

# Do Children's Attorneys Give a Child a Voice?

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Attorneys for children have taken on a variety of roles, depending on the needs of those being represented. Mark Twain opined: “When I was a boy of 14, my father was so ignorant I could hardly stand to have the old man around. But when I got to be 21, I was astonished at how much the old man had learned in seven years.”

Does the mere legal incapacity of youth necessitate appointment of an attorney to represent children?

## Historical Context

Children are thought to be within the custody and control of their parents, unless they choose to emancipate. Courts wish to assure that children's rights are protected in some fashion. To protect the rights of children in certain cases, judges often appoint attorneys to represent children. [In 1851, in \*King v. Robinson\*, Chief Justice Shepley stated that a court "is authorized to appoint a \*guardian ad litem\*, when a party becomes insane pending the suit."](#) Akin to the concept of "*parens patriae*," where a government or any other authority – such as a trial judge – steps into a role of acting as a legal protector of citizens who are unable to protect themselves, our courts rely on the appointment of attorneys to represent minor children, as minor children are viewed as incompetent to represent their own rights in court. The idea is that by exercising *parens patriae* powers, a state attempts to take steps to assure that children are protected – even from the child's own parents.

[In 1899, child advocates in Chicago helped launch the first juvenile court](#), where children's rights were distinguished from those of adults. Soon, however, it was difficult to distinguish between juvenile court and criminal court. In the 1967 landmark decision, [In re Gault](#), the United States Supreme Court unanimously held that juvenile defendants are entitled to the same due process rights as adults.

Tracking the historical context of court-appointed counsel for children, the [Hon. Debra Lehrmann](#) notes that evolution revolves around whether the child's attorney should zealously advocate according to the child's directions "or whether the lawyer should determine the goal of representation and advocate what is in the child's best interests." In 1974, the U.S. Congress passed the [Child Abuse Prevention Treatment Act](#) ("CAPTA"). In order to qualify for Federal assistance in regard to child abuse prevention and treatment programs,

states were to assure the appointment of a special advocate for children in abuse and neglect cases.

[Martin Guggenheim's 1984 publication](#), *The Right to be Represented But Not Heard: Reflections on Legal Representation of Children*, documents the reorientation towards drafting ethical canons requiring court appointed attorneys to fight for legal objectives as stated by their clients who were minor children.

The role of a Guardian ad Litem (GAL) has evolved significantly over time, expanding beyond its traditional legal scope to include a variety of legal professionals working on behalf of the court.

### **Distinguishing a GAL from a Child's Attorney**

Originally, a GAL referred to an attorney appointed for a person deemed incompetent, with the appointment often being to represent a child "for the purposes of legal action only." The GAL role has since broadened to encompass:

- Counselors.
- Social Workers.
- Mental Health Professionals.
- Other Qualified Individuals.

A key distinction has emerged between a GAL and a child's attorney:

- GAL: Can act as a witness in some jurisdictions, gathering data and reporting information to the court.
- Child's Attorney: Advocates for the wishes of the client/child.

This distinction necessitates specific role definitions, especially taking into account the fact that the child’s wishes may not be determinative in cases with evidence of abuse, neglect, or in the context of custody proceedings. In Texas, for instance, an [“amicus attorney”](#) is appointed in some private cases. In addition, the judge has the discretion to appoint an attorney in a [“dual role”](#) in cases filed by a governmental entity.

### **American Bar Association Standards**

The American Bar Association (“ABA”) has been instrumental in establishing clear standards and definitions for attorneys representing children. The 1995 [ABA](#) promulgated standards of practice for lawyers representing children in abuse and neglect cases. The 2003 revisions to the ABA Standards introduced key roles: Child’s Attorney and Best Interests Attorney. Pursuant to the [ABA 2003 standards](#), a Child’s Attorney is “a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.”

A Best Interests Attorney is “a lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.” Each judge should clearly define court appointed attorneys’ roles in the order appointing such attorneys. Why? Clarity in the order appointing counsel ensures that all parties understand each court-appointed attorney’s responsibilities and limitations in representing a child. For instance, in Texas, the roles are further refined by statute ([TxFam. Code Section 107.011](#) and [TxEst. Code 1054.051](#)). In California, further definitions may be found at [Family](#)

[Code, Sections 3150-3153](#), [Family Code, Sections 7600-7730](#), and in the [Probate Code Sections 3500-3613](#). It is recommended that the scope of the attorney's role is clearly defined by the bench officer upon appointment of the attorney for the minor child.

### **Need for Clearly Defined Roles**

Children's attorneys are the voices for the children. However, states are not uniform in their standardization of child attorneys' duties. Of course, [national guidelines for professional conduct](#) governing lawyers apply to all children's attorneys (i.e. the duties to maintain client confidentiality, to assure that there are no conflicts of interest, and to represent the child zealously within the bounds of the law). The challenges of representing children effectively include assuring that attorneys providing such services have a baseline of education regarding child development, determining the child's capacity to understand the implications of the case in which the child is involved, as well as mandating trauma-informed continuing education and related matters to assure that court appointed attorneys properly carry out their court assigned roles and duties.

### **Factors Beyond Age**

While many states set statutory ages (often 12-14 years of age) for considering a child's preferences, competency is not solely age dependent. Children develop at different rates, and individual capacities vary. Factors impacting a child's competency to express custody preferences include cognitive development, emotional maturity, physical limitations, and the ability to reason and articulate thoughts.

Factors impacting a parent's competency that may or may not impact children's choices include interruptions in early attachment and bonding, and include:

- Separation from parents due to foster care.
- Adoption after attaching to another parent figure.
- Prenatal exposure to drugs and alcohol.
- Traumas like sexual abuse, physical abuse, and domestic violence.
- Mental health issues such as depression, schizophrenia, and/or personality disorders.
- Drug or alcohol addiction in the parent figure.
- Orphanage care.
- Hospitalization of parent or child, during which children lose access to their parents.
- Neglect.

### **Challenges to Competency**

Several factors may compromise a child's competence to express genuine custody preferences:

- High conflict situations: Children may be coerced or manipulated into voicing preferences that are not their own.
- Neurodiversity: Some children may struggle to express their wishes effectively due to developmental or cognitive differences.
- Abuse or neglect: Victims may express a preference to live with an abusive parent due to complex attachment issues.

- Cultural and/or language issues: Impeding the child's ability to communicate to and with their attorney.

### **Assessing Competency**

Attorneys representing children must have sufficient training and experience to evaluate their young clients' competency. Such an assessment should include:

- Determining if the child can express their opinions independently.
- Identifying sources of undue influence or pressure.
- Assessing the child's understanding of the situation.
- Evaluating the child's ability to reason and articulate thoughts.

### **The Role of Minors' Attorneys**

Minors' attorneys must strive to maintain objectivity and not allow personal views on custody to influence their representation. Complete neutrality is challenging. Attorneys serving children should:

- Be aware of potential biases.
- Focus on the child's safety, expressed wishes and best interests.
- Seek supervision or consultation with other experts and mental health professionals when personal views may interfere with making an objective report.

### **Benefiting the Court**

Minors' attorneys can provide valuable insight to judges by:

- Presenting the child’s perspective and wishes (after screening for undue influence or pressure).
- Offering observations on family dynamics.
- Highlighting issues that may not be readily apparent from parents’ testimony.
- Providing a neutral assessment of the child’s needs.

Others contend that if minors’ attorneys do not have proper training or do not understand the psychological issues within high conflict custody disputes, the attorney becomes yet another obstacle that a parent must overcome to assert due process.

### **Scope of Recommendations**

Whether making custody recommendations exceeds the reach and grasp of a court appointed attorney is open to debate. Some argue that attorneys should limit themselves to presenting the child’s wishes (as long as those wishes are expressed without covert parental coercion), They believe custody recommendations are best left to mental health professions or child custody evaluators. Others contend that attorneys, with proper training, can offer valuable recommendations based on their unique perspective and relationship with the child.

### **Current Training Requirements vs. Updating ABA Standards**

The adequacy of nationwide/statewide training requirements for minors’ attorneys varies. [Some jurisdictions](#) arguably fall short of meeting the



objectives outlined in the ABA standards. Could an update of the ABA standards, or reference to work promulgated by [Association of Family and Conciliation Courts](#) (“AFCC”) give further insight? Yes. Further, the ABA should consider proposing updated guidelines, seeking to address:

- Evolving understanding of child development and competency.
- Best practices for representing children in high-conflict cases.
- Ethical considerations in making custody recommendations.
- Incorporating trauma-informed education and approaches.

## **Conclusion**

Determining a child’s competency to express custody preferences is a complex issue. Often, it is young lawyers, lacking in experience both in life and in practice, who step up to place their names on the wheel – the list of names that judges “roll” in order to determine which attorney to appoint in a given case. Ironically, lessons gleaned by serving on the wheel make lawyers more empathetic and clued into the difficulties of ensuring justice in custody, abuse and neglect cases. But no attorney should learn lessons at the cost of the clients they serve. Minors’ attorneys can and do play a crucial role in representing children’s voices in custody proceedings, but those attorneys must scrupulously navigate challenges of objectivity and scope. While such attorneys can provide valuable insight, acting as the arm of the court, the parameters of court-appointed GALs, AALs, and *amicus* attorneys remain the subject of continuing debate.

The bottom line is that judges often ignore children's desires in their quest to serve children's best interests. How much weight should judges continue to give to court-appointed counsel, who have historically served as giving children a voice in the courtroom? In 2001, the [National Association of Counsel for Children](#) outlined recommendations for changes for attorneys representing children in abuse and neglect cases. Do the existing rules that govern attorneys who represent children continue to work? Critics abound. As family law evolves, there is a clear need for updated standards and comprehensive training for judges, lawyers and mental health professionals involved in family law cases to ensure that children's best interests are truly served.

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