

Introduction

In child custody suits not initiated by the government, Texas courts have three options when appointing attorneys to represent a child's interests: an amicus attorney, an attorney ad litem, and a dual-role attorney ad litem and guardian ad litem. Only attorneys ad litem are statutorily authorized (in limited circumstances) to employ substituted judgment on a child-client's behalf, and for simplicity's sake we focus on the single-role attorney ad litem in this paper. Attorney ad litem is a child-directed role, where the attorney represents the child and advocates for the child's desires. A problem arises when the child is incapable of directing his or her own representation. The Code allows an attorney ad litem in that situation to use his or her substituted judgment—to present a position that the attorney has determined would serve the best interests of the child rather than the child's own expressed objectives. But the Code explains neither how an attorney ad litem should determine the child's best interests nor how to reconcile that exercise with the nature of the attorney ad litem role. Due to practical and legal limitations, the attorney ad litem should conduct a careful and thorough investigation to support an objective determination of the child's best interests.

The Family Code

Chapter 107 of the Family Code defines the role of an attorney ad litem in suits affecting the parent-child relationship. An attorney ad litem is appointed by the court to represent a person, including a child.¹ This is in contrast to an amicus attorney or a guardian ad litem, both of whom primarily help the court decide what is best for the child.² The Code explains that an attorney ad litem is child-focused and child-directed; the statutory duties of an attorney ad litem entail representing and following “the child's expressed objectives of representation during the course of litigation.”³ Such a charge naturally raises the question of what responsibilities an attorney ad litem has when the child cannot, for lack of maturity or otherwise, direct his or her own representation. For instance, it would be an impossible task to represent the desires of a preverbal child—to the extent such a child even has desires—with any level of accuracy or fidelity. An attorney ad litem might feel similarly ethically adrift if her child client expresses an obviously harmful desire, such as preferring to live with an abusive parent or step-parent. That situation might be even more difficult if the court is not aware of the danger posed by the child's wishes.

Section 107.008 contemplates exactly that kind of situation. Titled “Substituted Judgment of Attorney for Child,” it recognizes that an attorney ad litem “may determine that the child cannot meaningfully formulate the child's objectives of representation in a case.”⁴ This provision gives two specific examples of when substituted judgment would be appropriate—immaturity and “seriously injurious” decision-making—and a catch-all allowing substituted judgment when “for any other reason [the child] is incapable of making reasonable judgments and engaging in

¹ TEX. FAM. CODE § 107.001(2).

² *See id.* § 107.001(1), (5). An attorney may be appointed to serve in a dual role as both an attorney ad litem and a guardian ad litem. *Id.* § 107.001(4); *see also id.* § 107.0125. This paper refers only to the separate role of attorney ad litem for simplicity's sake.

³ *Id.* § 107.004.

⁴ *Id.* § 107.008(a).

meaningful communication.”⁵ If an attorney ad litem comes to such a conclusion, the Code allows her to instead present what she decides is in the child’s best interest.⁶

How to Implement a Substituted Judgment of Best Interest

This command raises additional questions, though, because it does not define how objective or subjective the best-interest determination should be. In other words, should the attorney strive to make an objective, evidence-based decision regarding the child’s best interests? Or should the attorney attempt to put herself in the child’s metaphorical shoes, making the decision she thinks the child would find best? Or should she take another approach entirely?

Much of the confusion stems from the client-centered role of the attorney ad litem. In an analogous medical context, where a patient is incompetent, substituted judgment entails a guardian making the “healthcare decision [the] patient would make if he or she were competent to do so.”⁷ An attorney ad litem’s charge is to advocate the desires of the client, and one can imagine scenarios in which an attorney ad litem could uncover what the client would want if he could communicate his desires. For instance, if the client were an incapacitated adult or teenager, an attorney might be able to interview friends and family or review records to reach a reliable estimate of what the client *would* want.⁸ But the same methods would not work as well for young children. Most obviously, children who lack the ability to meaningfully communicate, including preverbal children, cannot have left evidence of their desires. Even verbal children who lack the capacity to understand the attorney–client relationship or to make reasonable decisions will have had relatively little opportunity in their short lives to leave evidence of their desires.⁹ For these reasons, subjective substituted judgment—i.e., stepping into the shoes of the child to take the position the child would want—would be largely impracticable in custody cases where the child is incapable of formulating objectives of representation.

The Family Law Section of the American Bar Association (ABA) has published standards of practice that accord with that conclusion, inasmuch as they do not recommend using child-centered subjective substituted judgment when representing preverbal children. In the case that a child does not or cannot express desires on an issue, the ABA advises child-directed attorneys to revert to representing the child’s legal interests or to request appointment of a

⁵ *Id.*

⁶ *Id.* § 107.008(b).

⁷ *Substituted-judgment doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see also* Lawrence A. Frolik & Linda S. Whitton, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1500–01 (2012) (describing substituted-judgment process and noting tension between it and a best-interest determination).

⁸ *See* Frolik & Whitton, *supra* note 7, at 1501.

⁹ *But see Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference*, 64 FORDHAM L. REV. 1301, 1310 (1996) [hereinafter *Fordham Conference*] (recommending that child-directed attorneys glean whatever information they can from verbal children to guide their decisions regarding the child’s legal interests). Notwithstanding the Fordham Conference’s contention that verbal children unable to understand or direct their representation can still express desires about their representation, the Family Code calls for a switch to best-interest advocacy in that situation. Utmost deference to the child’s desires coupled with the fact that children with limited understanding and vocabulary can still express *some* desires may counsel reluctance in invoking § 107.008 but does not alter the substance of the best-interests directive.

best-interest attorney.¹⁰ In other words, the child-directed attorney should not make guesses about the child's desires and should not abandon her child-directed role in favor of presenting her own views of what is in the child's best interest. However, rather than direct the attorney ad litem to request the appointment of a best-interest attorney, the Texas Family Code simply tasks the attorney ad litem with making the best-interest determination herself.¹¹ That may not live up to the gold standard of full role separation, but it is the state of the law.¹²

Thus, the remaining question is the proper manner for an attorney ad litem to make a best-interest determination on the child's behalf. It would be easy for a lawyer charged with making such a determination to draw upon her own life experiences in arriving at a decision, perhaps asking herself, "what would I want if I were the child?"¹³ But that approach would be improper; it would result in a subjective determination dependent, to some extent, on the attorney's values, beliefs, and impulses. One risk of such a subjective best-interest inquiry is that the attorney simply misunderstands the child's situation and thus makes a less favorable determination. Each attorney ad litem unavoidably brings her unique life experiences to her representation of a client, and an attorney with a vastly different background from her client may be ill-equipped to fully appreciate the complex economic, cultural, or societal forces acting on that child's life. A more troubling risk is that, despite the best intentions, an attorney may unknowingly give voice to unconscious or implicit biases that work counter to the child's true best interests.

Indeed, just because the lawyer is substituting her own judgment for the child's does not mean she can lose focus from the child and the child's interests.¹⁴ This is rendered all the more important when the best interest decision is made by an attorney ad litem, someone typically bound to advocate for the child's desires to the extent allowed by law and who owes the child a duty of loyalty.¹⁵ These concerns are echoed in the written recommendations from Fordham's Conference on Ethical Issues in Representing Children. The recommendations expressed the belief that "the profession has reached a consensus that lawyers for children currently exercise too much discretion" in making best-interest determinations.¹⁶ As a solution, the recommendations suggest

¹⁰ American Bar Association Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 144 (2003) [hereinafter *ABA Standards of Practice*]. "Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts." *Id.* Examples include a child's right to medical care, to appropriate education if he has special needs, to child support, and to due process. *Id.* These are rights and interests that exist independently in the law and that can be pursued without the child's direction to do so.

¹¹ TEX. FAM. CODE § 107.008(b).

¹² An even greater blurring of roles occurs when an attorney is appointed to simultaneously fill the dual roles of attorney ad litem (child-directed and owing duties to child) and guardian ad litem (best-interest advocate whose purpose is to help the court). *See id.* §§ 107.001(1), (4), (5), 107.0125.

¹³ *See* John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1254 (2005); Rebecca E. Ellis, Comment, *The Heartbeat of Texas Children: The Role of Court-Appointed Special Advocates in the Wake of the 2005 Family Code Amendments*, 38 TEX. TECH L. REV. 1065, 1073 (2006).

¹⁴ *ABA Standards of Practice*, *supra* note 10, at 150–51. A best-interest attorney should base her decision on "objective criteria concerning the child's needs and interests" rather than her own "personal values, philosophies, and experiences." *Id.*

¹⁵ *See* TEX. FAM. CODE §§ 107.001(2), 107.004(a).

¹⁶ *Fordham Conference*, *supra* note 9, at 1309.

that child-directed attorneys focus on the “child in context” and approach their determinations with “extreme caution” about inserting their own values and views into the position they present to the court.¹⁷ To that same end, the University of Nevada, Las Vegas’ Conference on Representing Children in Families resulted in seven enumerated guiding principles for child-directed lawyers intended to ensure the child remains at the center of the proceedings.¹⁸ Those principles include encouraging maximal child participation, giving individualized treatment that challenges stereotypes, and requesting frequent feedback on representation from the child.¹⁹

While the Family Code does not define how an attorney ad litem should make a best-interest determination, a purely objective approach likely strikes the best balance between the child-directed nature of the attorney ad litem and the risks posed by broad attorney discretion. Likewise, an objective best-interest framework is likely a better approach to ensure the focus remains on the child’s needs. The ABA recommends that all best-interest lawyers in child-custody cases make objective assessments regarding the child’s best interests.²⁰ (The Family Code actually lists among the duties of an attorney ad litem becoming familiar with the ABA’s standards of practice for lawyers representing children in custody cases, so this is a sensible place to start.²¹) Reading the Family Code in accordance with the ABA standards, attorneys ad litem exercising substituted judgment should conduct “thorough, continuing, and independent investigations” into, among other things, court files, medical records, school records, and the other parties themselves.²² They should then apply existing legal criteria and standards to the gathered evidence in order to arrive at an objective best-interest determination.²³ “Factors in determining a child’s interests will generally be stated in a state’s statutes and case law”²⁴

Texas has not codified best-interest factors for custody cases, but the Supreme Court of Texas identified nine factors in its well-known and oft-cited 1976 decision in *Holley v. Adams*: the desires of the child, the present and future emotional and physical needs of the child, present and future emotional and physical danger to the child, parental abilities of the parties seeking custody, programs available to assist the parties seeking custody to serve the best interests of the child, plans for the child by the parties seeking custody, stability of the home or proposed home, acts or omissions by parents that indicate the existing parent–child relationship is improper, and excuses for acts or omissions in the previous factor.²⁵ These non-exclusive factors, known collectively as the *Holley* factors, were drawn from existing case law and statutory law.²⁶ Though the *Holley*

¹⁷ See *id.* Like the ABA, *Fordham Conference* recommends that child-directed attorneys revert to representing their clients’ legal interests instead of best interests as a means to ensure principled representation. *Id.* at 1310.

¹⁸ *Special Issue on Legal Representation of Children: Proceedings of the UNLV Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham: Recommendations of the Conference*, 6 NEV. L.J. 592, 595 (2006) [hereinafter *UNLV Conference*].

¹⁹ *Id.*

²⁰ See *ABA Standards of Practice*, *supra* note 10, at 149–51.

²¹ TEX. FAM. CODE § 107.004(a)(3).

²² See *ABA Standards of Practice*, *supra* note 10, at 149–50.

²³ See *id.* at 150–51.

²⁴ *Id.* at 151.

²⁵ *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).

²⁶ See *id.*

factors were created in a parental-rights termination case,²⁷ courts have applied them in custody cases.²⁸ In light of the ABA standards, an attorney ad litem serving a child's best interests should use gathered evidence to support objective arguments regarding the applicable *Holley* factors in a case. Though the factors may leave room for the injection of the attorney's personal values and views, mindfulness of that risk, as well as careful focus on facts and evidence, should go a long way to reducing the impact.

Criticisms of the Substituted Judgment Model

There is a certain redundancy in attorneys ad litem exercising substituted judgment because it overlaps with the roles of amicus attorneys and guardians ad litem. Appointing a child-directed attorney to a preverbal child may give the appearance of zealously guarding that child's rights, but it may accomplish little in practice if a guardian ad litem is already representing the child's best interests. In some sense, then, appointing an attorney ad litem in a situation where substituted judgment is appropriate might be a waste of resources. It might also distort the fact-finding process. A fact-finder's understanding of the attorney ad litem role as one promoting the child's own interests may carry over to instances in which the attorney ad litem is actually employing substituted judgment to advocate for what she believes are the child's best interests. Out of a commendable but misplaced desire to respect the child's wishes, the fact-finder could then plausibly overweight the attorney ad litem's best-interest recommendations. One could imagine further distortion if the attorney ad litem makes a best-interest determination contrary to that advanced by an appointed guardian ad litem or amicus attorney, whose dedicated role it is to discern and advocate for the child's best interest.

Conclusion

In limited circumstances, the Texas Family Code instructs child-directed attorneys ad litem to substitute their judgment for the child's by advocating for the child's best interests. But the Code does not explain how attorneys ad litem should arrive at their best-interest determinations. A survey of external standards and guidelines reveals that a purely objective best-interest analysis, guided by Texas case law, is likely the best way to comply with the law and protect the child's interests. This conclusion is further supported by real-world hazards of the alternative subjective analysis.

²⁷ See *id.* at 367; see also Raymond Zapata, Comment, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 206 (2003).

²⁸ See, e.g., *In the Interest of A.S.*, No. 02-14-00301-CV, 2016 WL 1470034, at *19 n.8 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (mem. op.); *In re Marriage of Bertram*, 981 S.W.2d 820, 822–23 (Tex. App.—Texarkana 1998, no pet.) (invoking but not applying the *Holley* factors in a challenge to the trial court's managing-conservatorship decision); *Reyes v. Lafferty*, No. 04-95-00937-CV, 1997 WL 13607, at *4–5 (Tex. App.—San Antonio Jan. 15, 1997, no pet.) (not designated for publication).