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March 4, 2021


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January 25, 2021

EFFECTIVE DATE
Immediately

NUMBER
3130-20-01

SUBJECT

Appointment of Legal Counsel for a Child in a
Contested Termination of Parental Rights Hearing

BY

Jonathan Rubin, Deputy Secretary
Office of Children, Youth & Families

SCOPE:

County Children and Youth Social Service Agencies
Private Children and Youth Social Service Agencies
Juvenile Court Judges' Commission
Administrative Office of Pennsylvania Courts
County Chief Probation Officers
Orphans Court Judges
County Children and Youth Solicitors
Private Attorneys
Statewide Adoption and Permanency Network Service System
American Bar Association
Pennsylvania Bar Association
Guardians Ad Litem
Parent Advocates

PURPOSE:

The purpose of this bulletin is to transmit to County Children and Youth Agencies (CCYAs) requirements related to a new Supreme Court decision on the appointment of legal counsel for a child in a contested Termination of Parental Rights (TPR) hearing. This bulletin is effective immediately and all requirements must be followed.

This bulletin was reissued on March 4, 2021 and this version effectively replaces the version of the same subject/title with the issue date of January 25, 2021.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO: The appropriate OCYF Regional Office.
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ORIGIN OF BULLETIN:

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BACKGROUND:

In 2015, a trial court filed a petition terminating the parental rights of the mother of dependent siblings L.B.M. and A.D.M. The mother contested the termination of her parental rights and requested the appointment of counsel to represent her children's legal interests. The trial court denied the mother's request, finding that the guardian ad litem (GAL) was an attorney dually representing the children's best interests and legal interests, which met the requirement at Section 2313 of the Adoption Act for appointment of counsel.

Unrectified parental concerns and prolonged adjudication of A.D.M. and L.B.M. prompted the CCYA to file a TPR petition. Two hearings were held to address the proposed termination of the mother's parental rights. A.D.M. expressed his wish to continue a relationship with his mother, and this disclosure along with progress initiated by the mother impelled the trial court to decline the termination of the mother's parental rights. A second petition to terminate parental rights was filed as additional concerns arose, and the trial court entered a decree terminating the parental rights of A.D.M. and L.B.M.'s mother. After the mother appealed the termination of her parental rights, an amicus brief was filed with the Pennsylvania Supreme Court by the Juvenile Law Center, in collaboration with five additional law firms, in support of the mother, stating that the children have the right to an attorney to represent their legal interest in a contested TPR hearing. The Supreme Court recognized that in some cases, the legal interests of the child may differ from the best interest and on March 28, 2017 (Attachments 1 & 2), found a conflict between the child's legal interests and best interests. The GAL concluded that the child's best interest was "to sever the bond with mother because his most important need was permanency."

Occasionally, a conflict of interest may exist for the GAL to represent both the child's best interests and the child's legal interests. When the child's best interests and legal interests conflict, the child's GAL may not appropriately fulfill the Adoption Act requirements. When necessary, the appointment of client-directed counsel can optimize the protection of the child's needs and welfare.

DISCUSSION:

The federal Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5106a et seq.) originally enacted on January 31, 1974 (Public Law 93-247) requires representation for children in dependency proceedings but does not require those representatives to be lawyers. Pennsylvania went beyond the federal law to require the appointment of a GAL for children in court proceedings. Section 6311 of the Juvenile Act (relating to GAL for child in court proceedings) requires the court to appoint a GAL for a child when court proceedings have been initiated alleging that the child is a dependent child, as defined in Section 6302 (relating to definitions). The GAL must be an attorney at law and must represent the legal interests and the best interests of the child. The GAL is the child's voice in the courtroom, especially if the child is not of age to articulate his or her own best interests. Best interests denote that a GAL is to express what the GAL believes is best for the child's care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

Pennsylvania's Adoption Act (Title 23, Part III) requires the court to consider the best interests of a child before it can terminate parental rights. If a child has been in placement at least 15 of the last 22 months, the Juvenile Act generally requires the agency to file a petition for TPR or an exception if applicable (42 Pa.C.S. § 6351(f)(9)). This requirement is consistent with federal law, as amended by the Adoption and Safe Families Act (ASFA) (42 U.S.C. § 675(5)(C) and (E)). By law, when the court ends parental rights, the parent's rights to the child are terminated, which has a significant impact on a child's well-being. It is imperative that a child's voice and wishes be heard by the court before the child's connections to the family are legally severed.

Section 2313(a) of the Adoption Act (relating to child) mandates the court to appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both parents. Section 2313(a) also states the court may appoint counsel or a GAL to represent any child who has not reached the age of 18 years and is subject to any other proceeding under the Adoption Act whenever it is in the best interests of the child.

In 2015, the Pennsylvania State Roundtable adopted the "Standards of Practice for Parents' Lawyers, Guardians ad Litem and Legal Counsel practicing Child Welfare Dependency Cases in Pennsylvania" document (Attachment 3) created by the Legal Representation Workgroup to enhance legal representation in PA's child dependency system. The "Standards of Practice" not only offer solutions for attorney performance and accountability but provide a pathway for legal advocacy. The document contents include, but are not limited to:

- Client contact;
- Expertise and knowledge;
- Case preparation;
- Collateral contacts and collaboration;
- Advocacy;
- Appellate advocacy;
- Ethical considerations; and
- Time/task charts.

POLICY AND PROCEDURES:

From determining dependency to the adoption of a child, the court makes decisions based on the best interest of the child within each court proceeding. While the best interest determination belongs to the court, statutes and rules guide the court. It is the responsibility of the CCYA to make recommendations to the court regarding placement, education, progress, updates, and any other information pertinent to the case. CCYAs have an obligation to promote that a child has the appropriate representation for each hearing to include court-appointed legal counsel for the child when necessary.

Because of the conflict between the child's wishes and the GAL's conclusions, the Supreme Court in the case of *In re Adoption of L.B.M.* held that, in some circumstances,

appointing a GAL to represent a child is insufficient. Specifically, where the child's wishes are ascertainable and different from their best interests, an attorney must be appointed to represent the legal interests of the child and advocate for the child's wishes. The *L.B.M.* Court remanded the case for a new TPR hearing following the appointment of counsel.

In subsequent cases, the Superior and Supreme Courts have provided further clarification on this process. As of the date of this bulletin, the Supreme Court has held in the case of *In re T.S.*, 192 A.3d 1080, 1092–93 (Pa. 2018) (Attachment 4):

1. During contested termination-of-parental-rights proceedings, where there is no conflict between a child's legal and best interests, an attorney-guardian ad litem representing the child's best interests can also represent the child's legal interests.
2. If the preferred outcome of a child is incapable of ascertainment because the child is very young and pre-verbal, there can be no conflict between the child's legal interests and his or her best interests; as such, the mandate of Section 2313(a) of the Adoption Act that counsel be appointed "to represent the child," is satisfied where the court has appointed an attorney-guardian ad litem who represents the child's best interests during such proceedings.
3. A child's statutory right to appointed counsel under Section 2313(a) of the Adoption Act cannot be waived by his or her failure to raise the issue.

CCYAs should be aware that in contested TPR hearings, the court will review whether the child's wishes are ascertainable. The court will usually identify whether the GAL can advocate for the child's wishes without conflict. Where there is a conflict, an attorney will be appointed to represent the child's legal interests.

ATTACHMENTS

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| Attachment 1 | Supreme Court Opinion March 28, 2017- LBM Majority Opinion |
| Attachment 2 | Supreme Court Opinion March 28, 2017- LBM Concurring Opinion |
| Attachment 3 | Standards of Practice for Parents' Lawyers, Guardians ad Litem and Legal Counsel practicing Child Welfare Dependency Cases in Pennsylvania |
| Attachment 4 | Supreme Court Opinion August 22, 2018- TS Majority Opinion |

Note: Correct opinions in this matter were posted May 23, 2017

**[J-119A-2016 and J-119B-2016]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: ADOPTION OF: L.B.M., A MINOR	: No. 84 MAP 2016 : : : Appeal from the Order of the Superior Court at 1834 MDA 2015 dated May 31, : 2016 Affirming the Order of the Court of : Common Pleas of Franklin County, : Orphans' Court Division, at 42-ADOPT- : 2014 dated September 25, 2015. : : ARGUED: December 6, 2016
IN RE: ADOPTION OF: A.D.M., A MINOR	No. 85 MAP 2016 Appeal from the Order of the Superior Court at 1835 MDA 2015 dated May 31, 2016 Affirming the Order of the Court of Common Pleas of Franklin County, Orphans' Court Division, at 41-ADOPT- 2014 dated September 25, 2015. ARGUED: December 6, 2016
APPEAL OF: J.P., MOTHER	

Justice Wecht delivers the Opinion of the Court with respect to Part I, Part II(A), and Part II(C) and announces the judgment of the Court. The opinion is joined in full by Justices Donohue and Dougherty. Chief Justice Saylor and Justice Todd join the opinion, except with respect to Part II(B), and the Chief Justice files a concurring opinion, joined by Justice Todd. Justices Baer and Mundy file separate dissenting opinions, which the authors cross-join.

OPINION

JUSTICE WECHT

DECIDED: March 28, 2017

This case requires us to determine whether 23 Pa.C.S. § 2313(a), which mandates the appointment of counsel for children involved in contested involuntary termination of parental rights (“TPR”) proceedings, is satisfied by the appointment of a guardian *ad litem* (“GAL”) provided that the GAL is an attorney. We hold that it is not.

I. Background

The plain language of Section 2313(a) requires the trial court to appoint a separate, independent attorney to represent a child’s legal interests in a TPR case. The trial court erred in failing to appoint such counsel, and the Superior Court erred in ruling that the GAL’s involvement sufficed to satisfy Section 2313(a). Accordingly, we reverse and remand for further proceedings.

At the outset, we define the terms that provide the backdrop for our resolution of this issue. In cases involving children, the law acknowledges two separate and distinct categories of interest: a child’s legal interests, which are synonymous with the child’s preferred outcome, and a child’s best interests,¹ which the trial court must determine.²

¹ The Comment to Pa.R.J.P. 1154 provides:

“Legal interests” denotes that an attorney is to express the child’s wishes to the court regardless of whether the attorney agrees with the child’s recommendation. “Best interests” denotes that a guardian *ad litem* is to express what the guardian *ad litem* believes is best for the child’s care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

Pa.R.J.C.P. 1154 cmt.

² See *In re Adoption of S.P.*, 47 A.3d 817, 820 (Pa. 2012) (court must determine child’s best interests in termination of parental rights); *In re R.I.S.*, 36 A.3d 567, 573 (Pa. 2011) (child’s best interests guide the court in a goal change); *In re Adoption of J.E.F.*, 902 A.2d 402, 412 (Pa. 2006) (child’s best interest is the “paramount consideration” in adoption); *Moore v. Moore*, 634 A.2d 163, 168 (Pa. 1993) (“The primary concern in any (continued...)”).

While the best interests determination belongs to the court, statutes and rules guide the court and channel its discretion. For instance, in child custody cases, the court may appoint counsel for the child, who “shall represent the child’s legal interests and zealously represent the child as any other client in an attorney-client relationship” and “shall not perform the role of a guardian *ad litem* or best interests attorney.” Pa.R.C.P. 1915.11(a). Additionally, the custody court may choose to appoint a GAL “to represent the best interests of the child,” and that GAL can be either an attorney or mental health professional. Pa.R.C.P. 1915.11-2(a).

In dependency cases where the trial court is required to appoint a GAL, the GAL must be an attorney. 42 Pa.C.S. § 6311(a). The GAL is authorized by statute to represent both the child’s legal interests and the child’s best interests. *Id.* The GAL makes recommendations to the court regarding the child’s placement and needs, and must advise the court of the child’s wishes, if ascertainable. 42 Pa.C.S. § 6311(b). Further, the statute explicitly provides that any difference between the child’s wishes and the GAL’s recommendations “shall not be considered a conflict of interest.” 42 Pa.C.S. § 6311(b)(9).³

(...continued)

custody case is the best interests of the child.”); *In re B.L.L.*, 787 A.2d 1007, 1014 (Pa. Super. 2001) (discussing differences between custody and termination of parental rights and noting that, in termination of parental rights, child’s legal interests are protected by representation of counsel).

³ Although Section 6311(b)(9) specifically provides that the dependency GAL has no conflict of interest when the child’s best interests and legal interests diverge, this Court has suggested that, in such instances, the GAL should request appointment of legal counsel. Pa.R.J.C.P. 1154 cmt. Indeed, we have suspended Section 6311(b)(9) to the extent that it conflicts with the rule. *Id.* cmt.

By contrast to this statutory authorization for a GAL in dependency proceedings, Section 2313(a) of Title 23 prescribes a different scheme for the representation of children in termination of parental rights and adoption cases.

(a) Child.--The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian *ad litem* to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

23 Pa.C.S. § 2313(a).⁴ No other statutory provision speaks to the appointment of counsel or a GAL in an involuntary termination of parental rights proceeding.

With this legal framework in mind, we turn to the facts of today's case. J.L.P. ("Mother") and J.D.M. ("Father") are the parents of A.D.M. (born March 2007) and L.B.M. (born May 2011). On July 2, 2013, Franklin County Children and Youth Services ("CYS") conducted a home visit with Mother. The visit was prompted by a referral alleging that Mother was on the verge of becoming homeless. The next day, Mother contacted CYS seeking to place the children due to her unstable living conditions. At the time, Father was incarcerated. That same day, the trial court ordered the children to

⁴ The comment to the statute states:

This new provision requires the court to appoint counsel for a child when parental rights are being involuntarily terminated and, when necessary, to appoint a guardian *ad litem* for a child who has not reached the age of 18 years. The guardian *ad litem* concept is broad enough to allow the appointment of a person other than a lawyer. For example, a social worker could be appointed guardian *ad litem* within this provision; in an appropriate case a nonlawyer guardian *ad litem* could request appointment of counsel.

23 Pa.C.S. § 2313 Jt. St. Gov. Comm. cmt.

be placed with CYS. Soon after, the children were adjudicated dependent. As required by Section 6311, the trial court appointed a GAL for the children (Attorney Kristen Hamilton) at the beginning of the dependency proceedings.

On August 13, 2013, Mother pleaded guilty to possession of drug paraphernalia and was sentenced to twelve months of probation.⁵ Thereafter, Mother was incarcerated, mostly due to probation violations, from July 5, 2013 to October 2, 2013, October 24, 2013 to November 6, 2013, December 12, 2013 to April 24, 2014, and May 5, 2014 to June 20, 2014.

On August 6, 2014, following Mother's repeated periods of incarceration, CYS filed a TPR petition. On November 25, 2014, after two hearings, the trial court issued findings of fact and a decree. The trial court declined to terminate Mother's parental rights, finding that Mother, while only recently released from jail, had obtained both housing and employment. Decree, 11/25/2014, at 8, 14-16.⁶ Further, Mother had attended almost all of her available visits with the children and had engaged and bonded with them. *Id.* at 8-9, 18. The court expressed "grave concerns" about the effect that severance of the relationship would have on A.D.M., who was "extremely close" with Mother. *Id.* at 19. The testimony reflected that A.D.M. "desperately want[ed] to be with his mother." Notes of Testimony ("N.T."), 10/3/2014, at 60; *see also* N.T., 10/24/2014, at 38.

⁵ At the time of her plea, Mother already was on probation stemming from a 2012 conviction for possession of a small amount of marijuana.

⁶ The trial court terminated Father's parental rights. He appealed, and the Superior Court affirmed the trial court's decision. *In re Adoption of A.D.M.*, 94 MDA 2014, 2015 WL 7089589 (Pa. Super. June 15, 2015) (unpublished).

Following the first TPR hearing, Mother made significant progress, and the children were scheduled to be reunited with her. However, while reunification was pending, L.B.M. returned from a weekend visit with Mother with bruises on his neck and chest. Although the bruises were suspected to be non-accidental, an investigation did not reveal their cause. Ultimately, the trial court delayed reunification in order to permit A.D.M. to finish the school year. Shortly thereafter, it was discovered that Mother had again violated her probation by living apart from her approved residence. Mother was reincarcerated. While in jail, Mother participated in visits with the children until her privileges were suspended after she tested positive for suboxone.

On August 4, 2015, the GAL filed a second TPR petition, citing both Mother's reincarceration and the cancellation of her visitation privileges. On August 28, 2015, Mother filed a motion requesting the appointment of counsel for the children, citing Section 2313(a). Mother noted that the GAL's position "may be adverse to the [children's] position," and accordingly averred the necessity of independent counsel. Motion to Appoint Counsel for the Child, 8/28/2015, at 1.

On September 9, 2015, the trial court denied Mother's motion. In its order, the trial court chose simply to skip over the first sentence of Section 2313(a) (which mandates counsel in contested TPR cases) in favor of that provision's second sentence, which "gives this Court the discretion to appoint counsel or a GAL to represent any child who has not reached 18 years and is subject to *any other proceeding* under this part whenever it is in the best interests of the child." Order, 9/9/2015 (emphasis added). The trial court stated that, because the GAL had an established relationship with the children, the GAL's representation would best suit the children's interests. *Id.*

The trial court held hearings on the TPR petition. At the start of the proceedings, the trial judge interviewed A.D.M. A.D.M. was equivocal about his desire to be reunited with Mother. He testified that he knew that Mother cared about him, but that he nonetheless was disappointed by her inability to maintain sobriety. He further stated that he probably would choose his foster family. N.T., 9/15/2015, at 10-11. A.D.M. expressed his desire for a final decision and his wish that, regardless of the outcome, he be allowed to maintain contact with both Mother (and her family) and his foster family. *Id.* at 17-18, 154. A.D.M.'s permanency worker testified that A.D.M.'s "first wish is always going to be with his mom." *Id.* at 161. The trial court recognized that A.D.M.'s bond with Mother was much stronger than L.B.M.'s, and that A.D.M. would be affected adversely by the termination. However, the trial court found that A.D.M. also had a strong bond with his foster parents, and that it was in A.D.M.'s best interests to sever the bond with Mother because his most important need was permanency. *See id.* at 17-18 (A.D.M. testifying that he just wanted a decision).

The trial court filed its findings of fact and decree on September 25, 2015. By that decree, the trial court terminated Mother's parental rights, finding that Mother had not remedied the conditions leading to the children's placement. In assessing the children's best interests, the court found that L.B.M.'s primary bond was with his foster parents, whom he considered to be his parents, although L.B.M. did have some bond with Mother. Decree, 9/25/2015, at 13.

Mother filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(ii) and (b). Mother alleged that the trial court erred in denying Mother's motion for the appointment of counsel, and that the trial court abused its discretion in terminating Mother's parental rights. We first address the appointment of counsel.

In support of its decision to deny Mother’s motion, the trial court relied upon *In re K.M.*, 53 A.3d 781 (Pa. Super. 2012), in which the Superior Court held that Section 2313(a) did not require appointment of an attorney when a GAL, who was an attorney, had been appointed. Trial Court Opinion, 12/7/2015, at 22-24. In *K.M.*, the Superior Court addressed a TPR determination involving a three-year-old child who had never been in the parents’ care. *K.M.*, 53 A.3d at 783-84. The trial court elected not to appoint counsel for the child pursuant to Section 2313(a), although a GAL, who was an attorney, had been appointed. *Id.* at 786. The mother appealed this decision. The Superior Court identified the purpose of the section as “protect[ing] the interests of the child. Implicit in this appointment of counsel is a recognition that the interests of the child may be very different than or diverge from the interests of the other parties” *Id.* at 787.

The Superior Court concluded that Section 2313(a)’s requirements were not clear and unambiguous as applied to circumstances when the appointed GAL was an attorney. Even though the second sentence of the statute did not apply to the case, the Superior Court opined that the use in that sentence of the disjunctive “counsel or guardian *ad litem*” indicated that the legislature deemed “it would be superfluous to appoint both counsel and an attorney serving as guardian *ad litem*” in most cases. *Id.* Further, the *K.M.* court relied upon the comment to Section 2313(a), noting that a GAL could be someone other than an attorney, to bolster its conclusion that the legislature did not intend for both an attorney-GAL and an attorney to be appointed. *Id.* at 787-88. Finally, the *K.M.* court did not discern anything in the statute that precluded the GAL from acting simultaneously as legal counsel. *Id.* at 788. Accordingly, the Superior Court affirmed the trial court’s refusal to appoint counsel in addition to the GAL. *Id.*

Based upon *K.M.*'s reasoning, the trial court here decided that it was not required to appoint counsel other than the GAL.⁷ A divided panel of the Superior Court affirmed upon the basis of the trial court's opinion. *In re: Adoption of L.B.M.*, 1834 MDA 2015, 2016 WL 3080124 at *6 (Pa. Super. May 31, 2016) (unpublished). In dissent, Judge Strassburger opined that *K.M.* was distinguishable because of A.D.M.'s age (eight at the time of the hearing) and because of A.D.M.'s expressed wish to return to Mother, a wish which conflicted with the GAL's position. *Id.* at *33-34 (Strassburger, J., dissenting). Judge Strassburger also observed that Section 2313(a) "suggest[ed] that the legislature intended to differentiate between legal counsel and GAL in TPR proceedings." *Id.* at *34.

Presently, Mother argues that *K.M.* was wrongly decided. Brief for Mother at 7. Mother contends that the second sentence of Section 2313(a), upon which the *K.M.* Court relied, does not apply to contested involuntary TPR hearings and is thus irrelevant to the case. If anything, Mother contends, the second sentence proves that the General Assembly recognized the distinct roles that a GAL and an attorney play. Accordingly, Mother argues that the use of the term counsel in the first sentence means a "client-directed" attorney who represents the child's legal interests and not a GAL who happens to be an attorney and seeks to vindicate the child's best interests. *Id.* at 8.⁸

⁷ Mother filed a separate motion to appoint counsel for each child (and at each docket number). It is unclear to us whether Mother sought the appointment of one attorney for both children or the appointment of separate counsel for each child.

⁸ Three *amicus curiae* briefs were filed in support of Mother. See Brief of Juvenile Court Project; Brief of Community Justice Project; Brief of Juvenile Law Center, American Civil Liberties Union of Pennsylvania, Community Legal Services, Inc., National Association of Counsel for Children, National Coalition for a Civil Right to Counsel, and Pennsylvania Legal Aid Network. All three *amici* argue that Section 2313(a) is unambiguous, highlight differences between legal and best interests and the potential conflicts inherent therein, and provide policy justifications for providing counsel for the child.

The GAL argues that, although Section 2313(a)'s purpose is "to ensure that the needs and welfare of a child will be actively advanced by an advocate who owes loyalty only to the child," a GAL, representing the child's best interests, is able to advocate for the child. Brief for GAL at 22 (quoting *In re Adoption of G.K.T.*, 75 A.3d 521, 527 (Pa. Super. 2013)). The GAL asserts that the age and development of a child may make it impossible for an attorney to be client-directed. The GAL contends that, since the GAL often has represented the child's best and legal interests pursuant to the Juvenile Rules in dependency, that dual role should continue through the termination process. *Id.* at 23.

CYS also argues that, because Section 6311 contemplates the GAL's advocacy on behalf of both the best interests and the legal interests of the child in dependency cases, it would be inefficient not to extend that dual role into and through TPR proceedings. Brief for CYS at 30-32.⁹ CYS points to potential problems with the mandatory appointment of counsel in addition to a GAL, such as the children's age and capacity to form and express preferences and the possible need for separate attorneys for each of multiple children in a family when children's legal interests diverge. *Id.* at 32-33.

II. Analysis

A. Appointment of Counsel

⁹ CYS suggests briefly that this appeal should be dismissed because the issue of counsel for the children was not raised in the first TPR proceedings and because Mother did not immediately appeal the denial of counsel. Brief for CYS at 18. CYS cites no rule or decisional law to support this contention. Because this request has not been developed, we will not review it. See *Commonwealth v. Spatz*, 18 A.3d 244, 262 n.9 (Pa. 2011) ("This sub-claim has not been developed factually or legally, and it is not supported with citations to relevant decisional or statutory law . . . it is waived for lack of development.").

Because our resolution of this issue necessarily requires us to interpret Section 2313(a), our standard of review is *de novo*. *Gilbert v. Synagro Cent., LLC*, 131 A.3d 1, 10 (Pa. 2015).

The purpose of statutory interpretation is to ascertain the General Assembly’s intent and give it effect. 1 Pa.C.S. § 1921(a). In discerning that intent, the court first resorts to the language of the statute itself. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning. See 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). “Relatedly, it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision.” *Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011) (citations omitted).

Mohamed v. Commonwealth, Dep’t of Transp., Bureau of Motor Vehicles, 40 A.3d 1186, 1193 (Pa. 2012) (citation modified).

The language of Section 2313(a) at issue in this contested TPR case reads, in pertinent part, “The court shall appoint counsel to represent the child” “The word ‘shall’ by definition is mandatory and it is generally applied as such.” *Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1104 (Pa. 2007) (citation omitted). When a statute is unambiguous, “shall” must be construed as mandatory. *Id.* Here, the use of “shall” is unambiguous and hence, mandatory. The statutory language does not suggest anything other than the general meaning of the word. By contrast, the statute’s second sentence uses the term “may” in connection with “any other proceeding” (*i.e.*, anything other than a contested TPR) evidencing the fact that our General Assembly knows well how to use non-mandatory language when it wishes to do so. The lawmakers codified a mandatory appointment of counsel for contested TPR cases, and, in the very next sentence, codified a discretionary provision

for other proceedings.¹⁰ There is no ambiguity in the statute. We may not manufacture one.

As well, it bears noting that the recognized purpose of the statute is to ensure that the needs and welfare of the children involved are actively advanced.¹¹ To hold otherwise would afford courts the discretion to deny counsel to children involved in contested TPR proceedings, which not only would disserve the purpose of the statute, but also would contradict its express terms.

“Counsel” also is clear and unambiguous. The second sentence of the statute is instructive, inasmuch as it demonstrates that the legislature recognized and understood the difference between counsel and a GAL. In cases other than involuntary (*i.e.*, contested) TPRs, the General Assembly has instructed that either counsel or a GAL adequately can represent the child’s interests. However, when a child’s relationship with his or her birth family could be severed permanently and against the wishes of the

¹⁰ My learned colleague Justice Mundy agrees that the first sentence of the statute controls this case, Mundy, J., dissenting. at 2-3, but asserts that we are “mistakenly reading the first and second sentences in conjunction with each other.” *Id.* at 3. To the contrary, we acknowledge the second sentence only to demonstrate that the General Assembly recognized the difference between counsel and a GAL.

¹¹ In *In re Adoption of N.A.G.*, 471 A.2d 871 (Pa. Super. 1984), the Superior Court explained that the statutory requirement for appointment of counsel was the legislative answer to Justice Manderino’s dissenting statements in *Matter of Kapcsos*, 360 A.2d 174 (Pa. 1976) and *In re Thomas*, 99 A.2d 1063 (Pa. 1979), that, because the legislature had not provided for the appointment of counsel for children, the courts must do so. *Id.* at 874 n.2. See *In re Adoption of Hess*, 562 A.2d 1375, 1381 (Pa. Super. 1989) (“[t]he purpose of 2313(a) is to ensure that the needs and welfare of a child will be actively advanced by an advocate who owes loyalty *only* to the child.”) (emphasis in original). Justice Mundy attempts to distinguish *Hess* by quoting its invocation of the child’s best interests. Mundy, J., dissenting at 5. This is wholly uncontroversial, but, respectfully, it misses the point. The issue here is not whether or not the child’s best interests must be served (they must), but rather whether the General Assembly’s mandate that counsel must be appointed for the child may be subverted or ignored (it may not).

parents, the legislature made the policy judgment, as is evident from the plain, unambiguous language of the statute, that a lawyer who represents the child's legal interests, and who is directed by the child, is a necessity. It is not our role to second-guess the policy choice made and expressed by the General Assembly. Nor is the legislative choice surprising; appointment of client-directed counsel optimizes the protection of the child's needs and welfare, which form the ultimate issue that the trial court must resolve before granting the TPR. Because the statute is clear and unambiguous, and because the application of the plain language gives effect to the General Assembly's intent, we hold that Section 2313(a) requires the appointment of counsel who serves the child's legal interests in contested, involuntary TPR proceedings.¹²

B. Service of GAL as Counsel

Having determined that the court must appoint counsel to represent the child's legal interest, we next consider whether a GAL may serve in that role. Because the GAL is familiar with the case and has represented the child's legal interests in the dependency case to the extent permitted by Pa.R.J.C.P. 1154 and Section 6311, there is some facial appeal in pressing (or allowing) the GAL into service as the child's counsel for the TPR proceedings.¹³ Moreover, because the Adoption Act does not

¹² Justice Mundy contends that there is no reason to conclude that section 2313(a) requires representation of "the child's legal interests, and not best interests." Mundy, J., dissenting at 4. However, the General Assembly chose to use the term "counsel." Had the General Assembly believed that an attorney representing both best and legal interests of the child would be sufficient to protect all of a child's interests, it certainly could have imported language into the Adoption Act similar to that utilized in the dependency statute, see 42 Pa.C.S. § 6111(b)(9), in which the legislature authorized a GAL to represent both species of interests. It did not do so, signaling its clear intention that section 2313(a) counsel must represent the child's legal interests.

¹³ The GAL only represents the child's legal interests to the extent permitted by rule and statute within the limited context of the dependency proceedings, and only to the (continued...)

require the appointment of a GAL, it might be suggested that the dependency GAL would not have to act as GAL during the TPR and could serve solely as the child's lawyer in that latter proceeding, converting, as it were, to the "counsel" role specified by statute. But practical concerns militate against such dual service for the GAL. First, if the dependency GAL also was appointed as counsel for the TPR, all of those involved — the court, the lawyers, the parties, the agencies — would have to be clear about the distinction between the roles: to wit, that the GAL advocates for the child's best interests while counsel advocates for the child's legal interests. That change in roles, and the subtle yet important distinction between those roles, has the potential to breed confusion for the child as well as other parties. Second, the dependency proceedings generally remain ongoing when the TPR petition is filed and may well continue, as they indeed did here, in the event that the petition is denied. To permit the dependency GAL to serve also as the TPR counsel while proceedings in each matter are ongoing increases the risk of confusion and may force the attorney to take conflicting stances in the proceedings depending on the role being performed at the time. These concerns argue against the GAL serving additionally in the distinct role of TPR counsel.

We recognize that providing a new attorney as counsel for the child carries a cost. In addition to an appointed counsel's fee, there may be delays while counsel prepares for the TPR proceedings and interviews the child and any other parties or

(...continued)

extent that there is no conflict with the GAL's determination and advocacy of the child's best interests. In contested TPR proceedings, per the General Assembly's directive, no attorney is assigned to represent the child's best interests. Respectfully, my learned colleague Justice Baer's desire to "allow[] the child to have continuity of representation between the dependency and termination proceedings. . .," Baer, J., dissenting at 7, obscures this distinction and conflates the roles of GAL and counsel for the child. In context, this "continuity" becomes a mechanism by which the child is judicially divested of the independent attorney that the General Assembly has mandated for that child.

witnesses. In some cases, the child may be too young to express his or her wishes. In other cases, as CYS notes, an attorney, guided by Pa.R.P.C. 1.7 (Conflicts of Interest), may determine that he or she ethically cannot represent multiple children in a family because the children's legal interests diverge. However, the language of Section 2313(a) is clear. The General Assembly has made the policy decision that these are the costs of ensuring that a child is represented adequately during a contested, involuntary TPR proceeding. Recognizing the legislative will, and in view of the risks posed by dual representation with conflicting obligations, the dependency GAL should not be employed as the child's counsel in TPR proceedings.¹⁴

Here, the trial court denied Mother's motion to appoint counsel, citing the inapplicable second sentence of Section 2313(a) and finding that the GAL could represent the children's interests. The court erred in failing to appoint counsel for the children. It was clear that the GAL was representing the children's best interests and not their legal interests. See N.T., 10/24/2014, at 59 (GAL at closing of first TPR proceeding stating, "So I can't say that I don't appreciate [A.D.M.'s] position [that he wants to return to Mother]. But I don't believe at this point he understands what's best for him."). Section 2313(a) requires counsel to advocate on behalf of the children's

¹⁴ Justice Baer suggests that the dependency GAL, bound by Pa.R.P.C. 1.7, could continue to represent the child in the TPR hearing because the dependency GAL would be required to seek appointment of counsel should there be a conflict of interest. Baer, J., dissenting, at 8. This essentially would make the GAL the arbiter of the child's right to counsel. The right belongs to the child. That child generally is not in a position to assert, much less to advocate, the presence of a conflict of interest. By mandating counsel who represents the child's legal interest in TPR proceedings, the General Assembly sought to vindicate and protect the child's right to counsel. Justice Baer maintains that "no universal disqualifying impediment exists to prevent a dependency proceeding GAL Attorney" from switching hats in order to represent a child's legal interests at a TPR hearing. But such an impediment does in fact exist, and we are not authorized to wish it away. It is Section 2313(a) of the Adoption Act.

legal interests. Counsel was not appointed here. Therefore, the Superior Court erred in affirming the trial court. To the extent that *K.M.* does not align with our holding, that decision was erroneous and is overruled.

C. Treatment of Error

Having found that the trial court erred, we must next determine the effect of that error. The GAL suggests that, if error, the failure to appoint counsel was harmless. Brief for GAL at 43-44. CYS concurs. Brief for CYS at 36. Mother does not address the issue directly. She asserts merely that the error justifies a new hearing. Brief for Mother at 15.

The most developed treatment of the issue lies in the *amicus curiae* brief submitted jointly by the Juvenile Law Center, the American Civil Liberties Union of Pennsylvania, Community Legal Services, Inc., the National Association of Counsel for Children, the National Coalition for a Civil Right to Counsel, and the Pennsylvania Legal Aid Network (hereinafter, collectively, “Juvenile Law Center”). The Juvenile Law Center notes that, in criminal proceedings, denial of counsel is deemed a structural error, requiring reversal without the need to demonstrate prejudice. *Id.* at 27-28. The Juvenile Law Center asserts that courts generally have extended other criminal law protections to TPR cases because of the importance of the right involved in termination, and maintains that we should deem the failure to appoint counsel a structural error. *Id.* at 28-29. The rationale for structural error’s applicability to criminal cases applies equally to TPR cases, according to the Juvenile Law Center. To wit, it is impossible to determine the effect that counsel who was not present would have had and to attempt to gauge the harmfulness of the failure to appoint counsel.¹⁵ To do so would be an

¹⁵ While he agrees that failure to appoint counsel is a structural error, Baer, J. dissenting, at 8, Justice Baer nonetheless suggests that remand is unnecessary in this case because “the record does not support Mother’s assertion that a conflict of interest (continued...) ”

exercise in speculation. *Id.* at 30-31. Further, the absence of counsel “calls into question the very structural integrity of the fact-finding process.” *Id.* at 31-32 (quoting *In re J.M.B.*, 676 S.E.2d 9, 12 (Ga. Ct. App. 2009)). For these reasons, the Juvenile Law Center advocates that a harmless error approach is untenable.

A structural error is defined as one that affects “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Commonwealth v. Baroni*, 827 A.2d 419, 420 (Pa. 2003) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Structural errors are not subject to harmless error analysis. *Id.* Generally, denial of counsel is a structural error, see *Commonwealth v. Martin*, 5 A.3d 177, 192 (Pa. 2010); although such error usually stems from deprivation of a constitutional right to counsel. Here, by contrast, the right to counsel is statutory. Nonetheless, we do not find that distinction to be determinative. The same concerns are evident regardless of the derivation of the right. Whether the right to counsel is conferred by constitution or statute, the right having been conferred must be protected.

In criminal and TPR cases alike, critical rights are at stake. With respect to the former, the framers of our Constitutions, and the courts interpreting those charters, have determined that counsel was required to ensure that liberty interests and process rights are protected. With respect to the latter, our General Assembly has decided that counsel for the child is required because of the primacy of children’s welfare, the

(...continued)

existed between A.D.M.’s legal and best interests during the second termination proceeding.” *Id.* at 9-10. We cannot know how the record was impoverished by the failure of the trial court to comply with the statute’s requirements that A.D.M. be provided with counsel charged with representing his legal interests. Counsel representing A.D.M.’s legal interests may have developed testimony from A.D.M. that was less equivocal about his wishes. It is this very speculation that shows the impossibility of determining *post hoc* the effect of the failure to appoint counsel and that compels the conclusion that this failure was structural error.

fundamental nature of the parent-child relationship and the permanency of termination. The legislature has codified a process that affords a full and fair opportunity for all of the affected parties to be heard and to participate in a TPR proceeding. The denial of mandated counsel compromises the framework of the proceedings and constitutes a structural error. Further, as suggested by the Juvenile Law Center, harmless error analysis would require speculation after the fact to evaluate the effect of the lack of appointed counsel, effectively requiring proof of a negative. For all of these reasons, we hold that the failure to appoint counsel for a child involved in a contested, involuntary termination of parental rights proceeding is a structural error and is not subject to harmless error analysis.

Because the trial court erred in failing to appoint counsel for the children, and because that error is structural, we remand for a new TPR proceeding following the appointment of counsel. Because of the remand, we need not reach, and we express no opinion regarding, Mother's challenge to the trial court's finding on the merits that Mother's parental rights should be terminated.

Justices Donohue and Dougherty join the opinion.

Chief Justice Saylor files a concurring opinion in which Justice Todd joins.

Justice Baer files a dissenting opinion in which Justice Mundy joins.

Justice Mundy files a dissenting opinion in which Justice Baer joins.

Note: Correct opinions in this matter were posted May 23, 2017

**[J-119A&B-2016][M.O. – Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: ADOPTION OF: L.B.M., A MINOR	:	No. 84 MAP 2016
	:	
APPEAL OF: J.P., MOTHER	:	Appeal from the Order of the Superior
	:	Court at 1834 MDA 2015 dated May 31,
	:	2016 Affirming the Order of the Court of
	:	Common Pleas of Franklin County,
	:	Orphans' Court Division, at 42-ADOPT-
	:	2014 dated September 25, 2015.
	:	
	:	ARGUED: December 6, 2016
IN RE: ADOPTION OF: A.D.M., A MINOR	:	No. 85 MAP 2016
	:	
APPEAL OF: J.P., MOTHER	:	Appeal from the Order of the Superior
	:	Court at 1835 MDA 2015 dated May 31,
	:	2016 Affirming the Order of the Court of
	:	Common Pleas of Franklin County,
	:	Orphans' Court Division, at 41-ADOPT-
	:	2014 dated September 25, 2015.
	:	
	:	ARGUED: December 6, 2016

CONCURRING OPINION

CHIEF JUSTICE SAYLOR

DECIDED: March 28, 2017

I join Parts I and II(A) and (C) of the majority opinion. However, I respectfully disagree with the majority's conclusion, in Part II(B), that a guardian *ad litem* may never serve as counsel, as I believe such a rigid rule is not required by either the language of the statute or any other considerations relating to counsel's role in legal proceedings.

Although the majority indicates that "the language of Section 2313(a) . . . clear[ly]" supports its holding in this respect, Majority Opinion, *slip op.* at 14, in my view, that provision reflects only that a court must appoint counsel in termination proceedings;

it is silent on who may or may not serve in that role. A contextual reading of the passage is similarly not dispositive. The majority aptly explains that the statutory scheme evinces the Legislature’s intent to distinguish between the respective roles of counsel, whose duty is to further the child’s legal interests, and a guardian *ad litem*, whose obligation is to advance the child’s best interests. It does not follow, however, that the General Assembly intended to categorically proscribe a guardian *ad litem* from serving as counsel.¹

In my view, the propriety of permitting the same individual to serve in both capacities should be determined on a case-by-case basis, subject to the familiar and well-settled conflict of interest analysis. Thus, where zealous representation is made impossible because of an attorney’s duties as guardian *ad litem* – or, for that matter, any other reason – the court must refrain from making the appointment and should find a suitable candidate. Conversely, in the absence of an actual or potential conflict between a child’s legal and best interests, I see no reason why a guardian *ad litem* may not also serve as counsel. There are multiple scenarios in which a child’s legal and best interests may be indistinguishable, including, most notably, cases involving children who are too young to express their wishes. In such circumstances, mandating the appointment of separate counsel seems superfluous and potentially wasteful.²

¹ In this regard, I agree with Justice Mundy that the second sentence of Section 2313(a), concerning discretionary appointment of a guardian *ad litem*, should not be read so as to limit the first sentence, relating to mandatory appointment of counsel. See Dissenting Opinion, *slip op.* at 2-3. However, because I find resonance in the majority’s view that the use of the word “counsel” necessarily implies an attorney who is bound to represent a client’s legal interests, I do not find the Legislature’s failure to explicitly distinguish between a child’s legal interests and best interests to be relevant, let alone dispositive. See Majority Opinion, *slip op.* at 13 n.12.

² Furthermore, inasmuch as I agree with the majority that the right to counsel in this setting must be as scrupulously protected as the right to counsel in criminal cases, for (continued...)

Here, as the majority explains, in permitting the termination to proceed with the guardian *ad litem* as the only attorney representing the children, the trial court understood the appointment of counsel to be optional, rather than mandatory. Accordingly, as it did not recognize the discrete functions of counsel and guardians *ad litem*, it could not have conducted the requisite conflict of interest analysis. As such, I agree with the majority’s characterization of the trial court’s order as a failure to appoint counsel.

In sum, while I agree that the court must appoint counsel who will advocate for the child’s legal interests, I find the majority’s *per se* prohibition on permitting a guardian *ad litem* to serve as counsel to be overly restrictive.

Justice Todd joins this concurring opinion.

(...continued)

purposes of assessing the resulting error, I would not distinguish between a court’s failure to appoint counsel and the appointment of conflicted counsel. See, e.g., *Commonwealth v. Hawkins*, 567 Pa. 310, 320, 787 A.2d 292, 297-98 (2001); accord *Commonwealth v. King*, 618 Pa. 405, 425, 57 A.3d 607, 619 (2012) (observing that, in assessing whether the conflict of interest resulted in a deprivation of the right to counsel under the Sixth Amendment, “the [United States Supreme] Court’s concern centers primarily on the potential for an attorney to alter his trial strategy due to extrinsic considerations stemming from other loyalties, thereby distorting counsel’s strategic or tactical decisions in a manner that would not occur if counsel’s sole loyalty were to the defendant” (citing *Wood v. Georgia*, 450 U.S. 261, 272, 101 S. Ct. 1097, 1103–04 (1981))).



Standards of Practice



For Parent Attorneys, Guardians Ad Litem
& Legal Counsel practicing in Pennsylvania's
Child Dependency System





The Legal Representation Workgroup (LRWG) was charged with drafting recommendations for specific Standards of Practice for Attorneys representing children and parents in dependency proceedings.

The Legal Representation Workgroup (LRWG) presents a combined set of Standards applicable to all dependency Attorneys. Several of the individual Standards will specifically apply to GALs or to all Attorneys representing children.

Other differences in practice are accounted for in the commentaries.



Foreword

Competent, well-trained attorneys impact outcomes for children and parents in the dependency system. Attorneys demonstrating knowledge and understanding of child welfare issues are better equipped to provide a higher level of advocacy. Recognizing the importance of this issue, the Pennsylvania State Roundtable's Legal Representation Workgroup was created. The Workgroup's primary task was the overall enhancement of legal representation in dependency proceedings.

After considerable analysis and thoughtful deliberation, the Workgroup created a document entitled, "*Standards of Practice for Parents' Lawyers, Guardians ad Litem and Legal Counsel practicing Child Welfare Dependency Cases in Pennsylvania*". This document was approved and adopted as best practice by the 2015 Pennsylvania State Roundtable.

This historic document provides guidance regarding legal advocacy on a number of general principles as well as unique issues faced by dependency attorneys. Topics covered include client contact outside of the courtroom, review of the case file, attendance at family meetings, caseload size, specialized training and the dual role of the Guardians *ad Litem* as protector of a child's best interest as well as counsel to the child, to mention a few.

This "Standards" document is intended to support our *Mission and Guiding Principles for Pennsylvania's Dependency System*, which states (in part), "Pennsylvania's child dependency system shall assure competent legal representation for children and parents before a shelter care hearing and throughout the legal process."

As Pennsylvania's State Roundtable Co-Chairpersons, we provide this document in hopes of encouraging the very finest legal advocacy possible. We thank you in advance for your role in protecting due process, constitutional and statutory rights, providing thorough and well-prepared information to the Court, and positively impacting the lives of children and families who are so dependent upon your advocacy.

Honorable Max Baer, Justice
Pennsylvania Supreme
Court

Cathy Utz, Deputy Secretary
Department of Human Services' Office of
Children, Youth & Families

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In 2011, Pennsylvania State Roundtable's Legal Representation Workgroup (LRWG) began to develop a set of practice standards for attorneys representing children and parents in the dependency system. To achieve the goals set forth in the Mission and Guiding Principles: protect Children, Promote Strong Families, Promote Child Well-Being and Provide Timely Permanency, any acceptable system for appointing child and parent attorneys must assure the following provisions:

- High-quality legal practice,
- Professional training,
- Reasonable caseloads and compensation that allows and encourages high quality practice, and
- Supervision and accountability

The Workgroup utilized a variety of resources, including Pennsylvania's Mission and Guiding Principles and Benchbook, state and national research and a review of various sources of academic and professional guidance in developing the practice standards. Focus groups were also held across the state. Participants included Attorneys from different jurisdictions representing various delivery methods of legal services including large agency, sole provider and contractual arrangements. In addition, youth and parents who have been represented by attorneys in dependency court were included as a focus group.

The standards set forth herein detail the various ways that attorneys, judges and the system can positively influence performance and accountability. While some of the standards are easily embedded into representation regardless of the number of clients an attorney represents (i.e. an attorney should explain their role and scope of representation), caseload size may impact the ability to fully meet other standards requiring additional time of the attorney (i.e. an attorney should have regular contact with the child). To assist in the analysis of caseload size, Time Charts have been included in the back of this booklet.

This booklet presents a combined set of Standards applicable to all dependency Attorneys. Several of the individual Standards will specifically apply to Guardians ad Litem or to all Attorneys representing children. Other differences in practice are accounted for in the commentaries. These Standards provide for solutions necessary to influence Attorney performance and accountability, and sets forth a path for legal advocacy in dependency.

Standards of Practice for Parents' Attorneys, Guardians Ad Litem & Legal Counsel for Children in Child Welfare Dependency Cases in Pennsylvania

The Legal Representation Work Group (LRWG) was charged with drafting recommendations for specific Standards of Practice for Attorneys representing children and parents in dependency proceedings. The Legal Representation Work Group (LRWG) presents a combined set of Standards applicable to all dependency Attorneys. Several of the individual Standards will specifically apply to GALs or to all Attorneys representing children. Other differences in practice are accounted for in the commentaries.

Practice Standards with Commentary

1) Client Contact:

Prior to Initial Contact

1a. Determine role as GAL or legal counsel for child in accordance with the 42 Pa. C.S.A. 6311 and 6337 and with the Supreme Court Rules of Juvenile Procedure.

Commentary:

Pursuant to Pa.R.J.C.P. 1151 and 42 Pa. C.S. §§ 6311 and 6337, a Attorney representing a child functions either as GAL or legal counsel, depending on the grounds for dependency alleged. These practice standards and accompanying commentary identify and provide guidance on both the similarities and unique aspects of the two roles. At the beginning of the appointment, prior to contact with the child, the Attorney must identify the basis of the appointment after reviewing the applicable documents and information (e.g., dependency petition, order of appointment, shelter care application). The Attorney should ascertain the facts of the case, and contact the caseworker and others to get a picture of the case before meeting with the child, even for a shelter hearing.

1b. Understand your role as a Parent Attorney

Commentary:

It is a serious matter when the state intervenes in the life of a family and decisions are made that may lead to the temporary or permanent severing of the parent-child relationship. The law recognizes the fundamental liberty interests implicated in child welfare proceedings and requires that due process be provided. The Juvenile Act also provides parents with the statutory right to representation in all proceedings under the Act. The role of the parent Attorney is critical to ensuring parents' due process rights are protected and that any disruption to their families is subject to critical review.

Parent Attorneys ensure that due process is provided to parents and that parents are provided with meaningful reasonable efforts to enable them to prevent removal or meet their reunification goals in a timely manner. Parent Attorneys ensure the critical voice and information of the child's

parent is present in all matters concerning their child to ensure the shortest family separation possible.

The duty of loyalty and confidentiality is indispensable to being effective in gathering needed information, counseling and zealous representation of parents. Parent Attorneys serve as a knowledgeable guide on navigating the child welfare system, a legal counselor as well as an advocate at hearings and in meetings.

Initial Contact

1c. Establish and maintain a working relationship with the client.

Commentary:

Attorneys should explore the client's situation, interests, preferences, and wishes to build trust, confidence and effectiveness in the relationship with the client.

GAL Commentary: *Effective representation of a child requires GALs and legal counsel for children to thoughtfully approach and engage the child. Building rapport often requires more than just discussing the case in language appropriate to the child's age and stage of development but also how to physically position oneself when meeting a child client such as sitting on the floor to draw or play while rapport building with younger clients. When representing multiple children in a family, it is essential to meet with each client individually and establish a separate relationship with each child appropriate to that child's age and developmental stage. GALs and legal counsel for children should be sensitive to the fact that some children will know the reason the case has come to court and others will not.*

Parent Attorney Commentary:

Establishing a working Attorney-client relationship with a parent in the child welfare system may be complicated by many factors, such as poverty, inadequate housing, and history of trauma among other issues. In dependency cases, parents are in jeopardy of temporarily or permanently losing custody of their children. Parent Attorneys have an important role in helping families stabilize, remain intact or reunite where possible. Given what is at stake, the parent may initially be angry and defensive with everyone, including their Attorney. Therefore gaining the clients' confidence by meeting with them, listening to them and understanding their concerns are key to a functional working relationship.

1d. Explain your role as the client's legal representative. GALs should explain the limitations on confidentiality that are inherent in their role.

Commentary:

Attorneys should explain their role and the scope of their representation. Attorneys should explain the rules concerning confidentiality and any limitations on confidentiality. They should also avoid potential conflicts of interest that would interfere with the competent

representation of the client, for example, representing both parents. It is helpful for the Attorney to explain that they are available for consultation, and want to communicate regularly.

GAL Commentary:

At the first client contact and on an ongoing basis, GALs should discuss their role and explain that they will communicate the client's wishes in all forums but may recommend something other than what the client desires in the course of the GAL advocating for appropriate placement and services to meet the client's best interests. GALs should explain, at the first client contact, that they cannot promise that all information they receive about the case will remain confidential because of the GAL's role to advocate for appropriate placement and services to meet the client's best interests. This commentary applies to clients who are able to comprehend the discussion of these issues. Clients who were unable to comprehend these issues at the outset of the case but whose cases are ongoing should receive this explanation if and when they later become capable of understanding these issues.

Counsel for Children and Parent Attorney Commentary:

At the first client contact, parent Attorneys and counsel for children should make clear to the client that the Attorney represents the client and has a duty of confidentiality and loyalty to the client, not to any other person in the case. The Attorney should explain any limitations on those duties pursuant to the Rules of Professional Conduct. Attorneys should explain their role as providing expertise, counsel and determining strategy, but that the client sets the goals that the Attorney will vigorously pursue in and out of court. The Attorney should explain how regular communication will help the Attorney gather updated information for the case, and learn of any difficulties the client is experiencing so that the Attorney might help the client address such problems early on. It's important to elaborate on the benefits of bringing issues to the Attorney's attention rather than letting problems persist as clients may not understand that Attorneys can provide counsel and take action as needed between hearings to help the client resolve case related problems. For example, if a client is having a problem obtaining a timely evaluation, treatment or visitation scheduled or if there is a problem with an agency following a court order, the Attorney can assist the client to resolve such issues.

1e. Explain in a developmentally and language appropriate manner the initial allegations and what will happen in court.

Commentary:

Attorneys should determine whether the client possesses any unique cognitive, developmental, language or other attributes that may impair the client's ability to understand English or to fully participate in the legal process and implement strategies or obtain services to support the client's understanding and full participation. Attorneys

should use interpreters to communicate with their clients who have limited English Proficiency, are deaf or hearing impaired, or experiencing other impairments and communicate with the court, agency and service providers as needed to ensure the client is able to participate in their treatment, meetings and hearings.

The parent's Attorney should spend time with the client to prepare the case and address questions and concerns. The Attorney should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of the parent reaching his or her goals.

If. GALs and legal counsel for children must assess the child's changing stages of cognition, development and language.

Commentary:

GALs and legal counsel for children should initially assess the child's developmental stage to explain the proceedings, obtain information from the child, discuss the case and ascertain the child's wishes in a developmentally appropriate manner. Recognizing that children's cognitive and language development typically increases over time, GALs and legal counsel for children must continue to assess the child's development throughout the course of representation. This will allow GALs and legal counsel for children to adjust their communication with the child to reflect the child's developmental growth as well as inform the need to request further assessment.

Ig. Consider the client's background and its impact on the case.

Commentary:

Attorneys should act in a culturally-competent manner and with due regard to the client's unique cognitive, developmental, language, socio-economic condition and other attributes. Attorneys should recognize that both child and adult clients may be coping with or experiencing trauma which may have an adverse impact on their functioning and communication. Consequently, Attorneys should understand trauma and respond and practice in manner that is trauma informed.

Parent Attorney Commentary:

Parent Attorneys should be aware that parents with low incomes may have challenges such as lack of resources to pay for housing, transportation or utilities, that may have a significant impact on their ability to meet certain case goals without support. It is also important for the parent Attorney to be sensitive to the parent's literacy level and impairments in order to communicate in language and in a manner that is accessible.

Ongoing Communication

1h. Contact your client regularly and establish a system that promotes regular Attorney-client two-way communication

Commentary:

Attorneys for parents, counsel for children and GALs should contact their clients regularly and should establish a system that enables two-way communication between client and Attorney to be regular, timely, and adequate. This communication can include, but is not limited to, contact in person, contact by phone, fax, letter, electronic communication like e-mail and text, and other effective methods. Contact is established timely and with sufficient frequency to support adequate preparation prior to court dates and important meetings and where applicable, to engage and support client's active participation in the child welfare and legal process. Whatever system is established for ongoing two-way communication should take into account the practical limitations on a client's ability to contact the Attorney. Attorneys should ask their clients how they prefer to communicate and Attorneys should provide their clients with such contact information. Attorneys should at the very least provide clients with a working phone number with voicemail and a mailing address.

Because child clients cannot be expected to initiate or maintain contact with the Attorney who is representing them, GALs and legal counsel for children are responsible for regularly contacting the child.

1i. GALs and legal counsel for a child must have regular contact and develop a relationship with the primary caregiver, and communicate and visit accordingly.

Commentary:

The child's primary caregiver is an essential source of information on the child's needs, progress and well-being. Caregivers, in their own interactions with the child, can significantly support or hinder the child's trust in and relationship with the GAL or legal counsel. Further, it is often through the caregiver that the GAL or legal counsel arranges access to the child. These considerations take on heightened importance when the child is a baby, toddler, nonverbal, or severely intellectually or developmentally compromised. Thus, GALs and legal counsel for children must regularly contact the child's primary caregiver and must take time to explain to the caregiver their role, their relationship to the caregiver, how they will handle information that comes from the caregiver, etc. Part of that explanation is informing the caregiver that you are the advocate for the child and not for the caregiver.

GALs and legal counsel for children must be especially mindful of ethical boundaries in their communications with the child's caregivers when the caregiver is a parent or an otherwise represented party.

1j. Meet with your client regularly. GALs and legal counsel for children must meet the child where the child resides.

Commentary:

Attorneys must meet with their client as soon as possible following appointment and on a regular basis thereafter. Attorneys should explain in a developmentally appropriate manner the nature of each stage of the legal proceedings. Client meetings should occur well in advance of court dates to allow for adequate preparation and should occur with regular frequency and when a client changes placements, has a case related problem or an emergency. Attorneys must make themselves available for in-person meetings and telephone.

calls with clients to address the client's questions and concerns and to move the case forward. The Attorney and client should work together to identify and review short and long-term goals and resolve problems and barriers, particularly as circumstances change during the case.

GALs and legal counsel for a child must meet with the child as soon as possible following appointment and on a regular basis thereafter in a manner appropriate to the child's age and maturity. See Pa.R.J.C.P. 1154 and 42 Pa. C.S. § 6311. The GAL or legal counsel should meet periodically with the child in the child's living environment so that they can observe the child's current living situation as well as accommodate a client's age, development, physical or mental health in a more convenient, comfortable environment. Unlike adult clients, the GAL or legal counsel cannot expect, nor would it be in the child's best interests to require, that the child client to come to the office for a meeting. GALs and legal counsel for children may need to visit with their clients in out-of-home placements such as foster homes, group homes, independent living facilities, hospitals, juvenile detention centers or residential treatment facilities. In some instances, the client's placement may require travel that requires additional time.

1k. Attorneys for parents and legal counsel for children must support and empower clients in directing the course of legal representation and in making informed decisions.

Commentary:

Attorneys for parents and legal counsel for children should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options, the expectations of the court and agency and consequences of decisions and actions. The Attorney provides expertise and counsel and makes strategic decisions about the best ways to achieve the client's goals while empowering the clients to make final decisions on desired case goals.

Parent Attorney Commentary:

The parent has at least two distinct and meaningful areas of decision making, one is the decision-making necessary to direct their legal representation in the case as referenced above, and the second is to continue decision-making regarding their children's medical, educational and other needs while the child is in placement.

With regard to encouraging and protecting parent's right to make decisions about their child during the dependency case, Attorneys representing parents should counsel the client and help the parent understand his or her rights and responsibilities including what decision-making authority remains with the parent and what lies with the child welfare agency while the child is in foster care regarding the child's medical, mental health and educational decisions and services. The Attorney for a parent should be mindful that parents may distrust the child welfare system and feel disempowered by the child welfare proceedings. If necessary, the parent's Attorney should intervene with the child welfare agency, provider agencies, medical providers and the school to ensure the parent is informed and has meaningful decision-making opportunities. This may include seeking court orders when the parent has been left out of important decisions about the child's life. Continuing to exercise as much parental responsibility as possible is important to help parents understand and prepare to meet their child's evolving needs and to expedite family reunification.

1l. GALs must regularly ascertain the child's wishes and factor that into the case strategy and the GAL's best interest recommendation.

Commentary:

It is critical that a GAL for a child identify and explore the child's wishes upon initially consulting with the child and on a regular basis thereafter. The child's position should be taken seriously and inform the best interest recommendation as well as the witnesses and evidence necessary to put forth the child's wishes, and what interim steps and decisions may occur in between hearings and throughout the duration of the case. The GAL must understand that a child may, because of age, developmental or intellectual abilities, or other conditions, change his or her position much more frequently than an adult client in a child welfare case. Sometimes this is due to changes in circumstances or the availability of information. Other times this may be due to the child's ongoing development, maturation or therapeutic progress, as well as the child's ability to have a better understanding and appreciation of his or her situation, all of which gives rise to the need to ascertain the child's wishes frequently.

1m. Discuss any recommendations or proposals from the county agency or others with your client. The GAL must discuss any proposals or recommendations with the client in terms of both how it relates to the child's wishes and to the GAL's best interests recommendations.

Commentary:

The Attorney should discuss any recommendations, proposals and settlement offers from the agency or others with the client. Pa.R.P.C 1.4.

1n. Take reasonable and necessary steps to communicate with institutionalized, incarcerated or absent clients and arrange for such clients to meaningfully participate in court proceedings and other important case events.

Commentary:

Attorneys should be mindful that their obligations towards clients who are incarcerated, institutionalized, in placement or in treatment are the same as for clients who are not incarcerated, institutionalized, in placement or in treatment and that these clients have the same rights under the law. Thus, Attorneys should regularly communicate with their clients and in some situations, this will require visiting prisons and engaging in more extensive phone or mail contact than with other clients. The Attorney should be aware of the challenges associated with having confidential conversations with the client in such environments, and attempt to resolve that issue. The Attorney should also be aware of the reasons for the incarceration, estimated duration of incarceration, location of prison and consider what impact these factors have on the case. The Attorney should take actions to ensure that their client is able to participate in hearings and case meetings.

In situations where the Attorney is having trouble reaching a client, the Attorney should take steps to communicate with the client including checking to see if client is incarcerated, speaking with the client's family, the caseworker, the foster care provider and other service providers.

GAL Commentary:

The statutory and R.J.C.P. requirements that the GAL meet with the client as soon as possible after appointment and on a regular basis thereafter applies to incarcerated children. See Commentary to Standard 1.h and 1j, and see Pa.R.J.C.P. 1154 and 42 Pa. C.S. § 6311. While incarcerated children generally should attend each hearing, in the rare instance that a child will not attend in person, GALs and legal counsel should arrange for participation via videoconferencing or, as a last resort, by phone. GALs and legal counsel for children can utilize that same technology for an incarcerated child to participate in important meetings. The R.J.C.P 1129 requirement that dependent children attend court at least every six months applies equally to and makes no exception for incarcerated youth.

Parent Attorney Commentary:

The parent's Attorney must be particularly diligent when representing an incarcerated parent. If a parent wants to be present in court, the Attorney should request a bring down order, order to produce or other documentation necessary for the client to be transported from the prison and where such is not possible, video or phone conferencing should be arranged. Parents' Attorneys must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child. Obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult. The parent's Attorney may need to advocate for reasonable efforts to be made for the client, and assist the parent and the agency caseworker in accessing services. The parent's Attorney should counsel the client on the importance of maintaining regular contact with the child while incarcerated. Parents' Attorneys should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

The parent's Attorney should also communicate with the parent's criminal defense Attorney. There may be issues related to self-incrimination as well as concerns about delaying the abuse and neglect case or the criminal case.

Parent Attorneys should be mindful of their ethical considerations when representing an absent client. After a prolonged period without contact with the client, the parent's Attorney should consider withdrawing from representation.

2) Expertise and Knowledge:

2a. Acquire and maintain a current working knowledge of all relevant state laws and regulations, case law and all local county rules and policies.

Commentary:

Attorneys should be thoroughly familiar with the Pennsylvania Juvenile Act, the Pennsylvania

Child Protective Services Law, the regulations for Protective Services found in the Pennsylvania Administrative Code (55 Pa. Code 3490), the Pennsylvania Rules of Juvenile Court Procedure, the Pennsylvania Adoption Act, Act 55 and the regulations for the Administration of County Children and Youth Social Service Programs found in the Pennsylvania Administrative Code (55 Pa. Code 3130). The Attorney must also be familiar with other potentially applicable state law that provides protection to a client's rights concerning, but not limited to privacy, ethnicity, race, religion, gender, health, education, socio-economic condition, immigrant status, etc. to know when such law is relevant to a case.

Attorneys should be familiar with all local court rules, administrative orders, policies, and protocols.

2b. Acquire and maintain a current working knowledge of all relevant federal laws and regulations.

Commentary:

Attorneys should be familiar with all federal law regarding child abuse and neglect. Attorneys should also be familiar with other potentially applicable federal law that provides protection to a client's rights concerning, but not limited to privacy, ethnicity, race, religion, gender, health, education, socio-economic condition, immigrant status, etc. to know when such law is relevant to a case.

Examples of relevant laws include but are not limited to:

- *Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357*
- *Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36*
- *Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979)*
- *Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998)*
- *Interstate Compact on Placement of Children (ICPC)*
- *Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351)*
- *McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq. (1989)*
- *Foster Care Independence Act of 1999 (FCIA), P.L. 106-169*
- *Individuals with Disabilities Education Act (IDEA), P.L. 91-230*
- *Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g*
- *Health Insurance Portability and Accountability Act of 1996 (HIPAA), P.L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part)*
- *Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2*
- *Immigration laws relating to child welfare and child custody*

2c. *Acquire and maintain a current working knowledge of the evaluation, diagnosis and treatment options, as well as the theories underlying the same for behaviors that may create risk which are common to dependency cases.*

Commentary:

Attorneys should understand the reports (expert or otherwise) generated after a party submits to an evaluation/assessment to effectively advocate for the client, conduct direct or cross-examination of witnesses and provide rebuttal testimony. These evaluations and reports may include, but are not limited to, drug and alcohol use, domestic violence, mental health disorders, cognitive disorders, developmental disorders, parenting capacity, and bonding, etc.

GALs and legal counsel for children should have a working knowledge of behavioral, developmental and physical health conditions that may be likely for children whom they may represent, as well as the treatment options and programs appropriate for these conditions.

2d. Acquire and maintain a current working knowledge of available services and resources that address risk creating behaviors or environments.

Commentary:

Attorneys should be familiar with resources that families in the child welfare system often require, including hotlines and resource guides maintained by child welfare agencies and other entities that can direct those in need to programs that provide assistance with housing problems, drug and alcohol treatment, mental health treatment, domestic violence treatment, truancy and other school problems, medical needs and to service providers who are culturally competent, such as those that are LGBTQ-friendly.

2e. Acquire and maintain a current working knowledge of children's language and development.

Commentary:

Children grow and develop in physical, psychological and emotional stages which are both predictable and unique for every child. The stages of child development are important factors in determining the services and supports that a child may need, as well as influencing the ability to communicate and to learn. GALs, legal counsel for children and Attorneys representing parents should acquire and maintain knowledge regarding child development, including stages of psychological development, language skills and cognition.

2f. Acquire and maintain expertise regarding education issues and system if appointed as educational decision maker.

Commentary:

The role of educational decision maker is highly specialized. GALs who accept this role should have specialized knowledge and/or training beyond what is necessary to address the educational and medical issues arising in dependency cases. This additional expertise includes knowledge of:

- *Enrollment and mandatory attendance requirements*
- *Eligibility for special education and gifted services and the corresponding services under the Individuals with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, PA Code 16.1 and other applicable laws*
- *School discipline, including protections for students with disabilities such as manifestation of disabilities*
- *Transition plans and graduation requirements for older youth*
- *Mental health diagnoses, services, and treatment*
- *Medicaid, Private Insurance, and other insurance issues*
- *Eligibility for social security benefits and services*

3) Case Preparation:

3a. Review all pleadings and file objections, answers, and motions as needed.

Commentary:

The Attorney must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case. These pleadings must be thorough, accurate and timely.

When a case presents a complicated or new legal issue, the Attorney should conduct the appropriate research. The Attorney must understand the relevant law, and be able to present it to the judge in a compelling and convincing way, including filing memoranda of law, when appropriate. The Attorney should be prepared to distinguish case law that appears to be unfavorable.

3b. Speak with the client before each hearing, in time to use client information for case investigation and preparation.

Commentary:

Child welfare cases are dynamic, where a child and parent's needs, concerns, progress, and many other important aspects of a case change throughout the case. Some of these developments will require the Attorney to take action, or conduct further investigation and prepare evidence to move the case forward. It is therefore important that Attorneys for all parties communicate with their own clients regularly, and especially before each hearing.

3c. Conduct a thorough and independent investigation at every stage of the proceeding.

Commentary:

Attorneys should conduct a thorough and independent investigation including acquiring and using formal discovery when needed, and reviewing relevant records. Relevant records in dependency matters may include but are not limited to, the county agency file, court records, criminal histories, medical records, mental health records, placement provider reports, police reports and school records. It also includes speaking with others involved with the child and family to gather relevant information including but not limited to, the county agency caseworker, relatives, foster parents, placement provider staff, school personnel, mental health providers, medical providers, and other providers such as in-home service providers.

3d. The GAL must discuss with the child in advance of the hearing the position and best interests recommendation being made.

Commentary:

Pursuant to Pa.R.J.C.P. 1154 and 42 Pa. C.S. § 6311, the GAL should advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. As discussed in section 1.1 of these Standards, the GAL should consider and take seriously the child's desired outcomes, as achieving them may serve the child's best interests.

However, the GAL must also make recommendations to the court regarding placement and services that meet the child's best interest. When the GAL's best interest recommendations diverge from the child's wishes, the GAL should discuss this with the child in advance of the hearing. The GAL should explain to the child why the GAL's position is different than the child's wishes as well as what would need to happen in the future for the GAL's recommendation to be similar to the child's wishes (e.g., child's parent would need to enter and actively engage in drug treatment before GAL could recommend that the child return home). Whenever realistic, the GAL should discuss any interim steps that could happen to help achieve the client's wishes.

3e. Develop a case theory and litigation strategy.

Commentary:

Once the Attorney has completed the initial investigation and discovery, including interviews with the client, the Attorney should develop a strategy for representation. The strategy may change throughout the case, but the initial theory is important to assist the Attorney in staying focused on the client and what is achievable. The theory of the case should inform the Attorney's preparation for hearings and arguments to the court throughout the case. It should also help the Attorney decide what evidence to develop for hearings and the steps to take to move the case forward.

3f. Identify and prepare all witnesses, using subpoenas when necessary.

Commentary:

Attorneys should investigate potential witnesses. Potential witnesses are identified through interviews with clients, relatives, neighbors, clergy, caseworkers, court-appointed personnel, law enforcement personnel, service providers, medical providers, mental health providers, school personnel and any other professionals who work with the family.

The Attorney, in consultation with the client, should develop a witness list well before a hearing. The Attorney should not assume the agency will call a witness. The Attorney should, when possible, contact the potential witnesses to determine if they can provide helpful testimony and subpoena them if appropriate.

When appropriate, the Attorney should consider working with other parties who share the same position when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing. If the witness is not able to appear in person on the date of the hearing, the Attorney should take the necessary steps to permit the witness to testify telephonically or on another date.

The Attorney should set aside time to fully prepare all witnesses in person before the hearing. The Attorney should remind the witnesses about the court date. Witnesses are often nervous about testifying in court. Attorneys should prepare them thoroughly so they feel comfortable with the process and questions.

3g. Prepare client to testify. GALs and legal counsel for children should prepare the child to participate, and respond to the court's inquiries regarding permanency planning.

Commentary:

Attorneys should prepare their clients for potential testimony by including an explanation of 1) the court process for taking testimony, 2) the reason for having the client testify, 3) the information to be elicited from the client, 4) the questions that will be asked to elicit the information, 5) what to do when someone objects, and 6) the need to be responsive to questions from other counsel and from the judge.

Attorneys should be attuned to the client's comfort level and ability to testify in court. Counsel should be careful to frame questions in a way that the client understands and is capable of responding to accurately.

GAL and Legal Counsel for Children Commentary:

GALs and legal counsel for children should explain that the child has the option to testify. Some children are ready and willing to speak in court. Other children are unwilling or afraid to do so for a variety of reasons, including being intimidated by the court process, being reluctant to speak in front of family members, etc. Those clients may still wish to communicate to the court and should be presented with the alternatives of writing down their thoughts to be shared with the judge, or testifying in camera. In addition, the court must consult with the child regarding the child's permanency plan in a manner appropriate to the child's age and maturity. 42 Pa. C.S. § 6351(e)(1). GALs and legal counsel for children should assist their clients in engaging directly with the court on this subject.

3h. Identify, secure and prepare expert witnesses when needed.

Commentary:

Often child welfare cases are complex and can require experts in different roles. Experts may be needed for ongoing case consultation and/or for providing testimony at trial. Attorneys should be prepared to both present their own expert witnesses and challenge other parties' expert witnesses as to their qualifications, scientific methodology, factual determinations, conclusions and recommendations.

When Attorneys determine expert testimony is necessary to the case, they should research and locate qualified experts, consult with them and seek necessary funds to retain them including motioning the court for the same. Attorneys should make efforts to speak with and obtain reports from all expert witnesses in advance of their testimony. The Attorney should subpoena the experts, giving them as much advanced notice of the court date as possible. As is true for all witnesses, the Attorney should spend as much time as possible preparing the expert witnesses for the hearing.

3i. Identify and prepare exhibits or other evidence.

Commentary:

Child welfare court hearings involve matters of great importance and Attorneys should be prepared for formal court hearings where evidence and exhibits are expected. One role Attorneys play is to bring evidence to support their case to the court's attention so that the judge has the information when rendering decisions. Each Attorney in the case has a duty to be proactive in identifying and preparing exhibits and evidence to further their case.

4) Collateral Contacts and Collaboration:

4a. Maintain regular communication with all counsel of record.

Commentary:

Attorneys should maintain contact with all other Attorneys in the case to identify issues in dispute, determine factual stipulations, explore settlements/agreements about adjudicatory and dispositional matters, and to exchange witness lists, documentary evidence, exhibits, etc.

4b. Maintain regular communication with counsel representing clients on other matters.

Commentary:

Attorneys should communicate with all other Attorneys representing the client in any matters which may include criminal, delinquency, protection from abuse, private custody, support, immigration, welfare, etc. The Attorney shall work collaboratively with other counsel to ensure that advocating the client's position is done in a way that does not undermine the client's position in any other cases.

The child's interests may be served through proceedings not connected with the case in which the GAL or legal counsel for the child is participating. See ABA Child Standards D-12. Child clients may not be able to themselves acquire much-needed legal representation in matters related to education and special education, disability benefits, immigration, personal injury, health care, and others. GALs and legal counsel for children should assist clients in securing legal representation in other matters as appropriate.

Although adult clients are generally better able to seek legal representation on collateral matters, it is similarly important to help them identify and connect with other legal resources where needed to resolve the collateral matters impeding their ability to meet their case goals. For example, where the parent is facing eviction and may lose their housing, it would be helpful to connect with a Attorney or legal aid service that advises or represents low income people in landlord tenant matters.

4c. Maintain regular communication with the child welfare agency and other child welfare professionals in the case.

Commentary:

Attorneys should regularly communicate with the child welfare agency and other child welfare professionals in the case to obtain updates about the client's progress and to ensure court-ordered referrals are made, services are provided, and any other case related matters are addressed. Attorneys should collaborate with child welfare professionals to try and reach agreement about appropriate goals, determine appropriate measures for assessing progress and determine appropriate services and providers. Attorneys should attempt to work with them to overcome any barriers to obtaining appropriate services.

4d. Maintain regular contact with service providers and case participants.

Commentary:

Attorneys should understand the client's and family's progress with services, and know what suggestions service providers have about the ongoing need for and effectiveness of services. Determining this information requires communication with providers of family support, parenting, domestic violence, anger management, mental health, medical, and substance abuse treatment (in addition to foster and group home staff referenced in Standard 4.c). From this investigation, Attorneys should identify which service providers and case participants to call as

witnesses in support of the case, or prepare to cross-examine service providers called by other Attorneys. Attorneys also may need to communicate the client's needs to the service providers and advocate for particular services. Attorneys similarly should communicate with case participants who are not parties -- such as probation officers, CASA, and educational decision makers -- to determine those participants' recommendations and whether to have those individuals testify.

5) Advocacy:

5a. Advocate for client's stated direction and goals of the case.

Commentary:

Parents' Attorneys and legal counsel for children should advocate in court to further the client's goals, present evidence, including witnesses and exhibits. See Pa.R.P.C. 1.2. If client wishes to testify, call client as witness.

5b. The GAL must advocate in a manner consistent with presenting the child's wishes while also advocating for the GAL's position regarding best interests.

Commentary:

Under Pennsylvania law, the GAL is required to advocate for both what the child wants and what the child needs. The Juvenile Act and Juvenile Court Rules of Procedure require the GAL to "make any specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, including the child's educational, health care, and disability needs." The GAL must also "advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes" and "[w]hen appropriate because of the age or mental or emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court." 42 Pa.C.S.A. § 6311 and Pa.R.J.C.P. 1154.

Accordingly, GALs should present witnesses, testimony and evidence to support the GAL's best interest recommendation, as well as the witnesses, testimony and evidence necessary to support the child's wishes.

5c. Advocate in and out of court on issues of visitation, to ensure that visitation among children and parents is a right, not a privilege.

Commentary:

Visitation is important to both children and parents, essential to preserving bonds, and to minimizing trauma of separation. Visitation is a strong predictor of successful reunification

outcomes. Attorneys for children and parents should all actively work to ensure frequent and appropriate visitation between parents and their children who are in out-of-home placement, as well as visitation among siblings. The frequency and duration of visits should respect the individualized needs of the children and their parents/guardians and the evidenced-based value of promoting reunification through maintaining family contact. The location and other conditions for visits should be creatively designed for privacy and interaction, should provide all avenues of positive connections to the family and community and should be only as restrictive as required to ensure a child's safety.

Out of Court Advocacy

5d. Attend and advocate at meetings held out of court which are important and relevant to the client's case including, but not limited to meetings related to placement, treatment, visitation, family services, permanency, transition planning, and educational or school meetings.

Commentary:

Attorneys should advocate for the client both in court and out of court, which includes engaging in case planning and attending major case meetings. Attorneys should also communicate with clients in advance of meetings to prepare and to provide clients a thorough explanation of the relevance of the meeting in the progression of the case; secure attendance of necessary participants and obtain necessary documents in advance.

5e. Work with other parties to reach stipulations and joint recommendations for placement, services, visitation, etc.

Commentary:

Attorneys should advocate for the client both in and out of court, including working with all parties to design the best service plan for the family. The Attorney should talk to the client about the client's needs and willingness to engage in services. Services should be tailored to the needs of each client and address the dependency issues in the case.

Attorneys should know about the social, mental health, substance abuse treatment and other services available to parents, children and families in the county in which the Attorney practices so the Attorney can advocate effectively for the client to receive available services. When available services are insufficient for the family's needs, Attorneys should be prepared to advocate for appropriate services to be provided or created.

When possible, Attorneys should seek stipulations or joint recommendations with other parties for placement, services, visitation, etc. Attorneys should be aware that sometimes the services or outcome sought will not be available or stipulated to, and the Attorney will need to advocate in and out of court for those services or outcomes.

5f. Monitor and ensure the implementation of court orders consistent with the Attorney's role.

Commentary:

Attorneys should contact the child welfare agency and other service providers using a collaborative approach soon after hearings to monitor and ensure timely implementation of court orders and family service/case plans as appropriate and consistent with their role. Attorneys should also communicate with the client soon after hearings and regularly thereafter to ensure the client is receiving the assistance she needs to follow the court order and case plan. When barriers and obstacles occur, Attorneys should make efforts to identify and implement strategies to mitigate them. When necessary, Attorneys should file motions to ensure compliance with court orders.

In Court Advocacy:

5g. Identify legal or evidentiary issues which require advance ruling by the court.

Commentary:

Where possible, Attorneys should make efforts to reach stipulations as to legal or evidentiary issues. Where appropriate, Attorneys should motion the court for advance rulings on issues related to jurisdiction, standing, procedural due process, discovery, and other evidentiary issues.

5h. Advocate in court, present evidence, including witnesses and exhibits. If client wishes to testify, call client as witness.

Commentary:

Attorneys should use the court hearing as an opportunity to advance the case. As is referenced in the court preparation standards in section 3, the Attorney must be fully aware of the client and case goals and be ready to present witnesses and exhibits to the court in furtherance of those goals. The client should know what the Attorney hopes to accomplish during the court hearing, and be prepared to testify as appropriate.

GALs must ensure that the court is provided with the necessary information for the court to determine what is in the best interest of the child. To accomplish this task, GALs must inform the court of the child's wishes and present whatever evidence exists to support those wishes, including client testimony. If the GAL's best interest recommendation differs from the child's wishes, the GAL must present evidence to support those recommendations. GALs should discuss with the child in advance of the hearing if their best interest recommendation differs from the child's wishes. (See Standard 3.d.) The GAL should discuss with the client whether the client wishes to testify (See Standard 3.g), and if so call the client as a witness.

GALs and legal counsel for children should ensure that arrangements have been made for children to attend court hearings. It is important that children understand and be part of decisions being made about their lives. R.J.C.P 1129 requires that dependent children attend court at least every six months.

While children should attend hearings, GALs and legal counsel for children should consider whether in unusual circumstances a child should be excused for a portion of the hearing due to age, maturity, or a legal/factual issue such as a challenge to paternity, etc.

In the rare instance when a child is placed out of state and will not attend a hearing or important meeting in person, GALs and legal counsel should arrange for participation via videoconferencing or, as a last resort, by phone.

5i. Cross-examine other parties' witnesses.

Commentary:

Attorneys should cross examine other parties and witnesses when appropriate. Thus, as referenced in the section on case preparation, Attorneys should engage in necessary communication and preparation to enable meaningful trial strategy decision-making and cross-examination. This preparation includes, but is not limited to, speaking with clients about their knowledge of witnesses and anticipated testimony, and obtaining and reviewing records, reports or statements of other parties' witnesses.

5j. Prepare and file appropriate motions regarding evaluations, services, placement, visitation, compelling compliance, etc. File objections and motions for reconsideration if appropriate.

Commentary:

Attorneys should be involved in active motions practice to advance their clients' cases including being proactive in ensuring compliance with court orders and obtaining referrals, services and addressing other issues before the court as needed.

When necessary, Attorneys should file motions with specific averments in support of requested relief, including identification of providers and individuals involved in proposed services and placement, provide affidavits and necessary records where relevant, and obtain stipulations of other parties whenever possible. Attorneys should seek enforcement through court order or otherwise as necessary.

6) Appellate Advocacy

- 6a. *Determine whether to appeal after explaining the court order and discussing with the client all available options, including appeals.***

Commentary:

When discussing the possibility of an appeal, Attorneys should promptly explain, as developmentally and age appropriate, the significance of the court order. Attorneys should discuss and advise clients about the available options when court orders are contrary to a client's position or interests. Attorneys should ensure that clients are fully aware that court orders are in effect once issued and that if court orders are disobeyed what the possible consequences may be. Attorneys should explain timeliness obligations in filing an appeal, how appellate practice works including distinctions between presentation of the case at trial and on appeal, the scope and standard of appellate review, which orders are reviewable, the possibility of stays, the continuing jurisdiction of the trial court, the likelihood of prevailing on appeal, and the potential negative impact, if any, on the parent and child, of pursuing an appeal.

Parents' attorneys and legal counsel for children should determine whether to appeal after considering the client's wishes and whether there is a legal basis for the appeal. GALs should determine whether to appeal after considering the child's best interests, the client's wishes and whether there is a legal basis for the appeal. Attorneys should be aware of any statutory or case law which provides the client with the automatic right to appeal such as in a termination of parental rights case.

- 6b. *When pursuing or responding to an appeal, timely file all necessary post-hearing motions and documents adhering to the Pennsylvania Rules of Appellate Procedure, and, as appropriate, participate in oral argument.***

Commentary:

Attorneys should carefully review their obligations under the Pennsylvania Rules of Appellate Procedure to ensure compliance with the various requirements of appellate procedure and a Children's Fast Track Appeal. Attorneys should participate fully in pursuing or responding to appeals by filing motions, briefs and other pleadings and documents consistent with the position taken on appeal, and participating in oral argument when appropriate.

- 6c. *Communicate the status and results of the appeal as appropriate.***

Commentary:

Attorneys should communicate the result of the appeal to the client as soon as possible and provide a copy of the appellate decision to the client as age and developmentally appropriate. The Attorney should explain whether the appellate court affirms, reverses or remands the trial court order, and inform the client of the steps and process necessary to effectuate the appellate court's decision as well as any additional appellate options. A Attorney's responsibility to engage in further appellate advocacy is determined by the representation agreement or other scope of representation.

7) Ethical Considerations:

7a. *The Rules of Professional Conduct apply to GALs and all other attorneys in dependency proceedings.*

Commentary:

The Rules of Professional Conduct apply to all attorneys in dependency proceedings, including parents' attorneys, legal counsel for children, and GALs. The vast majority of children involved in dependency proceedings are represented by attorneys appointed as GALs and charged with representing the child's legal interests and best interests. 42 Pa.C.S. § 6311, Pa. R.J.C.P. 1151. Pennsylvania law recognizes the child as a party to the dependency proceedings and requires that the GAL be an attorney. Thus, GALs must understand that they are acting as Attorneys in fulfilling their responsibilities and that the Rules of Professional Conduct apply to them.

That said, the GAL must also recognize that the dual nature of the representation (i.e., legal interests and best interests) affects how certain Rules of Professional Conduct apply and/or how certain Rules of Professional Conduct should be interpreted to account for the GAL's unique responsibilities. These standards both highlight and address the unique ethical considerations that apply to GAL representation.

7b. *A GAL may not testify during any proceeding in which the GAL represents the child.*

Commentary:

The child's GAL is an advocate, not a witness. Pa. R.J.C.P. 1154 and 42 Pa. C.S. § 6311 explicitly require the GAL to "examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child [and] make recommendations relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, including the child's educational, health care, and disability needs." Just like any other attorney, a GAL may, and should, make offers of proof, summarize their position for the court and analyze evidence that has been introduced. Further, GALs should take care to clarify for the court that they are not functioning as witnesses, unless pursuant to Pa. R.P.C. 3.7, "Attorney as Witness," which prohibits attorneys from acting as an advocate and a witness in the same proceeding except under one of the enumerated exceptions.

7c. *GALs may not reveal information related to the representation unless the client gives informed consent, the disclosure is necessary to comply with the child abuse reporting requirements of the CPSL, or the disclosure is necessary in the course of advocating for placement and services to meet the child's best interests.*

Commentary:

GALs must conduct their practice so as to respect the confidentiality of both client communications and of confidential information regarding the client, whether oral or written,

that comes from sources other than the client. That said, the GAL's responsibility to represent the child's best interests will at times require that the GAL disclose a client's communication or confidential information without the client's consent.

Disclosure of confidential information to serve the child's best interests is consistent with Pa. R.P.C. 1.6, which permits disclosure of confidential information, without client consent, if the disclosure is "impliedly authorized to carry out the representation." Implicit in the GAL's duties to carry out the representation under both Pa. R.J.C.P. 1154 and 42 Pa. C.S. § 6311 is that information gained in the course of the representation of the child may need to be disclosed to "present witnesses and evidence necessary to protect the best interests of the child" and "make recommendations relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, including the child's educational, health care, and disability needs."

Because the handling of confidential information is so critical to a trusting relationship between the GAL and the child, the GAL must take care at the beginning of the representation to explain to the child the limits on confidentiality inherent to the GAL role. See section 1.d. of these standards. The GAL should repeat this explanation periodically throughout the course of the representation. Further, GALs should routinely consider whether the information to be provided through disclosure of the client's communication or confidential information could be provided from a witness other than the client. If so, the GAL should elicit the information from that other witness when practicable.

7d. Except in limited circumstances, GALs should preserve attorney-client privilege and work product privilege in their interactions with clients.

Commentary:

While the attorney-client privilege applies to GALs, as discussed in section 7c of these standards, GALs may find it necessary to disclose certain client communications to comply with the Child Protective Services Law, Rules of Professional Conduct or to advance the client's best interests. However, in general, GALs should recognize that their clients' communications with them are protected by attorney-client privilege and that their work product may be protected by the work product privilege. When interacting with clients, GALs should be mindful of preserving their ability to assert these privileges. For example, GALs should carefully consider when to meet with children with a third party present (e.g., foster parent, caseworker, placement provider staff member, CASA volunteer), since client communications during such a meeting will not be subject to privilege. Similarly, GALs who work with non-Attorney staff members must ensure that their co-workers conduct their work so as to protect any potentially applicable privileges.

7e. GALs must report suspected child abuse, in accordance with Pennsylvania's Child Protective Services Law.

Commentary:

The CPSL, in 23 Pa. C.S. § 6311(a), requires persons who come into contact with children in the course of their employment, occupation or practice of a profession to report suspected child abuse. Although the provision creates an exception for communications protected by attorney-client privilege, GALs should not rely on that provision to excuse them from making reports. Rather, the GAL's obligation to pursue the child's best interests makes reporting necessary. To build and support the child's understanding of the GAL's role and the child's rapport with the GAL, it is essential that the GAL explain his obligation to report suspected child abuse at the outset of the representation and to repeat that explanation periodically throughout the course of the representation. Further, the GAL should contact clients in advance to inform them when the GAL finds it necessary to make a report.

GALs should recognize that their child abuse reporting obligation is quite limited. The CPSL maintains the GAL's ability to assert that attorney-client privilege protects against any attempt to compel testimony about the client's confidential communications to the GAL. See 23 Pa. C.S. §6381(c). Thus, even when a GAL must make a report of suspected abuse, the GAL should continue to treat as confidential the information or communication disclosed in the report. See section 7c of these standards for a fuller discussion of confidentiality and limitations on confidentiality.

7F. Attorneys must establish systems that allow them to identify and address conflicts of interest quickly and consistently.

Commentary:

Attorneys should avoid potential conflicts of interest that would interfere with the competent representation of the client in child welfare matters, which may include refraining from:

- *Representing both the parent and child (child of a current client; parent of a current client; or when two new clients are parent and child),*
- *Representing both parents in a child welfare matter,*
- *Representing two parties in a child welfare proceeding,*
- *Representing one party in a child welfare proceeding and another party in a different matter, and*
- *Representing a party where also representing an agency involved in the case.*

GALs and legal counsel for children must be particularly attentive to the potential for conflicts of interest to exist or arise between siblings as well as between unrelated child clients whose interests may conflict.

*The following situations represent common types of potential conflicts in **new** cases where GALs and legal counsel for children should strongly consider immediately declining to represent a new client, or taking on representation of only one of the clients:*

- A parent/child relationship exists (i.e., child of a current client; parent of a current client; or when two new clients are parent and child)*
- One child has harmed or is alleged to have harmed another child (i.e., new client has harmed current client; new client has harmed another new client)*

Other situations may involve former clients (i.e., child of former client; parent of former client). These situations require analysis under Rule 1.9 of the Rules of Professional Conduct for the GAL or legal counsel for the child to determine whether the Rules permit the GAL or legal counsel to accept the representation of the new client.

*The following situations represent common types of potential conflicts in **ongoing** cases, when GALs and legal counsel for children should carefully consider whether a conflict in fact exists, and then should consider whether the GAL or legal counsel for the children must withdraw from representing the existing clients because of the conflict, or whether the Rules of Professional Conduct permit the GAL or legal counsel for the children to continue the representation:*

- Sibling group where the Attorney is appointed as GAL for certain siblings and legal counsel for others*
- Child has harmed/is alleged to have harmed another child (when clients either are unrelated or when siblings)*

When faced with these situations, GALs and legal counsel for children should recognize that even when clients' interests diverge, there may be strategies, based on available evidence and the status of the case, that can achieve both sets of interests if pursued simultaneously. If this is the case, GALs and legal counsel for children may be able to continue representing the clients and provide continuity of the child's attorney relationship. When the evidence will not allow for this solution, then it is likely that the GAL or legal counsel for the children will need to withdraw from the representation (or in some cases request appointment of an additional Attorney, so that child is represented by both a GAL and by legal counsel.) See Rule 1154.

GALs should note that the Pennsylvania Supreme Court suspended the portion of 42 Pa. C.S. §6311(b)(9) that provided "a difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the guardian ad litem." This provision was suspended by the Supreme Court under its rule-making authority because Article V, Section 10(c) of the Pennsylvania Constitution vests the Supreme Court rather than the General Assembly with the authority to determine what is or is not a conflict of interest under the Rules of Professional Conduct. See Pa.R.J.C.P. 1800. Consequently, GALs should be aware that 42 Pa. C. S. 6311(b)(9) does not create an exception to conflicts of interest arising under the Rules of Professional Conduct.

Time Charts Introduction

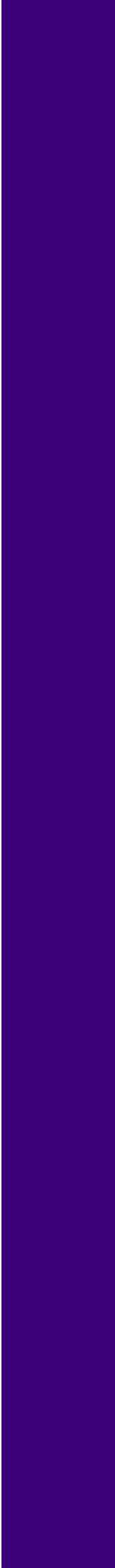
Implementing the Standards of Practice for children and parents in dependency cases requires attorneys to perform specific tasks, each of which takes time. A key component of an attorney's ability to implement the Standards for every client will be the size of the attorney's caseload. Recognizing this, the Legal Representation Workgroup developed the following Time Charts of tasks required to meet the Standards of Practice in a typical dependency case. The Workgroup also convened separate committees of children's and parents' attorneys from differing size counties to validate the tasks and to determine a representative amount of time required for each task. Finally, the Workgroup used these Time Charts to develop the Caseload Calculations found at the end of the charts, including one for the Representation of Children and one for the Representation of Parents.

The four Time Charts contained within include the following:

- The tasks and time involved in representing a child in a **one** child dependency case;
- The tasks and time involved in representing a parent in a **one** child dependency case;
- The tasks and additional time involved in representing a child and parent when there is an added sibling; and
- The tasks and time involved in representing children or parents in a contested termination of parental rights and an appeal hearing.

The purpose of disseminating these Time Charts with the Standards is to facilitate discussion in each county regarding how much time per case it will take to implement the Standards. The Workgroup recognizes that there could be county-level differences in key assumptions (e.g., number of hearings per year) or differences in activity numbers (e.g. travel time) such that the time necessary to implement the Standards could vary by County and by Attorney, depending on any private practice or other work commitments. To that end, configurable time charts are available at (<http://www.ocfcpcourts.us/childrens-roundtable-initiative/state-roundtable-workgroups/legal-representation>).

Similarly, the Caseload Calculation sheets are meant to provide a framework from which each County and Attorney can plug in their estimated hours from the time charts, as well their County-specific data, to determine the number of hours available to work per year, percentage of clients in their first year and second year, percentage of clients who have no siblings, percentage of cases that are complex, percentage of annual cases with contested Termination of Parental Rights, etc. Configurable Caseload Calculation Sheets are also available at (<http://www.ocfcpcourts.us/childrens-roundtable-initiative/state-roundtable-workgroups/legal-representation>).



TIME / TASK CHARTS

CHILD REPRESENTATION: ONE CHILD

			RECOMMENDED TIME REQUIREMENTS			YOUR COUNTY	
DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	Intake Thru 12 months	Year 2 & per year to Case discharge
CLIENT CONTACT AND COMMUNICATION							
Visit/Meet with minor client as soon as possible after appointment and on a regular basis thereafter.	42 PaCSA § 6311(B)(1), (8); Pa.R.J.C.P. Rule 1154(1), (8); ABA Model Act § 7(b)(5) and (8)	Have a significant initial client visit in their living environment. Visit with the client in their living environment at least once every six months thereafter. Meet with the client as needed including before and/or after a hearing and before and/or after a client-related meeting that the client attends. Explain role as the client’s legal representative and expectations. Explain in a developmentally appropriate manner the child welfare process, allegations, what will happen in court etc. Establish a system that promotes regular contact, provide the client with contact information, be appropriately responsive and communicate regularly.	Time for initial visit: 1 hour	1.00	0.00		
			Time for subsequent visits & documentation: 1 hr (minimum 2 visits per year at 1 hr per visit) + 0.5 hr. doc/visit	3.00	3.00		
			Travel time for visits: 3 x 1.25 hr ([#] of visits at [x] time traveling per visit)	3.75	2.50		
			Time meeting with client one-to-one outside of visits (at court, meetings, office, etc.) + calls/emails/texts	2.50	2.50		
subtotal: CLIENT CONTACT AND COMMUNICATION				10.25	8.00	0.00	0.00
CASE PREP: DOCUMENT & RECORDS REVIEW							
Request and review relevant court and county agency records. Request and review other relevant records, for example, reports relating to parents or other custodian of client. Request and review client’s records/reports.	42 PaCSA §6311(B)(2); Rule 1154(2) ; ABA Model Act § 7(b)(1) and (7)	Request and review CYS file and copy relevant portions of files; review pleadings Request and review reports of examinations of parents or other custodian of the child (including drug and alcohol reports, psychological reports, etc.). Request and review client records including school, medical, psychological, interactionals, and visitation records for each hearing. Obtain consent or court orders for release of records and send to records holders.	Time to review CYS file & related docs	1.50	0.00		
			Time to request and review parent related records (incl. time to obtain/provide consents or court orders): .75 hour	0.50	0.50		
			Time to request and review child-client related records: 3.5 hour	3.50	3.50		
			Travel time to access records	0.50	0.00		
subtotal: CASE PREP: RECORDS REVIEW				6.00	4.00	0.00	0.00
CASE PREP: INVESTIGATION, WITNESS & EXHIBIT PREPARATION, ETC							
Conduct such further investigation necessary to ascertain the facts. Interview potential witnesses, including parents, caretakers and foster parents. Prepare witnesses and evidence. Take steps to ensure that client appears in court at least once every six months.	42 PaCSA § 6311(B)(4),(5); Rule 1154(4), (5); ABA Model Act § 7(b)(1) and (7)	Contact and interview potential lay witnesses and expert witnesses for example: caseworker, therapist, teachers or daycare providers, service providers, foster parents or group home, etc. Prepare witnesses to testify. Subpoena witnesses. Gather and prepare documentary evidence. Make contact with client and client’s foster parents and/or service providers to arrange and/or coordinate youth’s appearance.	Contact & interview witnesses, document contact: 0.5 hr per potential witness X 5 potential witnesses per hearing = 2.5 hours per hearing X 4 hearings ; Prep witnesses for hearing: 1.5 hours for adj., 1 hour per reviews ;	12.00	11.00		

TIME / TASK CHARTS

CHILD REPRESENTATION: ONE CHILD

DUTY	SOURCE	SPECIFIC TASKS	RECOMMENDED TIME REQUIREMENTS			YOUR COUNTY	
			TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	Intake Thru 12 months	Year 2 & per year to Case discharge
File motions as needed		Draft and file motions as needed					
			Prepare documentary evidence:	1.00	1.00		
			Time to arrange child's appearance: .25 per hearing	1.00	1.00		
			Time to prepare and file motions, objections:	1.00	1.00		
subtotal: CASE PREP: INVESTIGATION, WITNESS & EXHIBIT				15.00	14.00	0.00	0.00
ADVOCACY: HEARINGS							
Participate in all court proceedings.	42 PaCSA § 6311(B)(3),(7),(9); Rule 1154(3),(7),(9); ABA Model Act § 7(b)(7, 9, 10)	Attend and advocate at all hearings. Advocate to the court on key issues, for example : removal, adjudication, visitation, permanency, placement, and services, etc.	Time for Adjudicatory hearing: 1 hr.	1.00	0.00		
			Time for shelter hearings: .5	0.50	0.00		
Including Pre-hearing conferences and hearings on motions to change placement and other motions.		Prepare for and advocate at pre-hearing conferences	Time for Permanency hearings: .5 hr, 4 hearings per year	1.50	2.00		
Advise the court of the child's wishes and present whatever evidence exists to support the child's wishes.		Identify legal or evidentiary issues which require advance ruling by the court. Where possible, reach stipulations as to legal or evidentiary issues. File motions, objections, including for reconsideration if appropriate.	Pre-hearing conferences: .5 hr before adj. hearing	0.50	0.00		
Make specific recommendations relating to the safety and appropriateness of the child's placement and services necessary to address the child's needs and safety.		Make specific recommendations relating to the safety and appropriateness of the child's placement and services necessary to address the child's needs and safety. Make specific recommendations regarding: appropriateness/ stability of educational placement, If needed, appointment of education decision-maker, service plan to meet client's health care and disability needs.	Hearings on motions: .25 if just presenting or responding, .75 if contested hearing	0.50	0.50		
			Average travel time to court: .25 hr	1.00	1.00		
			Average time to prepare notes for file: .25 hr	1.00	1.00		
subtotal: ADVOCACY--HEARINGS				6.00	4.50	0.00	0.00
ADVOCACY: OUT OF COURT							

TIME / TASK CHARTS

CHILD REPRESENTATION: ONE CHILD

			RECOMMENDED TIME REQUIREMENTS			YOUR COUNTY			
DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	Intake Thru 12 months	Year 2 & per year to Case discharge		
Attend and advocate at meetings held out of court which are important and relevant to the client's case.		Attend and advocate at meetings held out of court which are important and relevant to the client's case, including, but not limited to meetings related to placement, treatment, family services, permanency, visitation, transition planning, and educational or school meetings. If needed, apprise clients promptly of the scheduling of any of these significant meetings. Provide a thorough explanation of the relevance of the meeting in the progression of the case. Secure attendance of necessary participants. Meet with clients and obtain necessary documents in advance.	Time FSP meetings per year ([#] meetings at x minutes per meeting]): .75 hr, 2 mtgs per year	1.50	1.50				
Maintain collateral contacts, communicate and collaborate where possible with other counsel, parties, providers, etc.		Maintain communication with other counsel, caseworkers; Work with other parties to reach stipulations and joint recommendations for placement, Follow up with CYS and providers to ensure court orders are implemented;	Other case meetings per year (of other case meetings at x minutes per meeting): 2-4 at .75	2.00	3.00				
			Average travel time for meetings ([x] minutes per meeting): 1 hr	3.00	3.00				
		Provide collateral information to providers for purposes of evaluation and	Average time to prepare notes for file: .25 hr	0.75	0.75				
			Average time for communication with collateral contacts:	1.00	1.00				
subtotal: ADVOCACY--OUT OF COURT				8.25	9.25	0.00	0.00		
LEGAL RESEARCH AND WRITING									
Case specific research and writing	ABA Model Act § 7(b)(1)	Research law and/or placement or service options	Case specific research 1 hr	1.00	1.00				
			Consultation with supervisor or colleagues:	0.50	0.50				
subtotal: LEGAL RESEARCH AND WRITING				1.50	1.50	0.00	0.00		
TOTALS:						47.00	41.25	0.00	0.00

TIME / TASK CHART**Parent Representation: One Child**

			RECOMMENDED TIME REQUIREMENTS			YOUR COUNTY	
DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	Intake Thru 12 months	Year 2 & per year to Case discharge
CLIENT CONTACT AND COMMUNICATION							
Communicate with client as soon as possible after appointment and on a regular basis thereafter.	ABA Parent Rep Standards 7-18, 20	Have a significant initial client meeting. Communicate with clients outside of court and regularly -- at a minimum, prior to each hearing with sufficient time to prepare. Explain role as the client's legal representative and expectations.	Significant initial client interview/visit:	2.00	0.00		
		Explain in an accessible manner the child welfare process, allegations, what will happen in court etc.	Time for subsequent substantive communication with client & documentation: (minimum 2 communications at 15 min time per hearing-may be pre & post). (meetings, calls, texts, prepping client for hearings and letters)	2.50	2.50		
		Establish a system that promotes regular client-attorney contact, provide the client with contact information and be appropriately responsive.	Average travel time for meetings with client:	0.00	0.00		
		Conduct diligent search and communicate with Incarcerated and hard to locate parents					
subtotal: CLIENT CONTACT AND COMMUNICATION				4.50	2.50	0.00	0.00
CASE PREP: DOCUMENT & RECORDS REVIEW							
Request and review relevant court and county agency records.	ABA Parent Rep 19, 21, 22, 23	Request and review CYS file as needed, especially early in the case and again prior to TPR. Review pleadings	Time to review CYS file and related documents:	1.50	0.00		
Request and review client related reports, evaluations and other relevant records		Request and review parent-related provider reports, reports of examinations (including drug and alcohol reports, psychological reports, interactional evaluations) anything else relevant prior to each hearing.	Time to request and review parent-related records (incl. time to obtain/provide consents or court orders):	2.00	2.00		
Request and review each child's medical, psychological and school records etc prior to each hearing as relevant.		Request and review each child's medical, psychological and school records etc prior to each hearing as relevant.	Time to review child's records/reports:	1.50	1.50		
		Obtain consent or court orders for release of records and send to records holders as needed	Travel time to review CYS or other records:	0.50			
subtotal: CASE PREP--RECORDS REVIEW				5.50	3.50	0.00	0.00
CASE PREP: INVESTIGATION, WITNESS & EXHIBIT PREPARATION, ETC							
Conduct a thorough and independent investigation at every stage.	ABA Parent Rep 20-31	In advance of hearing, address with client knowledge of witnesses and anticipated testimony; obtain records, reports or statements of other parties' witnesses	Contact & interview witnesses, document contact: 0.5 hr per potential witness X 5 potential witnesses per hearing = 2.5 hours per hearing X 4 hearings ; Prep witnesses for hearing: 1.5 hours for adj., 1 hour per reviews; Time to subpoena witnesses	12.00	11.00		
Prepare case for hearings.		Contact and interview potential lay witnesses and expert witnesses including: medical and mental health professionals, teachers or daycare providers, service providers, etc.					
		Prepare and secure attendance of witnesses, including expert witnesses.					
		Thoroughly prepare client for testimony; Plan effective organization of testimony based upon the theory of the case; Prepare evidence, including exhibits:	Time to gather documentary evidence and prep exhibits:	1.00	1.00		

TIME / TASK CHART**Parent Representation: One Child**

DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	Intake Thru 12 months	Year 2 & per year to Case discharge
		File objections and motions, including motion for reconsideration if appropriate.	Time to prepare and file motions, objections, etc:	1.00	1.00		
subtotal: CASE PREP: INVESTIGATION, WITNESS & EXHIBIT PREPARATION				14.00	13.00	0.00	0.00
ADVOCACY: HEARINGS							
Participate in all court proceedings. Participate in all pre-hearing conferences and hearings on motions	ABA Parent Rep 25-28, 32, 34	Prepare for and attend all hearings. Advocate to the court about key issues like: removal, adjudication, permanency, placement, services, visitation.	Time for Adjudicatory hearing: 1 hr.	1.00	0.00		
			Time for shelter hearings: .5	0.50	0.00		
		Prepare for and attend prehearing conferences	Time for Permanency hearings: .5 hr, 4 hearings per year	1.50	2.00		
			Hearings on motions: .25 if just presenting or responding, .75 if contested hearing	0.50	0.50		
		Identify legal or evidentiary issues which require advance ruling by the court.	Pre-hearing conferences: .5 hr before adj. hearing	0.50	0.00		
		Where possible, reach stipulations as to legal or evidentiary issues. File objections and motions for reconsideration if appropriate.					
		Average travel time to court: .25 hr	1.00	1.00			
Average time to prepare notes for file: .25 hr	1.00	1.00					
subtotal: ADVOCACY--HEARINGS				6.00	4.50	0.00	0.00
ADVOCACY: OUT OF COURT							
Attend and advocate at meetings held out of court which are important and relevant to the client's case. Maintain collateral contacts, communicate and collaborate where possible with other counsel, parties, providers, etc.	ABA Parent Rep 6, 7, 11, 26 -28	Attend and advocate at meetings held out of court which are important and relevant to the client's case, including, but not limited to meetings related to placement, treatment, family services, permanency, visitation, transition planning, and educational or school meetings. If needed, apprise clients promptly of the scheduling of any of these significant meetings. Provide a thorough explanation of the relevance of the meeting in the progression of the case. Secure attendance of necessary participants. Meet with clients and obtain necessary documents in advance.	Average time FSP meetings per year ([#] meetings at x minutes per meeting)) :	1.50	1.50		
			Other case meetings per year (of other case meetings at x minutes per meeting): 2-4 at .75	2.00	3.00		
		Maintain communication with other counsel, caseworkers; Work with other parties to reach stipulations and joint recommendations for placement, services, visitation, etc.;	Average travel time for meetings ([x] minutes per meeting): 1 hr	3.00	3.00		
			Average time to prepare notes for file: .25 hr	0.75	0.75		
		follow up with CYS and providers to ensure court orders are implemented; provide collateral information to providers for purposes of evaluation and the preparation of various plans (e.g., ISP, treatment, etc).	Average time for communication with collateral contacts:	1.00	1.00		
		subtotal: ADVOCACY--OUT OF COURT				8.25	9.25
EXPERTISE AND KNOWLEDGE							
Develop and maintain expertise and knowledge	ABA Parent Rep 1, 2	Engage in training and continuing education specific to child welfare representation.	Case specific research 1 hr	1.00	1.00		
Case-specific research and writing		Case-specific research on law and/or placement or service options.	Consultation with supervisor or colleagues:	0.50	0.50		
subtotal:EXPERTISE AND KNOWLEDGE				1.50	1.50	0.00	0.00
TOTALS				39.75	34.25	0.00	0.00

CHILD AND PARENT REPRESENTATION: ONE ADDED SIBLING

			RECOMMENDED TIME REQUIREMENTS				YOUR COUNTY		
DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE
CLIENT CONTACT AND COMMUNICATION									
GAL and counsel for children: Visit/meet with minor client as soon as possible after appointment and on a regular basis thereafter. <									

CHILD AND PARENT REPRESENTATION: ONE ADDED SIBLING

DUTY	SOURCE	SPECIFIC TASKS	RECOMMENDED TIME REQUIREMENTS				YOUR COUNTY		
			TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE
Conduct such further investigation necessary to ascertain the facts. Interview potential witnesses, caretakers and foster parents). Prepare witnesses and evidence.	42 PaCSA § 6311(B)(4),(5); Rule 1154(4), (5); ABA Model Act § 7(b)(1) and (7)	Contact and interview individuals for case investigation and to determine potential witnesses, i.e., caseworker, therapist, teachers or daycare providers, service providers, foster parents or group home, etc. Prepare witnesses to testify. Subpoena witnesses. Gather and prepare documentary evidence. Document investigation and interviews in file as needed for case and hearing prep.	Contact and interview witnesses: 0.5 hr per potential witness X 4 potential witnesses per hearing = 2.0 hours per hearing X 4 hearings per year; time to subpoena witness: prep witnesses for hearing: .25-.5 hours for adj., .25-.5 hour per reviews. Adjusted for parents.	7.50	7.50	3.00			
Take steps to ensure that child client appears in court at least once every six months.		Make contact with client and client's foster parents and/or service providers to arrange and/or coordinate youth's appearance.							
File motions as needed		Draft and file motions as needed							
		Prepare documentary evidence:		0.25	0.25	0.25			
		Time to arrange youth's appearance:		0.38	0.38	0.00			
		Time to prepare and file motions, objections:		0.38	0.38	0.38			
subtotal: CASE PREP--INVESTIGATION, WITNESS & EXHIBIT				8.50	8.50	3.63			0.00
ADVOCACY: HEARINGS									
Participate in all court proceedings.	42 PaCSA § 6311(B)(3),(7),(9); Rule 1154(3),(7),(9); ABA Model Act § 7(b)(7, 9, 10)	Attend and advocate at all hearings. Advocate to the court on key issues, for example : removal, adjudication, visitation, permanency, placement, and services, etc.	Time for Adjudicatory hearing: 1 hr.	0.25	0.00	0.25			
			Time for shelter hearings: 0	0.00	0.00	0.00			
Including Pre-hearing conferences and hearings on motions to change placement and other motions.		Prepare for and advocate at pre-hearing conferences	Time for Permanency hearings: 4 hearings per year	0.75	0.75	0.75			
Advise the court of the child's wishes and present whatever evidence exists to support the child's wishes.		Identify legal or evidentiary issues which require advance ruling by the court. Where possible, reach stipulations as to legal or evidentiary issues. File motions, objections, including for reconsideration if appropriate.	Pre-hearing conferences: 0 hr before adj. hearing	0.00	0.00	0.00			
Make specific recommendations or argument relating to the safety and appropriateness of the child's placement and services necessary to address the child's needs and safety.		Make specific recommendations or argument relating to the safety and appropriateness of the child's placement and services necessary to address the child's needs and safety. Make specific recommendations or argument regarding: appropriateness/ stability of educational placement, if needed, appointment of education decision-maker, service plan to meet client's health care and disability needs.	Hearings on motions:	0.25	0.25	0.25			
			Travel time to court: 0 hr	0.00	0.00	0.00			
			Time to prepare notes for file: 0 hr	0.00	0.00	0.00			

TIME / TASK CHARTS

CHILD AND PARENT REPRESENTATION: ONE ADDED SIBLING

			RECOMMENDED TIME REQUIREMENTS				YOUR COUNTY		
DUTY	SOURCE	SPECIFIC TASKS	TIME REQUIREMENTS: "Typical -- what it should be, tempered by what is"	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE	Intake Thru 12 months	Year 2 & per year to Case discharge	PARENT REP FOR ADDED SIB CASE
subtotal: ADVOCACY--HEARINGS				1.25	1.00	1.25			0.00
ADVOCACY: OUT OF COURT									
Attend and advocate at meetings held out of court which are important and relevant to the client's case. <									

Contested Termination of Parent Rights and Appeal

CONTESTED TERMINATION CASE		RECOMMENDED TIME REQUIREMENTS		YOUR COUNTY	
TASK		TIME ESTIMATE-- CHILD	TIME ESTIMATE -- PARENT	TIME ESTIMATE-- CHILD	TIME ESTIMATE -- PARENT
Prepare/file entry of appearance		0.5	0.5		
Review file, records		6	6		
Communicate & prep client			2.5		
Contact with/prep potential witness(es)		3	3		
Contact with other counsel		0.5	0.5		
Prepare and serve subpoena(s)		0.5	1		
Conduct legal research		2	2		
Prepare/file pre-trial statement		1.5	1.5		
Prepare for hearing/case prep/exhibits		6	6		
Attend termination hearing(s), including travel		4	4		
Write proposed findings of fact/conclusions of law, closing argument – (6 hours but doesn't happen in all cases; adjusted to 2 hours)		2	2		
TOTAL: CONTESTED TERMINATION CASE		26	29		0

TPR (OR OTHER) APPEAL

TPR (OR OTHER) APPEAL		RECOMMENDED TIME REQUIREMENTS		YOUR COUNTY	
TASK					
Client consultation			1.5		
Notice of appeal, Rule 1925(b) Statement & related docs			1.5		
Review transcript(s), trial court opinion, briefs		5	5		
Review appellate record, including travel		1	1		
Conduct legal research		4	4		
Write appeal brief		25	30		
Prepare brief for filing		4	4		
File brief, including travel		0.5	0.5		
Prepare for oral argument		10	10		
Attend oral argument, including travel and down time in court		4	4		
TOTAL: APPEAL		53.5	61.5		

CASELOAD CALCULATION

REPRESENTATION OF CHILDREN

- 1536 hours = hours available to work per year (i.e., 32 hours/week x 48 weeks)
- 47 # hours per year for One Child representation in the first year (See "One Child" Chart)
- 41.25 # hours per year for One Child representation in the second year (See "One Child" Chart)
- 24.13 # hours per year for One Added Sibling representation in the first year (See "Added Sibling" Chart)
- 22.96 # hours per year for One Added Sibling representation in the second year (See "Added Sibling" Chart)
- 60% Assume 60% of clients are in their first year and 40% are in the second year
- 40% Assume 40% are in the second year
- 45% % of clients have no sibs (assumption) and 55% have sibs
- 55% % of clients have sibs (assumption)
- 44.70 hours = average hours per year for clients with no sibs (i.e., combination new and 2d year cases)
- 23.66 hours = average hours per year for clients with sibs (i.e., combination new and 2d year cases)
- 33.13 hours = average hours per year per client for all "typical" clients
rate: 90% of caseload is typical
- 45.13 hours = average hours per year per client for "complex" cases (i.e., 33.54 + 12 hours per complex case; See Complexity Chart)
rate: 10% of caseload is complex

34.33	hours = average hours per year per client for all cases (90% typical + 10% complex case)
44.74	CLIENTS PER YEAR (i.e. total hrs per yr/average hrs per yr per client for all clients; <u>static caseload</u> -- assumes all cases are open the whole year)(90% "typical", 10% complex)
71.59	TOTAL ANNUAL CASELOAD PER FULL-TIME LAWYER (i.e., clients per yr x 1.6; <u>dynamic caseload</u> -- assumes turnover rate of 60% close during year; <u>not</u> including TPRs or appeals)

ADDITIONAL CALCULATIONS:

- 26 hours = **contested TPR** (See TPR & Appeal Chart): 7% of caseload is contested TPR [104/1467]= 0.0709
1.843 = total hours per case for contested TPRs
- 18 hours = **uncontested TPR** (See TPR & Appeal Chart): 2% of caseload is uncontested TPR [26/1467]= 0.0177
0.319 = total hours per case for uncontested TPRs
- 53.5 hours = **appeals** (See TPR & Appeal Chart): 2% of caseload is appeals [23/1467]= 0.0157
0.839 = total hours per case for appeals
- 3.00 = total hours for all TPRs and appeals (to be applied for all cases)**
- 37.33** hours = average hours per year per client for all cases (including TPRs and appeals)

65.83 TOTAL ANNUAL ADJUSTED CASELOAD PER FULL-TIME CHILDREN'S LAWYER
(dynamic caseload-- assumes turnover rate of 60% close during year;
including time for complexity, TPRs, appeals)

typical	+	complex	+	contested TPR	+	uncontested TPR	+	appeals	=
<input type="text"/>		<input type="text"/>		<input type="text"/>		<input type="text"/>		<input type="text"/>	

** Assumptions on sibling groups, time of service and rate of TPRs and appeals based on preliminary data supplied by KidsVoice, Allegheny County Bar Foundation Juvenile Court Project and Allegheny County DHS Office of Data Analysis, Research & Evaluation (DARE).

CASELOAD CALCULATION

REPRESENTATION OF PARENTS

- 1536 hours = hours available to work per year (i.e., 32 hours/week x 48 weeks)
- 39.75 # hours per year for One Child representation of parent in the first year (See "One Child" Chart)
- 34.25 # hours per year for One Child representation of parent in the second year (See "One Child" Chart)
- 12.63 # hours per year for One Added Sibling representation of parent in the first year (See "Added Sibling" Chart)
- 12.63 # hours per year for One Added Sibling representation of parent in the second year (See "Added Sibling" Chart)
- 60% Assume 60% of clients are in their first year and 40% are in the second year
- 40% Assume 40% are in the second year
- 45% % of clients have one child (assumption)
- 55% % of clients have more than one child (assumption)
- 37.55 hours = average hours per year for parents of children with no sibs (i.e., combination new and 2d year cases)
- 12.63 hours = average hours per year for parents of children with sibs (i.e., combination new and 2d year cases)
- 23.84 hours = average hours per year per client for all "typical" clients
rate: 90% of caseload is typical
- 35.84 hours = average hours per year per client for "complex" cases (i.e., 23.84 + 12 hours per complex case; See Complexity Chart)
rate: 10% of caseload is complex

25.04	hours =	average hours per yr per client for all clients (90% "typical", 10% complex)
61.33		CLIENTS PER YEAR (i.e. total hrs per yr/average hrs per yr per client for all clients; <u>static caseload</u> -- assumes all cases are open the whole year)(90% "typical", 10% complex)
98.13		TOTAL ANNUAL CASELOAD PER FULL-TIME LAWYER (i.e., clients per yr x 1.6; <u>dynamic caseload</u> -- assumes turnover rate of 60% close during year; <u>not</u> including TPRs or appeals)

ADDITIONAL CALCULATIONS:

- 29 hours = **contested TPR** (See TPR & Appeal Chart): 7% of caseload is contested TPR [104/1467]= 0.0709
2.06 = total hours per case for contested TPRs
- 18 hours = **uncontested TPR** (See TPR & Appeal Chart): 2% of caseload is uncontested TPR [26/1467]= 0.0177
0.319 = total hours per case for uncontested TPRs
- 61.5 hours = **appeals** (See TPR & Appeal Chart): 2% of caseload is appeals [23/1467]= 0.0157
0.964 = total hours per case for appeals
- 3.34 = total hours for all TPRs and appeals (to be applied for all cases)**
- 28.38** hours = average hours per year per client for all cases (including TPRs and appeals)

86.59 TOTAL ANNUAL ADJUSTED CASELOAD PER FULL-TIME PARENT LAWYER (dynamic caseload-- assumes turnover rate of 60% close during year; including time for complexity, TPR, appeals)

typical	+	complex	+	contested TPR	+	uncontested TPR	+	appeals	=
<input type="text"/>		<input type="text"/>		<input type="text"/>		<input type="text"/>		<input type="text"/>	

** Assumptions on sibling groups, time of service and rate of TPRs and appeals based on preliminary data supplied by KidsVoice, Allegheny County Bar Foundation Juvenile Court Project and Allegheny County DHS Office of Data Analysis, Research & Evaluation (DARE).



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**[J-3A&B-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: T.S., E.S., MINORS	:	Nos. 50 & 51 WAP 2017
	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 8/25/17 at Nos. 364-
APPEAL OF: T.H.-H., NATURAL MOTHER	:	365 WDA 2017, affirming the order of
	:	the Court of Common Pleas of
	:	Allegheny County entered 2/3/17 at
	:	Nos. CP-02-AP-0000208-2016 and CP-
	:	02-AP-0000209-2016
	:	
	:	ARGUED: April 10, 2018

OPINION

CHIEF JUSTICE SAYLOR

DECIDED: AUGUST 22, 2018

This appeal involves a proceeding in which parental rights were involuntarily terminated. Throughout the termination proceedings, up to and including the hearing on the termination petition, an attorney guardian *ad litem* represented the best interests of the children involved. The primary issue is whether the common pleas court erred in failing to appoint a separate attorney to represent their legal interests.

I. Background

A. In re Adoption of L.B.M.

The present appeal follows closely upon our decision in *In re Adoption of L.B.M.*, 639 Pa. 428, 161 A.3d 172 (2017). In that matter, this Court interpreted and applied Section 2313(a) of the Adoption Act. See 23 Pa.C.S. §2313(a) (relating to

representation in proceedings under the Adoption Act). Although multiple opinions were filed in *L.B.M.*, a majority of the Court agreed on several points: (a) in the context of contested termination-of-parental-rights (“TPR”) proceedings, the first sentence of Section 2313(a) requires that the common pleas court appoint an attorney to represent the child’s legal interests, *i.e.*, the child’s preferred outcome;¹ (b) where there is a conflict between the child’s legal interests and his best interests, an attorney-guardian *ad litem* (an “attorney-GAL”), who advocates for the child’s best interests, cannot simultaneously represent the child’s legal interests;² and (c) in such a circumstance, the failure to appoint a separate attorney to represent the child’s legal interests constitutes structural error, meaning it is not subject to a harmless-error analysis.

¹ That provision states:

(a) Child.—The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian *ad litem* to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

23 Pa.C.S. §2313(a).

² The difference between legal interests and best interests is summarized in a comment to a rule governing the GAL’s duties in dependency matters:

“Legal interests” denotes that an attorney is to express the child’s wishes to the court regardless of whether the attorney agrees with the child’s recommendation. “Best interests” denotes that a guardian *ad litem* is to express what the guardian *ad litem* believes is best for the child’s care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

Pa.R.J.C.P. 1154, cmt., *quoted in L.B.M.*, 639 Pa. at 431 n.2, 161 A.3d at 174 n.2.

While the lead opinion indicated that there must always be a separate attorney representing the child’s legal interests, see *L.B.M.*, 639 Pa. at 442-43, 161 A.3d at 180-81 (plurality in relevant part), that portion of the opinion represented the views of three Justices – Justices Wecht, Donohue, and Dougherty. The four Justices in a responsive posture were of the view that an attorney-GAL can fill the role required by Section 2313(a), while also advancing the child’s best interests, so long as there is no conflict between the child’s legal interests and best interests.³

In terms of disposition, *L.B.M.* vacated the TPR decree and remanded to the trial court for further proceedings. Of the five members who supported that result, the three lead Justices did so because no separate counsel had been appointed for the children involved, thereby violating the rule they favored broadly prohibiting one attorney serving both roles in any contested TPR proceeding. See *id.* at 446, 161 A.3d at 183 (plurality in relevant part). The two Justices concurring in the result supported the outcome on narrower grounds, namely, that the trial court had failed to conduct a conflict analysis to determine whether the attorney-GAL could fulfill both roles in that specific case. See *id.* at 448, 161 A.3d at 184 (Saylor, C.J., concurring). Notably, at the time of the TPR hearing in *L.B.M.*, the children were four and eight years old, and the hearing transcript reflected that the eight-year-old in particular was able to articulate his feelings and

³ See *id.* at 447-48, 161 A.3d at 184 (Saylor, C.J., concurring, joined by Todd, J.) (“[T]he propriety of permitting the same individual to serve in both capacities should be determined on a case-by-case basis, subject to the familiar and well-settled conflict of interest analysis.”); *id.* at 455, 161 A.3d at 188-89 (Baer, J., dissenting, joined by Mundy, J.) (“Section 2313(a), in my view, does not mandate the appointment of counsel distinct from the GAL Attorney serving in the same dual capacity in the dependency proceedings, absent a conflict of interest between the child’s best interests and legal interests.”); *id.* at 459, 161 A.3d at 191 (Mundy, J., dissenting, joined by Baer, J.) (concluding that, per the applicable court rules, an attorney GAL can represent the best interests and legal interests unless there is a conflict of interest).

beliefs about the case and respond rationally to the judge's questions concerning his preference as to the outcome of the TPR proceedings. See *id.* at 436, 161 A.3d at 177.

B. Factual and procedural history of this case

Turning to the present controversy, T.S. and E.S. were born to Appellant T.H.-H. ("Mother") in June 2013 and August 2014, respectively. The Allegheny County Office of Children, Youth and Families ("CYF") became familiar with Mother shortly after E.S.'s birth.

Mother admitted to using marijuana while pregnant with E.S., and she tested positive for THC (a cannabinoid) shortly after giving birth. CYF did not initially file a dependency petition, opting instead to provide services to help Mother implement her goals. However, Mother was not substantially compliant with treatment and failed to discontinue her drug use. Also, she admitted to smoking marijuana in the presence of the children, exhibited minimal parenting skills – often leaving Children in a bedroom unattended with the television "blaring," and failing to undertake basic parenting tasks such as feeding the children or changing their diapers – and did not follow through with E.S.'s medical appointments. See N.T., Feb. 3, 2017, at 8, 13-14.⁴

Beginning in January 2015, home visits were conducted by a caseworker from an independent social services agency, who helped Mother with various aspects of parenting and budgeting. On one visit, the caseworker developed concerns for the safety of the children when she observed an open oven being used to heat the residence, the presence of a cigarette lighter and a large knife where T.S. could access them, and a used condom on the floor which she believed could constitute a choking hazard. See N.T., Feb. 3, 2017, at 52-53. Although she discussed these matters with

⁴ Both children had special needs. T.S. had speech delays and severe tantrums, and E.S. had feeding problems. See *id.* at 21.

Mother, Mother downplayed their significance and generally did not appear to appreciate that they could compromise the children's safety.

In July 2015, a CYF caseworker made an unannounced visit and noticed that the home smelled of marijuana and Mother was under the influence of drugs or alcohol. Because CYF believed it could no longer ensure the safety of the children in Mother's care, it sought an emergency custody authorization and the children were removed that day. They were adjudicated dependent and placed with foster parents. For the placement and permanency review period that followed, the court appointed KidsVoice (a child-advocacy organization in Pittsburgh) to represent the children's best interests and legal interests in compliance with Section 6311 of the Juvenile Code. See 42 Pa.C.S. §6311; Pa.R.J.C.P. 1154.

After the foster care placement, Mother's court-ordered goals were, *inter alia*, to participate in drug and alcohol treatment (which included random urine screens), mental health treatment, and parenting classes, and to visit her children and maintain contact and cooperation with CYF. The court appointed Beth Bliss, Psy.D., a licensed forensic psychologist, to conduct evaluations. Dr. Bliss evaluated Mother individually and performed interactional evaluations between the children and Mother, and between the children and their foster parents.⁵

In late 2016, CYF filed a petition to terminate Mother's parental rights, which Mother contested.⁶ The court held a hearing on the petition on February 3, 2017. At the hearing, CYF was represented by Melaniesha Abernathy, Esq.; Mother was

⁵ Separately, Mother was referred to ACHIEVA due to an intellectual disability. According to the record, the ACHIEVA program in which Mother took part supports parents with an IQ score of 70 or below. See N.T., Feb. 13, 2017, at 33.

⁶ The petition also sought termination of the biological father's parental rights. His rights were terminated and he has not appealed. Only the mother's appeal is before us.

represented by Kiersten Frankowski, Esq., of the Allegheny County Bar Foundation's Juvenile Court Project; and, as reflected on the hearing transcript and the TPR docket sheet, the children were represented by Cynthia J. Moore, Esq., from KidsVoice. The orders appointing KidsVoice to represent the children in the dependency proceedings stated it was to represent their legal and best interests, and it is undisputed that this dual function carried over into the termination proceedings. Thus, the children had continuity of representation between the dependency and TPR proceedings. However, no independent counsel represented *solely* the children's legal interests in the latter proceedings.

The CYF caseworker, the ACHIEVA employee, and Dr. Bliss were among the witnesses called by CYF. According to their testimony, Mother was inconsistent or non-compliant with most of the treatment programs to which CYF referred her – including dual-diagnosis (*i.e.*, mental health and substance abuse) treatment – and had difficulty providing clean urine screens, see N.T., Feb. 3, 2017, at 10-11; she was unable to understand or manage the needs of both children simultaneously during supervised visits, including their safety needs, see *id.* at 13, 31, 36, 39, 64; see *generally id.* at 37 (reflecting the ACHIEVA worker's assessment that Mother "would need 24/7 supports if she were alone with the children"); and she only minimally complied with the court's permanency plan, see *id.* at 31. More generally, the conditions leading to the children's removal had not been remedied, nor were they likely to be within a reasonable timeframe. See, *e.g.*, *id.* at 24. In foster care, moreover, T.S.'s speech and overall behaviors "improved greatly," and E.S.'s feeding problems resolved. *Id.* at 21. The CYF caseworker expressed that it would be best for the children to remain with the foster parents and ultimately to be adopted by them. See *id.* at 24.

Dr. Bliss testified that Mother did not prioritize being a parent, as she missed numerous visits with the children because she had “other things she had to do,” *id.* at 72, and she continued to use drugs although she was aware such conduct would negatively impact the likelihood of reunification. Dr. Bliss also expressed that, whereas the children were indifferent to Mother’s presence in the visiting room and did not seem bonded with her, they appeared emotionally bonded with their foster parents. In this respect, Dr. Bliss stated that T.S. repeatedly sought attention from his foster mother, referred to the latter as “Mommy,” and showed her physical affection. Further, according to Dr. Bliss, the foster parents were effective in attending to the children’s needs, providing them with affection, and promoting developmentally appropriate skills.⁷ Dr. Bliss opined to a reasonable degree of psychological certainty that the children would not suffer any harm from not seeing Mother again, and she recommended that the current foster placement continue. *See id.* at 78-79.

Later that day, the court granted the petition, finding that CYF had established by clear and convincing evidence grounds for termination under paragraphs (2), (5), and (8) of Section 2511(a) of the Adoption Act, *see* 23 Pa.C.S. §2511(a)(2), (5), (8),⁸ and

⁷ The bond with the foster parents was corroborated by the CYF caseworker. *See id.* at 22. Still, the ACHIEVA employee did report observing affection between Mother and her children during at least some of the visits she supervised. *See id.* at 40.

⁸ That provision states, in relevant part:

(a) General rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

* * *

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and (continued...)

that termination would serve the children’s needs and welfare. See *id.* §2511(b) (providing that, in terminating parental rights, the court “shall give primary consideration to the developmental, physical and emotional needs and welfare of the child”).

While Mother’s appeal to the Superior Court was pending, this Court decided *L.B.M.* on March 28, 2017.⁹ Accordingly, in her appellate brief Mother claimed for the first time that the children should have been represented by appointed counsel separate

(...continued)

the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent

* * *

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

* * *

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

23 Pa.C.S. §2511(a)(2), (5), (8).

⁹ On May 23, 2017, we filed revised opinions in *L.B.M.* clarifying which parts of the lead opinion reflected the views of a majority of the Court. See *L.B.M.*, 639 Pa. at 432 n.1, 161 A.3d at 174 n.1. The timing of those clarifications in relation to the parties’ Superior Court filings is not material to this appeal.

from the GAL at the termination proceeding.¹⁰ Mother argued that the trial court's failure to appoint such counsel constituted structural error, thereby entitling her to a new TPR proceeding. Mother also maintained that her failure to raise the issue previously should be excused because this Court had not yet ruled in *L.B.M.* at the time of the February 3, 2017, hearing.

In a supplemental brief, the GAL argued that, under the Superior Court's interpretation of *L.B.M.* in *In re D.L.B.*, 166 A.3d 322 (Pa. Super. 2017), a guardian *ad litem* may serve as legal counsel for a child in an involuntary TPR proceeding as long as the child's legal interests and best interests are not in conflict.¹¹ The GAL asserted that no such conflict had been identified here. In response, Mother did not contend that the children's best interests and legal interests were in conflict. Rather, she argued that the *D.L.B.* panel had misapprehended *L.B.M.*, which, she argued, requires the appointment of independent legal counsel for children in every involuntary TPR proceeding.

A three-judge panel of the Superior Court affirmed in an unpublished decision. The panel observed that, regardless of Mother's suggestion that *D.L.B.* was wrongly decided, *D.L.B.* represented binding precedent which the panel was not at liberty to overrule. See *In re T.S.*, Nos. 364 & 365 WDA 2017, *slip op.* at 5, 2017 WL 3669504, at *2 (Pa. Super. Aug. 25, 2017). The court noted that, per *D.L.B.*'s analysis, *L.B.M.* does not require appointment of independent legal counsel for a child in a contested TPR proceeding unless the child's legal and best interests conflict. See *id.* (citing *D.L.B.*, 166

¹⁰ In her Rule 1925(b) statement, Mother had only challenged the trial court's ruling that that the children's needs and welfare would be best served, for purposes of Section 2511(b), by terminating her rights. See 23 Pa.C.S. §2511(b).

¹¹ *D.L.B.* was decided in mid-June 2017, after the Superior Court briefing schedule had closed. The intermediate court granted the parties' request to file supplemental briefs addressing the impact of *D.L.B.* on the present case.

A.3d at 329). The court ultimately concluded that a remand was unnecessary as Mother did not argue that the children’s legal and best interests were in conflict and, in the court’s view, the record did not indicate that any such conflict existed. See *id.*¹²

We granted further review to determine whether the common pleas court erred in failing to appoint separate counsel to represent the children’s legal interests pursuant to Section 2313(a), 23 Pa.C.S. See *In re T.S.*, Pa. , 173 A.3d 266 (2017) (*per curiam*).

II. Waiver

CYF and the GAL both maintain that Mother waived the issue of whether the common pleas court should have appointed a separate attorney to represent the children’s legal interests by waiting until her appeal to raise it.¹³ See Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”). They argue the timing of this Court’s *L.B.M.* decision is immaterial since the separate-counsel requirement is alleged to be based on Section 2313(a), which was extant long before *L.B.M.* was decided. Mother counters that failure to appoint counsel to represent a child’s legal interests at a contested TPR hearing is not subject to waiver because it constitutes structural error. See Brief for Appellant at 21.

¹² The panel separately held that the county court did not err in concluding that termination of her parental rights would best serve the children’s needs and welfare pursuant to Section 2511 of the Adoption Act. See *id.* at 8-9, 2017 WL 3669504, at *4. Mother has not challenged that aspect of the Superior Court’s decision.

¹³ The GAL filed her brief on behalf of the children inasmuch as she has served as their counsel throughout these proceedings. In light of the substantive issue in this appeal, however, and for the sake of clarity, where the GAL’s advocacy is concerned we depart from our usual custom of attributing arguments to the party. Cf. *Commonwealth v. Wright*, 621 Pa. 446, 456 & n.9, 78 A.3d 1070, 1076 & n.9 (2013) (citing cases and departing from such custom where counsel’s and the party’s positions were at odds).

Mother’s focus solely on structural error does not resolve the waiver question without further analysis (which she does not provide). First, and as noted, structural error means that no harmless-error analysis is relevant; however, it does not always imply non-waivability. *Accord Weaver v. Massachusetts*, U.S. , , 137 S. Ct. 1899, 1910 (2017); *see, e.g., Commonwealth v. Rega*, 620 Pa. 640, 657, 70 A.3d 777, 786-87 (2013) (observing that a violation of the right to a public trial “is a particular type of structural error which is waivable” (citations omitted)); *cf. Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 896, 111 S. Ct. 2631, 2648 (1991) (Scalia, J., dissenting) (positing that non-waivability is more closely aligned with jurisdictional defects than with whether an error is structural). *See generally Commonwealth v. Martin*, 607 Pa. 165, 218, 5 A.3d 177, 208–09 (2010) (Saylor, J., concurring) (surveying jurisdictions and discussing policy concerns).

Nevertheless, we conclude this particular type of alleged error is non-waivable. The statutory right under Section 2313(a) belongs to the child, not the parent. *Accord In re E.F.H.*, 751 A.2d 1186, 1189 (Pa. Super. 2000). There was no attorney representing solely the children’s legal interests who could have raised their rights in the trial court, and the children plainly could not have done so themselves. *See In re K.J.H.*, 180 A.3d 411, 413 (Pa. Super. 2018) (“Child, due to his minority and lack of representation in the orphans’ court, could not raise this issue himself.”); *cf. Pa.R.J.C.P. 1152(A)(2)* (stating minors can waive counsel in dependency cases only if the waiver is knowing, intelligent, and voluntary, and the court conducts a record colloquy). We conclude, then, that the failure of any party, including Mother, to affirmatively request separate counsel for the children cannot have constituted waiver. Accordingly, the substantive question on which we granted review is properly before the Court. We now turn to that issue.

III. Dual-role representation

When reviewing an order granting or denying termination of parental rights, we accept factual findings and credibility determinations supported by the record, and we assess whether the common pleas court abused its discretion or committed an error of law. See *In re D.C.D.*, 629 Pa. 325, 339-40, 105 A.3d 662, 670-71 (2014). We resolve all questions of law *de novo*. See *id.*

Mother has abandoned her original challenge to the county court’s exercise of its discretion, see *supra* note 12, and instead asserts that the Superior Court erred in not recognizing that *L.B.M.* required it to remand this matter to the trial court for a new termination proceeding at which the children’s legal interests would be represented by appointed counsel. She structures her advocacy in terms of rebutting what she perceives as three erroneous assumptions made by the *D.L.B.* court. See Brief for Appellant at 13.¹⁴ We address them in turn.

A. Prevailing law

First, Mother asserts *D.L.B.* wrongly assumed that counsel appointed pursuant to Section 2313(a) may represent a child’s best interests. She states that, in *L.B.M.*, the three-Justice plurality, joined by the concurrence, agreed that Section 2313(a) requires

¹⁴ A joint amicus brief supporting Mother’s position was submitted by Professor Kara R. Finck of the University of Pennsylvania Law School, together with the following organizations: Juvenile Law Center; American Civil Liberties Union of Pennsylvania; Community Justice Project; Community Legal Services, Inc.; National Association of Counsel for Children; National Coalition for a Civil Right to Counsel; and Pennsylvania Legal Aid Network (collectively, the “Amici for Reversal”).

A joint amicus brief supporting CYF and the GAL was submitted by Professor Lucy Johnston-Walsh of the Penn State Dickinson School of Law, together with the following organizations: Support Center for Child Advocates; Defender Association of Philadelphia; and Dauphin County Social Services for Children & Youth (collectively, the “Amici for Affirmance”).

that the legal interests of the child be represented, and further, that the appointment of counsel is a necessary measure to ensure such representation occurs. See Brief for Appellant at 14-17. She concludes by suggesting that a majority of the *L.B.M.* Court disapproved the concept that Section 2313(a) counsel can ever represent a child's best interests. See *id.* at 17-18.

As developed above, four Justices in *L.B.M.* agreed that, where a child's legal and best interests do not diverge in a termination proceeding, an attorney-GAL representing the child's best interests can also fulfill the role of the attorney appointed per Section 2313(a) to represent the child's legal interests. See *supra* note 3.¹⁵ This majority view of the Justices was apparent from the face of the opinions in *L.B.M.*, as the Superior Court has recognized on multiple occasions. See *D.L.B.*, 166 A.3d at 329; *In re Adoption of T.M.L.M.*, 184 A.3d 585, 588 (Pa. Super. 2018).

Furthermore, all four Justices in a responsive position indicated that, where a child is too young to express a preference, it would be appropriate for the GAL to represent the child's best and legal interests simultaneously. See *L.B.M.*, 639 Pa. at 448, 161 A.3d at 184 (Saylor, C.J., joined by Todd, J., concurring); *id.* at 461, 161 A.3d

¹⁵ The GAL highlights Justice Baer's observations that termination proceedings often arise from dependency proceedings, and continuity of representation can be beneficial. See *L.B.M.*, 639 Pa. at 454, 161 A.3d at 188 & n.6 (Baer, J., dissenting). She proffers that, where no conflict exists, requiring two attorneys to represent the child would impose unnecessary financial burdens on public agencies. See Brief for Appellees at 25; *accord* Brief for Amici for Affirmance at 22 ("[T]he Pennsylvania counties that would be asked to pay for separate Section-2313(a) lawyers are and are likely to remain in difficult financial condition with a great many critical needs vying for terribly limited resources. It is one thing to impose expense on those budgets . . . when there is a conflict; it is quite another to impose that expense when neither the law nor the facts . . . suggest such a conflict."); *cf. id.* at 17-18 (asserting that since *L.B.M.* was decided, amicus Defender Association has litigated approximately 200 TPR petitions where the court appointed separate counsel, and in virtually every case there has been no conflict between the GAL's and counsel's respective positions).

at 192 (Mundy, J., joined by Baer, J., dissenting). Although that circumstance was not before the *L.B.M.* Court, we now expressly reaffirm these legal principles in the context of the present case, as they are material to the result. See generally *Pap's A.M. v. City of Erie*, 553 Pa. 348, 357, 719 A.2d 273, 278 (1998) (explaining that a holding arises from a fragmented decision when a majority of Justices are in agreement on the legal point at issue), *rev'd on other grounds*, 529 U.S. 277, 120 S. Ct. 138 (2000). Therefore, we disagree with Mother's contention that *L.B.M.* reflects "prevailing case law of the Commonwealth" that an attorney-GAL representing the child's best interests can never satisfy the mandate embodied in the first sentence of Section 2313(a), Brief for Appellant at 17, and that *D.L.B.*'s "assumption" along these lines was incorrect.

B. Presumption for non-communicative children¹⁶

Next, Mother addresses the presumed legal interests of a child who cannot communicate information relevant to termination proceedings. She does not claim that the children in this case would have been able meaningfully to express their preferred outcome or otherwise direct counsel's representation of their legal interests. Rather, she agrees the children would not have been able to do so and states that, therefore, "the question is what presumption should be made about the child's legal interest, *i.e.*, their preferred outcome, when the child is nonverbal or unable to satisfactorily verbalize their preferred outcome." Brief for Appellant at 23. Mother contends that the Superior Court assumed there can be no conflict of interest between the child's best and legal interests in such circumstances. She argues that such assumption was in error. Instead, she maintains, the child should be presumed as a matter of law to oppose

¹⁶ We have reversed the order of Mother's second and third arguments for ease of discussion.

termination – thereby creating a conflict whenever the GAL believes that termination would be in the child’s best interests.

The parties agree that, due to the children’s very young age (two and three years old), they cannot have formed a subjective, articulable preference to be advanced by counsel during the termination proceedings, and this is entirely consistent with the record.¹⁷ It follows that the legal interests to be represented by Section 2313(a) counsel – which, again, are synonymous with the child’s preference, see *In re L.B.M.*, 639 Pa. at 432, 161 A.3d at 174 – were not ascertainable during the termination proceedings. The question then becomes whether the requirement of Section 2313(a), that counsel be appointed to “represent the child” in a contested TPR proceeding, can be deemed to have been fulfilled by an attorney-GAL who has already been appointed and is present in those proceedings, advocating for the child’s best interests (which may be denial of the TPR petition, depending on the facts of the case).

The statute does not provide a clear answer to this question, as it does not expressly contemplate the circumstance that the child’s wishes cannot be ascertained. We therefore look for guidance to the analogous provision of the Juvenile Act, which does contemplate that situation. Section 6311 of the Juvenile Act initially states that the guardian *ad litem* is to “represent the legal interests and the best interests of the child.” 42 Pa.C.S. §6311(a). It then specifies that the guardian *ad litem* must “[a]dvice the court of the child’s wishes *to the extent that they can be ascertained* and present to the court whatever evidence exists to support the child’s wishes.” 42 Pa.C.S. §6311(b)(9)

¹⁷ Conversely, Pennsylvania’s Rules of Professional Conduct refer to “children as young as five or six years of age . . . having opinions which are entitled to weight in legal proceedings concerning their custody.” Pa.R.P.C. 1.14, Explanatory Comment 1.

(emphasis added).¹⁸ By straightforward implication, if the wishes of the child cannot be ascertained, the GAL has no duty to “advise the court” of such wishes. For purposes of the proceeding, such wishes do not exist. That is not merely a legal fiction. As explained above, it comports with reality to the extent any participant in the proceedings can discern it. Moreover, and contrary to Mother’s argument, it would be tenuous to simply presume a particular preference by the child as a matter of law.

Such a circumstance does not negate the mandate of Section 2313(a) that counsel be appointed to “represent the child” in contested TPR proceedings. It does, however, bear on the question of whether a conflict arises if the trial court allows the attorney-GAL to fulfill that mandate. As a matter of sound logic, there can be no conflict between an attorney’s duty to advance a subjective preference on the child’s part which is incapable of ascertainment, and an attorney’s concurrent obligation to advocate for the child’s best interests as she understands them to be. Thus, we conclude that where an attorney-GAL is present in such proceedings undertaking the latter task (advocating for the child’s best interests), Section 2313(a) does not require the appointment of another lawyer to fulfill the former (advancing the child’s unknowable preference).¹⁹

¹⁸ The third sentence of paragraph (b)(9) – which provides that no conflict of interest arises from a difference between the child’s wishes and the GAL’s needs-and-safety recommendation as to the child’s placement and services – has been suspended insofar as it “is inconsistent with [Juvenile Court] Rules 1151 and 1154, which allows for appointment of separate legal counsel and a [GAL] when the [GAL] determines there is a conflict of interest between the child’s legal interest and best interest.” Pa.R.J.C.P. 1800(3); see *L.B.M.*, 639 Pa. at 433 n.4, 161 A.3d at 175 n.4.

¹⁹ Mother observes there was no order appointing the dependency GAL as GAL for the termination proceedings. See Reply Brief for Appellant at 1. However, she concedes that Attorney Moore “verbally” entered her appearance as GAL at the time of the hearing. Brief for Appellant at 20. She has also explained that, as a matter of local custom in Allegheny County, the GAL appointed for dependency proceedings “automatically” represents the same dependent child in any follow-on involuntary TPR (continued...)

Mother disagrees with the above based on her contention that, in the case of a pre-verbal child, the law should indeed presume a preference on behalf of the child, and that it should presume the child opposes termination. Mother rests her argument in this regard on certain passages from the Supreme Court’s decision in *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982). See Brief for Appellant at 23-25.

In *Santosky*, the Court reviewed a New York State statute which bifurcated termination proceedings into two phases: a fact-finding phase designed to ascertain whether the parent was unfit – or, in the words of the statute, the child was “permanently neglected” – and a dispositional phase to determine what placement would serve the child’s best interests. See *Santosky*, 455 U.S. at 748, 102 S. Ct. at 1392. The second phase would only be reached if the parent was found to be unfit at the conclusion of the first phase. Under the New York enactment, the party petitioning for termination could prevail in the fact-finding phase through proof of parental unfitness by a fair preponderance of the evidence. The question before the Court was whether that relatively low evidentiary standard satisfied due process. The Court held that it did not and that, in view of the nature of a parent’s right to her natural children, proof by at least clear and convincing evidence was constitutionally required. See *id.* at 769, 102 S. Ct. at 1403. Mother notes that, in rejecting the preponderance-of-the-evidence

(...continued)

proceedings. *In re T.S.*, Nos. 364 & 365 WDA 2017 (Pa. Super.), Appellant’s Reply to Supplemental Argument at 5 n.1 (filed July 20, 2017).

It would be a better practice for the court to place an order on the record formalizing the GAL’s role for termination purposes. See *L.B.M.*, 639 Pa. at 454, 161 A.3d at 188 (Baer, J., dissenting). Nevertheless, we are disinclined to elevate form over substance. See *id.*; cf. *Commonwealth v. D’Amato*, 579 Pa. 490, 517-18, 856 A.2d 806, 822 (2004) (holding that, where a lawyer who had not entered his appearance pursuant to the criminal procedural rules effectively represented a defendant during a critical stage of trial, the technical defect did not deprive the defendant of his right to counsel).

standard, *Santosky* indicated that “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship,” and that in this phase the state cannot simply assume that a child and his parents are adversaries. *Id.* at 760, 102 S. Ct. at 1398.

However, it is important to recognize the context in which these statements were made. The Supreme Court’s entire discussion related to how the risk of erroneous fact-finding should be allocated *as between the state and the parent*. The Court first recognized that, under due process, the function of a standard of proof is to allocate the risk of error between competing parties through consideration of the comparative loss each would suffer as a result of erroneous fact-finding. The Court recited the well-known concept that the preponderance-of-the-evidence standard applies in civil disputes over money damages because society has only a minimal interest in the outcome and, in fairness, the litigants should share the risk of error equally. On the other hand, the majority observed, when the government initiates criminal proceedings to deprive an individual of life or liberty, the beyond-a-reasonable-doubt standard obtains because of the severe consequences to the individual and the substantial societal loss occasioned when an innocent person is imprisoned. *See id.* at 755-58, 102 S. Ct. at 1395-97; *see also Commonwealth v. Maldonado*, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (discussing the function of the various standards of proof in similar terms). Turning to a state-initiated petition under New York law, the Court concluded that an erroneous finding of permanent neglect would result in a more significant loss than an erroneous finding of parental fitness. *See Santosky*, 455 U.S. at 761, 102 S. Ct. at 1399. Given this “disparity of consequence,” *id.*, the Court concluded that clear and convincing evidence of parental unfitness was constitutionally necessary.

When viewed in this context, it is evident that the Court’s expressions about the child’s interest were made solely to emphasize that the proceeding is a contest between the state and the parent, and not one in which equal but opposite interests of the parent and child are pitted against each other. See *id.* at 759, 102 S. Ct. at 1398 (explaining that the fact-finding phase under New York law is not intended to “balance the child’s interest in a normal family home against the parents’ interest in raising the child,” but instead, it “pits the State directly against the parents”). Along these lines, the Court clarified that, although the child and his foster parents may be “deeply interested in the outcome of the contest,” at the fact-finding phase “the focus emphatically is not on them.” *Id.*; see also *id.* at 761, 102 S. Ct. at 1399 (“Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding *between these two parties.*” (emphasis added)). That being the case, as long as trial courts require the state to prove parental unfitness – or, under Pennsylvania’s law, grounds for termination, see 23 Pa.C.S. §2511(a) – by at least clear and convincing evidence, the child’s status as a non-adversary has been folded into the analysis and the Due Process Clause is satisfied.

Notably, the question of what a very young, pre-verbal child’s legal interests should be presumed to be within proceedings that satisfy due process was not before the *Santosky* Court.²⁰ Further, the Court did not indicate that such a child is deemed to have a constitutionally protected interest in remaining with his natural parents, and its emphasis that the proceeding only involves the parents’ and the state’s respective

²⁰ Pennsylvania’s proceedings satisfy due process as set forth in *Santosky*, as the grounds for termination must be proved by clear and convincing evidence. See *In re T.R.*, 502 Pa. 165, 166-68, 465 A.2d 642, 642-43 (1983); *In re T.S.M.*, 620 Pa. 602, 628, 71 A.3d 251, 267 (2013).

interests contradicts any such precept. If this were not so, moreover, it would call into question whether due process requires proof by clear and convincing evidence in circumstances where an older, verbal child directs his attorney to advocate in favor of termination. *Santosky* cannot reasonably be understood to suggest that due process would permit the state to prove its case by a less exacting evidentiary standard in that situation – again, because the Supreme Court’s focus was not on the child’s legal interests, but on those of the parent.

In light of the above, when the passages of *Santosky* on which Mother relies are understood in their context, they do not undermine our conclusion that it would be inadvisable for us to impose a legal presumption as to the preferred outcome of a child who is too young to formulate a subjective, articulable preference.

C. Presumption that harmless-error analysis can be used

Finally, Mother maintains *D.L.B.* wrongly assumed that a post-hoc appellate conflict analysis can be performed to assess whether the failure to appoint Section 2313(a) counsel was error. She notes that failure to appoint counsel as required constitutes structural error and posits that a remand for the appointment of counsel is always necessary due to the nature of the child’s rights, as the intermediate court previously recognized in *In re Adoption of G.K.T.*, 75 A.3d 521 (Pa. Super. 2013). See Brief for Appellant at 20.

To the extent Mother indicates that structural error is not subject to harmless error analysis, by definition she is correct. However, structural error cannot arise unless the trial court erred. While a majority of the *L.B.M.* Court agreed that the error under review was structural, the children in that matter were able to express their thoughts concerning whether they wanted to stay with their natural parent. Here, by contrast, and as developed above, the children were too young to have had any such capability.

We have determined an attorney-GAL who is present and representing a child's best interests can properly fulfill the role of Section 2313(a) counsel where, as here, the child at issue is too young to be able to express a preference as to the outcome of the proceedings. Thus, the trial court did not err in allowing KidsVoice, the children's guardian *ad litem*, to act as the sole representative for T.S. and E.S. Moreover, *G.K.T.* is distinguishable in that, although the child in that case was very young and pre-verbal, no attorney represented the child at all.

IV. Conclusion

In sum, we hold that a child's statutory right to appointed counsel under Section 2313(a) of the Adoption Act is not subject to waiver. We additionally reaffirm certain principles agreed upon by a majority of Justices in *L.B.M.*, namely, that during contested termination-of-parental-rights proceedings, where there is no conflict between a child's legal and best interests, an attorney-guardian *ad litem* representing the child's best interests can also represent the child's legal interests. As illustrated by the present dispute, moreover, if the preferred outcome of a child is incapable of ascertainment because the child is very young and pre-verbal, there can be no conflict between the child's legal interests and his or her best interests; as such, the mandate of Section 2313(a) of the Adoption Act that counsel be appointed "to represent the child," 23 Pa.C.S. §2313(a), is satisfied where the court has appointed an attorney-guardian *ad litem* who represents the child's best interests during such proceedings.

For the reasons given, we affirm the order of the Superior Court.

Justices Baer, Todd and Mundy join the opinion.

Justice Dougherty joins Parts I and II of the opinion, as well as the mandate, and files a concurring opinion.

Justice Donohue files a concurring and dissenting opinion.

Justice Wecht files a dissenting opinion.