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The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases

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I. INTRODUCTION

AT LEAST SINCE THE SUPREME COURT'S DECISION in In re Gault,¹ the providing of independent counsel to juveniles who are parties to judicial or quasi-judicial proceedings affecting their liberty has been a subject of great concern and interest to the bar, courts, legislatures and service-delivery systems. Only relatively recently, however, has the focus turned to the right to counsel of juveniles who are subjects of essentially civil processes affecting their custody or quality of life.²

This article treats the issues of whether a child who is the subject of a report of suspected abuse under the Child Protective Services Law of Pennsylvania³ is entitled to independent counsel and, if so, the point in the process that this entitlement attaches, the

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² These civil procedures include, for example, hearings to determine custody and involuntary civil commitment hearings to determine mental competency. See notes 7–32 and accompanying text infra.

³ PA. STAT. ANN. tit. 11, §§ 2201–2224 (Purdon Cum. Supp. 1977-1978). The Child Protective Services Law was enacted several years ago, Act of Nov. 26, 1975, P.L. 438, to encourage more complete reporting of child abuse and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate.

PA. STAT. ANN. tit. 11, § 2202 (Purdon Cum. Supp. 1977-1978). This law defines an "abused child" as a child under 18 years of age who exhibits evidence of serious physical or mental injury not explained by the available medical history as being accidental, sexual abuse, or serious physical neglect, if the injury, abuse or neglect has been caused by the acts or omissions of the child's parents or by a person responsible for the child's welfare . . . .

Id. § 2203. The Child Protective Services Law is administered on the state level by the Department of Public Welfare, which keeps records of all child abuse complaints. Id. § 2214. On the county level, the public child welfare agencies establish within themselves "child protective services" to carry out the responsibility of receiving and investigating reports of suspected child abuse. Id. § 2216(a). The child protective services are authorized to purchase the services of any appropriate public or private agency. Id. § 2216(b). See also notes 9 & 21 infra.
adequacy of the statutory guardian ad litem system as a means of providing counsel and, finally, the role of the counsel representing the abused child.

II. THE RIGHT OF AN ABUSED CHILD TO COUNSEL

The issues of whether a child who is the subject of a report of suspected abuse must be provided independent counsel and, if so, at what point in the procedure must counsel be provided have not been squarely met to date by any court in Pennsylvania. Nevertheless, various recent Pennsylvania court decisions in related areas, the unmistakable trend of federal and state court decisions in other jurisdictions, and the apparent intent of the Pennsylvania legislature in the construction of the Child Protective Services Law leave little doubt that an abused child in Pennsylvania has a right to be represented by independent counsel. The time when that right attaches, however, remains unclear.

A. The Existence of the Right

A number of Pennsylvania cases have firmly established that a juvenile who is the subject of custody proceedings in the commonwealth is entitled to representation by counsel at the custody hearing. In Stapleton v. Dauphin County Child Care Service, an action was brought under the Juvenile Act by foster parents for a determination as to the custody of a child whom the county Child Care Service sought to return to the natural parents. Section 20 of the Juvenile Act provides that counsel must be provided to a juvenile at all stages of any proceeding under that statute; this right

4. See text accompanying notes 7–21 infra.
5. See, e.g., In re Gault, 387 U.S. 1 (1967); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078 (D. Wis. 1972); Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976); notes 24–32 and accompanying text infra.
7. See text accompanying notes 8–21 infra.
can be waived by an affirmative act of a parent, guardian or custodian only when their interests are not in conflict with the interests of the child. In a well-reasoned opinion, the Stapleton court noted that the juvenile's right to counsel was not affected or limited by the fact that he may be the subject of, as opposed to a party to, the proceeding. Judge Edmund B. Spaeth, writing for the court, stated:

To say that the child is merely the subject of a proceeding, not a "party" to it, would be to return to the child-as-chattel mentality . . . . [The child] is just as much a party to this case, which will determine his future, as he would be if . . . the proceeding were a delinquency proceeding.

Now can anyone waive [his] right to counsel. The purpose of the hearing will be to determine what is in his best interests. To confer power to waive counsel, whether on the [parents], the [foster parents], or the Child-Care Service, would be to prejudge the case, since it would amount to a determination that the party's interests were in accord with [the child's] best interests.

The outstanding significance of the Stapleton case on the issue of the right to counsel of an allegedly abused child is the recognition by the court of the child as an independent human being with the right to articulate his own interests in matters affecting his custody and the quality of his life. According to Judge Spaeth:

The basic error in the argument made in behalf of the claim of the Society for the custody of the child because of the Society's "rights" under the [placement] contract . . . is that the child is treated as a chattel without any rights in respect to his own happiness and physical well being. That a child cannot be made the subject of a contract with the same force and effect as if it were a mere chattel has long been established law.
The holding of Stapleton was followed in two subsequent Juvenile Act custody cases. In the case of In re Clouse, the court, citing Stapleton, stated: "In a child custody case, the hearing judge receives evidence from all interested parties, and the child should be represented by counsel, for the child's interests may be distinct from any other party's." 16

Similarly, in In re LaRue the court again cited Stapleton, stating that in such proceedings "evidence should be received from all interested parties, and the child should be represented by counsel, for its interests may be distinct from any other party's." 17 The LaRue court, while dealing specifically with section 20 of the Juvenile Act, spoke in more general constitutional terms, clearly recognizing that, not only may the interests of a parent and child conflict, but also that the state's interest in preserving the integral family unit and the child's interest in the quality and conditions of his life can be at odds:

Parents may not dispose of their children at will. The right to have and raise children is coupled with a "high duty." . . . Too often this duty is ignored. Instead of a shelter where love and security may be found, the family becomes a Hell. No one who has seen what parents sometimes do to children will think this language too strong. 20

The custody cases reviewed above reinforce the right to counsel for juveniles who are "subjects" of proceedings under the Juvenile Act. However, the Child Protective Services Law which covers

19. For the text of § 20, see note 12 supra.
21. See notes 9-20 and accompanying text supra. The Juvenile Act also contains a procedure for "deprived" children. The definition of "deprived child" is contained in § 2(4):

"Deprived child" means a child who: (i) is without proper parental care of control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals; or (ii) has been placed for care or adoption in violation of law; or (iii) has been abandoned by his parents, guardian, or other custodian; or (iv) is without a parent,
abuse cases contains no provision parallel to section 20 of the Juvenile Act. Nevertheless, an abused child's right to counsel can be inferred from federal cases in analogous noncriminal areas that have imposed a right to counsel whenever a custodial change or a deprivation of liberty was threatened.

In *Bartley v. Kremens*, a federal class action was brought on behalf of children under the age of nineteen who had been or could be committed to mental health facilities pursuant to Pennsylvania's guardian, or legal custodian; or (v) while subject to compulsory school attendance is habitually and without justification truant from school.


Once a child has been found to be "deprived," the court has wide powers to make remedial orders. Section 24 of the act states:

Disposition of deprived child:

(a) If the child is found to be a deprived child the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:

1. Permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.

2. Subject to conditions and limitations as the court prescribes transfer temporary legal custody to any of the following: (i) any individual in or outside of Pennsylvania who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child; (ii) an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child or (iii) a public agency authorized by law to receive and provide care for the child.

3. Without making any of the foregoing orders, transfer custody of the child to the juvenile court or another state if authorized by and in accordance with Section 32.

(b) Unless a child found to be deprived is found also to be delinquent, he shall not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children.


Since the evidence in many cases may be insufficient to prove abuse but sufficient to establish deprivation, sound practice in Pennsylvania is to bring a petition under both the Juvenile Act and Child Protective Services Law. Doing so also provides the benefit of the right to counsel requirement of the Juvenile Act. See id. § 50-317; note 3 supra.

22. PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Cum. Supp. 1977-1978). See note 3 supra. The most analogous provision of the Child Protective Services Law to § 20 of the Juvenile Act (see note 12 supra) is the former law's guardian ad litem provision, PA. STAT. ANN. tit. 11, § 2223 (Purdon Cum. Supp. 1977-1978). See note 92 infra. For reasons developed later in this article, it is the opinion of this author that providing the abused child with a guardian ad litem does not satisfy that child's constitutional right to counsel. See notes 112-31 and accompanying text infra.


24. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977). The Supreme Court vacated and remanded because the laws found unconstitutional had been repealed, so that the action was moot, and because the Court felt that the passage of time and change of law rendered the continued validity of the plaintiffs' "class" dubious. 431 U.S. at 133. See text accompanying note 25 infra. This subsequent disposition did not in any way detract from the finding of the right to counsel.
Among the challenges was the assertion that a probable cause hearing must be held within seventy-two hours from the date of the initial detention and that counsel must be provided at that time. In responding to the argument advanced by the commonwealth that assistance of counsel would transform institutionalization proceedings into adversarial proceedings — thereby delaying the treatment of the subject and increasing the danger of trauma — the court stated:

Notice and the opportunity to be heard may be of little value without the assistance of counsel. . . . A child whose liberty is in question "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." . . . As the right to counsel applies to criminal cases, so it must apply during all significant stages of the commitment process, and plaintiffs must be informed of both their right to counsel and . . . to appointment of free counsel.

In another class action contesting the validity of civil commitment procedures which did not provide for adversary counsel, a three-judge federal district court panel in Wisconsin clearly found, in Lessard v. Schmidt, that representation by a true advocate is a fundamental right of any person subject to a restriction of liberty and that a person detained on grounds of mental illness had a right to counsel, and to appointed counsel if necessary. In reaching this conclusion, the court relied heavily on Heryford v. Parker, in which the chief judge of the Tenth Circuit compared the situation of a mentally deficient individual to that of a juvenile in a delinquency procedure and stated:

[Like Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the

26. 402 F. Supp. at 1039, 1042 & n.5.
27. Id. at 1050.
30. 349 F. Supp. at 1097. The Lessard court also held that the guardian ad litem provision in the Wisconsin statute at issue did not satisfy this right to counsel. 349 F. Supp. at 1099. For a further discussion of the adequacy of the guardian ad litem as counsel, see notes 112-31 and accompanying text infra.
31. 396 F.2d 393 (10th Cir. 1968). See 349 F. Supp. at 1097.
reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent — which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that a subject of an involuntary commitment proceeding is afforded the opportunity to . . . legal counsel at every step of the proceedings . . . .

The framers of the Model Child Abuse and Reporting Law also recognized the right of an abused child to counsel and specifically provided as follows:

Children subject to any judicial proceeding regarding child abuse or neglect shall be entitled to legal counsel appointed by the Court at public expense. Counsel for the child shall in no case be the same as counsel for the alleged abuser or any governmental or social agency involved.

Whether it is recognized that a child who is the subject of an abuse proceeding is entitled to the benefits of independent counsel, such a need is clear. In any action to declare a child deprived or abused, a conflict necessarily ensues between the rights of the child and the parent or custodian. This conflict most often is resolved only through judicial proceedings. Under these circumstances, "[t]he State becomes both arbiter and party."

In child abuse or deprivation proceedings, the state and the parents frequently are each represented by counsel. Under the

32. 396 F.2d at 396 (emphasis added).
34. Id.
doctrine of parens patriae, the state, historically, was charged with protecting the interest of the child.\textsuperscript{39} Yet, in abuse cases, as in other juvenile proceedings, the state is also an interested party. As one writer states:

In theory, the State should represent the best interests of the child. It is possible, however, that the State may lose sight of the fact that the child’s interests may be best served by rehabilitating the parents in keeping the family intact.

\ldots

The parties to the proceeding, however, are in opposition: the social workers seek removal of the child; the parents are fighting to retain custody, the helpless child is caught in the middle. Thus, there appears to be a need that some consideration be given to the adversary nature of any such proceeding.\textsuperscript{40}

Certainly, the attorney who represents the parents in a child abuse proceeding has, as his primary obligation to his clients, the duty to seek a finding most satisfactory to the parents and this translates itself most often into a position that “no abuse” has occurred.\textsuperscript{41} The stigma attached to a parent as a “child abuser” is one which the advocate must seek to prevent in his client’s best interests — despite the consequences to the child.\textsuperscript{42} The seriousness of being labeled a child abuser was recognized by Judge Spaeth in his separate opinion in the case of \textit{In re Sharpe}:\textsuperscript{43}

It is therefore apparent that by its finding that James is an abused child the lower court has done appellant great damage. Many would characterize a child abuser as one of the most despicable and unworthy persons in the community, others, as one of the most pitiful. It is reasonable to suppose that the reputation of anyone labeled by a court as a child abuser has been destroyed. Not only has appellant been so labeled, but she will be so labeled for 15 more years. In addition to destroying appellant’s reputation, the label of child abuser may have a decisive effect in subsequent legal proceedings relating to her


\textsuperscript{41} See generally Paulsen, supra note 38, at 178.

\textsuperscript{42} See generally id.

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child, not to mention the effect it may have on the relationship
between her and her child when he is old enough to understand
what a child abuser is.\textsuperscript{44}

Given the nature of a child abuse proceeding, it is obvious,
therefore, that the parents’ position is adverse to that of the child,
despite what natural love and affection the parent may possess for
the child.

Although not as obvious, the state’s position, as represented by
the Department of Public Welfare and the county child protective
services — the administrative unit in the Child Protective Services
Law\textsuperscript{45} — often collides with the child’s individual interest. The
representatives of the state are charged with the responsibility of
advocating the state’s interest, which is, at best, what the state
deems will ensure the child’s well-being\textsuperscript{46} in light of the stated
legislative mandate in the Pennsylvania Child Protective Services
Law “to preserve and stabilize family life wherever appropriate.”\textsuperscript{47}
Consequently, in all close cases, the county child protective service
invariably advocates the return to, or the maintaining of a child in
his own home. This is despite the fact that the home, in the vast
majority of child abuse cases nationwide, has been the source of the
abuse.\textsuperscript{48} The child protective services thus often cannot seek a result
that is in the best interests of the child while also serving the state’s
interest in preserving and stabilizing families.

Just as counsel for the parents must pursue the independent
interests of his client,\textsuperscript{49} so too, the attorney representing the state is
bound to serve his client’s interest.\textsuperscript{50} In addition, the state’s interests
or problems may have an impact upon the recommendations made
by a child protective service to the detriment of the child.\textsuperscript{51}
Insufficient funding may result in inadequate psychiatric, diagno-
sic and treatment programming, lack of sufficient staff to prepare
cases properly and fewer contracts with service agencies. These
factors may be far more responsible for the recommendations made
in a particular case than the special needs of the child.\textsuperscript{52} Because of

\textsuperscript{44} Id. at \textsuperscript{374 A.2d at 1329 (Spaeth, J., concurring in part and dissenting in
part).}
\textsuperscript{45} See note 3 supra.
\textsuperscript{47} Id.
\textsuperscript{48} See Gil, Incidence of Child Abuse and Demographic Characteristics of
Persons Involved in THE BATTERED CHILD, supra note 18, at 33 & Table 16.
\textsuperscript{49} See notes 41 & 42 and accompanying text supra.
\textsuperscript{50} See Skoler, Counsel in Juvenile Court Proceedings — A Total Criminal Justice
\textsuperscript{51} Id.
\textsuperscript{52} See Fraser, supra note 35, at 32.
these potential conflicts with both parents and the state, independent counsel is needed to represent the child if he is to be guaranteed an advocate for his interests and his interests alone.53

In part, the recognition that juvenile subjects of judicial or quasi-judicial proceedings affecting their custody and the quality of their lives are entitled to independent counsel is a product of the more general recognition that the child is an individual;54 not merely a product of a marriage or a chattel, subject to the unrestricted will of the parents, or the unsolicited protection of the state.55 Once it is recognized that a child is not the property of either the parents or the state but is an individual with personal rights, the question really becomes who is going to speak for the child in a proceeding which will affect or determine his future life?56

The evolutionary process beginning with In re Gault57 and continuing through the federal cases discussed58 has developed the clear principle that any juvenile who is the subject of any proceeding which may affect his custody or quality of life is constitutionally entitled to independent counsel, regardless of the particular nature of the proceeding.59 Applying this mandate to children in Pennsylvania who are subjects of reports of suspected abuse pursuant to the Child Protective Services Law raises extremely difficult questions, not the least of which is when that right should attach.

B. When The Right Accrues

Both the Lessard60 and Heryford61 courts emphasized the importance of the assistance of counsel from the inception of

56. See Coyne, supra note 35 at 193, 208-10.
57. 387 U.S. 1 (1967).
58. See notes 24-32 and accompanying text supra.
59. Id. See authorities cited note 35 supra.
60. 349 F. Supp. 1078 (D. Wis. 1972). For a discussion of Lessard, see text accompanying notes 29 & 30 supra.
61. 396 F.2d 393 (10th Cir. 1968). For a discussion of Heryford, see text accompanying notes 31 & 32 supra.
proceedings brought against the individual in which a deprivation of liberty is possible. The question arose in Lessard because the subject of the proceedings had retained counsel prior to the commencement of judicial hearings on the commitment, but after interviews with psychiatrists upon whose evaluations decisions affecting Lessard would be based. In dealing with the time at which the right adheres, the court stated:

We agree that the importance of the interests involved make imperative the assistance of counsel as soon after proceedings are begun as is realistically feasible. Certainly the detained individual must have counsel at the preliminary hearing on detention, with time enough before that hearing to prepare any initial defenses which may be available. Otherwise the right to representation by counsel may be a formality [and a] grudging gesture to a ritualistic requirement.

The Lessard court also found that such counsel must necessarily have access to any and all reports, psychiatric or otherwise, which would be introduced at the hearing on commitment.

In the case of In re Barnard, the appellant challenged an order of the District of Columbia federal district court that mandated his confinement as an emergency involuntary patient. Pursuant to a hearing requested and granted under the applicable statute, the court below had found that the certificate of the admitting psychiatrist and the application for emergency hospitalization formed an adequate basis for detaining the appellant who had been represented by counsel at that proceeding. In dealing with the challenge, the District of Columbia Circuit noted that the fourth amendment to the United States Constitution provides “that every person shall be free from seizure unless supported by probable cause.” The court interpreted this to mean that one need not be arrested in order to have the fourth amendment protections

62. The Lessard court noted that the inception of proceedings in mental health commitments may be by complaint. 349 F. Supp. at 1099–1100 & n.29. The Heryford court stated that effective assistance of counsel must be provided at all significant stages including judicial proceedings and any other official proceedings affecting liberty. 386 F.2d at 389 & n.5.

63. 349 F. Supp. at 1081.
65. 349 F. Supp. at 1099–1100.
66. 455 F.2d 1370 (D.C. Cir. 1971).
67. Id. at 1372.
68. Id. at 1372–73, citing D.C. Code § 21–525 (1967).
69. 455 F.2d at 1373.
70. Id.
applied. Indeed, the court noted that the purpose of the fourth amendment "was and is to guarantee that no person will be deprived of his freedom without due process of law." In the course of its decision, the court observed that the District of Columbia Code provided for representation of counsel in such proceedings. The court additionally found that there was a constitutional right to counsel, not premised in any way on the statute, stating:

We think there is a constitutional right to counsel at this hearing. The judge in his . . . order should appoint the Public Defender Service to represent the patient, at least until retained counsel notes his appearance, and a copy of the order should be served on the patient as well as the Service. By this procedure a hearing can be quickly requested and concluded in an appropriate case and thus many persons may be spared unnecessary days in the hospital.

Thus, Barnard, like Lessard and Heryford, requires that counsel be appointed at the earliest feasible stage of the proceeding in which a deprivation of liberty is possible. The Barnard court grounded this conclusion squarely on the Constitution, i.e., the fourth amendment's protections against unreasonable seizures.

Similarly, in Dixon v. Attorney General of Commonwealth of Pennsylvania, a federal district court in Pennsylvania entered an order requiring that counsel must be appointed at the initiation of involuntary civil commitment proceedings involving the plaintiff class stating: "The subject thereof shall be informed of his right to counsel and an attorney shall be appointed to represent him unless he can afford to retain an attorney himself."

Finally, in Lynch v. Baxley, where a class action was brought in a federal district court in Alabama on behalf of persons who were or might be involuntarily committed in a civil proceeding, the
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Statutes authorizing such commitment were challenged as unconstitutional on their face. In dealing with the question of the right to counsel, Chief Judge Frank W. Johnson, speaking for the court stated:

At the very least . . . due process does require that the hearing be preceded by adequate notice informing the person (or his counsel) of the factual grounds upon which the proposed commitment is predicated and the reasons for the necessity of confinement; that the person be represented by counsel, appointed if necessary . . . .

In explicating its decision, the Lynch court further noted that:

The subject of an involuntary civil commitment proceeding has the right to the effective assistance of counsel at all significant stages of the commitment process. . . . Further, he has the right to be advised of his right to counsel, . . . and to the appointment of counsel if indigent. . . . Counsel must be made available far enough in advance of the final commitment hearing to ensure adequate opportunity for preparation . . . .

The right to counsel is a right to representative counsel occupying a traditional adversarial role. Where state law requires or permits the appointment of a guardian ad litem, such appointment shall be deemed to satisfy the constitutional right to counsel if, but only if, the appointed guardian is a licensed attorney and occupies a truly adversary position.

The “significant stages” of the process were defined by the court to mean “all judicial proceedings and any other official proceedings at which a decision is, or can be, made which may result in a detrimental change in the conditions of the subject’s liberty.” Thus, Lynch confirms that the requirement of the appointment of counsel as close to the inception of any proceedings as reasonably possible should extend to any state action in which, as one court observed, “a citizen can be deprived of liberty even when the state’s purpose is benign.”

As the foregoing cases demonstrate, it is settled that the subject — juvenile or adult — of a state proceeding which may affect his

80. Id. at 385.
81. Id. at 388.
82. Id. at 389 (citations and footnotes omitted) (emphasis added).
83. Id. at 389 n.5.
custody or the quality of his life, is entitled by the federal constitution to independent counsel. Awareness in Pennsylvania of this constitutional right is manifested in section 20 of the Juvenile Act which provides for representation by, and if necessary, appointment of counsel and in the expansive interpretation this law has been given in the courts.

The more complex and timely issue, however, is when the subject's right to the effective assistance of counsel must be satisfied in the course of a child abuse proceeding. When is "as soon as possible after proceedings are begun as are realistically feasible?" Or what are the earliest "significant stage[s] of the . . . process . . . at which a decision is, or can be, made which may result in a detrimental change in the conditions of the subject's liberty?"

The stages of a child abuse proceeding under the Child Protective Services Law are: Stage 1) from the filing of the report of suspected abuse to the completion of the investigation; Stage 2)
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from the completion of the investigation and a finding that the report is "indicated" or "unfounded" through the attempts at voluntary adjustment to the filing of a petition with the court; and Stage 3) all court proceedings.

Section 23 of the statute provides for the appointment of a guardian ad litem, who must be an attorney, upon the initiation of a proceeding arising out of a child abuse. This has generally been accepted as meaning when a petition has been filed with the court seeking an adjudication of abuse and remedial order, or "Stage 3." Such a construction is warranted as consistent with the legislative intent.

To delay the appointment of counsel until "Stage 3" is, however, far too late to pass constitutional muster. It is neither the first significant stage of the proceeding nor as soon as realistically feasible. In Philadelphia, for instance, less than 15% of all reported

made no such determination within the time prescribed, the report is automatically considered "unfounded" and all records expunged. PA. STAT. ANN. tit. 11, § 2214(k) (Purdon Cum. Supp. 1977-1978). See note 95 infra.

Section 3 of the Child Protective Services Law defines an "unfounded" report as any report which is neither "founded" nor "indicated." An "indicated report" is a report of suspected abuse which, after investigation, appears to the child protective service agency to be based on "substantial evidence" that "abuse exists." A "founded report" is any report upon which there is any judicial adjudication based upon a finding of abuse. PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978).


(a) The court, when a proceeding has been initiated arising out of child abuse, shall appoint a guardian ad litem for the child. The guardian ad litem shall be an attorney-at-law. The guardian ad litem shall be given access to all reports... of examination of the child's parents or other custodian pursuant to this act. The guardian ad litem shall be charged with the representation of the child's best interests at every stage of the proceeding and shall make such further investigation necessary to ascertain the facts, interview witnesses, examine and cross-examine witnesses, make recommendations to the court and participate further in the proceedings to the degree appropriate for adequately representing the child.

(b) The court shall have the duty, upon consideration of the petition of any attorney, for the child, to order a local child-protective service or other agency to establish and/or implement, fully and promptly, appropriate services, treatment, and plans for a child found in need of them. Additionally, the court, upon consideration of the petition of any attorney for the child, shall have the duty to terminate or alter the conditions of any placement, temporary or permanent, of a child.

Id.

93. See PA. LEGISLATIVE J. H3005 (daily ed. Oct. 15, 1975); PA. LEGISLATIVE J. S926 (daily ed. Nov. 18, 1975). The legislature apparently believed that §23 of the "Law" satisfied the child's right to counsel. It will be noted later that while the legislature may have intended the guardian ad litem system to satisfy the right of an allegedly abused child to counsel, it does not satisfactorily accomplish this purpose. See note 131 infra.

94. As delineated below, the guardian ad litem system as a means of providing counsel is, in and of itself, constitutionally suspect. See text accompanying notes 94-115 infra.
cases of suspected abuse and neglect reach the court. Over 85% of all reported cases were either dismissed as "unfounded" or adjusted voluntarily following an "indicated" determination. In each instance, the agency of the state made custodial decisions. From the time the report is first filed, the agency has the ability to proceed to obtain custody of the child. This may be done in some cases without a hearing at which the parents would be present or in other cases upon requests made to law enforcement officials. From the time a report is filed, therefore, a decision regarding the child's custody is not only possible but is continually taking place because of the state's ever present power of direct action. As a result, all stages of a child abuse proceeding are "significant" in the sense used by the court in *Lynch*. Ideally, therefore, the right of a subject child to the effective assistance of counsel should accrue at the time a report of suspected abuse is filed.

Unfortunately, it is not feasible to provide a court appointed counsel to every subject child at Stage 1, especially in large metropolitan areas in which the volume of reported cases exceeds the ability of the system to supply effective counsel to all subject children. Moreover, while the risk of tragedy following an inadequate investigation is great and the appointment of counsel during Stage 1 may result in a lower percentage of error, the role of the attorney during this stage would be limited principally to scrutiny of the investigation. This use of an attorney to perform this "watchdog" function does not seem to be either the proper or

95. In 1976, 1,738 reports of suspected abuse were received by the Philadelphia Department of Public Welfare (DPW) — the county agency administering the statutory duties (see note 3 supra). In 1976, approximately 5,000 reports of suspected abuse and neglect cases were reported. Of that number, about 600 (12%) of these cases were made the subject of court petitions. The Philadelphia DPW would not inform this author of the number of cases reported in 1976 which were subsequently found to be "unfounded" or "indicated." See note 91 supra.

The 1976 Child Abuse Report of the Pennsylvania Department of Public Welfare, however, states that 48 (2.8%) cases were determined to be "founded," that 77 (44.4%) were "indicated" and that 915 (52.6%) were "unfounded." The number of cases listed as "unfounded" may be misleading since 587 cases were listed as "unfounded" solely because the investigations on these cases were not filed by the local DPW within 60 days. See PA. STAT. ANN. tit. 11, § 2214(k) (Purdon Cum. Supp. 1977-1978). This frightening trend appears to continue unabated. The unofficial state totals for 1977 reveal that of the 4,537 reports of suspected abuse in Philadelphia, 1,550 were listed as "unfounded" merely because the Philadelphia DPW did not file results of investigations concerning them within the mandated 60 days. See id.

96. Under § 17(7) of the Child Protective Services Law, PA. STAT. ANN. tit. 11, 2217(7) (Purdon Cum. Supp. 1977-1978), the child protective agency could obtain immediate temporary custody of a child through the procedure of § 8 of the statute, id. § 2208, or by obtaining an emergency court order whenever necessary to protect the child. Id. § 2217(7).

97. See note 131, infra.

98. See Fraser, supra note 35, at 34.
necessary role of counsel. Theoretically, the state agency should be capable of performing the investigative function adequately without the interjection of an outsider into the process. While a child has the right to an independent counsel to insure that, to the extent possible within the system, a determination is in his best interest or to his least detriment as the least restrictive alternative, it is doubtful that the appointment of counsel is constitutionally mandated at a time when the state agency is initially charged with determining probable cause to credit allegations of suspected abuse.

The point in a child abuse proceeding by which counsel should be guaranteed would appear to be when the state agency determines that child abuse is "indicated." Such a determination virtually assures that something will be done which will affect the custody of the child and determine to some extent the future quality of his life. Whether the action is taken as a result of the parents' voluntary

99. But see Fraser, supra note 35, at 34, 45, wherein the author argues that this investigatory function is the cornerstone to the effectiveness of the guardian's role. Id. 100. See Fraser, supra note 35, at 34.


102. The courts in both Lessard and Lynch stated that, as a general rule, the mandate of due process did not require counsel during the purely investigative stage. 349 F. Supp. at 1100; 386 F. Supp. at 389 n.5. However, the courts also agreed that the rights of the subject would be violated if counsel were to be wholly excluded from the effective means of evaluating the investigation at the time custodial decisions may be made. 349 F. Supp. at 1099-1100; 386 F. Supp. at 389. Consequently, the investigative agency must ensure access of counsel not only to the product of the investigation but the manner in which it was conducted as well. The example used by the court in Lessard and adopted by the court in Lynch was the taping of psychiatric interviews. 349 F. Supp. at 1100; 386 F. Supp. at 389 & n.5. One of the most questionable provisions in the Child Protective Services Law which developed as a compromise following substantial lobbying is that which provides for the expunging of the record in the event a report is determined to be unfounded either by investigation or the passage of 60 days. Pa. Stat. Ann. tit. 11, § 2214(k) (Purdon Cum. Supp. 1977-1978). The loss to the system of the ability to correct its errors seems potentially more tragic than any damage which could occur from retaining the information. The risk of tragedy is too great.

103. Fraser, supra note 35, at 34, also contends that counsel must be appointed after the investigation has been completed by the social agency and a preliminary diagnosis of the child's condition is made. Fraser too recognizes that such investigations are often incomplete or improperly conducted. Consequently, Fraser sets forth as the task of the child's counsel that of investigation, rechecking, and supplementing the investigation of the agency. Fraser, supra note 37, at 35-39 & nn.115-19. Our experience confirms the wisdom of this recommendation and the danger of blind reliance upon the investigative reports of the public agency. Unfortunately the institutionalization of counsel to represent children in abuse cases often results in high case loads and forced dependency upon the agencies' investigations as the sole source of facts. See note 131 infra. The inadequacies of the system are legitimized under the guise of due process and become self-perpetuating to the detriment of the child.
commitment of the child to the state agency \textsuperscript{104} or a court proceeding and order, the effect is the same, \textit{i.e.}, the future life of the child is altered by direct state action.

The experience in Philadelphia adds a special urgency to the need for counsel as soon as possible after a report is listed as "indicated" and before any voluntary commitment is accomplished.\textsuperscript{105} A voluntary commitment of the child by the parents to the welfare agency in Philadelphia rarely, if ever, includes a detailed program for the care and treatment of the child. This program is left wholly within the discretion of the agency which must first of all seek to maintain the family unit.\textsuperscript{106} Moreover, the program is subject to the economic and political considerations of the agency as well as the needs of the child.\textsuperscript{107} Consequently, a child may be placed in a group home or institution or returned home under supervision of the agency because of contractual commitments of the agency with the service delivery organizations — and not because the facility is best suited for the child's well being.

It has been also our experience that critical psychiatric or psychological treatment frequently is not provided in voluntary commitment cases simply because the agency has not expended the funds necessary to obtain minimally adequate diagnosis or has not contracted with facilities that offer such services.\textsuperscript{108} Consequently, the most that can be expected in these cases is often only that the child will be boarded in a reasonably safe place. Since the intent of the law goes far beyond the mere safety of the person and aims to achieve that which is in the child's best interest, including custody, diagnosis, and treatment, participation of the child's counsel in the decisions of where and under what circumstances the child will live and the treatment to be provided is essential to due process. This would be true even when services are adequate simply because of the inherent conflicts of interest.\textsuperscript{109}

The court in \textit{Dixon} clearly recognized the importance to due process of the establishing of a treatment plan prior to involuntary

\begin{itemize}
  \item \textsuperscript{104} The standard practice in Philadelphia is that all voluntary commitments are confirmed by an \textit{ex parte} court order which prohibits parents from regaining custody of their children without leave of court. The propriety of this practice is dubious at best.
  \item \textsuperscript{105} For a discussion of the number and disposition of reports in Philadelphia in 1977, see note \textsuperscript{95} supra.
  \item \textsuperscript{106} See notes \textsuperscript{46} & \textsuperscript{47} and accompanying text supra.
  \item \textsuperscript{107} See notes \textsuperscript{51} & \textsuperscript{52} and accompanying text supra.
  \item \textsuperscript{108} This conclusion is based upon the experience of the Committee on Child Abuse of the Young Lawyers Section of the Philadelphia Bar Association.
  \item \textsuperscript{109} See text accompanying notes \textsuperscript{48}-\textsuperscript{53} supra. An important issue beyond the scope of this article is whether the child's custodian may be required by the court to undergo diagnosis and/or treatment.
\end{itemize}
commitment. There, a federal district court in Pennsylvania found constitutionally infirm the prior state practice of blanket commitments to the state facility and required the participation of the subject's attorney or guardian in the establishing of the program to be effected during confinement. So also in abuse cases, the custodial and treatment program must be developed at a time when the subject child has the effective assistance of counsel. Failure to provide counsel in all cases at this stage must necessarily result in a deprivation of due process.

III. THE GUARDIAN Ad Litem As Counsel

The Pennsylvania Child Protective Services Law provides for the appointment of a guardian ad litem, who is an attorney, to represent the best interests of the child when the proceeding of a case of suspected abuse is initiated in the court. This is not, it is submitted, a satisfactory means for the providing of counsel since the guardian ad litem is not charged with the representation of the child, but, rather, with the representation of the child's "best interests." Consequently, the guardian may simply act as a mere extension of the state in its capacity as guardian of the child under the doctrine of parens patriae. It is precisely this confusion of roles in the Pennsylvania statute that makes the Pennsylvania system constitutionally suspect.

As noted previously, the need for independent counsel is partially based on the inherent conflicts which may exist between

110. 325 F. Supp. at 972-74.
111. Id. See note 77 & 78 and accompanying text supra.
114. See note 39 supra; SUSSMAN & COHEN, supra note 35, at 54; COYDE, in THE RIGHTS OF CHILDREN, supra note 35, at 195; Comment, supra note 53, at 442. See generally Stansby, In re Gault: Children are People in THE RIGHTS OF CHILDREN, supra note 18, at 289-90.

According to Douglas J. Besharov, Director of the National Center on Child Abuse and Neglect of the Department of Health, Education and Welfare, 24 states specifically require the appointment of a guardian ad litem who is an attorney. Besharov, The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 VILL. L. REV. 514 (1978). Impetus was given to representation of the child through the guardian ad litem mechanism by the federal Child Abuse Prevention and Treatment Act of 1974, which mandates the institution of various state policies and procedures as a prerequisite to the receipt of federal funds. 42 U.S.C. § 5103(b)(2)(A)-(2)(J) (Supp. V 1975). One such requirement was the providing of a guardian ad litem to represent children in such proceedings. 42 U.S.C. § 5103(b)(2)(G).
the parents or custodians and the child and between the state agency and the child. Each "party" to the proceeding may have its own concept of what may be in the "best interest" of the child. The parent's concept may well be more indicative of what they desire in their own interest than of what is in the best interest of the child and the state agency may view the future of the child through its own prism of caseloads, supervision, and budget as well as the statute's own mandate for family unit preservation. In spite of the imposition of a third party, a guardian ad litem, who may offer an opinion unclouded by some of these other concerns, the wishes of the child still may not be advanced in court under the Pennsylvania system. This problem is clearest in cases involving articulate children. For example, although a seventeen-year-old victim of parental rape may have very cogent reasons for wanting a specific disposition, it is quite possible that in Pennsylvania those desires may never be advanced in court if the guardian ad litem believes another disposition is in the best interest of the child. This child, therefore, is effectively denied the benefit of a legal representative performing his duty as an advocate for the child.

It was precisely this disunity between the role of a guardian ad litem who determines his own concept of the "best interest" of the child and the role of an advocate which led the Wisconsin federal district court in Lessard v. Schmidt to find that the appointment of a guardian ad litem did not fulfill the constitutional requirement of the right to counsel. The court, noting that the Wisconsin Civil Commitment Statute provided for a guardian ad litem at the discretion of the court, concluded nonetheless, that since the guardian would not view his role as that of adversary counsel, his appointment did not take the place of such counsel. The court indicated that the appointment of a guardian might be sufficient if his role were clearly defined and restructured.

116. See text accompanying notes 36-53 supra.
118. This distorted perspective has been documented in other jurisdictions. See N.Y. STATE ASSEMBLY COMM. ON CHILD ABUSE, Report, 5-9 (1972) [hereinafter cited as N.Y. SELECT COMM. REP.].
119. See note 3 and text accompanying notes 47 & 48 supra.
120. See text accompanying notes 132-43 infra.
122. 349 F. Supp. at 1099.
123. Id. at 1097, citing Wis. STAT. ANN. § 51.02(4) (West 1957). The court also noted that the law required the guardian to be an attorney. Id. at 1097, citing Wis. STAT. ANN. § 256.48 (West 1971).
124. Id. at 1097.
125. Id.
The Lessard court, in support of its conclusion, cited a study of the Wisconsin civil commitment procedures, which found:

In the present practice, it seems clear that in almost all cases where a guardian is appointed he sees his role not as an advocate for the prospective patient but as a traditional guardian whose function is to evaluate for himself what is in the best interest of his client-ward and then proceed almost independent of the will of the client-ward to accomplish this.

In the official comments to section 15A of the Model Child Abuse and Reporting Law, the drafters recognized the inadequacy of relying upon a guardian ad litem, a representative of a social services agency, counsel for the parent, or even the judge to represent and promote the legal rights of a child. They stated:

The legal rights of a child may not be represented adequately by a guardian ad litem, a representative of a social services agency, counsel for the parent or even a judge. A guardian ad litem is unsuitable for two reasons. First, he may not be an attorney; consequently, he might be unaware of many procedures available to protect the legal rights of a child. Second, his duty to represent the “best interests” of the child may conflict with the expressed interest or desires of the child. Similarly, a member of a social services agency may not represent the rights and interests of the child, since his perspective is that of what is best for the entire family in a community setting. Counsel for the parent is unable to defend the rights of the child at the same time, since the interests of the parents and the child may conflict. Finally, the judge should not be cast in the additional role of representing the child since his task is to weigh the evidence and balance the competing rights of all parties in order to reach a just and proper disposition.

The rationale of the Lessard court and the drafters of the Model Law is persuasive and it is the belief of this author that the guardian ad litem system, as constructed in the Pennsylvania Child Protective

126. Id. at 1099.
128. MODEL CHILD ABUSE AND REPORTING LAW § 15A, reprinted in SUSSMAN & COHEN, supra note 33, at 54. For the text of § 15A, see text accompanying note 36 supra.
129. See MODEL CHILD ABUSE AND REPORTING LAW, reprinted in SUSSMAN & COHEN, supra note 33, at 54.
130. Id. (footnotes omitted).
Services Law, does not satisfy the constitutional requirement that children subject to child abuse proceedings be provided with legal counsel.\textsuperscript{131}

\textsuperscript{131} Various methods for providing counsel have been suggested generally and are in practice in Philadelphia and surrounding jurisdictions. Counsel are supplied to abused children in Philadelphia principally through three delivery systems. In terms of number of cases, the Child Advocacy Unit of the Defender Association of Philadelphia is the primary source for counsel. The stated goal of the Unit coincides with the statutory mandate of reuniting the child with his family and keeping the child within the family structure. This same mandate controls the operations of the child protective service agency. See note 3 supra. The Unit attempts to secure services to the child and child's family within the home structure which will resolve the problematic situation. The Unit provides counsel only to those children who are subjects of court petitions (less than 20 percent of the reported cases) and handles all juvenile cases of which abuse cases are only a part. The Unit currently employs three social workers, two investigators and five attorneys. During the first year of its operation (1976) the unit employed three attorneys and handled in excess of 2000 cases.

Other delivery systems are the Juvenile Law Center and the Child Abuse Committee of the Young Lawyers Section of the Philadelphia Bar Association. The latter organization maintains a list of about 100 trained private practitioners who seek appointments as counsel to abused children in selected cases as referred by hospitals, doctors, the Department of Public Welfare and the courts. The attorneys act without compensation. In 1976 the committee volunteers became involved in approximately 75 cases. With funds from the Governor's Public Health Trust Fund, the Bar Association and the Philadelphia Bar Foundation, the committee has established a Support Center for Child Advocates which employs two social workers (one of whom is also an attorney) for the purpose of assisting volunteer attorneys in the preparation of cases and training new volunteers.

Delaware County utilizes approximately 36 private practitioners who are appointed on a rotating basis and receive a flat $40.00 fee for each case handled. Appointments are made only upon the filing of an abuse petition with the court. In 1976, 95 such appointments were made. When an abuse petition is filed in Chester County a single attorney is appointed to represent the child. That attorney received 20 guardian \textit{ad litem} appointments in 1976. The attorney is paid $15.00 per hour to a maximum on any case of $250.00. Montgomery County appoints only private practitioners to abuse cases, but, as in all other counties surveyed, only after an abuse petition has been filed with the court. Just 12 appointments were made in the last year and the attorneys are compensated at cost level fee schedules. The public defender office in Bucks County represents all abuse children who are subjects of court petitions. In 1976, there were 129 such cases.

The report of the New York State Assembly noted that after a three-year study, the committee found the law guardian to be ineffective in most instances. N.Y. SELECT COMM. REP., supra note 118, at 147. The assemblymen noted a distinction between the effectiveness of these lawyers in the urban and non-urban areas of the state. \textit{Id.} at 148. In urban areas, the law guardians were generally attorneys attached to a legal aid society. Their effectiveness was undermined by their heavy caseloads and the lawyers "institutional bent." \textit{Id.} at 148–50. The report noted that the law guardians from the legal aid society, who also often represented children in delinquency actions, had a bias towards preventing the removal of a child from the home — a bias which was wrongly carried over to the abuse proceedings. \textit{Id.} at 148–49. Although the report found that the law guardians as a group had failed to assume a role of active representation, they did find that in the non-urban areas of the state, the attorneys more adequately fulfilled their role, conducting active pretrial investigations and playing a forceful part in the proceeding. \textit{Id.} at 149–50. Because of their view as to the ineffectiveness of the law guardian, the committee recommended that a full-time "Children's Attorney" be appointed in each county. \textit{Id.} at 153.

One writer suggests that reliance on individual practitioners is not an adequate means of providing the child with counsel. C. E. Campbell, \textit{The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Their Rights...}
IV. THE ROLE AND RESPONSIBILITY OF THE ADVOCATE IN CHILD ABUSE PROCEEDINGS

The attorney who is charged with the representation of the child in a child abuse case is faced with a difficult, and perhaps conflicting, dual obligation. As with every other client, the lawyer is obliged to represent the child "zealously within the bounds of the law."\footnote{ABA Code of Professional Responsibility, Canon 7.}

Yet, in representing a child, the attorney is more than a legal representative,\footnote{Cf. Kay & Segal, The Role of the Attorney in Juvenile Proceedings: A Non-Polar Approach, 61 Geo. L.J. 1401-15 (1973).} since he must also act as the child's protector,\footnote{See New York's system of "law guardians," N.Y. Family Ct. Act §§ 241-249 (McKinney 1975).} which, in the terms of the legal shibboleth, means that he must advance the "best interests" of the child. It is because of this manifest dual obligation, that independent counsel is vital for the child since

\textit{Under the Due Process Clause, 4 Suffolk U.L. Rev. 631, 687 (1970).} The author recommends the development of a new type of institutional means since the individual practitioners will not have the time nor the interest to develop the expertise necessary to effectively represent a neglected child. \textit{Id.} The article additionally cautions that the job should not be given to the attorney of the state agency which will assume the custody of the child upon a finding of abuse or neglect. In that case, in addition to the burden of the lawyer's existing caseload, as an employee of the agency, he, like social workers, may have biases which would inhibit him from giving the child the best representation to which he is entitled. \textit{Id.}

A third view is taken by the authors of an article in the Chicago Kent Law Review. See Brown, Fox & Hubbard, \textit{Medical and Legal Aspects of the Battered Child Syndrome, 50 Chi.-Kent L. Rev. 45 (1972).} In that article, the authors suggest that adequate representation in a child abuse case would take from 10 - 20 hours of preparation and that the high caseload of the public defender and the unavailability of adequate resources would preclude proper representation. \textit{Id.} at 68. The article suggests the use of private attorneys as an alternative. \textit{Id.} at 77-78.

It is the third view which is supported by this author and the Committee on Child Abuse of the Young Lawyers Section of the Philadelphia Bar Association. Based upon over five years of experience, the estimate of 10-20 hours of attorney time to handle a child abuse case properly is conservative and many cases have required in excess of 50 hours. In part, this is due to the failure of the Philadelphia Family Court to schedule most cases for certain times and their continuing to operate on the daily case list system. Nevertheless, the committee's volunteers are told that in accepting a case they must be prepared to spend 15-30 hours of their time. It is hoped that the Support Center for Child Advocates (see supra) will reduce this time requirement substantially.

It is our experience with the amount of time necessary to handle the representation of an abused child properly which causes us to question the adequacy of the systems utilized in Philadelphia and vicinity. Assuming 40 productive case related hours per attorney and two weeks vacation each, the Child Advocacy Unit of the Defender Association of Philadelphia could have averaged not more than 3.3 hours per case. Delaware County's system of $40.00 per case seems unlikely to stimulate extensive effort. For similar reasons, the Chester County System is inadequate. Montgomery County's experience is too limited to reveal anything more than the general and tragic lack of reporting and investigation. The Bucks County use of the Public Defender may or may not be adequate, depending upon the case load.
[a]n inquiry into the best interests of a child may produce differences of opinion when it is directed to the parents and to the court. And if the child himself is capable of assessing his own position, he may have an alternative of his own to suggest. Such an alternative would merit the skill of an advocate who would represent the child.135

In this rather conflicting role of lawyer-protector, the attorney representing the child must tread delicately. He must advance and protect the child’s rights so as not to permit the child to be treated as a “chattel” or the property of the marriage.136 Yet, he cannot become an avenging angel, as amateur social worker, or a psychologist.137 The lawyer for the child is, in fact, that child’s spokesperson, and, to the degree possible, the child must be permitted to express his wishes or desires, and to have them presented to the court.

One of the most important duties of the lawyer representing the child in an abuse proceeding is to present the court with all relevant information, which will permit the court to make an informed decision. This requires extensive investigation, and communication with the child, if possible.138

The lawyer representing the child should look into all the available alternatives and assess them in light of the interests of the child, utilizing various expert opinions as to the child’s needs. It would be the responsibility of the child’s attorney to investigate thoroughly by consultation with “experts” in related social and medical disciplines, in order to determine what the actual needs of the child are. He may not substitute his opinion for those of the expert, but must balance the assessed needs with the expressed “wants” of his client.

Unlike with most clients, the lawyer may not be able to rely on the child’s expressions or desires.139 The Code of Professional Responsibility clearly imposes additional obligations and responsibilities upon the lawyer representing an incompetent or immature client. Disciplinary Rule 7-101(A) provides: “A lawyer shall not

135. Coyne, supra note 35, at 201.
138. Cf. Kay & Segal, supra note 133.
139. See H. Janssen & L. Fishman, The Role of the Child’s Attorney in How to Handle a Child Abuse Case (unpublished paper of the Committee on Child Abuse of the Young Lawyers Section of the Philadelphia Bar Association).
intentionally (i) Fail to seek the lawful objectives of his client through reasonably available means.”

In Commonwealth v. Silo, the Pennsylvania Supreme Court, in a per curiam decision, found that: “The question of competency is an issue that cannot be effectively waived. If there is any basis in the record that would support such a claim, counsel is duty bound to present that issue to the Court.”

Although perhaps not as obvious or compelling as in a criminal proceeding, counsel representing a child would have a similar duty to apprise the court of the degree of incapacity which his client suffers. In representing a child in an abuse proceeding, the attorney should ascertain the extent to which the child can articulate his needs and desires and the level of maturity which his client possesses. In this respect, it may be necessary for counsel to obtain expert opinions in those areas. Thus, the attorney representing the child must be careful to maintain a balance between his roles as an advocate and protector. He must not be so zealous in his role as advocate that in advancing his client’s “desires” he may impair his client’s future; nevertheless, he must not permit himself to become exclusively a protector of the child’s “best interests” so that there is no one acting as a spokesperson for the child.

140. ABA Code of Professional Responsibility, DR 7-101(A)(1). Further, Ethical Considerations 7-11 and 7-12 provide respectively that:

The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in Court proceedings to make decisions on behalf of his client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of legal representative compels a lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously, a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

ABA Code of Professional Responsibility, E.C. 7-11, 7-12 (emphasis added).

142. Id. at 42, 364 A.2d at 894 (emphasis added).
V. Conclusion

It appears to this author that children subject to reports of suspected abuse under the Pennsylvania Child Protective Law are entitled to be represented at the earliest feasible stage in the proceeding by independent counsel and that the guardian ad litem system established by the law is inadequate to satisfy this right. It is recommended that allegedly abused children be provided with counsel at least at the point the child protective service determines that a report of suspected abuse is "indicated" and further that the system for providing counsel be closely monitored to ensure that counsel be able to dedicate a minimum of fifteen to twenty hours of time for an average case and be given the ability to secure adequate social and medical expertise through court ordered examinations.

Finally, counsel for abused children should be adequately trained in the peculiarities and subtleties of child advocacy prior to appointment in any case to ensure that they are prepared to assume their proper role of advocate for and protector of their clients.

144. See text accompanying notes 90-104 supra.
145. See note 131 supra.