child abuse and neglect.”<sup>5</sup> The House Committee on Ways and Means included this resolution in its stack of resolutions for implementation. Hopefully, this is a sign that the federal government will seriously consider increasing funding for CAPTA programs.

### *C. Rights Discourse: Sources of Children’s and Parents’ Rights*

While systems vary by state, they share the same purpose. The purpose of terminating parental rights is to protect children. The reality, however, is that punishing parents is the primary focus. *We have the right to!* and *You cannot punish me!* echo in the courtroom. Talk on rights comes naturally. This part explains.

#### 1. Three Battling Rights

The *Meyer-Pierce* line of decisions from the Supreme Court of the United States discusses a three-party battle. We will call this line of decisions and the theory they represent *Meyer-Pierce*. That state has rights to protect children. The parents’ have rights to raise children. The child has rights, or needs, or interests. The sources for each party’s rights are different, however. So too is the reason each party deserves consideration. in the courtroom.

Two sources drive the state’s rights: the police power and the *parens patriae* doctrine. Together, they give the state considerable leeway. “Acting under its *parens patriae* power, the

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<sup>4</sup> Douglas E. Abrams & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy and Practice* 285 (3d ed. 2007).

<sup>5</sup> H. Res. 299, 110<sup>th</sup> Cong. (2007).

state may pursue ends that would be impermissible under the police power because they are unrelated to any harm to third parties or to the public welfare. At the same time, however, when the state acts as *parens patriae*, it [will] advance only the best interests of the [child] and not attempt to further other objectives, deriving from its police power, which may conflict with the [child]'s welfare."<sup>6</sup> These are the state's rights: rights to protect the public and rights to protect children as a super-parent. The state is entitled to consideration because, as Justice McReynolds bluntly and succinctly wrote, "[no one question[s] . . . the power of the state reasonably to regulate all schools," or anything else devoted to ensuring that children grow to be "good citizens[.]"<sup>7</sup>

The federal Constitution is the source of the parents' rights. Justice Reynolds gleaned them from the meaning of "liberty" in the Due Process Clause. "Liberty," he reasoned, "denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children."<sup>8</sup> These rights are personal. Parents may decide where to live, what religion to practice, how many children to have, where their children go to school, what to eat on a Sunday, nearly everything. Implicit in Justice Reynolds's explanation is the theory that the parents' rights are entitled to consideration because the Constitution is at stake.

What the child deserves, needs, or has a "right" to, and why, is a debate. Child advocates argue that children have rights because they are human beings. Their rights may not be explicit in the Constitution, but as living creatures they are entitled to respect as a matter of natural law.<sup>9</sup> *Meyer-Pierce*, however, stifles that argument. For example, Justice Rutledge linked children's rights to education with parental control when asserting that "[t]he rights of children to exercise their religion, and of parents to *give* them religious training[,] . . . have had recognition here."<sup>10</sup> Children have rights inasmuch as the parents "give" them.

## 2. Whose Rights Control?

That is the conundrum. The child advocate will know what the court terminating parental rights *should* do: focus on the child. But *Meyer-Pierce* protects parents first. Why?

Child advocates Douglas E. Abrams and Sarah H. Ramsey provide one explanation. Throughout much of our nation's history, "the law viewed children as incompetents in family

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<sup>6</sup> *Id.* at 19.

<sup>7</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>8</sup> *Id.*

<sup>9</sup> See generally Abrams & Ramsey, *supra* note 4.

<sup>10</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

matters.”<sup>11</sup> Small wonder, then, that *Meyer-Pierce* protects parents’ right to control their children. The law honored parents’ desires and accordingly “recognized almost absolute parental authority over children.”<sup>12</sup> Professor Barbara Woodhouse provides another explanation. She argues that by *Meyer-Pierce* “constitutionalized a narrow, tradition-bound vision of the child as essentially private property.”<sup>13</sup> The battle in the courtroom is essentially a battle over property.

## II. How National Child Protection Theory Operates in Michigan

Michigan laws echo *Meyer-Pierce*. According to the Michigan Court of Appeals, “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.”<sup>14</sup> In other words, Michigan courts refuse to terminate parental rights merely because a parent is not a perfect Betty Crocker or an Eddy with a “rap sheet.”

### A. Termination of Parental Rights

The burden of proof for terminating parental rights is high – precisely because the law carefully honors parental rights. Michigan Court Rule 3.977, Termination of Parental Rights, demands that the judge hearing a termination of parental rights case find “clear and convincing evidence . . . that one of the facts alleged in the petition [to conduct a child protection proceeding (a) are true, and (b) come within MCL 712A.19(b)(3).”

MCL 712A.19(b)(3) outlines the grounds for terminating parental rights. A close reading, which these new attorneys fail to do, reveals how carefully and narrowly defined the grounds are. Each ground focuses on severe abuse, like death, not mere “he should have taken Susie to the doctor when she had a fever that one time” behavior. *Must* the lawyer/guardian ad litem focus on the parents alone, searching for “really bad” behavior? No. Notice another part of the statute: section (b)(5). Under this section, the court will not terminate parental rights, even with clear, convincing evidence that one of the statutory grounds in section (b)(3) exists, when doing so is “clearly not in the child’s best interests.”<sup>15</sup>

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<sup>11</sup> Abrams & Ramsey, *supra* note 4 at 19.

<sup>12</sup> *Id.* As early as the nineteenth century, Chancellor James Kent proclaimed “The duties that are enjoined upon children to their parents, are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives.” *Id.* at 18 (citing II James Kent, Commentaries on American Law, 202, 206 (5<sup>th</sup> ed. 1844)).

<sup>13</sup> *Id.* at 24. Woodhouse laments the child’s constitutional position even further by asserting that coupled with parents’ rights are the “child’s voicelessness *Id.*

<sup>14</sup> *In re Boursaw*, 239 Mich. App. 161, 607 N.W.2d 408 (Ct. App. 1999).

<sup>15</sup> Mich. Comp. Laws § 712A.19(b)(5) (2007).

### *B. The Lawyer/Guardian ad Litem*

The lawyer/guardian ad litem's job is to advance those best interests. The state legislature bestowed the lawyer/guardian ad litem with this duty in MCL 712A.17d. Almost with a scolding finger, in fact. A review of the statute, attached in the appendix, reveals how demanding Michigan law. For example, the legislature chose these short, stern words to begin its list of duties: "A lawyer-guardian ad litem's duty is to the child, and not the court."<sup>16</sup> Period.

Then, the legislature set out a twelve part, *non-exclusive* list of tasks which the lawyer/guardian ad litem must complete. Read the statute carefully. At a minimum, she must maintain an attorney-client privilege; meet with, interview and observe her child client before every pretrial, disposition, and post-termination hearing; explain to her child client, however many times necessary, what the lawyer/guardian ad litem's role is; file all necessary court pleadings; and monitor her client's progress in foster care, during reunification efforts and after parental rights termination.<sup>17</sup> Essentially, she must act like any attorney.

Acting like an attorney is confusing when *Meyer-Pierce* reemerges. Subsection (c) requires the lawyer/guardian ad litem to independently investigate her child client's best interests. Then, subsection (i) requires her to advocate those best interests:

The lawyer/guardian ad litem must . . . make a determination regarding the child's best interests and advocate for those best interests according 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.<sup>18</sup>

The lawyer/guardian ad litem does *not* give the child a voice. Instead, she speaks *for* the child and determines what she thinks best for the child upon her own, often cursory investigation.

Has Michigan law, like *Meyer-Pierce*, silenced the child? Not necessarily. The statute does require the lawyer/guardian ad litem to advise the court whenever her assessment of the child's best interests contradicts the child's.<sup>19</sup> The court must then decide whether the child

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<sup>16</sup> Mich. Comp. Laws § 712A.17d(1) (2007).

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

<sup>18</sup> *Id.*

<sup>19</sup> Mich. Comp. Laws § 712A.17(k) (2007).

requires an independent representative.<sup>20</sup> One must wonder whether the court has enough attorneys at its disposal to do so.<sup>21</sup>

Notice another problem. The statute does not explain *how* the lawyer/guardian ad litem determines her child client's best interests. The statute does provide a few cursory references to reviewing "reports and other information," but nothing regarding the best methods for obtaining the reports, what she should look for in them, how she can interview the child about them, and the like. Instead, the burden is on the lawyer/guardian ad litem to figure out how to do the job Michigan law imposes.

The national Youth Center's *Making Reasonable Efforts* handbook helps, a bit. In laudable words, the handbook seems to pat the lawyer/guardian ad litem on the back, telling her she has assumed an important, special role: "Representing clients in [child protection] cases requires expertise not usually acquired in the general practice of law."<sup>22</sup> How nice. Our lawyer/guardian ad litem is an *expert*. She is special. She should work her hardest representing her child client, and with pride.

Then, the handbook slaps a mighty list of tasks upon her shoulders. She must: become familiar with causes of child abuse and neglect, before even representing a child; investigate community resources for abuse prevention and family reunification; and network with experts who can testify on the child welfare system, child development and family preservation.<sup>23</sup> She must interview her child client as soon as possible to assess the child's wishes, connection with her parents, past history of abuse and neglect, and involvement with the child protection agency.<sup>24</sup> When reports are vague, the lawyer/guardian ad litem must interview third parties.<sup>25</sup>

### *C. Theory Unraveling*

Unfortunately, lawyer/guardians ad litem rarely do all of these tasks. There are too many children and not enough lawyers for them all. What lawyers are available are young, newly-

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<sup>20</sup> *Id.*

<sup>21</sup> *See infra* Part III.

<sup>22</sup> Youth Law Center, *Making Reasonable Efforts: A Permanent Home for Every Child* at 11 (2004).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.*

admitted to practice law, little-experienced, poorly paid.<sup>26</sup> They are untrained to meet the duty to become their child client's investigator, expert and advocate all in one.

This is a national problem. In 2004, the Pew Commission on Children in Foster Care to investigated its source. The Commission did find that *some* courts "are doing an exemplary job," but only a few, as the Commission concluded with these chilling words:

Unfortunately, these courts are the exceptions—not the norm. The status of [child protection] courts varies from state to state and from jurisdiction to jurisdiction, but most do not have the information and resources they need to effectively manage their dockets and their courtrooms – thus leaving many children hanging in the balance far longer than necessary.<sup>27</sup>

The problem was not merely the court's fault. Many "judges, attorneys, and social workers working in the [child protection] system often lack the training and/or experience they need to make good decisions."<sup>28</sup> Poor collaboration between attorneys and social workers plagues the courts in particular. The Commission concluded that a lack of cooperation and coordination between attorneys and social workers leads the court astray because attorneys and social workers present conflicting opinions.<sup>29</sup> They leave the court to sort out the mess.

The problem plagues Michigan, too. There are approximately 19,000 children currently in Michigan's child protection system.<sup>30</sup> Each one has a lawyer/guardian ad litem. Of those 19,000, 4,500 are available for adoption. William Johnson, the director of the Michigan Children's Institute, who has final authority over all adoptions, relies primarily upon the lawyer/guardian ad litem's opinion. Good, perhaps, because he must base his consent upon the child's best interests, even though, as he acknowledges, he rarely meets the child.<sup>31</sup> What is troublesome, however, is that the lawyer/guardian ad litem's opinion does not bind him. She is a mere consultant who may bring a conflicting opinion to the court. In almost divine clairvoyance, the judge must determine what is best for the child when she and Mr. Johnson disagree.

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<sup>26</sup> See generally, Astra Outley, *Overcoming Barriers to Permanency: Recommendations for Juvenile and Family Courts*, 44 FAM. CT. REV. 244 (April 2006).

<sup>27</sup> *Id.* at 2

<sup>28</sup> *Id.* at 3

<sup>29</sup> *Id.* at 5-6.

<sup>30</sup> William Johnson, Child Advocacy, MSU College of Law (guest lecture of November 28, 2007).

<sup>31</sup> *Id.*

This common outcome is unfortunate. The system is supposed to serve the child's best interests, but the judge speculates. Is there a better way? Or do practical problems hinder the lawyer/guardian ad litem even more?

## PART II: PRACTICAL PROBLEMS

This Part discusses the system in practice. First, we explore the most common method for invoking the system: the CPS Complaint. Second, a real lawyer/guardian ad litem tells us her story. Finally, we ask whether practice and theory peacefully coexist – and whether there is a better way.

### I. “They Just Snatched ‘Em, Then and There”

My first interview with Eddy was startling. I sat in a hard-backed office chair at my cubicle desk, clicking my pen, nervously waiting for him to answer the telephone. *Ring*. It was a stuffy August afternoon. The sun pierced the window blinds and beat at my back. *Ring*. The air conditioner stopped working that morning. *Ring*. I shifted awkwardly in my chair, sweat beading at my brow. *Ring*. Click went my pen.

“Sir?” He answered with a swift, “*Halllloo?*” English was his second language, and he spoke little of it. “Sir? Sir, I just want to ask you a few questions about your case.” What followed was a ten minute (that’s all, before he said, “I gotta go. Can’t talk ‘bout it anymore”) journey into the emotional debacle parents face when their rights to raise their children are at stake. I asked him how it happened, who took his children, and why.

“They just snatched ‘em, then and there,” he told me. He whispered. I imagined him crying. It was after a traffic stop. The children were with him. The officers suspected a drug crime. The police station called CPS right away. “And then they took ‘em, right while those guys frisked me, right in the – in the street – and I.” He stopped. “What is CPS, anyway?” he whispered, before he cut our conversation short. *Click* went the telephone. *Click* went my pen. “Then and there,” I repeated.

#### A. *What is CPS?*

Eddy had an excellent question. What is CPS? Many people have never heard of it, unless CPS has knocked at their door (or, in Eddy’s case, arrived on the street during a frisk). A mysterious group, perhaps, or a silent one, the general public assumes. But in termination of parental rights cases, CPS is a crucial organization.

“CPS” is the shorthand for Child Protection Services. It is a sub-agency of Michigan’s Department of Human Services. Its central office is located in Lansing, Michigan. There, CPS executives coordinate uniform child protection goals, manage the State’s central child abuse and neglect registry, and promulgate a series of practice points for local offices. Every county has a local office where the real work, the “nitty-gritty” work with children and parents, occurs. We will focus on the “nitty-gritty” work.

Why should the lawyer/guardian ad litem care about the “nitty-gritty”? There are at least three reasons. First, the local offices conduct investigations. Their investigators are often the first people to have contact with the child whom the lawyer/guardian ad litem represents. They are an excellent source of information concerning how the child appeared the day CPS investigated, what the parents’ reaction was, what the condition of the home was, whether family members were concerned, whether the parents had a history of CPS investigations, etc. Second, the local offices keep detailed records for every aspect of their investigation. These records are a fruitful source of information about the child. Third, the investigators, like lawyer/guardians ad litem, *care about children*. “The primary focus of CPS is the protection of children,” says the Lansing office.<sup>32</sup> So too is the lawyer/guardian ad litem’s. Coordination and collaboration with CPS can only strengthen that mission.

### *B. CPS Procedure*

Each local office follows the same rules. The Lansing office promulgates these rules in the *Children’s Protective Services Manual*. The rules are available online for free to each investigator (or the curious citizen). The Lansing office counsels each investigator to follow them closely. Common jargon in the local offices, in fact, are “the Man” (for the *Children’s Protective Services Manual*) and “CFP-X says” (for a particular rule).<sup>33</sup>

A detailed review of CPS procedure is beyond the scope of our discussion. A few procedures are worth mentioning, however, because they produce valuable records. These are the investigation procedure, the maintenance procedure, and the service agreement procedure.

#### 1. Investigation

CPS investigates every report of child abuse or neglect. Yes, *every* report, even those unfounded reports sneaky neighbors make to harass each other or angry divorcing spouses make

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<sup>32</sup> *Childrens Protective Services Manual*, CFP 712-6.

<sup>33</sup> Melissa Demming, CPS investigator for Shiawassee County (Interview of August 2007).

to secure an advantage in custody proceedings. Not every report receives the same detailed investigation, however. CPS conducts an initial investigation by reviewing the family's CPS files, assessing the face of the report, and contacting the family or third parties. Then, CPS categorizes the report, investigates further as needed, and keeps detailed records.

There are five categories of child abuse and neglect. Each category receives different treatment.<sup>34</sup> Category V cases are those in which the investigator finds no evidence of child abuse or neglect, cannot locate the family or cannot secure a court order requiring the family to cooperate with the investigation. In these cases, CPS ceases its investigation. Category IV cases are cases in which the investigator strongly suspects child abuse or neglect but has not found a preponderance of evidence proving so. In these cases, the investigator must provide the family with information on available community resources commensurate with the risk of harm to the child and request that the family voluntarily use these services. In Category III cases, the investigator has found a preponderance of evidence substantiating child abuse and neglect. In these cases, the investigator must refer the family to community resources commensurate with the risk of harm to the child. If the family refuses to attend or does not make progress, the investigator may re-categorize the case to Category II. In these cases, the investigator must act as a case manager to secure orders for the family to attend community-based programs to remedy the risks. If free services are unavailable, the investigator may provide services directly or purchase them. If the risk of harm persists, or the risk of harm is too great to allow the parents an opportunity to remedy it, then the investigator must designate the case to Category I. In these cases, Michigan law requires that the investigator secure a petition to terminate parental rights via the county prosecutor's office.

CPS investigators keep detailed investigation records for all categories. The information varies by category, but much of it is fruitful. Standard investigation forms list contact information for family members. Interestingly, however, records disclosing why the investigator chose a particular category over another are not required. A former CPS investigator from Shiawassee County admitted that she relies heavily on her personal notes, often scribbled in the margins of scraps of paper, which she either types into a personal computer or discards.<sup>35</sup>

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<sup>34</sup> For this paragraph, *see generally* *Childrens Protective Services Manual*, CFP 714-1.

<sup>35</sup> Demming, *supra* note 33.

Whatever records are available, however, provide relevant information about the lawyer/guardian ad litem's client.

## 2. Maintenance

Maintenance records are also a fruitful source of information. There are at least three maintenance procedures CPS uses to ensure that each child it investigates is, as “the Man” demands, protected. These procedures are contacts, home visits and service agreements. The records for each procedure disclose information about the child's risk of harm, the family's history, and what protection CPS believes the child needs.

Contacts are monthly discussions with anyone pertinent to the case.<sup>36</sup> Depending on the case's category, the number of contacts can range from one (for low-level risk cases) to four (for high-level risk). Direct contacts are in-person discussions with the perpetrator, the victim child or the caretaker. They are made “for the purpose of observation, conversation or interview about substantive case[] issues.”<sup>37</sup> The investigator must keep records of all discussions regarding the child's risks and needs, treatment plans, and the family's progress. Collateral contacts are any other face-to-face or telephone contact the investigator makes to learn more about the family. Collateral contacts may occur, for example, with “the extended family, a relative, the school, other agencies or the foster family.”<sup>38</sup> The investigator records all information from these discussions as well. All reports go in the case file.

Home visits are scheduled or unannounced interviews with the family in the family's home. During the interview, the investigator must do three things to assess the child's safety. First, the investigator must “[d]etermine actual home conditions and monitor the child [in those conditions].”<sup>39</sup> Second, the investigator must “[a]ssess risk to the child when caretakers are allegedly allowing the child . . . [to live in] harmful or undesirable situations” (such as when the known perpetrator is in the home).<sup>40</sup> Third, the investigator must “[m]onitor the child[']s safety if there are concerns that the parent may not be following through on mutually agreed upon actions,” even if the parent insists during the interview to having done so.<sup>41</sup> The investigator records all information in the case file.

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<sup>36</sup> For this paragraph, *See generally* CFP 714-1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Service agreements are voluntarily-entered plans that require parents to remedy the risks that prompted harm to their child.<sup>42</sup> The investigator must negotiate terms for the plan using the risks/needs assessment the investigator made when categorizing the case. Terms of service “should be relevant [and] sufficient in frequency and duration and should address, at a minimum, the top three needs (identified by the needs assessment) that contributed most to the child’s maltreatment.”<sup>43</sup> The plan’s tenure is strength-based to encourage the family to voluntarily and vigorously adhere to the terms. Each strength is a subpart of the family’s self-imposed goals, which are bolded in goal statements that precede the service terms. Each family member signs and dates the agreement, like any contract. This goes in the case file, too.

### 3. Hidden Treasures?

Termination of parental rights courts rarely refer to these CPS records. Too bad, because these records are hidden treasures. Evidence of abuse and neglect fades by the time the lawyer/guardian ad litem (if ever) conducts interviews. The family cleans the home, the child’s bruises will heal, the parents will have “learned how to work the system,” tricking the lawyer/guardian ad litem into believing that staying with them is in the child’s best interests. Impeachment material is dormant. The investigator’s notes from interviews could disclose the parents’ ulterior motives (child support? taxes? charity?) for defending their parental rights. So too can the service agreement’s goal statements. (Have the parents *really* met their goals?).

And yet, rarely do parties in the courtroom refer to these records in detail. The lawyer/guardian ad litem might make a quick glance at any records provided during her hurried review of the case (another of the hundreds assigned to her). The prosecutor may attach the service agreement to the petition, leaving the judge to review it. The parents’ attorneys may read a line or two from a goal statement. But CPS records are certainly not central in the dispute. Instead, murky *Meyers-Pierce* rights discourse abounds.

## II. The Experienced

Does the lawyer/guardian ad litem have time for these records? Jenifer Pettibone, a highly regarded lawyer/guardian ad litem who has practiced this area of the law for eight years, says no. There is too much other documentation to review for her clients (and so many clients to

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

represent). What else has Ms. Pettibone learned in the past eight years, and what practical problems has she encountered? I interviewed her to find out.

#### *A. Case Overload*

When Eddy's file reached my desk, I was overwhelmed. Although my firm did not represent his children, I still needed to know about them to assess Eddy's parenting skills. What toys did the children like? Did Eddy buy them? Were the children healthy? Did Eddy take them to their doctor appointments? Did the children like playing football with Eddy in the autumn? Did Eddy do that? Even now, I feel like I did not know enough about that family.

What about Ms. Pettibone? She represents an average of 150 Eddys each year (figuratively speaking). Over the past eight years, she has represented approximately 1200 children.<sup>44</sup> 1200 different children, all of whose best interests lay in her hands! The burden of handling so many children's files was sometimes overwhelming. Ms. Pettibone candidly admits that she and her peers "are unable to handle the nature of the cases for a long period of time," especially when so many abused and neglected (helpless, really) children need them every year.<sup>45</sup> Most often, these cases are "case[s] involv[ing] drug use by parents and their inability to understand how this effects their children."<sup>46</sup> Talking drugs all day, every day, for years, for so many children, is one of the most significant practical problems facing lawyer/guardians ad litem working in the system.

#### *B. Philosophy of the Law*

How does Ms. Pettibone navigate the law as she represents this many children? She disregards rights discourse. "[C]hildren do not have 'rights' equal to adults," she says, "[because] children do not have the level of experience or maturity to understand numerous decisions that need to be made."<sup>47</sup> Her philosophy is child-focused. She warns against a strictly needs-based advocacy. Needs discourse forces the court to consider what to do *to* the child, not what to do *for* the child. To avoid needs discourse, she asks her clients what they want done *for* them. "[T]heir opinions are very important," she counsels, "and should be considered."<sup>48</sup> Unfortunately, too many of her peers, bogged by cases, speak of *needs* and *rights*. Forgetting to ask the children what they want done *for* them is a second practical problem.

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<sup>44</sup> Jenifer Pettibone, Lawyer/guardian ad litem (interview of April 8, 2008).

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

### *C. Managing the Pressure*

How does Ms. Pettibone manage, and her peers not? Literature about representing children abounds, and there is simply too much to read. Peer groups abound too, and there are simply too many to join. A lawyer/guardian ad litem wanting to be “the best” can quickly fall prey to a desire to read a dozen magazines each month and join six groups each year. All of that reading and meeting leaves less time for the client. Managing is a third practical problem.

The key is to be selective. Ms. Pettibone browses online publications and reads the MiSPAC Journal and the FCRB newsletter.<sup>49</sup> Just those three, and perhaps a few miscellaneous journals or articles that cross her desk. She is also a board member for MiPSAC and the chair elect for the NACC, Children’s Law Section.<sup>50</sup> Just a few groups, no more. She has more time to devote to her clients.

Unfortunately, most lawyer/guardians ad litem are not as selective. Newsletters and groups overwhelm them. Trapped amid children to represent, court files (and those darn CPS records!) to review, and, now, journals to read and websites to browse and group meetings to attend, they revert to what feels comfortable -- what they learned in law school – what is easy. They talk rights and needs. The *Meyer-Pierce* problem persists.

### PART III: LOOKING ABROAD

This Part discusses the *Meyer-Pierce* problem on the world stage. Yes, the problem exists elsewhere. Wading in this debate already, the lawyer/guardian ad item might shutter.

#### I. The Benefits of Comparative Analysis

Is the analysis worth the trouble? The question is understandable. One can never “know” what a foreign culture is “like.” Comparative law scholar Günter Frankenberg explained:

The dilemma of understanding foreign (legal) cultures and of transcending the domestic (legal) culture [our culture] can neither be resolved by ‘going rational’ nor by ‘going native.’ The rigorous rationalist who relies on . . . universals is prone to give her worldviews and norms, her language and biases only a different label . . . The rigorous relativist who naively deludes herself into believing that cultural baggage and identities can be dropped at will, is prone to oscillate between ventriloquism and ethnocentrism.<sup>51</sup>

Neither approach suffices, but both are inescapable. The truth is, biases are inherent.

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<sup>49</sup> *Id.*

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

<sup>51</sup> Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L..J. 411 (1985).

The bias problem, however, should not forestall comparative analyses. While Frankenberg does make an excellent point, there are benefits to comparative analyses even with biases. First, the lawyer/guardian ad litem will very likely represent a child with a different cultural background; she should at least acquire cultural vocabulary. Second, the bias problem is embraceable. One need not understand *why* a particular county has a particular law to see how the law operates. Third, the National Organization for Human Services believes that comparative analyses make for “better” people who demonstrate humanistic values.<sup>52</sup>

Nevertheless, a few words of caution are due. Comparative analyses for child protection laws is difficult. Jean Koh Peters, who regularly studies these laws, has barely managed. She lamented:

The researchers and I were . . . surprised to find that the comparative research remained, to the end, much more difficult than anticipated, and in some cases impossible or inconclusive despite our efforts. For sixteen jurisdictions, we were unable to find the text of laws that applied to child protective proceedings, even for some countries for which we had reliable information that these laws existed and governed the country. We remained puzzled by this lack of transparency despite the resources we were able to bring to bare. . . . [Also,] we were unable in over three dozen countries to successfully interview a knowledge contact person in the jurisdiction. In some cases, this was because child protective proceedings and provisions for child’s expression did not exist in the jurisdiction.<sup>53</sup>

To avoid Peters’ difficulties, the following discussion limits the scope of comparative analysis. First, the focus turns to the United Nations Convention on the Rights of the Child (CRC). Then, the focus turns to the sources of law for a few countries that have ratified the CRC. Finally, the discussion extrapolates lessons to use in the United States.

## II. The United Nations Convention on the Rights of Children

On November 20, 1989, the United Nations General Assembly adopted the most expansive international covenant for children, the Convention on the Rights of the Child (CRC). The CRC “broke records by gaining the greatest number of signatures on the day it opened for

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<sup>52</sup> National Organization for Human Services, *Defining Culturally Competence*, available online at <http://nationalhumanservices.org/ethics>. [Culturally responsive] decision-makers demonstrate humanistic values . . . . [They] continually examine themselves and their behavior to determine how their attitudes and feelings influence their decision-making. They see maintaining self-awareness and self-evaluation as integral parts of their professional activity . . . .”

<sup>53</sup> Jean Koh Peters, Special Issue on Legal Representation of Children: How Children Are Heard In Child Protective Proceedings, 6 NEV. L. J. 966 (Spring 2006).

signature.”<sup>54</sup> All UN members save Somalia and the United States ratified it.<sup>55</sup> The record-breaking ratification demonstrates “an indisputable worldwide consensus about the importance of the child’s voice in proceedings in which the child is subject.”<sup>56</sup> The consensus ends there. There is no worldwide consensus on *how* to represent the child’s voice.

The consensus ends because the CRC does not mandate a particular method for representing children. Instead, the CRC addresses legal and social issues affecting the lives of children, from termination of parental rights to social welfare, and affords them corresponding “rights.” I write “rights” purposely, because these are not the colloquial “right to free speech” or adult-like rights. Instead, the CRC offers three types of “rights” known as the “three Ps”: provision, protection and participation.<sup>57</sup> Provisions afford children’s such things as names, nationality and healthcare.<sup>58</sup> Protection affords them such things as freedom from exploitation, child labor and unwarranted detention.<sup>59</sup> Participation affords them a right to “participation in all decision-making processes and all community systems that affect the child’s life.”<sup>60</sup>

The participation right, however, does not mean that children have a right to represent themselves. The CRC’s drafters were well aware that there is no worldwide consensus on that point.<sup>61</sup> Article 12 carefully skirts the issue by requiring that ratifying nations “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,” with the following qualifier:

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.<sup>62</sup>

Through Article 12, the CRC engrafted a new policy onto existing child protection laws. That policy is child-centered: the child’s voice shall be represented, somehow.

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<sup>54</sup> *Id.* at 970.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 969.

<sup>57</sup> *Id.* at 971.

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

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

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

<sup>61</sup> *Id.*

<sup>62</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 12(2).

### III. Alternative Models

Given Article 12, the CRC does not contain a standard method for representing children. Ratifying countries took different approaches to comply with the CRC's child-centered policy. This section examines approaches from South Africa, Sweden and Israel.

#### *A. South African Constitutional Rights*

In 1996, the Republic of South Africa adopted a children's bill of rights. The rights granted echoed two of the "three Ps": provision and protection. Children have "the right to . . . social services" and "the right to be protected from maltreatment, neglect, abuse or degradation."<sup>63</sup> They also have a right "to a judicially-enforceable priority" to scarce resources.<sup>64</sup>

South African rights elevate children even in termination of parental rights cases. Under the South African Constitution, "[e]very child has the right to . . . a family or parental care."<sup>65</sup> The court must give "[the] child's best interests . . . paramount importance."<sup>66</sup>

Rarely do countries moot the issue so clearly. Tamar Ezer argues that "[t]he 1996 Republic of South Africa Constitution contains the most explicit constitutionalization of children's rights to date."<sup>67</sup> Ezer argues that this explicit protection is natural in South African culture. Ancient tribal communities "acknowledg[ed] . . . the intrinsic worth of human beings," who were dependent on each other, and thus nurtured the young to perpetuate the tribe.<sup>68</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC) is another reason. The ACRWC is a regional treaty similar to the CRC. Article 4(2) invokes the CRC's voice goal:

In all judicial or administrative proceeding[s] affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority . . . .<sup>69</sup>

Article 4(2) models United States law. The child receives legal representation. Unlike United States law, however, the South African constitution explicitly declares that the representative is to represent the child's voice, not the representative's own.

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<sup>63</sup> Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE H.R. & DEV. L.J. 1, 27 (2004).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> African Charter on the Rights and Welfare of the Child, Article 4(2).

Unfortunately, these explicit provisions have not produced a comparatively better child protection system. Poor funding plagues African ratifying countries. Most of them have insufficient resources to enforce Article 4(2) for every child.<sup>70</sup> They save scarce resources for only the most egregious cases.<sup>71</sup> Moreover, non-ratifying countries have no constitutional, statutory or judicially-created explicit provisions for representing the child's voice.<sup>72</sup> Presently, the African child's voice is a mere whisper.

*B. Statutes in Sweden*

In 1979, Sweden became the first country to ban corporal punishment of children with the following statute:

Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other humiliating treatment.<sup>73</sup>

This statute is purposely broad. The drafters believes that breadth was necessary to achieve twin purposes: "to 'stop beatings,' [and] also 'to create a basis for general information and education for parents as to the importance of giving children good care and as to one of the prime requirements of their care.'"<sup>74</sup> Criminal sanctions for corporal punishment are possible without terminating parental rights.

Sweden starts its child protection system much earlier than South Africa and the United States. The government finances "a sweeping education campaign, and [provides] vast support services to families."<sup>75</sup> Shortly after enacting the statute, the government distributed 600,000 copies of a mailing to parents with young children and daycare centers explaining the law and its twin purposes.<sup>76</sup> Parental education courses taught parents non-abusive discipline skills.<sup>77</sup> Even milk cartons carried a cartoon of a little girl saying "I'll never hit my own children."<sup>78</sup>

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<sup>70</sup> *Id.* at 993.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Ezer, *supra* note 63 at 28.

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

<sup>75</sup> *Id.*

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

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Violations trigger mandatory legal rights for the punished child. Sweden follows a “mandatory direct hearing” model.<sup>79</sup> In this model, the child has a right to appear in court to seek protection. If she is old enough to express her views, she may speak personally; if too young, a representative attorney must speak on her behalf.<sup>80</sup> There is no third option – either the child or the child’s attorney speaks – much like the options in the United States. Unlike courts in the United States, however, courts in Sweden are bound to the CRC. As a ratifying nation, Sweden must ensure that the child’s interests are paramount and that the child’s voice is heard.<sup>81</sup> No question arises whether the parents’ rights deserve equal or louder voicing.

Sweden’s education campaign achieved remarkable success. “Although most Swedes opposed the [statute] upon its enactment . . . , they now favor it by a wide margin. Public opinion polls . . . showed a doubling of the proportion of parents who believe that children should be raised without corporal punishment . . . .”<sup>82</sup> As societal tolerance for corporal punishment has decreased, so have the overall rates of fatal child abuse and termination of parental rights cases.<sup>83</sup>

### *C. Israeli Interpretation*

Israel has no written constitution or statutes for children. Instead, Israel complies with the CRC through judicial interpretation. The seminal case is *A v. State of Israel*. In that case, the Supreme Court of Israel prohibited the use of corporal punishment as an education tool by parents. Dicta expanded children’s priority in Israel law. The Court declared that “the child is an autonomous person, with interests and independent rights of his own; society has the duty to protect him and his rights.”<sup>84</sup> Moreover, the Court approved “state intrusion into the ‘sacrosanct’ privacy of the family home and close regulation of parent-child relations.”<sup>85</sup>

The judges supported this dicta by referencing the 1992 Basic Law: Human Dignity and Liberty, which has become a piecemeal constitution. According to the judges, “[t]he Basic Law elevate[s] the status of human dignity to a super-legislative constitutional right.”<sup>86</sup> The Basic

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<sup>79</sup> Peters, *supra* note 53, at Appendix A.

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

<sup>81</sup> Convention, *supra* note 62 at pmb1. & art. 12.

<sup>82</sup> Ezer, *supra* note 63 at 29.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 30 (quoting *A. v. State of Israel*, 54(1) P.D. 145)..

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (quoting *A v. State of Israel*).

Law applies to all, even children. Thus, it provides “the child’s right of dignity, bodily integrity, and mental health.”<sup>87</sup>

Unfortunately, Israeli courts limit this dicta to *just dicta*, not law. Even the judges recognized that parents have rights to their children. The Court did declare that these are subordinate rights, but with the following: “[T]he rights of parents to read and educate their children are not absolute rights. The relative nature of these rights is reflected in the duty of the parents to care for the child, his welfare and rights.”<sup>88</sup> This is the same holding that prompted the *Meyer-Pierce* problem in the United States. Israeli termination of parental rights cases mirror United States cases, and the problem plagues them both.

#### IV. Pure Chatter?

To be honest, my reader, I once felt that researching comparative law was fruitless. South Africa does this, Sweden and Israel that. I kept careful notes, but that magical “click” (the hoped-for “you should learn X”) was no where. Then, a washed-up movie star from the 1980s spoke to me. Literally.

On my television screen, that is. “The only skill you need is caring – CASAs.” It was a commercial soliciting for volunteer court-appointed special advocates (CASAs). These are lay men and women. In states without lawyer or guardian ad litem laws, CASAs represent children. In states with lawyer or guardian ad litem laws, they provide an extra voice (like an older sister who chimes in with her opinion). I snickered. “*Only* caring? Nothing else? No knowledge of the law? None whatsoever? Yeah, right.” This was the typical crabby response for someone up late at night reading from law books. But that phrase stuck with me the next morning.

Then, *CLICK!* Caring is what makes a child representation system successful. Success does not turn on a constitution, a statute or dicta. South Africa’s explicit constitutional provisions have not trickled-over to help other African children. These countries care more to fund other programs. Sweden’s aggressive education campaign, on the other hand, protects children more than the country’s statutes.

*CLICK!* There is the hoped-for click, the lesson we seek. We need not apply South Africa’s laws. Or Sweden’s. Or Israel’s. We can stick to our own. But we can learn from them. We learn that success comes from caring. Maybe all we need is a little more caring locally.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

## PART IV: WE CAN CHANGE – IF WE CARE

That simple. The lawyer/guardian ad litem need only care. The trick is to work care into an existing system which is plagued with *Meyer-Pierce* rhetoric. This Part presents the plan that will help the lawyer/guardian ad litem avoid the *Meyer-Pierce* problem.

### I. Michigan's New Plan

If Michigan is to measure up to CAPTA's laudable goals, we need a change. The lawyer/guardian ad litem faces three problems. First, the law demands that she give her child client a voice. But she confronts parental rights rhetoric from the *Meyer-Pierce* problem immediately. Second, the law demands that she advance what she believes is in the child's best interests. But she has neither time nor resources to investigate the child. Third, the law demands that she put the child first. But how?

#### A. *Child Friendly Representation*

I propose a child-centered perspective to representation called "child friendly" representation. This model asks the lawyer/guardian ad litem to become the child's "legal" ally, a buddy who shows the child that she cares, she will listen, and she will advocate for the child above the parental rights discourse. The lawyer/guardian ad litem should advance the child's *rights and needs* and parents' *responsibilities*, avoiding the phrase parental rights altogether.<sup>89</sup> Rights discourse is fundamentally flawed, anyhow. Barbara Bennett Woodhouse explains: no one has rationally explained how children have rights in the "adult sense [because] children simply do not fit the mold of liberal individualism that provides the traditional basis for our understanding of rights."<sup>90</sup> They are not women suffragist of antebellum blacks capable of caring for themselves; they are dependents.

#### B. *Practice Standards*

Child-friendly representation requires careful attention (caring) and advocacy *above* the rights discourse, dancing around it. The lawyer/guardian ad litem should use the following steps.

##### 1. Accept Needs

The lawyer/guardian ad litem must accept that children have needs. They need someone to drive them to the doctor's office, feed them, teach them. Adults have cars, can feed themselves, have learned. The lawyer/guardian ad litem must phrase her arguments

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<sup>89</sup> Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective On Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

<sup>90</sup> *Id.* at 1842.

accordingly. Say something like, “Your honor, this child needs a nutritionist” rather than, “This child’s parents should not have the right to feed their child.” Professor Dana Prescott offers this argument to help the lawyer/guardian ad litem: “[E]ach parent may have a constitutional and statutory right to *participate* in raising their children . . . [but not] a right to debase the [] child.”<sup>91</sup> Then, follow up with “because the child needs” such-and-such.

## 2. Listen Openly

Should the lawyer/guardian ad litem advocate from the child’s perspective? After all, children watch cartoons, spend hours coloring, believe in the Tooth Fairy. Children are so obviously different from adults, the lawyer/guardian ad litem might conclude, that the child’s reality is not “real.” Therein hides the problem. Children are so different, “we hardly notice their outsider status or the ways in which adult power defines this difference.”<sup>92</sup> Once again, the focus shifts to adult rights. Approaching the child from the child’s perspective avoids the shift. The lawyer/guardian ad litem advocates what her client wants, not what she believes her client wants (else the chimney sweeper cries, “They think they do me no injury”).

At least three problems confront the lawyer/guardian ad litem. First, she has to remember what it is like to be a child. The lawyer/guardian ad litem is likely young, but not *that* young. Second, she must commit herself to taking children seriously. No easy task is it to proclaim, “Scotty loves Sesame Street, and he should be able to watch it at home.” Third, she must understand how children develop.

To overcome the first problem, the lawyer/guardian ad litem should look inward. Consider the following question Woodhouse poses and then answers:

Can adults, no longer being children, raise their own consciousness about children? Adults *began* as children: they can try to remember. . . . [A]dults can seek out and listen to children’s narratives . . . . We can draw on many sources that let children speak for themselves [like] children’s narratives.<sup>93</sup>

Woodhouse also suggests reading children’s stories. Children’s stories put the lawyer/guardian ad litem directly into the child’s world, where she can obtain vocabulary necessary to interview.

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<sup>91</sup> Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. Ar. Little Rock L. Rev. 529, 540 (Spring 2000) (emphasis in original).

<sup>92</sup> *Id.* at 1827.

<sup>93</sup> Woodhouse, *supra* note 89 at 1831–34.

To overcome the second problem, the lawyer/guardian ad litem should listen for what her child client *means*. Consider the following comments from ten year old Margarita:

You two [researchers] should be knocking on the door of the priest's house and asking him why he eats so well when my little sister is always crying because she doesn't get enough food! I hope Jesus sees everything that goes on here.<sup>94</sup>

What does the child *mean*? Margarita, for example, *means* that *something is wrong* when her sister starves while the community pastor feasts; *Margarita and her sister deserve nourishment*. Margarita's lawyer guardian ad litem should use *that* argument in court.

To overcome the third problem, the lawyer/guardian ad litem must know how children develop. Only with that knowledge can she determine what nourishment, education, discipline, and emotional bonds to protect in a court order. She must speak with experts. Call the community psychologist. Interview social workers. Read a medical article. Join a national committee such as the Council on Children and Families, a national organization devoted to preventing child abuse and neglect.

### 3. Interview Carefully

The lawyer/guardian ad litem has gleaned children's vocabulary from stories. Now she has the tools to interview her child client effectively. She must develop a sense of trust to get that child to "open up." Opening with lines like "Have you read X" puts the child at ease.

But interview carefully, too. Professor Katherine Hunt Federle warns:

The lawyer for the child . . . must be aware of the ways in which she, ad an adult, may dominate her child client. Because children are powerless, they do not expect adults to treat them with respect or to listen to their opinions. They are treated as passive and subordinate . . . . The lawyer, therefore, must be cognizant of the effect she may have on her client."<sup>95</sup>

The lawyer/guardian ad litem must not elicit the child's "adult-approved" preferences. Professor Peters suggests these helpful questions: "[A]m I seeing the case, as much as I can, from my client's point of view?"; "If I decide to treat my client differently from the way I would treat an adult in a similar situation, and in what ways will my client concretely benefit"; and "Is it

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<sup>94</sup> *Id.* at 1835.

<sup>95</sup> Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655 (1996).

possible that I am making decisions in the case for my own gratification?"; and, finally, "Does the representation . . . reflect what is unique and idiosyncratically characteristic of this child?"<sup>96</sup>

#### 4. Forget Crime

While the *Meyer-Pierce* problem carefully protects parents' rights, the lawyer/guardian ad litem's duty is to advance the child's best interests. The court's duty is to use those interests to navigate MCL 712A.19b's murky waters, recall. How is the lawyer/guardian ad litem to keep the court from focusing on the parents?

By not focusing on the parents. Focusing on the parents actually disserves the child. First, invokes rights discourse the lawyer/guardian ad litem seeks to avoid. Second, it injects criminal stigma into the civil courtroom. Third, it punishes "bad" parents *and* their children. "[W]e allow [ourselves] to believe we act in the children's best interests by separating them from their 'bad' [parents], without acknowledging the intensity of their mutual loss."<sup>97</sup>

#### 5. Tap CPS

The lawyer/guardian ad litem must take advantage of CPS. CPS investigators are often the first parties to assess the child. Their practice procedures require CPS to investigate each reported case of child maltreatment. For serious maltreatment, particularly those leading the child to the courtroom, the procedures also require CPS to carefully monitor the child's needs, the family's risks and any progress made to relieve the child of harm. Every investigator keeps records, some personal and some in the child's CPS file.

The investigators are willing to talk about their records – sometimes quite willingly! The lawyer/guardian ad litem need only make a phone call. Depositions might be necessary. If the lawyer/guardian ad litem builds rapport (try opening with the line, "You and I share the same mission; our primary focus is the protection of children, just like 'the Man' says"), CPS will even share its file. The lawyer/guardian ad litem need not waste time, precious and short given her high caseload, making records requests and subpoenaing documents.

That phone call taps the lawyer/guardian ad litem into valuable resources. Investigation notes substantiating child abuse or neglect are available. Notes from contacts with the parents, the neighbors, the schools, even the child, are available. Service agreements explaining the parents' goals for protecting their child and disclosing how they tried (and perhaps failed) to do

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<sup>96</sup> Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyer for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996).

<sup>97</sup> *Id.* at 1840.

so are available. These records are detailed, analytical and carefully drafted from an adult perspective with the underlying mission to protect children. Armed with more protection-oriented information, much of it free, the lawyer/guardian ad litem will come to the court prepared to advocate for her child client.

## 6. Have Faith

The lawyer/guardian ad litem must have faith that what she does matters. Ms. Pettibone proclaims, happily, “I love what I do,” and she counsels everyone practicing in this field to love what they do, too.<sup>98</sup> “Seeing the long term benefits to the children is very rewarding,” she says, and that gives her faith that what she does truly matters. As an example of what gives her faith, she recounts the following:

Once when I contacted several children (siblings) to let them know that the termination trial was over and their parents’ rights were in fact terminated, they were so excited and relieved that they started screaming and yell[ed] for joy in the phone and kept calling me back all day telling me how much they loved me for helping them to be safe for the rest of their life. These were young children that had been exposed to drug use, sales, physical violence, basic neglect, pornography and extreme unsafe conditions. I never had kids quite that happy about a termination before.<sup>99</sup>

Their excitement stuck with her. She counsels the lawyer/guardian ad litem to have the same faith. “[C]ritical to your representation,” she tells the lawyer/guardian ad litem, is making sure the children you represent “know[] someone cared enough to actually know who they are.”<sup>100</sup> Have faith in what you do, and care, she suggests, so that these children know the system actually cares about them.

## II. Doing the “Rights Discourse Dance”

Showing that the system cares is tough, however. In most termination of parental rights cases, rights discourse shifts the court’s attention to punishing “bad” parents. That is neither CAPTA’s nor our goal. Child-friendly representation, however, keeps the goal in focus.

### A. Benefits

Benefits abound. First, the child-centered approach avoids the confusing “rights discourse” that inevitably shifts the court’s focus to parental rights, to children’s demise. Second, a little “needs discourse” is allowed. Professor Prescott believes that focusing on children’s

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<sup>98</sup> Pettibone, *supra* note 44.

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

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

needs makes parents more willing to accept help, less hostile and defense. Parents more willing to accept that help by, for example, attending parenting classes, will save their parental rights.<sup>101</sup> Third, the approach avoids separating parents – like Eddy – from their children too soon.

### *B. Burdens*

Granted, child friendly representation is imperfect. First, the lawyer/guardian ad litem must avoid “needs discourse,” which treats children just as powerless as “rights discourse.” Children once again become chattel, things to be served and not human beings with a “right” to parents who will provide for them. Second, shifting focus from the parents might lower the threshold for parental fitness. While the parents are not the most important party in the proceeding, their actions are nonetheless crucial. The court must decide whether to terminate parental rights under statutory grounds phrased in terms of what the parents *did*.

### SPEAK UP!

Children are not “mini-adults”; nor are they younglings with needs. They have voices which deserve attention. Perhaps Peters put the point best:

The collective international data portrays an indisputable worldwide consensus. [T]o the extent that children in the United States are represented by professionals who are understandably confused about both the importance and the logistics of their role, the international consensus demonstrates that the ability of children to express their views . . . is now an internationally recognized human right.<sup>102</sup>

International consensus teaches that successful child protection systems *care* about children, rights discourse aside. In the United States, funding may be lax and training low, but caring can work marvelous changes. How? I submit that caring begins with child friendly representation. The lawyer/guardian ad litem must *care*. Care by accepting needs. Care by listening openly. Care by interviewing carefully. Care by forgetting crime. Care by tapping CPS. Care by having faith. Michigan lawyer/guardians ad litem – I know you can. So, speak up! My practice standards for child friendly representation show how.

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<sup>101</sup> Prescott, *supra* note 54, at 533.

<sup>102</sup> Peters, *supra* note 34, at 969.

**APPENDIX A**  
**MCL § 712A.19b**

§ 712A.19b. Termination of parental rights to child; petition; hearing; record; notice; findings; order; "concerned person" defined.

Sec. 19b. (1) Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or children's ombudsman as authorized in section 7 of the children's ombudsman act, 1994 PA 204, [MCL 722.927](#), the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated. The court shall issue an opinion or order regarding a petition for termination of parental rights within 70 days after the commencement of the initial hearing on the petition. However, the court's failure to issue an opinion within 70 days does not dismiss the petition.

(2) Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following:

(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.

(b) The child's foster parent or custodian.

(c) The child's parents.

(d) If the child has a guardian, the child's guardian.

(e) If the child has a guardian ad litem, the child's guardian ad litem.

(f) If tribal affiliation has been determined, the Indian tribe's elected leader.

(g) The child's attorney and each party's attorney.

(h) If the child is 11 years of age or older, the child.

(i) The prosecutor.

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(a) The child has been deserted under any of the following circumstances:

(i) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.

(ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

(iii) The child's parent voluntarily surrendered the child to an emergency service provider under chapter XII and did not petition the court to regain custody within 28 days after surrendering the child.

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse

under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(d) The child's parent has placed the child in a limited guardianship under section 5205 of the estates and protected individuals code, 1998 PA 386, [MCL 700.5205](#), and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, [MCL 700.5205](#), regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, [MCL 700.1101](#) to [700.8102](#), and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, [MCL 700.5207](#) and [700.5209](#), regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, [MCL 700.1101](#) to [700.8102](#), and both of the following have occurred:

(i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home

for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life threatening injury.

(vi) Murder or attempted murder.

(vii) Voluntary manslaughter.

(viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state.

(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

(i) A violation of section 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, [MCL 750.316](#), [750.317](#), [750.520b](#), [750.520c](#), [750.520d](#), [750.520e](#), and [750.520g](#).

(ii) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, [MCL 769.10](#), [769.11](#), and [769.12](#).

(iii) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (i) or (ii).

(4) If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing. If a petition to terminate parental rights to a child is filed, parenting time for a parent who is a subject of the petition is automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended under this subsection establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.

(5) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child

is clearly not in the child's best interests.

(6) As used in this section, "concerned person" means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the family independence agency, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

HISTORY: Act 288, 1939, p 558; eff September 29, 1939.

Pub Acts 1939, No. 288, Ch. XIIA, § 19b, as added by Pub Acts 1988, No. 224, imd eff July 1, 1988, by § 2 eff April 1, 1989 (see 1988 note below); amended by [Pub Acts 1990, No. 314](#), imd eff December 20, 1990 (see 1990 note below); [1994, No. 264](#), imd eff July 5, 1994, by § 2 eff January 1, 1995 (see 1994 note below); [1997, No. 169](#), eff March 31, 1998 (see Mich. Const. note below); [1998, No. 479](#), imd eff January 4, 1999, by enacting § 1 eff March 1, 1999; [1998, No. 530](#), imd eff January 12, 1999, by enacting § 1 eff July 1, 1999; [2000, No. 46](#), imd eff March 27, 2000; [2000, No. 232](#), imd eff June 27, 2000, by enacting § 2 eff January 1, 2001.

**APPENDIX B**  
**MCL § 712A.17d**

§ 712A.17d. Lawyer-guardian ad litem; powers and duties.

Sec. 17d. (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.
- (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. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.
- (d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:
  - (i) Before the pretrial hearing.
  - (ii) Before the initial disposition, if held more than 91 days after the petition has been authorized.
  - (iii) Before a dispositional review hearing.
  - (iv) Before a permanency planning hearing.
  - (v) Before a post-termination review hearing.
  - (vi) At least once during the pendency of a supplemental petition.
  - (vii) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.
- (e) The court may allow alternative means of contact with the child if good cause is shown on the record.
- (f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.
- (g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
- (h) To attend all hearings and substitute representation for the child only with court approval.
- (i) 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.
- (j) 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.

(k) 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 through consultation with the child's parent, foster care provider, guardian, and caseworker.

(1) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(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.

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable.

HISTORY: Act 288, 1939, p 558; eff September 29, 1939.

Pub Acts 1939, No. 288, Ch. XIIA, § 17d, as added by [Pub Acts 1998, No. 480](#), imd eff January 4, 1999, by enacting § 1 eff March 1, 1999; amended by [Pub Acts 2004, No. 475](#), imd eff December 28, 2004.

**APPENDIX C**  
**CHILD FRIENDLY REPRESENTATION**  
**THE NEW LAWYER/GUARDIAN AD LITEM'S MANTRA.**

*I WILL:*

**ACCEPT NEEDS**

**LISTEN OPENLY**

**INTERVIEW CAREFULLY**

**FORGET CRIME**

**TAP CPS**

**HAVE FAITH**

**AND SPEAK UP!**