Attorneys for Children

Deanne Darling
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1975	Bachelor of Social Work	**Colorado State University**
1981	Juris Doctorate	**Lewis & Clark NW School of Law**
1981-95	Private practice of Law; General practice/w heavy emphasis On domestic relations law	**West Linn, Oregon**
1985-88	Pro-tem Judge	**State of Oregon**
1987-95	Municipal Court Judge	**Lake Oswego, Oregon**
1987-88	President Clackamas Co. Bar Assoc.	
1995-	Circuit Court Judge-Clackamas County First woman judge in county. First & only Woman to serve as District Court Judge in this county	**State of Oregon**
1999-2008	Chair-Juvenile & Family Law Comm.	**Oregon Judicial Conference**
1999	Recipient of the Chief Justices Juvenile Court Champion Award	
2009/10	President - Circuit Judges Association	
2009	Recipient of the County Bar Assoc Lifetime Achievement award	

I have served on numerous bar committees: Legal Education; Lawyer Referral Services; Judicial Administration; Byers & Tongue Judicial Needs Committees: Local Professional Responsibility Committee and served on the Juvenile Law Subcommittee of the Oregon Law Commission and the OYA advisory board.

For several years I have been a presenter for the National Council of Juvenile and Family Court Judges and for the Center for Effective Public Policy on the topic of managing juvenile sex offenders. I have been the lead judge in Teen Drug Court since its creation in 2000, and led the dependency drug court from inception in 2001 thru 2009. I operate a truancy court for several

of my local school districts. I have presided over all the delinquency cases in Clackamas County since 1996.

I have been married since 1973 to Bob. We have two adult children. We live on a farm and raise horses, cattle and hay.

Resume for John W. "Jack" Lundeen

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Lake Oswego, Oregon 97035
(503) 635 9393 Jacklundee@aol.com

Born in Concord, California in May of 1947, the Lundeen family moved to Midland, Michigan in 1962 where Jack's dad followed the corporate call to Dow Chemical's headquarters. Jack graduated from Midland High in June,1965

In the Fall of '65 Lundeen enrolled at Kalamazoo College, where he spent a year and a half until he was drafted while taking a term off of college in the spring of 1967. Rather than risking service as a junior Army officer in Vietnam, Lundeen opted for four years in the Navy, from which he was honorably discharged in January, 1971. He was principally responsible for managing radio shacks in Rhode Island and the Panama Canal Zone

Lundeen completed college, obtaining a Bachelor in General Studies from the University of Michigan in December, 1973. He also earned a teaching certificate, which he took to Australia where he taught Australian history and the Queen's English to high school students in the small mining town of Lithgow in New South Wales. Teaching was fun and, after becoming an attorney, Jack has continued teaching evening classes in local colleges, currently teaching Family Law to paralegal students at PCC.

Jack took the LSAT's and enrolled at Lewis and Clark Law School in 1976, graduating in the summer of 1979. He hung out his shingle on Boones Ferry Road, in the Lake Grove district of Lake Oswego, where he has practiced for 30+ years, with a practice focusing principally on family law. Lundeen continues as a sole practitioner, sharing office space since 1982 with 14 other sole practitioners with a variety of practice focii.

In addition to his legal practice, Jack Lundeen has co-convened the Clackamas County Family Law Group for 10+ years, and has been on the boards of the St Andrew Legal Clinic, Oregon Academy of Family Law Practitioners, the Clackamas County Bar Association, and Family Stepping Stones. He continues to serve as president of the Senior Citizen Council of Clackamas County. Lundeen has coached mock trial, organized CLE's and mentors young attorneys. He has been active in his business community, serving on the board of the Lake Grove Business Association, as well as serving on a number of citizen advisory committees over the years.

Jack and Jan Blakeslee consummated a long-term relationship with marriage in December 2010. Jack has two daughters. Erika is an accountant with PriceWaterhouse Cooper. Kirsten is an alumni and development officer at Boston University.

CHILDREN AS WITNESSES

A. The Law
   a. ORS 107.425 (7)
      i. On motion of a party or the courts motion
      ii. **Take testimony** from *OR* **confer** with the child(ren)
      iii. May exclude from the *conference* the parents & others (so not from the testimony?)
      iv. Shall permit an attorney for the party to attend the conference and question (what if one side pro se?)(not if testimony?)
      v. Shall be recorded- can court place restrictions on parental access to the recording?

   b. ORS 419B.875
      i. The child or ward is a party to a dependency case

   c. ORS 419B.839(1)(f) requires service of summons in a dependency case on child if he/she is 12 or older

   d. ORS4 419B.310 (1) allows child testimony on motion of party or court and allows exclusion of parents and other persons but prohibits exclusion of a party's attorney and required a record of such testimony

   e. While I could not find any statutory authority for this – it is common knowledge in the dependency world that best practice is to have the child present for all reviews and permanency hearings starting as young as age 10- and their imput is required on ILPlans as early as 14 and no later than 16.

   f. There is no minimum age at which a youth can be charged under a delinquency petition. While practice is to avoid it before age 12- charges have been brought against youth as young as 9. Their appearance is mandatory in delinquency proceedings. Youth in these

cases are often asked to waive defenses, decide to proceed as guilty but insane- to decide whether to assert a mental disease or defect defense- and more. All the same decisions an adult accused with a crime would have to make. Many suffer lifelong consequences of their delinquent acts- as if they were adults. At age 15 – minors can be tried and sentenced as adults for certain crimes or violence.

g. ORS109.328 requires that the consent of child age 14 or older be obtained for their adoption.

h. ORS 109.610 allows ANY minor who may have come in contact with and venereal disease to consent to their own medical care

i. ORS109.640 any physician or nurse practioner may provide birth control information or services to any person – without regard to their age,

j. ORS109.640 authorized anyone age 15 or older to consent to their own hospital care, medical or surgical diagnosis or treatment including dental or dental surgery WITHOUT THE CONSENT OF THE PARENT OT GUARDIAN. The same is true for diagnosis and treatment by a nurse practioner. However, the minor cannot consent to their first time acquisition of contact lenses but can consent to their own treatment and diagnosis by an optometrist.

k. ORS 109.670 any 16 year old can consent to donate blood

l. ORS109.675 any minor 14 or older can consent to their own mental or emotional treatment- including chemical dependency-

m. The saving grace- if the kid consents to treatment or services as outlined above and the parent does not- the parent is not liable for the payment of the services ORS 109.690

n. ORS 109.697 allows some minors to enter into binding contracts for housing and utilities- provided certain criteria are met: ex: pregnancy, living apart from the parent, etc. And again there is no parental liability for the expenses

o. ORS419C.133 allows the placement of any youth age 12 or older into detention without a court order. Youth less than 12 can also be detained but a court order is required

p. Oregon State Bar Principles and Standars for Counsel in Delinquency, Dependency and Civil Commitment Cases (9/25/1995)
   i. Performance standard 1.2 requires the attorney to diligently advocate for the child's position.
   ii. Performance standard 1.3 requires the attorney to seek the lawful objectives of the client and to NOT substitute counsel's judgment for that of the client
   iii. Performance standard 2.3 requires counsel for delinquent clients to be bound by the clients definition of his/her interests and should NOT substitute counsel's judgment for the client.
   iv. Performance standard 3.3 requires the attorney in a dependency case to determine if the child is capable of considered judgment. If the child is – then the child's preferences control. If not then the attorney is to advocate for what is in the child's best interest

B. THE PRACTICE
   a. Do not shy away from calling children as witnesses

   b. Always tell the other side if/when you have spoken directly to the child

   c. Any communication to or from the child should be sent to the other side- or DHS=- and be sure the child knows it

d. Never promise the child they can have a private conversation with the judge or you- unless it is in a settlement conference

e. Use technology- video- etc

f. If the judge does describe what you are seeing- ask for the record to reflect it-

g. Do not assume for one minute that the child is not already in the middle of it- or is not aware of what is going on

h. A parent bringing a child into the court process is not per se a bad parent

i. Children can and do lie

j. Make sure they know what perjury is and the importance of the oath

k. You are mandatory reporter- keep notes of all DHS reports you make- beware getting too much information. If you report- tell everyone you have done it.

l. Most kids can recite their Miranda rights

m. Most schools are teaching and preaching that children as young as 5 should advocate for themselves- they are even now required participants in school conferences- starting in 1st grade.

n. Mock trials begin as early as 2nd grade.

o. Kids can find anything on the internet starting at age 2 – or before.

C. Judicial observation

a. Parents behave better in front of their children when judges are present

b. Children hearing from me what I have ruled and why is far better than hearing from their parents what they think I said- especially if the parents don't hear the same thing.

c. Every decision we make in a dom rel case affects the kids – somehow

d. Children are resilient- smart- inventive- and cunning

e. Children have been excluded from the courtroom because judges were afraid – or uncomfortable

f. Who can waive a child's priviledge with their doctor- therapist- etc
   i. Do no assume it is the custodial parent-
   ii. Age of child and issue might be important
   iii. Who can assert the priviledge

Other interesting child related issues

1. ORS 107.159 (3) To consult with any person who may provide care or treatment for the child and to inspect and receive the child's medical, dental and psychological records, to the same extent as the custodial parent may consult with such person **and inspect and receive such records**
    a. Grants rights equal to a custodial parent
        i. What rights are those?
    b. Are the last 6 bold words some different right - or a modifier of the prior words?
    c. Can the child stop the disclosure?
    d. What about privilege attaching to the records?
    e. Can a custodial parent waive the privilege?
    f. What if the custodial parent's interest is adverse to the child's?
    g. Does the child need a guardian ad litem or a guardian to deal with this?
    h. Can a parent serve in that capacity under these facts?

2. Privilege
    a. ORE 504- Psychotherapist- patient
    b. ORE 504-1- Physician-patient privilege
    c. ORE 504-2 Nurse- patient privilege
    d. ORE 504-3 School employee-student privilege
    e. ORE 504-4 Regulated social worker – client
    f. ORE506 clergy- penitent
    g. ORE 506 counselor- client

3. ORS 107.164 Parents duty to provide information to each other
    a. Applies after the issuance of a custody or protective order
        i. Does this include status quo?
    b. Requires disclosure of address and contact phone
    c. Requires immediate notification of any emergency circumstance or substantial change in child's health
    d. Is contempt available for a violation?
        i. As with statutory restraining order on assets and insurance – is the existence of the statute sufficient notice?
    e. Is this required in the petition- is the ORS reference required in the statute?
    f. The court can order otherwise- which means there has to be something filed in order for us to have jurisdiction to order anyting
        i. No process or notice requirement in the statute
        ii. No hearing provision- how contest it?

107.093 must R.O. process

for contempt false ?

4. ORS 109.012 Liability of parent for expenses and education of minor children
    a. Applies to unmarried parents
    b. If parent A enrolls kid in private school and or preschool or ?? day care etc, and does not pay – can the provider sue the other parent?
    c. Also see ORS 109.020- for the trust fund or rich kid and for an example of how NOT to write a sentence

5. Foreign travel by children 109.035
    a. Can require bond
    b. Requires finding risk of international abduction by clear and convincing evidence
    c. Factors to consider are listed in the statute
    d. Requires written findings and conclusions by the court

(c) The court may order one or more of the parties to pay for services provided under this subsection, if the parties are unable to agree on their respective responsibilities for payment. The court may not order that expenses be charged against funds appropriated for public defense services.

(d) The presiding judge of each judicial district shall establish qualifications for the appointment and training of individuals and panels and the designation of programs under this section. In establishing qualifications, a presiding judge shall take into consideration any guidelines recommended by the statewide family law advisory committee.

(4) The provisions of this section apply when:

(a) A person files a domestic relations suit, as defined in ORS 107.510;

(b) A motion to modify an existing judgment in a domestic relations suit is before the court;

(c) A parent of a child born to an unmarried woman initiates a civil proceeding to determine custody or support under ORS 109.103;

(d) A person petitions or files a motion for intervention under ORS 109.119;

(e) A person or the administrator files a petition under ORS 109.125 to establish paternity and paternity is established; or

(f) A haheas corpus proceeding is before the court.

(5) Application of the provisions of subsection (1), (2) or (3) of this section to the proceedings under subsection (4) of this section does not prevent initiation, entry or enforcement of an order of support.

(6) The court, on its own motion or on the motion of a party, may appoint counsel for the children. However, if requested to do so by one or more of the children, the court shall appoint counsel for the child or children. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

(7) Prior to the entry of an order, the court on its own motion or on the motion of a party may take testimony from or confer with the child or children of the marriage and may exclude from the conference the parents and other persons if the court finds that such action would be likely to be in the best interests of the child or children. However, the court shall permit an attorney for each party to attend the conference and question the child, and the conference shall be reported. [1971 c.280 §3; 1973 c.502 §11; 1981 c.775 §5; 1981 s.s. c.3 §34; 1983 c.369 §1; 1983 c.386 §1; 1989 c.188 §1; 1989 c.1084 §1; 1999 c.569 §4; 2001 c.873 §§6,6a,6c; 2003 c.73 §§51,52; 2003 c.576 §§121,122; 2007 c.454 §12]

107.430 [Formerly 107.180; 1963 c.223 §1; repealed by 1971 c.280 §28]

107.431 Modification of portion of judgment regarding parenting time or child support; procedure. (1) At any time after a judgment of annulment or dissolution of a marriage or a separation is granted, the court may set aside, alter or modify so much of the judgment relating to parenting time with a minor child as it deems just and proper or may terminate or modify that part of the order or judgment requiring payment of money for the support of the minor child with whom parenting time is being denied after:

(a) Motion to set aside, alter or modify is made by the parent having parenting time rights;

(b) Service of notice on the parent or other person having custody of the minor child is made in the manner provided by law for service of a summons;

(c) Service of notice on the Administrator of the Division of Child Support of the Department of Justice when the child support rights of one of the parties or of a child of both of the parties have been assigned to the state. As an alternative to the service of notice on the administrator, service may be made upon the branch office of the division which provides service to the county in which the motion was filed. Service may be accomplished by personal delivery or first class mail; and

(d) A showing that the parent or other person having custody of the child or a person acting in that parent or other person's behalf has interfered with or denied without good cause the exercise of the parent's parenting time rights.

(2) When a party moves to set aside, alter or modify the child support provisions of the judgment:

(a) The party shall state in the motion, to the extent known:

(A) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child, including a proceeding brought under ORS 25.287, 107.135, 109.100, 125.025, 416.400 to 416.465, 419B.400 or 419C.590 or ORS chapter 110; and

(B) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.303, involving the child, other than the judgment the party is moving to set aside, alter or modify.

(b) The party shall include with the motion a certificate regarding any pending sup-

xxvii. the Parental Kidnapping Protection Act;

xxviii. the Interstate Compact for the Placement of Children;

xxvix. the Interstate Compact on Juveniles;

xxx. guardianships;

xxxi. adoption placement preferences.

STANDARD 3.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

Implementation

1. Counsel should comply with Standard 1.2, Implementation 5, *supra*. Counsel should be especially cautious when accepting representation of more than one parent, guardian or child. Counsel should avoid representing both parents in dependency cases and should never represent both parents in cases that involve allegations of sexual, physical or emotional abuse, or when the interests of the parents may be adverse. Counsel should avoid representing multiple siblings when their interests may be adverse and should never represent siblings where it is alleged that one sibling has physically or sexually abused another sibling. Child clients may not be capable of consenting to multiple representation even after full disclosure.

2. Counsel should preserve the attorney-client privilege and not disclose, without the client's permission or as otherwise provided by law, confidential information. Counsel should try to avoid publicity connected with the case. Counsel should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client.

3. Counsel should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.

4. Counsel should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.

5. Counsel should maintain professional decorum when appearing before the juvenile court. Counsel should identify for the record any person who is present in the courtroom on behalf of a client.

6. Counsel may not contact represented parties without the consent of their counsel.

STANDARD 3.3 — Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

Implementation

1. In determining whether a child is capable of considered judgment, counsel should consider:

   a. the child's chronological and intellectual age;

   b. the child's developmental stage;

   c. the child's sophistication and experience;

   d. whether the child is articulating a position concerning the issues of the case; and

   e. the presence of undue influence.

2. Whether a child is capable of considered judgment and able to contribute to a determination of their position in the case depends on the

context and circumstances at the time the position must be determined. A child may be able to determine some positions in the case but not others.

3. Ideally, a guardian ad litem should be appointed in every case in which the child is incapable of considered judgment. These standards suggest, but do not require such appointments because of the expense associated with such appointments and the long-term practice in Oregon courts of not appointing guardians ad litem in juvenile court cases.

   a. Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian ad litem and the child.

   b. Where a guardian ad litem has not been appointed, counsel should consider asking that one be appointed and consideration should be given to appointment of an appropriately trained CASA or other qualified volunteer as guardian ad litem.

4. When representing parents and children capable of considered judgment, decisions that are ultimately the client's to make include whether to:

   a. admit the allegations of the petition;

   b. agree to jurisdiction, wardship and temporary commitment to SOSCF;

   c. accept a conditional postponement; or

   d. agree to specific services or placements.

5. Counsel should advise the client concerning the probable success and consequences of adopting any posture in the proceedings. It is the duty of counsel to give the client the information necessary to make an informed decision, including advice and guidance, but to not overbear the will of the client. Counsel may not advocate a position contrary to the client's expressed position.

6. When representing parents and children capable of considered judgment, counsel is bound by and should advocate for the client's definition of his or her interests, and may not substitute counsel's judgment for the client's, nor ignore the client's wishes because they are perceived not to be in the best interests of the child.

7. If the client is not capable of considered judgment and a guardian ad litem has not been appointed, counsel should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best interests with respect to the proceeding. After consultation with the child, the parents (where their interests do not appear to conflict with the child's), and any other family members or interested persons, such as the caseworker or child's therapist, counsel shall advocate what counsel determines to be the best interests of the child.

8. Where there is a conflict between what counsel has determined would be in the best interests of a child who is not capable of considered judgment, and the child's stated desires, counsel must to the greatest extent possible resolve the conflict by working with the young client, although this sensitive issue cannot always be avoided or completely resolved. If unable to resolve the conflict, counsel should communicate the child's wishes to the court but advocate for what counsel determines to be the best interests of the child.

9. Unless inconsistent with the client's interests, counsel should cooperate with other parties to the case.

STANDARD 3.4 — Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

2001 OREGON REVISED STATUTES
TITLE 11. DOMESTIC RELATIONS
CHAPTER 107. MARITAL DISSOLUTION, ANNULMENT AND SEPARATION; MEDIATION AND
CONCILIATION SERVICES; FAMILY ABUSE PREVENTION
DISSOLUTION, ANNULMENT AND SEPARATION

Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

107.425. Investigation of parties in domestic relations suit involving children; physical, psychological, psychiatric or mental health examinations; parenting plan services; counsel for children.

(1) In suits or proceedings described in subsection (4) of this section in which there are minor children involved, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties for the purpose of protecting the children's future interest. The court may defer the entry of a final judgment until the court is satisfied that its judgment in such suit or proceeding will properly protect the welfare of such children. The investigative findings shall be offered as and subject to all rules of evidence. Costs of the investigation may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for indigent defense services.

(2) The court, on its own motion or on the motion of a party, may order an independent physical, psychological, psychiatric or mental health examination of a party or the children and may require any party and the children to be interviewed, evaluated and tested by an expert or panel of experts. The court may also authorize the expert or panel of experts to interview other persons and to request other persons to make available to the expert or panel of experts records deemed by the court or the expert or panel of experts to be relevant to the evaluation. The court may order the parties to authorize the disclosure of such records. In the event the parties are unable to stipulate to the selection of an expert or panel of experts to conduct the examination or evaluation, the court shall appoint a qualified expert or panel of experts. The court shall direct one or more of the parties to pay for the examination or evaluation in the absence of an agreement between the parties as to the responsibility for payment but shall not direct that the expenses be charged against funds appropriated for indigent defense services. If more than one party is directed to pay, the court may determine the amount that each party will pay based on financial ability.

(3)(a) In addition to an investigation, examination or evaluation under subsections (1) and (2) of this section, the court may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans. The services provided to the court and to parents under this section may include:
(A) Gathering information;
(B) Monitoring compliance with court orders;
(C) Providing the parents, their attorneys, if any, and the court with recommendations for new or modified parenting time provisions; and
(D) Providing parents with problem solving, conflict management and parenting time

coordination services or other services approved by the court.
(b) Services provided under this section may require the provider to possess and utilize mediation skills, but the services are not comprised exclusively of mediation services under ORS 107.755 to 107.785. If only mediation services are provided, the provisions of ORS 107.755 to 107.785 apply.
(c) The court may order one or more of the parties to pay for services provided under this subsection, if the parties are unable to agree on their respective responsibilities for payment. The court may not order that expenses
be charged against funds appropriated for indigent defense services.
(d) The presiding judge of each judicial district shall establish qualifications for the appointment and training of individuals and panels and the designation of programs under this section. In establishing qualifications, a presiding judge shall take into consideration any guidelines recommended by the statewide family law advisory committee.

(4) The provisions of this section apply when:
(a) A person files a domestic relations suit, as defined in ORS 107.510;
(b) A motion to modify an existing decree in a domestic relations suit is before the court;
(c) A parent of a child born out of wedlock initiates a civil proceeding to determine custody or support under ORS 109.103;
(d) A person petitions or files a motion for intervention under ORS 109.119;
(e) A person or state agency files a petition under ORS 109.125 to establish paternity and paternity is established; or
(f) A habeas corpus proceeding is before the court.

(5) Application of the provisions of subsection (1), (2) or (3) of this section to the proceedings under subsection (4) of this section does not prevent initiation, entry or enforcement of an order of support.

(6) The court, on its own motion or on the motion of a party, may appoint counsel for the children. However, if requested to do so by one or more of the children, the court shall appoint counsel for the child or children. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for indigent defense services.

(7) Prior to the entry of an order, the court on its own motion or on the motion of a party may take testimony from or confer with the child or children of the marriage and may exclude from the conference the parents and other persons if the court finds that such action would be likely to be in the best interests of the child or children. However, the court shall permit an attorney for each party to attend the conference and question the child, and the conference shall be reported.

(1971 c. 280 S 3; 1973 c. 502 S 11; 1981 c. 775 S 5; 1981 s.s. c. 3 S 34; 1983 c. 369 S 1; 1983 c. 386 S 1; 1989 c. 188 S 1; 1989 c. 1084 S 1; 1999 c. 569 S 4; 2001 c. 873 SS 6,6a)

Note: The amendments to 107.425 by section 6c, chapter 873, Oregon Laws 2001, become operative October 1, 2003. See section 6d, chapter 873, Oregon Laws 2001.

8.085 APPOINTMENT OF COUNSEL FOR CHILDREN

The Court may appoint counsel for children in cases arising under ORS Chapter 107 upon its own motion or upon motion of either party pursuant to ORS 107.425(3), and shall appoint counsel if requested to do so by one or more of the children. A reasonable fee may be imposed by the Court against either or both of the parties or as a cost in the proceedings.

The procedure for appointment of counsel for children in cases arising under ORS Chapters 107-109 shall be as follows:

(1) In its sole discretion, the Court may appoint counsel for the children on its own motion with or without prior notice to the parties.

(2) A person requesting appointment of counsel for a child or children must petition the Court for an order setting forth the reasons for such request. After reasonable notice to all parties, the person seeking such appointment shall appear and request an Order Appointing Counsel.

(3) The Court will appoint counsel where requested to do so by one or more children.

(4) Orders appointing counsel issued by the Court may contain provision for payment of attorney fees and terms for payment. No Order will be issued until counsel has agreed to accept such appointment upon the fee terms set forth.

(5) To the extent possible, appointed counsel will represent their clients' legal interests in obtaining a secure, stable home life and a balanced relationship with both parents and will be answerable only to their client and to the Court. The parents or persons having physical custody of the child shall cooperate in allowing counsel opportunity for private consultation with the child or children, including making or assisting with arrangements for the children's transportation to the attorneys' office or some other reasonable meeting place and reasonable phone communication if needed.

(6) Counsel to be appointed for children shall meet the Court's standards for qualification in family law matters and in the resolution of custody/parenting time issues.

Info Needed for Appointment of Attorney for a Child

Case Name:

Case No:

Petitioner's Attorney:

Respondent's Attorney:

Outstanding Issue:

Name/Age of Child(ren):

Next hearing date:

Firm or Negotiable:

Pro Bono:
Or
Hourly Rate of $____ paid by:

Other Relevant Data:
(ie: Current custody is with whom? Mediation/Evaluations ordered/completed? Parties out of town?

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

Department of Domestic Relations

In the Matter of the Marriage of	)	
	)	Case No.
_____,	)	
	)	
	)	
Petitioner.	)	ORDER FOR APPOINTMENT
	)	OF ATTORNEY FOR MINOR
_____,	)	CHILD(REN) OF THE
	)	PARTIES
Respondent.	)	

THIS MATTER having come before the Court upon the Court's motion for the Appointment of_____ () as attorney for the minor children and the files and records herein, and the Court being fully advised now, therefore,

IT IS HEREBY ORDERED THAT:

1. Under the provisions of ORS 107.425(6) and 2007 Multnomah County Supplementary Local Rule 8.085, is appointed as attorney for the minor child(ren) of the parties.

2. Both parties shall provide any and all information, including, but not limited to, medical, dental, Department of Human Services, and C.A.R.E.S. records pertaining to the minor child(ren) of the parties, and each party shall sign any and all releases for obtaining any information requested.

3. Both parties shall encourage mutual access and communication between the attorney and the child(ren), and neither of the parties shall interfere in

any way with any communications between and the child(ren).

4. Both parties are absolutely enjoined from discussing with the child(ren) the nature, extent or content of any communication between and the child(ren).

5. Both parties and shall cooperate in the scheduling of the time and location of appointments. However, in the unlikely event that such cooperation proves difficult, shall have the sole discretion and authority to determine the place, duration and circumstances of his/her interview and interactions with the child(ren). In any event, unless otherwise agreed to by the appropriate party, shall provide at least 48 hours notice to the appropriate party of the time and place of such planned interviews with the children.

6. The fees and costs of services shall be paid as follows:

_____

_____

_____.

7. OTHER:

DATED this ___ Day of ____, 2006.

_____
CIRCUIT COURT JUDGE

American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases

Approved by the American Bar Association House of Delegates
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I. INTRODUCTION

Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. By adopting these Standards, the American Bar Association sets a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases.

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do. Too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or children's lawyers themselves understand children's lawyers' roles, duties and powers. Children's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. These Standards distinguish two distinct types of lawyers for children: (1) The Child's Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) The Best Interests Attorney, who independently investigates, assesses and advocates the child's best interests as a lawyer. While some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child's best interests and/or related information, this is not a lawyer's role under these Standards.

These Standards seek to keep the best interests of children at the center of courts' attention, and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity and predictability. They require that: (1) all participants in a case know the duties, powers and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions. The American Bar Association commends these Standards to all jurisdictions, and to individual lawyers, courts, and child representation programs.

II. SCOPE AND DEFINITIONS

A. Scope

These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).

B. Definitions

1. "Child's Attorney": A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

2. "Best Interests Attorney": A lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.

Commentary

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child's Attorney or a Best Interests Attorney. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child's Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

These Standards do not use the term "Guardian Ad Litem." The role of "guardian ad litem" has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving

as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.

III. DUTIES OF ALL LAWYERS FOR CHILDREN

In addition to their general ethical duties as lawyers, and the specific duties set out in Parts IV and V, Child's Attorneys and Best Interests Attorneys also have the duties outlined in this section.

A. Accepting Appointment

The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.

B. Lawyer's Roles

A lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.

Commentary

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child's Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child's Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

C. Independence

The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.

Commentary

The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

D. Initial Tasks

Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment, and that as counsel of record he or she should receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.

E. Meeting With the Child

The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.

Commentary

Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child's interest.

The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child's developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, non-suggestive questions and how to interpret the child's responses. The lawyer may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

While the lawyer should always take the child's point of view into account, caution should be used because the child's stated views and desires may vary over time or may be the result of fear, intimidation and manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes.

F. Pretrial Responsibilities

The lawyer should:

1. Conduct thorough, continuing, and independent discovery and investigations.

2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.

3. Stay apprised of other court proceedings affecting the child, the parties and other household members.

4. Attend meetings involving issues within the scope of the appointment.

5. Take any necessary and appropriate action to expedite the proceedings.

6. Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.

7. Participate in depositions, pretrial conferences, and hearings.

8. File or make petitions, motions, responses or objections when necessary.

9. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.

Commentary

The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. This is necessary even for a Child's Attorney, whose ultimate task is to seek the client's objectives. Best Interests Attorneys have additional investigation duties described in Standard V-E.

By attending relevant meetings, the lawyer can present the child's perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of

domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available to litigants under state laws or court rules or by permission of the court, relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings; or third parties, (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

G. Hearings

The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:

1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney at the beginning of any hearing.

2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.

3. Present and cross-examine witnesses and offer exhibits as necessary.

4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.

5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.

6. Where appropriate, introduce evidence and make arguments on the child's competency to testify, or the reliability of the child's testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility.

7. Make a closing argument, proposing specific findings of fact and conclusions of law.

8. Ensure that a written order is made, and that it conforms to the court's oral rulings and statutorily required findings and notices.

Commentary

Although the lawyer's position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child's interests, describe the issues from the child's perspective, keep the case focused on the child's needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer's exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing. If there is a jury, a brief explanation of the role will be needed.

The lawyer's preparation of the child should include attention to the child's developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes, explaining that such a result would not be the child's fault.

If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness, or seek a protective order from the court. The lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by law so that the child's views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally, in chambers, without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

Questions to the child should be phrased consistently with the law and research regarding children's testimony, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue, or have an expert present when a young child is directly

involved in the litigation, to point out any developmentally inappropriate phrasing of questions.

The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child's input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Many jurisdictions have abolished presumptive ages of competency and replaced them with more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

H. Appeals

1. If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to Standard IV-D or V-G that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

2. The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.

3. When the appeals court's decision is received, the lawyer should explain it to the child.

Commentary

The lawyer should take a position in any appeal filed by a party or agency. In some jurisdictions, the lawyer's appointment does not include representation on appeal, but if the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court's decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

I. Enforcement

The lawyer should monitor the implementation of the court's orders and address any non-compliance.

J. End of Representation

When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

IV. CHILD'S ATTORNEYS

A. Ethics and Confidentiality

1. Child's Attorneys are bound by their states' ethics rules in all matters.

2. A Child's Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.

Commentary

The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client, subject to Rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct (2002).

The Model Rules of Professional Conduct (2002) (which in their amended form may not yet have been adopted in a particular state) impose a broad duty of confidentiality concerning all "information relating to the representation of a client", but they also modify the traditional exceptions to confidentiality. Under Model Rule 1.6 (2002), a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm", or "to comply with other law or a court order", or when "the disclosure is impliedly authorized in order to carry out the representation". Also, according to Model Rule 1.14(c) (2002), "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests" when acting under Rule 1.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial or other harm."

Model Rule 1.7 (1)(1) (2002) provides that "a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client ... ." Some diversity between siblings' views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are "directly adverse." Comment [8] to Model Rule 1.7 (2002) states: "... a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited ... a lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. ... The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

B. Informing and Counseling the Client

In a developmentally appropriate manner, the Child's Attorney should:

1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed.

2. Explain to the child what is expected to happen before, during and after each hearing.

3. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.

4. Discuss each substantive order, and its consequences, with the child.

Commentary

Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

The Child's Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client's choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child knows, and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On the one hand, the lawyer has a duty to ensure that the client is given the information necessary to make an informed decision, including advice and guidance. On the other hand,

the lawyer has a duty not to overbear the will of the client. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by the applicable ethical standards.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

As developmentally appropriate, the Child's Attorney should consult the child prior to any settlement becoming binding.

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

C. Client Decisions

The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.

Commentary

The child is entitled to determine the overall objectives to be pursued. The Child's Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult's lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child's developmental limitations make it not feasible to obtain the child's direction, as with an infant or preverbal child.

1. The Child's Attorney should make a separate determination whether the child has "diminished capacity" pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.

Commentary

These Standards do not presume that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Disability is

contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

2. If the child does not express objectives of representation, the Child's Attorney should make a good faith effort to determine the child's wishes, and advocate according to those wishes if they are expressed. If a child does not or will not express objectives regarding a particular issue or issues, the Child's Attorney should determine and advocate the child's legal interests or request the appointment of a Best Interests Attorney.

Commentary

There are circumstances in which a child is unable to express any positions, as in the case of a preverbal child. Under such circumstances, the Child's Attorney should represent the child's legal interests or request appointment of a Best Interests Attorney. "Legal interests" are distinct from "best interests" and from the child's objectives. Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts. A child's legal interests could include, for example, depending on the nature of the case, a special needs child's right to appropriate educational, medical, or mental health services; helping assure that children needing residential placement are placed in the least restrictive setting consistent with their needs; a child's child support, governmental and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child's due process or other procedural rights.

The child's failure to express a position is different from being unable to do so, and from directing the lawyer not to take a position on certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client's legal interests based on information the lawyer has, and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, or to remain silent with respect to that issue, or wants the point of view expressed only if the party is out of the room. The lawyer is then bound by the child's directive.

3. If the Child's Attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. The Child's Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise

the child's position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.

Commentary

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

It should be remembered in this context that the lawyer is bound to pursue the client's objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function, if the lawyer has taken the time to establish rapport with the child and gain that child's trust. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child's first choice.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a Best Interests Attorney. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Best Interests Attorney may never learn of the disclosed danger.

Model Rule 1.14 (2002) provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action ... the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules. States that do not abrogate the lawyer-client privilege or confidentiality, or mandate reporting in cases of child abuse, may permit reports notwithstanding privilege.

4. The Child's Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child's needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in case, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child's Attorney is bound by the child's direction concerning testifying.

Commentary

Decisions about the child's testifying should be made individually, based on the circumstances. If the child has a therapist, the attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

D. Appeals

Where appeals on behalf of the child are permitted by state law, the Child's Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child's Attorney should appeal. If the Child's Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she should notify the court and seek to be discharged or replaced.

Commentary

The lawyer should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

E. Obligations after Initial Disposition

The Child's Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary

Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The bulk of the Child's Attorney's work often

comes after the initial hearing. The Child's Attorney should stay in touch with the child, with the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

F. End of Representation

The Child's Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child's Attorney and the child will continue to have, and how the child can obtain assistance in the future, if necessary.

V. BEST INTERESTS ATTORNEYS

A. Ethics

Best Interests Attorneys are be bound by their states' ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.

Commentary

Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client's objective. A Best Interests Attorney in such a case should report the relevant views of all the children in accordance with Standard V-F-3, and advocate the children's best interests in accordance with Standard V-F-1.

B. Confidentiality

A child's communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.

Commentary

ABA Model Rule 1.6(a) bars any release of information "except for disclosures that are impliedly authorized in order to carry out the representation." Under DR 4-101(C)(2), a lawyer may reveal confidences when "required by law or court order". As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child's best interests, without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV-A.

C. Limited Appointments

If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney's tasks may be reduced as the court may direct.

D. Explaining Role to the Child

In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the Best Interests Attorney will (1) investigate and advocate the child's best interests, (2) will investigate the child's views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.

E. Investigations

The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:

1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;

2. Reviewing child's social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;

3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);

4. Contacting and meeting with the parties, with permission of their lawyers;

5. Interviewing individuals significantly involved with the child, who may in the lawyer's discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

6. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it;

7. Staying apprised of other court proceedings affecting the child, the parties and other household members.

Commentary

Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party's lawyer will not allow the Best-Interests Attorney to communicate with the party. Model Rule 4.2 prohibits such contact without consent of the party's lawyer. In some such cases, the Best-Interests Attorney may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, Model Rule 4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests Attorney's role.

The parties' lawyers may have information not included in any of the available records. They can provide information on their clients' perspectives.

Volunteer CASAs can often provide a great deal of information. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and reporting on the child's best interests. Where there appears to be role conflict or confusion over the involvement of both a lawyer and a CASA in the same case, there should be joint efforts to clarify and define the responsibilities of both.

F. Advocating the Child's Best Interests

1. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.

2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

3. At hearings on custody or parenting time, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.

Commentary

Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child's interests will generally be stated in a state's statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child's desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including his or her sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court's attention. This should not be done by ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.

G. Appeals

Where appeals on behalf of the child are permitted by state law, the Best Interests Attorney should appeal when he or she believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.

VI. COURTS

A. Appointment of Lawyers

A court should appoint a lawyer as a Child's Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case.

1. Mandatory Appointment

A court should appoint a lawyer whenever such an appointment is mandated by state law. A court should also appoint a lawyer in accordance with the A.B.A. Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996)

when considering allegations of child abuse or neglect that warrant state intervention.

Commentary

Whether in a divorce, custody or child protection case, issues such as abuse, neglect or other dangers to the child create an especially compelling need for lawyers to protect the interests of children. Lawyers in these cases must take appropriate steps to ensure that harm to the child is minimized while the custody case is being litigated. Appointing a lawyer is no substitute for a child protective services investigation or other law enforcement investigation, where appropriate. The situation may call for referrals to or joinder of child protection officials, transfer of the case to the juvenile dependency court, or steps to coordinate the case with a related ongoing child protection proceeding, which may be in a different court. Any question of child maltreatment should be a critical factor in the court's resolution of custody and parenting time proceedings, and should be factually resolved before permanent custody and parenting time are addressed. A serious forensic investigation to find out what happened should come before, and not be diluted by, a more general investigation into the best interests of the child.

2. Discretionary Appointment

In deciding whether to appoint a lawyer, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:

a. Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
b. Relocation that could substantially reduce the child's time with a parent or sibling;
c. The child's concerns or views;
d. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;
e. Disputed paternity;
f. Past or present child abduction or risk of future abduction;
g. Past or present family violence;
h. Past or present mental health problems of the child or a party;
i. Special physical, educational, or mental health needs of a child that require investigation or advocacy;
j. A high level of acrimony;
k. Inappropriate adult influence or manipulation;
l. Interference with custody or parenting time;
m. A need for more evidence relevant to the best interests of the child;
n. A need to minimize the harm to the child from the processes of family separation and litigation; or

o. Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.

Commentary

In some cases the court's capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child's best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child's case, or a case for the child's best interests, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner — that which is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child's best interests. A decision not to appoint should not be regarded as actionably denying a child's procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

3. Appointment Orders

Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties as well as to counsel. Orders should specify the lawyer's role as either Child's Attorney or Best Interests Attorney, and the reasons for and duration of the appointment.

Commentary

Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-2(o), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child's interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

4. Information Access Orders

An accompanying, separate order should authorize the lawyer's reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.

Commentary

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term "privileged" in this Standard does not include the attorney-client privilege, which is not affected by it.

5. Independence

The court must assure that the lawyer is independent of the court, court services, the parties, and the state.

6. Duration of Appointments

Appointments should last, and require active representation, as long as the issues for which the lawyer was appointed are pending.

Commentary

The Child's Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and

institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

7. Whom to Appoint

   Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.

Commentary

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney, or only as Best Interests Attorney.

8. Privately-Retained Attorneys

   An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) should have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) should be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) should vigilantly guard the client-lawyer relationship from interference as provided in Model Rule 1.8(f).

B. Training

Training for lawyers representing children in custody cases should cover:

1. Relevant state and federal laws, agency regulations, court decisions and court rules;

2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;

3. Applicable representation guidelines and standards;

4. The court process and key personnel in child-related litigation, including custody evaluations and mediation;

5. Children's development, needs and abilities at different ages;

6. Communicating with children;

7. Preparing and presenting a child's viewpoints, including child testimony and alternatives to direct testimony;

8. Recognizing, evaluating and understanding evidence of child abuse and neglect;

9. Family dynamics and dysfunction, domestic violence and substance abuse;

10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;

11. Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;

12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.

Commentary

Courts, bar associations, and other organizations should sponsor, fund and participate in training. They should also offer advanced and new-developments training, and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed, and the different legal standards to be applied.

Training should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.

C. Compensation

Lawyers for children are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness of privately-retained lawyers' hourly fees in family law cases.

1. Compensation Aspects of Appointment Orders

The court should make clear to all parties, orally and in writing, how fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work will be paid for; and how and by whom the fees and expenses are to be paid, in what shares. If the parties are to pay for the lawyer's services, then at the time of appointment the court should order the parties to deposit specific amounts of money for fees and costs.

2. Sources of Payment

Courts should look to the following sources, in the following order, to pay for the lawyer's services: (a) The incomes and assets of the parties; (b) Targeted filing fees assessed against litigants in similar cases, and reserved in a fund for child representation; (c) Government funding; (d) Voluntary pro bono service. States and localities should provide sufficient funding to reimburse private attorneys, to contract with lawyers or firms specializing in children's law, and to support pro bono and legal aid programs. Courts should eliminate involuntary "pro bono" appointments, and should not expect all or most representation to be pro bono.

3. Timeliness of Claims and Payment

   Lawyers should regularly bill for their time and receive adequate and timely compensation. Periodically and after certain events, such as hearings or orders, they should be allowed to request payment. States should set a maximum number of days for any required court review of these bills, and for any governmental payment process to be completed.

4. Costs

   Attorneys should have reasonable and necessary access to, or reimbursement for, experts, investigative services, paralegals, research, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings.

5. Enforcement

   Courts should vigorously enforce orders for payment by all available means.

Commentary

These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers' fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.

Lawyers and parties need to understand how the lawyer will be paid. The requirement to state the lawyer's hourly rate in the appointment order will help make litigants aware of the costs being incurred. It is not meant to set a uniform rate, nor to pre-empt a court's determination of the overall reasonableness of fees. The court should keep information on eligible lawyers' hourly rates and pro bono availability on file, or ascertain it when making the appointment order. Judges should not arbitrarily reduce properly requested compensation, except in accordance with legal standards of reasonableness.

Many children go unrepresented because of a lack of resources. A three-fold solution is appropriate: hold more parents responsible for the costs of representation, increase public

funding, and increase the number of qualified pro bono and legal service attorneys. All of these steps will increase the professionalism of children's lawyers generally.

As much as possible, those whose decisions impose costs on others and on society should bear such costs at the time that they make the decisions, so that the decisions will be more fully informed and socially conscious. Thus direct payment of lawyer's fees by litigants is best, where possible. Nonetheless, states and localities ultimately have the obligation to protect children in their court systems whose needs cannot otherwise be met.

Courts are encouraged to seek high-quality child representation through contracting with special children's law offices, law firms, and other programs. However, the motive should not be a lower level of compensation. Courts should assure that payment is commensurate with the fees paid to equivalently experienced individual lawyers who have similar qualifications and responsibilities.

Courts and bar associations should establish or cooperate with voluntary pro bono and/or legal services programs to adequately train and support pro bono and legal services lawyers in representing children in custody cases.

In jurisdictions where more than one court system deals with child custody, the availability, continuity and payment of lawyers should not vary depending on which court is used, nor on the type of appointment.

D. Caseloads

Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.

E. Physical accommodations

Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.

F. Immunity

Courts should take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their

appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child should have any right of action against a Child's Attorney or Best Interests Attorney.

Commentary

Lawyers and Guardians Ad Litem for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children's lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers' ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their state bars' rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.

APPENDIX A

IN THE _____ COURT OF _____

_____
Petitioner,

v. Case No. _____

_____
Respondent.

In Re: _____, D.O.B. _____

CHILD REPRESENTATION APPOINTMENT ORDER

I. REASONS FOR APPOINTMENT

This case came on this _____, 20____, and it appearing to the Court that appointing a Child's Attorney or Best Interests Attorney is necessary to help the Court decide the case properly, because of the following factors or allegations:

A. Mandatory appointment grounds:

( ) The Court is considering child abuse or neglect allegations that warrant state intervention.
( ) Appointment is mandated by state law.

B. Discretionary grounds warranting appointment:

( ) Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
( ) Relocation that could substantially reduce of the child's time with a parent or sibling
( ) The child's concerns or views
( ) Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
( ) Disputed paternity
( ) Past or present child abduction, or risk of future abduction
( ) Past or present family violence
( ) Past or present mental health problems of the child or a party
( ) Special physical, educational, or mental health needs requiring investigation or advocacy
( ) A high level of acrimony
( ) Inappropriate adult influence or manipulation
( ) Interference with custody or parenting time
( ) A need for more evidence relevant to the best interests of the child
( ) A need to minimize the harm to the child from family separation and litigation
( ) Specific issue(s) to be addressed: _____

II. NATURE OF APPOINTMENT

_____, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as (_) Child's Attorney (_) Best Interests Attorney, for the (_) the child or children named above (_) the child(ren) _____, to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which (_) is attached (_) has been furnished to the appointee. A Child's Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child's best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

III. FEES AND COSTS

The hourly rate of the lawyer appointed is $ ____, for both in-court and out-of-court work.

(_) The parties shall be responsible for paying the fees and costs. The parties shall deposit $_____ with (_) the Court, (_) the appointed lawyer. _____ shall deposit $ _____, and _____ shall deposit $ _____. The parties' individual shares of the responsibility for the fees and costs as between the parties (_) are to be determined later (_) are as follows: _____ to pay _____ %; _____ to pay _____ %.

(_) The State shall be responsible for paying the fees and costs.

(_) The lawyer has agreed to serve without payment. However, the lawyer's expenses will be reimbursed by (_) the parties (_) the state.

IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer appointed shall have access to confidential information about the child as provided in the Standards of Practice for Lawyers Representing Children in Custody Cases and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20___ _____
JUDGE

APPENDIX B

IN THE _____ COURT OF _____

_____
Petitioner,

v. Case No. _____

_____
Respondent.

In Re: _____, D.O.B. _____

ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION

_____ has been appointed as (_) Best Interests Attorney (_) Child's Attorney for (_) the child or children named above (_) the child _____, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child's Attorney or Best Interests Attorney only in accordance with such laws.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20___ _____
JUDGE

Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (With Commentary)

Preamble

These Standards set forth guidelines for the appointment and role of counsel and guardians ad litem representing children[1] in custody and visitation proceedings.[2] The Standards address when lawyers and guardians ad litem should be appointed and their obligations and responsibilities.

These Standards apply to three distinct categories: counsel for children who are empowered to direct the role of counsel (counsel representing "unimpaired" clients); counsel for children lacking the capacity to direct the role of counsel (counsel representing "impaired" clients); and guardians ad litem (regardless of the child's capacity and regardless of whether the guardian is an attorney).

Standards 1.1 to 1.3 address the appointments of counsel and guardians ad litem for children. They address when such appointments should be made, the training persons eligible for appointments should have, and the first steps both courts making the appointments and the persons who are appointed should take. Standards 1.1 to 1.3 apply to all appointments for children, including counsel and guardian ad litem appointments. Stan-

[1] In these Standards, "counsel" refers to an attorney acting as a lawyer for a child. A guardian ad litem may or may not be an attorney.

[2] There are many other proceedings in which representatives are routinely assigned to represent children, including abuse and neglect proceedings, termination of parental rights proceedings, and juvenile delinquency proceedings. These Standards do not reach any of those types of cases. These Standards only apply to private custody or visitation proceedings, including those between parents and non-parents in which the state is not a party and the standard by which the case is to be decided is the best interests of the child. Moreover, the Standards only apply to the visitation and custody issues in those cases. Other issues that commonly arise in those cases, such as child support and other financial matters, are beyond the scope of these Standards.

dards 2.1 to 2.13 address the behavior of attorneys assigned to represent children as counsel. Standards 2.3 to 2.6 and Standards 2.7 to 2.13 differentiate the role of counsel depending on the age, maturity, and intelligence of the child. Standards 3.1 to 3.8 address the role of guardians ad litem. Those Standards apply to all guardian ad litem appointments, whether or not the guardian is an attorney or a court combines the role of guardian ad litem and counsel, the attorney should represent the client in accordance with Standards 2.1 to 2.13.

These Standards are not intended to contravene state law. Rather, they are designed to fill gaps where they exist. In addition, to the extent the Standards actually conflict with current law in a particular jurisdiction, it is hoped the law will be reevaluated in light of these Standards. The Standards are most likely to be particularly useful, however, in those jurisdictions that currently provide little guidance either to judges or lawyers as to when and why children should be represented.

1. *Standards Relating to the Appointment of Counsel and Guardians ad Litem for Children in Custody or Visitation Proceedings*

The following standards are applicable to all appointments of representatives for children, including appointments of counsel and guardians ad litem.

1.1 *Courts should not routinely assign counsel or guardians ad litem for children in custody or visitation proceedings. Appointment of counsel or guardians should be preserved for those cases in which both parties request the appointment or the court finds after a hearing that appointment is necessary in light of the particular circumstances of the case.*

Comment

These Standards reject the general call for children to be represented in all matrimonial cases. Representatives for children, whether counsel or guardians ad litem, may be appropriate in particular cases. Other than in those cases, however, children are not necessarily better served by being given a representative, and the other parties to the action may be adversely affected by the appointment. In the absence of a particular reason for assigning representation for a child, the representative frequently will merely duplicate the efforts of counsel already appearing in the case.

Matrimonial and related custody proceedings should continue to be viewed as private disputes brought to the court for resolution because the parties are unable to resolve the dispute by other means. The mere fact that parents have decided to resolve their dispute in a contested manner is insufficient reason to require a separate legal representative for children in most cases.

Furthermore, the routine addition of representatives for children may delay the proceedings and tax the resources both of the parties and the courts. Adding a lawyer or guardian ad litem can not only increase the fees; overall costs may become geometrically greater if the child's representative wishes to retain paid experts whose contributions may, in turn, encourage the parties to retain additional experts. These greater expenses may ultimately be detrimental to the child's interests, since less money will be available after the divorce (and during its pendency) to spend on the child. If the child's representative is paid by the county, taxpayers will be subsidizing private parties engaged in a private legal dispute; in the absence of allegations that the child has suffered serious risk of harm that rises to the level of abuse or neglect, this would appear to be a misuse of public money. If representatives for children are unpaid, there will be an insufficient number of qualified professionals routinely available to represent children.[3]

A review of the laws in the different jurisdictions in the United States reveals that very few states provide meaningful guidance about any aspect of the use of representatives for children in custody or visitation cases. Relatively few states provide courts with any meaningful guidelines regarding when to make appointments. In the vast majority of jurisdictions, the relevant statute or caselaw merely recognizes the court's discretion to make an appointment when, for example, "the court determines

[3] *See* AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 3-8 (Report of the American Bar Association Working Group on the Unmet Needs of Children and Their Families 1993).

that representation of the interest would otherwise be inadequate."[4]

Under this Standard, representatives for children should be assigned when both parties want the child to be represented or when the court finds that there should be an appointment. When both parties want the child to be represented, there are few reasons to disallow the appointment. The impact on the parents' privacy and pocketbook are not the exclusive costs associated with the needless complication of legal dispute resolution (judicial resources, as one prominent example, can be severely taxed when cases are not resolved expeditiously). Nevertheless, when both parties are willing to absorb these costs, the appointments should go forward.

If either one or both parties do not want the child to be represented, this Standard requires that the court first conduct a hearing and make specific findings that a representative should be assigned before an appointment may be ordered. Such a hearing may be held upon motion of either party, on application of the child or a representative purporting to represent the child, or on the court's own motion. Under this Standard, before permitting a representative to appear on a child's behalf the court should find that separate representation is appropriate.

This Standard does not expressly set forth factors to be considered at the hearing. Some states have established useful criteria providing guidance where courts have the discretion to make an appointment. Arkansas, for example, authorizes an appointment "where the evidence is either nonexistent or inadequate to

[4] ALA. CODE § 26-2A-52 (1992). Some states mandate the appointment of counsel when certain criteria are met. Florida, Louisiana, Minnesota, Missouri, South Dakota, and Tennessee, for example, require the appointment of a guardian ad litem or an attorney if allegations of abuse or neglect are involved. *See* FLA. STAT. ANN. § 61.401 (West 1992); LA. REV. STAT. ANN. § 345(B) (West Supp. 1995); MINN. STAT. § 518.165 (1990); MO. ANN. STAT. § 452.423(1) (Vernon Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-4-45.4 (1992 & Supp. 1993); TENN. R. JUV. P. 37(c). Oregon requires the appointment of counsel "if requested to do so by one or more of the children." OR. REV. STAT. § 107.425(3) (1993). Vermont requires the appointment of counsel whenever a child is called as a witness in a custody, visitation or child support proceeding. VT. STAT. ANN. tit. 15, § 594(b) (1989 & Supp. 1991). Finally, Wisconsin requires counsel for children in all contested custody proceedings. WIS. STAT. § 767.045(1) (1989-1990).

determine the comparative fitness of the parents and to determine where the best interests of the child lie, or in cases where it is apparent that the dispute is centered on the desires of the parents rather than the best interests of the child."[5] Louisiana has developed a set of guidelines that this Commentary recommends that courts consider when deciding whether to appoint a representative. Louisiana law instructs judges to consider the following five issues when exercising discretion to appoint counsel for children:

(1) Whether the proceeding is exceptionally intense or protracted;
(2) Whether the attorney could provide the court with significant information not otherwise available or likely to be presented;
(3) Whether it is possible neither parent is capable of providing an adequate and stable environment for the child;
(4) Whether the interests of the child and those of either parent conflict;
(5) Any other factor relevant in determining best interests.[6]

Finally, in those cases in which appointment of counsel or guardian ad litem for a child is appropriate, such appointment should take place at the earliest possible stage of the proceeding.

1.2 *To be eligible for appointment as counsel or guardian ad litem for a child in a custody or visitation proceeding, a person should be trained in representation of children.*

Comment

To be effective, children's representatives, whether they are lawyers appointed as counsel or guardians ad litem or non-lawyers appointed as guardians ad litem, should be specifically trained as children's advocates. At a minimum, representatives must know how to communicate effectively with children. Non-lawyers appointed as guardians should receive training in the laws and procedures in custody and visitation proceedings.

This Standard anticipates that bar associations or local court personnel in each jurisdiction will develop courses and materials designed to familiarize persons who wish to be eligible for assign-

[5] Kimmons v. Kimmons, 613 S.W.2d 110, 113 (1981)
[6] LA. REV. STAT. ANN. § 345 (West Supp. 1995).

ment as children's representatives. These courses and materials should include methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping the parties to de-escalate conflict. It would be appropriate if these materials incuded an inter-disciplinary focus on children. This specialized training will prepare representatives, as these Standards require, to protect children from the harms attendant with litigation and to facilitate expeditious resolution of the dispute in accordance with the child's best interests.

1.3 *Whenever a court assigns counsel or a guardian ad litem for a child, the court should specify in writing the tasks expected of the representative. In the event the court does not specify the tasks expected of the representative, the representative's first action should be to seek clarification of the tasks expected of him or her.*

Comment

State law rarely specifies what type of representative for a child is to appointed. Although most states permit an appointment of either an attorney or a guardian ad litem or both, a few states require that the appointment be a guardian ad litem,[7] an attorney,[8] a guardian ad litem who must be an attorney,[9] or "a

[7] *See, e.g.*, Arkansas (Kimmons v. Kimmons, 613 S.W.2d 110, 113 (1981)); Florida (FLA. STAT. ANN. § 61.401 (West 1992)); Maine (Gerber v. Peters, 584 A.2d 605, 607 (Me. 1990); Cyr v. Cyr, 432 A.2d 793 (Me. 1981)); Massachusetts (MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1993)); New Hampshire (N.H. REV. STAT. ANN. § 458:17-a(1) (1992)); South Carolina (S.C. R. CIV. P. 17(c)).

[8] *See, e.g.*, Colorado (COLO. REV. STAT. ANN. § 14-10-116 (West Supp. 1995)); Delaware (DEL. CODE ANN. tit. 13, § 721(c) (1974)); Iowa (IOWA CODE ANN. § 598.12(1) (West Supp. 1995)); Louisiana (LA. REV. STAT. ANN. § 345 (West Supp. 1995)); Maryland (MD. CODE ANN., FAMILY LAW § 1-202 (1992)); Montana (MONT. CODE ANN. § 40-4-205 (1991)); Oregon (ORE. REV. STAT. § 107.425(3) (1991 & Supp. 1992)); Pennsylvania (PA. R. CIV. P. 1915.11(a)); South Dakota (S.D. CODIFIED LAWS ANN. § 25-4-45.4 (1989 & Supp. 1993)); Vermont (VT. STAT. ANN. tit. 15, § 594(a)-(b) (1989 & Supp. 1991)); Washington (WASH. REV. CODE ANN. § 26.09.110 (West 1986 & Supp. 1993)).

[9] *See, e.g.*, New Mexico (N.M. STAT. ANN. § 40-4-8(A) (Michie 1989 & Supp. 1992)); Virginia (VA. CODE ANN. § 16.1-266(D) (Michie 1988 & Supp. 1993)); Wisconsin (WIS. STAT. § 767.045(1), (3) (1989-1990)).

friend of the court."[10] It is even rarer when jurisdictions specify what duties the representative should undertake. Only about a dozen jurisdictions even attempt to provide meaningful guidance.[11]

It is essential, however, that the representative's role be clear to everyone before he or she undertakes any significant tasks. These Standards set forth rules of conduct for counsel and guardians ad litem representing children, enumerating both actions that representatives are expected to undertake and those they are prohibited from undertaking. Ideally, the bar will adopt these Standards in individual jurisdictions. Until they are formally adopted, there will continue to be uncertainty concerning the purpose and role of the assignment. To minimize this uncertainty, this Comment recommends that, at the time they make the appointment, courts specify in writing: (a) the purposes of the assignment; (b) the role of the child's representative; (c) the particular tasks expected to be performed by the representative; (d) the time frames, if any, within which to complete the tasks; (e) the fee arrangement for the representative's services, including the rate, payment schedule, and who is responsible for paying; and (f) whether the appointment is only for trial-level matters or includes responsibilities through any appeal that may be prosecuted.

Although this Standard does not require that the court schedule a formal appearance with all parties to discuss the role of the representative, such an appearance may serve everyone's interests and actually save time in the long run. In any event, if the court fails to specify the representative's role, the newly ap-

[10] *See, e.g.*, Kentucky (KY. REV. STAT. ANN. § 403.090(1) (Michie/Bobbs-Merrill 1984 & Supp. 1992)); Michigan (MICH. STAT. ANN. § 25.121) (Callaghan 1991)).

[11] These states include Colorado (*In re* Marriage of Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988), *cert. denied*, 490 U.S. 1021 (1989)); Florida (FLA. STAT. ANN. § 61.403 (West 1992)); Louisiana (LA. REV. STAT. ANN. § 345 (WEST SUPP. 1995)); MAINE (Gerber v. Peters, 584 A.2d 605, 606 (ME. 1990)); Massachusetts (MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1993)); Missouri (MO. ANN. STAT. § 452.423(2) (Vernon Supp. 1993)); New Hampshire (N.H. REV. STAT. ANN. § 458:17-a(I) (1992)); New Mexico (Collins v. Tabet, 806 P.2d 40 (N.M. 1991)); New Jersey (N.J. CT. R. 5:8A & 5:8B)); South Carolina (Shainwald v. Shainwald, 395 S.E.2d 441 (S.C. Ct. App. 1990)); Virginia (VA. R. ANN. 8:6); and Wisconsin (WIS. STAT. ANN. § 767.045(4) (West Supp. 1992)).

pointed representative should take the necessary steps to ensure clarification. Ideally, the representative should arrange for a meeting with all counsel and the judge shortly after the assignment to request specific guidance as to his or her role, the tasks to be performed, and the reasons for this assignment.

When judges are explicit about the purpose of the assignment, the representative should feel free to react. If a lawyer appointed as counsel to represent a child is given instructions by the court that conflict with the ethical obligations of counsel's role, counsel should inform the court as promptly as possible that counsel's higher duty is to the professional rules. Once counsel has determined that the child is impaired or unimpaired for purposes of the representation pursuant to Standard 2.2, *infra*, it is appropriate for counsel to inform both court and the parties of that determination.

2. *Standards Relating to Counsel for Children*

a. *Determination of "impaired" or "unimpaired" children*

The following standards are applicable to all appointments of counsel for children. These standards control the behavior of lawyers acting in the capacity of counsel for children. When lawyers are acting in such a capacity, of course, they are fully bound by the controlling rules of professional conduct in their jurisdiction.

2.1 *In order to define the appropriate nature of his or her role and responsibilities as counsel for a child, counsel should determine whether the child client is "impaired" or "unimpaired."*

Comment

Rule 1.14 of the American Bar Association's Model Rules of Professional Conduct makes clear that a lawyer's role and responsibilities vary sharply, depending upon whether the client is "impaired" or "unimpaired."[12] As the Rule recognizes, children are among the populations of clients who may suffer from an

[12] Although Model Rules are not binding on counsel unless adopted in a particular jurisdiction, they refect the most current thinking of the American Bar Association and usefully serve as guidelines for these Standards.

"impairment" that affects the client's ability to participate meaningfully in an attorney-client relationship. Yet, as the Rule and its Commentary also recognize, the age of a child is not the central criterion for assessing "impairment." Children can be "impaired" or "unimpaired," depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors. Thus, in every case in which an attorney is appointed to represent a child client, the attorney must make a threshold judgment about whether the client is "impaired" or "unimpaired." That determination will guide the attorney's responsibilities throughout the course of the representation. Standards 2.3 to 2.6, *infra*, set forth guidelines for representation of "unimpaired" children; Standards 2.7 to 2.13, *infra*, apply to the representation of "impaired" children.

2.2 *There is a rebuttable presumption that children age twelve and above are unimpaired. There is a rebuttable presumption that children below the age of twelve are impaired. Under this Standard, the child's counsel, rather than the judge, is to make the judgment whether the child is impaired.*

Comment

The Model Rules of Professional Conduct provide little guidance to lawyers representing child clients who may be "impaired" by virtue of their age and/or level of maturity. The Model Rules recognize that "a client's ability to make adequately considered decisions" may be "impaired" by reason of "minority, mental disability, or for some other reason."[13] However, the Rules say (a) nothing about how lawyers are to determine whether a particular client is impaired or unimpaired and (b) virtually nothing about what lawyers may or must do when they represent impaired clients.[14] Rule 1.14(b) merely states: "A law-

[13] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1994).

[14] The Model Code of Professional Responsibility is similarly unenlightening. Ethical Consideration 7-11 states: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . ." Ethical Consideration 7-12 states:

> 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

yer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[15] As already stated in the Comment to Standard 2.1, perhaps the only thing the Model Rules make clear concerning impairment is that lawyers are not free to make across-the-board assumptions that children below a particular age are automatically impaired and instead must make individualized assessments of a child client's capacity.

This Standard sets forth the rebuttable presumptions counsel should use when determining a child client is unimpaired or impaired. This Commentary articulates the factors counsel should consider when determining whether to treat these presumptions as rebutted in any given case. The Standard is designed to: (a) reduce the discretion available to lawyers to decide for themselves when and whether to cede any meaningful control of the case to the client and (b) ensure that the significant percentage of children who are unimpaired are accorded their rightful prerogatives.

Under the Model Rules, a client is impaired only when he or she "cannot adequately act in the client's own interest."[16] For purposes of this Standard, the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interest at stake, and

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 the 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 a legal representative compel the 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.

15 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (1994).

16 *Id.*

to appreciate the consequences of the available alternatives. Clients who have these qualities should ordinarily be deemed "unimpaired" within the meaning of the Model Rules of Professional Conduct and these Standards.

It is worth pointing out that the Standard is directed solely to the nature of the relationship between counsel and client when the court has seen fit to appoint counsel for a child. The Standard does not require appointment of an attorney to every child who is a party in litigation. Indeed, as explained in Standard 1.1, these Standards assume that children will not be represented by counsel except when there is a specific reason or need for representation.

Moreover, the Standard's use of age twelve as a dividing line for assessing capacity of children is not intended to apply, either directly or by analogy, to the question of whether (and, if so, when) a judge should accord deference to the stated preferences of a child. This Standard is concerned solely with the type of relationship an attorney should have with his or her child client.

(a) *The Use of Age Twelve as a Dividing Line for the Rebuttable Presumption*

The standard deliberately uses an objective chronological criterion to distinguish between children. Under this Standard, lawyers representing children aged twelve or older are to presume their clients to be capable of directing the lawyer's actions. The age of twelve was carefully selected. Although any chronological age is necessarily arbitrary, a number of factors suggest that age twelve is an appropriate dividing point with regard to children's capacity to understand the circumstances of their case and to articulate a considered position about their future. First, the literature on cognitive development suggests that children reach the highest stage of cognitive development between the ages of eleven and fourteen,[17] and many children have already reached the highest stage of cognitive development by the time they are twelve. As a leading author, writing on the subject of

17 *See* Lois A. Weithorn & Susan A. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589-91 (1982); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING (1958).

when children should have the power to consent to health-related treatment, has written:

> Many authors have reexamined the presumption that minors are incompetent to make decisions regarding their own health or research participation. The conclusions drawn by these authors are strikingly similar. On the basis of cognitive-developmental theory and research, all authors suggest that children age 14 and older possess the requisite cognitive and intellectual capacities to render them comparable to adults, as a group, relative to competency. And, most of these authors recognize that many children attain this highest level of cognitive functioning by age 12."[18]

This research was conducted to support the conclusion that almost all children above the age of twelve are competent to make informed medical decisions about their own treatment. Surely if children over the age of twelve are able to make such decisions, they are mature and intelligent enough to perform the lesser task of instructing their lawyer as to their wishes in a custody or visitation proceeding.

Second, children as young as twelve years of age already enjoy many rights recognized under the law. These rights include the First Amendment right to free speech[19] and the Fourteenth Amendment privacy and autonomy rights to choose to terminate an abortion over the objection of their parents.[20]

Indeed, as the empirical data suggests, many judges already treat children age twelve as a dividing line with regard to the degree to which judges are interested in the views of the child. In the only known survey of its kind, juvenile court and circuit court judges in Virginia who together decide all custody cases in that state were surveyed to determine whether and to what extent they are interested in the views of the children who are the subject of the custody dispute.[21] Virtually all judges reported that the preference of children aged fourteen and older was extemely important (89 percent of the judges surveyed described the preference of children fourteen years or older as dispositive or extremely important).[22] Moreover, virtually all of the judges rated the preferences of children aged ten and thirteen as extremely important (54 percent).[23] In sharp contrast, 92 percent of the judges rated the preferences of children between the ages of six to nine as only somewhat important or as not important.[24] Most judges considered the views of children below the age of six to be irrelevant.[25]

This study might suggest that the presumption of unimpairment be made at age ten. Unfortunately, because the study used a broad category (ages ten to thirteen) for children immediately below fourteen years of age, the study does not indicate how many judges would give even greater weight to children aged twelve and thirteen, as opposed to those aged ten and elevem. At the very least, however, this study clearly shows that judges give significant weight to the expressed views of a twelve-year-old.

(b) *Exercising Discretion As to Each Client*

It is, of course, neither possible nor desirable to eliminate all discretion for lawyers. This portion of the Commentary discusses how a lawyer ought to determine whether a child is of sufficient preference. It is essential that lawyers be given meaningful guidance when making this crucial determination or else a central purpose of these Standards would be defeated—the avoidance of dramatically disparate behavior by professionals in similarly situated cases.

For purposes of determining impairment, counsel's inquiry should focus on the process by which a client reaches a position, not on the position itself. A lawyer who has reason to believe a child over the age of twelve is impaired should evaluate the

18. Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, *in* CHILDREN'S COMPETENCE TO CONSENT 235 (Gary B. Melton et al. 1983). *See also*, Gary B. Melton, *Children's Competence to Consent*, *in* CHILDRENS COMPETENCE TO CONSENT 1, 14 (Gary B. Melton et al. eds., 1983).

19 *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

20 *See, e.g.*, Ohio v. Akron Reproductive Health Ctr., 497 U.S. 502 (1990); Bellotti v. Baird, 443 U.S. 622 (1979). *See also* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

21 Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988).

22 *Id.* at 1050.

23 *Id.*

24 *Id.*

25 *Id.* at 1046.

child's ability to engage in a coherent conversation and to comprehend the nature of the proceedings. In addition, counsel should look to the client's "basic understanding of the facts and possibilities described."[26] So long as a twelve-year-old or older child is able (a) to understand the nature and circumstances of the case; (b) to appreciate the consequences of each alternative course of action; (c) to engage in a coherent conversation with the lawyer about the merits of the litigation; and (d) to express a preference that similarly situated persons might choose or that is derived from rational or logical reasoning,[27] the lawyer must treat the client as unimpaired.

It is important to note the test does not allow an attorney who believes his or her client has selected an option that is not in the client's best interests to declare the client impaired. Rather, if the client's choice has some rational and reasonable basis to it, whether or not counsel believes it to be in the client's best interests, it is the responsibility of the attorney to follow the client's instructions. Under the Model Rules of Professional Responsibility clients are free to decide for themselves what outcome they prefer, and, except in the rare circumstances when clients are actually impaired, lawyers must respect the wishes and instructions given to them by their clients. Under these principles, a lawyer may not "reasonably believe" a client is impaired simply because the client seeks a different outcome than the lawyer would choose if the lawyer were free to make that determination for the client.

(c) *Lawyers, Not Court, Are to Determine Impairment*

The last sentence in the Standard is not meant to change current law. The terms of the relationship between an attorney and a client are always a matter for the attorney to determine.

26 Weithorn, *supra* note 17, at 248.

27 The Comments to the Juvenile Justice Standards recommend that counsel should consider clients to be incapable of considered judgment in their own behalf "[w]hen clients are incapable of understanding the proceeding in which they find themselves and therefore cannot rationally determine their interests in the matter." JUVENILE JUSTICE STANDARDS, Counsel for Private Parties, Standard 3.1(b) cmt. (Institute of Judicial Administration/American Bar Association 1982).

Under both the Model Rules of Professional Conduct[28] and the Code of Professional Responsibility,[29] attorneys are obliged to make the case-by-case determination regarding a client's capacity to set the goals of the representation. This is an impossible task for judges to perform since it requires spending many hours with a client. Moreover, counsel's determination is not properly subject to review by a court because any judicial inquiry would necessarily intrude into the confidential communication between counsel and the client.

b. *Representing "Unimpaired" Children*

2.3 *Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client.*

Comment

As stated in the Comment to Standard 2.1, the crucial distinction between categories of clients is impairment versus unimpairment, not age by itself. Once children are found to be unimpaired, they are to be treated substantially like all other unimpaired clients regardless of their age. This means, among other things, that all communications between attorney and client are privileged and subject to the profession's ordinary rules of confidentiality. The only difference these Standards recognize between representing unimpaired children and all other unimpaired clients is set forth in Standard 2.6.

Representation of multiple clients in the same proceeding presents special concerns regarding conflicts of interest. Counsel should remain sensitive to the possibility that siblings may require separate counsel and that representing both an unimpaired and an impaired child in the same proceeding may result in a conflict of interest.[30]

28 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

29 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1982).

30 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994).

2.4 *Unimpaired clients, regardless of age, have the right to set the goals of representation. Counsel for an unimpaired client should discuss the case with the child and counsel him or her with regard to the objectives of representation. Counsel is obliged to seek to attain the objectives of representation set by the client.*

Comment

The ethical rules of professional conduct emphasize the client-centered focus of lawyers. The American Bar Association's Model Code of Professional Responsibility provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[31] Similarly, the Model Rules of Professional Conduct require that lawyers representing unimpaired clients "abide by a client's decisions concerning the objectives of representation."[32] This requirement "is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[33] Lawyers representing children must accord them the same ultimate authority to determine the objectives of the litigation, unless the child's ability to make decisions is impaired.

The attorney-client relationship is, of course, richly textured.[34] A central component of lawyering involves assisting clients to reach the position that makes the most sense for them. Lawyers are expected to counsel clients, to provide them with feedback, and to help them sort out the advantages and disadvantages of the choices before them. This important counseling role is especially vital when lawyers represent young people. However, the basic principle remains that the final choice of what position to take in the litigation is the client's.[35]

31 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1982).

32 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994).

33 *Id.* Rule 1.14 cmt.

34 *Id.* Rule 2.1 (1994).

35 *See also* BOUNDS OF ADVOCACY Standard 2.17 (American Academy of Matrimonial Lawyers 1991), *reprinted in* 9 J. AM. ACAD. MATRIM. LAW. 1, 24 (1992): "AN ATTORNEY SHOULD NOT ALLOW PERSONAL, MORAL OR RELIGIOUS BELIEFS TO DIMINISH LOYALTY TO THE CLIENT OR USURP THE CLIENT'S RIGHT TO MAKE DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION."

Difficult ethical issues remain when counsel believes the child's preference is the result of parental manipulation or when counsel has evidence that awarding custody in accordance with the child's preference will put the child at risk of severe harm. At a minimum, counsel's role as counselor and advisor should include confronting the client with these concerns and having a full and frank conversation about the implications of the child's stated preferences. But counsel should not be free to second-guess the client or to work against the legitimate ends the client seeks. If counsel is unsuccessful in persuading the unimpaired client to seek a different outcome, counsel is obliged to zealously seek to effect the result sought by the client even when counsel disagrees with the wisdom of the client's preferences.[36] The only measure of escape provided by the ethical rules is when the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[37] Counsel may then ask the court to permit withdrawal, provided that "withdrawal can be accomplished without material adverse effect on the interests of the client."[38]

2.5 *Counsel for an unimpaired child should be treated by all parties and the court as a counsel of record unless the court expressly specifies otherwise.*

Comment

This Standard simply clarifies that counsel for an unimpaired child should be treated as all other counsel of record in a lawsuit, except to the extent limited by court order. The emphasis of this Standard is on process. When notices are sent to counsel, for example, the child's counsel should be included. When pleadings are filed, all counsel of record should routinely receive them. Similarly, attorneys for other parties may not communicate with the child or have the child evaluated without the permission of the child's counsel.

36 *See, e.g.*, Robert M. Horowitz & Howard A. Davidson, *Tough Decisions for the Tender Years*, FAM. ADVOC., Winter 1988, at 8, 11. *See also* JUVENILE JUSTICE STANDARDS, *supra* note 27, at Standard 3.1(b)(1).

37 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1994).

38 *Id.* Rule 1.16(b).

However, this standard is not meant to expand the purpose of the initial assignment. When, as may be expected in the vast majority of cases, the court has limited counsel's involvement to issues of custody or visitation — excluding counsel from taking part in other matters such as property division or financial issues — it is appropriate to treat the child's lawyer as counsel of record only with regard to issues of custody or visitation.

2.6 *When representing an unimpaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.*

Comment

Litigation involving dissolution of the family can be particularly acrimonious. All persons involved can suffer greatly as a result of this hostility and conflict. Children are especially vulnerable to the harms commonly associated with custody and visitation litigation.

The Standards for Matrimonial Lawyers endorsed by the American Academy of Matrimonial Lawyers already go further than the Model Rules of Professional Conduct by requiring counsel to "encourage the settlement of marital disputes through negotiation, mediation, or arbitration."[39] That Standard, like this one, recognizes that in matrimonial cases traditional notions of winning and losing are less appropriate than in other areas of the law. Taking the interests of all family members into account is justified in these cases.

Although these Standards require counsel to cede ultimate authority to the unimpaired child to direct counsel's conduct, it is appropriate for counsel to advance the interests of the child by protecting him or her from unnecessary conflict. Counsel should be ever mindful that the prosecution of the litigation often can be harmful to children of any age. For example, counsel should try to minimize the number of interviews to which a child may be exposed as a result of investigations or expert evaluations.

39 BOUNDS OF ADVOCACY, *supra* note 35 Standard 2.15.

This Standard requires counsel to take appropriate steps to de-escalate all conflict in the litigation.[40] Counsel should try, consistent with the client's instructions on the goals: (a) to resolve the dispute in the least contentious manner; (b) to resolve the dispute in the most expeditious manner; and (c) to expose the child to as little of the controversy as possible. To accomplish this, counsel should attempt to negotiate disputes that have the potential to escalate into harmful conflict. Counsel should also urge the parties and their lawyers to keep the interest of the child paramount, reminding them at various stages of the proceedings how particular actions may affect the child and recommending alternative actions that would better serve the child's interests.

c. *Representing "Impaired" Children*

2.7 *When a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation.*

Comment

The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests. The danger is that this additional adult will make a difference in the outcome of the proceeding without any assurance that the outcome is "better" (that is, without an assurance that the outcome best serves the child's interests). This Standard rejects as fundamentally flawed a rule that gives attorneys the authority to advocate the result they themselves prefer, in the client's name.[41]

40 These Standards impose this obligation on representatives of all children, whether they are counsel for impaired clients or guardians ad litem. *See* Standards 2.10 and 3.5, *infra*.

41 As the comment to Standard 2.3 states, Model Rules of Professional Conduct Rule 1.14(b) appears to allow a lawyer who reasonably believes that the client is impaired to "seek the appointment of a guardian or take other protective action with respect to a client." The comments to that Rule add, "[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian." In ordinary guardian-ward relationships, guardians are free to advocate a position contrary to what the ward wants.

When lawyers represent unimpaired clients, the individual lawyer's personal views are virtually irrelevant. Because lawyers must "abide by the client's decisions"[42] when representing ordinary clients, all are obliged to perform the same role. Once the unimpaired client has determined his or her goals, counsel's conduct depends in no way on his or her personal values. Similarly situated clients will be similarly represented. Although cases may be decided differently because of the quality of counsel's skill, such differences are unavoidable. Our legal system can do no more — but should do no less — than define an objective, uniform role for professionals.

When clients are impaired, it is equally important to develop standards that seek to achieve such uniformity. Accordingly, these Standards define a uniform role of counsel for lawyers representing impaired children that does not depend on the opinions or values of the lawyer. When counsel is free to determine what is the best outcome for the client and then to develop a litigation strategy to obtain that outcome, discrepant results will be sought by the child's counsel depending on the values and beliefs of the attorney fulfilling that role.

In other words, under such an arrangement similarly situated children would be subject to dramatically divergent representation depending on the views of the particular lawyer assigned the task. This arbitrariness is the antithesis of the rule of law. It is difficult to justify a system that treats similarly situated persons so differently.

Even if ethical rules arguably allow lawyers acting as "de facto guardians" to advocate a position based on the lawyer's personal opinion of what is best for the child, they do not require lawyers to do so; this Standard prohibits such action. The Model Rules insist the lawyers only undertake assignments that they are competent to handle. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994). Since lawyers are untrained to determine what is best for children, it is consistent with those rules for an attorney acting as a "de facto guardian" to eschew taking any position on the ultimate outcome of the case. Therefore, under this Standard, lawyers who are assigned to represent impaired children should refuse the assignment as beyond their competence if the court directs them to make a recommendation on the outcome of the case.

42 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994).

2.8 *To the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship. This should include, whenever possible, advising the client of counsel's role and informing the client of all significant developments in the case. When communicating with the child client, counsel should use terms and concepts comprehensible to a child of the client's age and intellect.*

Comment

Perhaps the most important function counsel can perform when representing an impaired child is to develop a strong relationship with the child. Under this Standard, lawyers are expected to keep in regular contact with their clients and are encouraged to maintain an ongoing dialogue with them. This is consistent with the Model Rules of Professional Conduct. Rule 1.14(a) states that even when clients are impaired, lawyers are obliged to try, "as far as reasonably possible, [to] maintain a normal client-lawyer relationship."[43] Even when the client is impaired, it is important for the child to know that there is an attorney in the proceeding who will keep the child informed of all relevant information during the course of the case.[44]

2.9 *Counsel for an impaired child should be treated by all parties and the court as a counsel of record unless the court expressly specifies otherwise.*

Comment

This Standard, like Standard 2.5, reminds all parties that, once assigned to represent a child, counsel is another counsel of record in the case and should be treated accordingly. This means, among other things, and subject to court order in a particular case, that the child's counsel should: (a) be served with copies of all papers; (b) be given notice of all court appearances or conferences; and (c) appear at every conference and every court appearance unless excused by the court. In addition, counsel for

43 *Id.* Rule 1.14(a).

44 This is because, as the comment to MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 states, "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."

an impaired child, as all other counsel of record, may file any motions or other pleadings seeking relief on the child's behalf.

However, the admonition in the Commentary to Standard 2.5 should be kept in mind. This standard is not meant to expand the purpose of the initial assignment. When the court has limited counsel's involvement to issues of custody or visitation — excluding counsel from taking part in other matters such as property division or financial issues — it is appropriate to treat the child's lawyer as counsel of record only with regard to those issues for which counsel has been assigned.

2.10 *When representing an impaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.*

Comment

As set forth in the Commentary to Standard 2.6, children are particularly vulnerable to the harms commonly associated with custody and visitation litigation. The Commentary to Standard 2.6 is generally applicable to this Standard. However, nothing in this Standard is intended to put counsel for the impaired child in the awkward position of being asked to propose a particular outcome that appears to be based on the preference of the child's counsel. If either of the parties were to ask counsel to state such a position, consistent with Standard 2.7 counsel must decline to do so.[45]

45 Experienced counsel who have represented very young children in custody proceedings consider the roles of investigator and protector to be of enormous benefit to children. Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study*, 68 NEB. L. REV. 330 (1989).

2.11 *As a general rule, counsel for an impaired child should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where counsel reasonably believes that the court would not approve the settlement if it were aware of certain facts, counsel should bring those facts to the court's attention.*

Comment

As Standard 2.10 indicates, ordinarily counsel serves the child's interests by encouraging settlement. However, when counsel believes a proposed settlement may endanger the child, counsel's duty to protect the child may require interposing an objection to the proposed settlement at least to the extent of bringing the matter to the court's attention. This duty applies unless counsel is prohibited from disclosing information by reason of the attorney-client privilege. This standard requires that counsel reasonably believe the court would not approve the settlement if it possessed the facts known to counsel. In those exceptional cases, counsel should alert the court before allowing the settlement to be completed. The manner of alerting the court may vary. However, *ex parte* communication is inappropriate. Ordinarily, counsel should file a formal pleading with notice to all parties.

2.12 *During the pretrial stage of a case, counsel for an impaired child should use all appropriate procedures to develop facts which the decisionmaker should consider in deciding the case and which otherwise would not be brought to the decisionmaker's attention.*

Comment

Counsel for impaired children can play a very productive role in custody proceedings by becoming an aggressive fact-finder seeking to uncover information that the decisionmaker should consider relevant. This Standard addresses counsel's role in the pretrial stage. Standard 2.13 focuses on counsel's role at an evidentiary hearing. These two Standards are closely connected and are both founded on a certain model of the role of a lawyer for an impaired client. This objectively defined role is similar to that of *amicus curiae*: counsel should become familiar

with the factors that properly may be taken into account in determining the child's best interests, then satisfy himself or herself that the court has the necessary facts to decide the case.

The precise steps counsel should take to accomplish this will vary depending on the procedures in the jurisdiction. In many jurisdictions, for example, an independent investigation will be conducted by an agency connected with the court. In other jurisdictions, no investigation of any kind will be ordered. Counsel should set into motion the process by which relevant facts will be uncovered. If an independent investigation has been conducted, it may be sufficient for counsel to speak with the principal investigator and read the final report. If counsel is satisfied that a thorough investigation has been conducted, there may be no further investigative work necessary.

Among the procedures to develop facts that counsel should consider are all types of discovery, including interrogatories, depositions, interviews of witnesses, requests for production of documents, and so forth. Ordinarily, counsel should plan to interview each of the adults seeking custody or visitation (after receiving permission from their counsel) and to ascertain whether there are other witnesses who counsel should interview, such as caregivers, healthcare providers, and teachers. In addition, in preparing for trial, counsel should consider interviewing all witnesses who may be called, including experts who have filed a report with the court or who have been retained or assigned to investigate the case.

Some might object that reducing counsel's role to a fact-gatherer who may present facts to the court that would otherwise not be disclosed deprives the child of his or her own lawyer within the ordinary use of the term.[46] Although this is correct, it is not possible to provide an impaired child with an advocate in the traditional sense of the word. It is for this reason, among others, that these Standards prohibit counsel representing impaired children from undertaking a traditional advocate's role. Having eschewed such a role, this Standard strives to define an objective alternative role.

[46] Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349, 355-56 (1993).

2.13 *At a trial or hearing to determine custody or visitation, the primary function of counsel for an impaired child is to make the decisionmaker aware of all facts which the decisionmaker should consider.*

Comment

This Standard addresses the role of counsel for an impaired child at an evidentiary hearing. It is closely connected with Standard 2.12 which addresses the role of counsel in the pretrial state of a custody or visitation case. This Standard applies to all situations where evidence is presented to a fact-finder to persuade the fact-finder to decide a controversy between the parties. This Standard sets out a non-partisan role of counsel for an impaired child.

a. *Counsel should use all appropriate procedures, including cross-examination and presentation of witnesses, to adduce facts which the decision-maker should consider and which otherwise would not be adduced.*

Comment

Counsel should not routinely cross-examine witnesses called by other parties nor should counsel routinely present witnesses. Rather, counsel should consider asking questions of a witness called by another party only if counsel believes there are relevant facts that have not already been elicited. Counsel can thereby serve as an important check against the danger that relevant information will be hidden from the court's attention. However, counsel is not a partisan seeking to elicit facts in order to persuade the court to reach a particular outcome. The purpose of counsel's cross-examination or presenting evidence is simply to place the court in the best possible position to decide the case on the basis of the child's best interests.

b. *Unless the child requests otherwise, counsel should take appropriate steps to make the court aware of the child's preferences.*

Comment

When an impaired child has expressed a preference on the outcome of the proceeding, counsel should discuss with the client whether or not he or she would want the preference revealed to the court. Even though these Standards generally do not require that counsel be bound by a position of an impaired child, the one exception to this rule is when the impaired child requests that counsel not reveal the child's preferences. When such a request is made, counsel should honor it. In all other cases, however, counsel should ensure that the court is made aware of the child's wishes. In virtually all jurisdictions, courts may or must take into account the preferences of children as one factor among many in determining the outcome.[47] Judges have discretion to decide

47 *See* Alabama (Calhoun v. Calhoun, 179 So. 2d 737 (Ala. 1965)); Alaska (ALASKA STAT. § 25.24.150(c) (1992)); Arizona (ARIZ. REV. STAT. ANN. § 25-332(A) (Supp. 1995)); California (CAL. CIV. CODE § 4600(a) (Deering Supp. 1993) (operative until 1-1-94)); Colorado (COLO. REV. STAT. ANN. § 14-10-124 (West 1987)); Connecticut (CONN. GEN. STAT. ANN. § 46b-56(b) (West 1986 & Supp. 1993)); Delaware (DEL. CODE ANN. tit. 13, § 722(a) (1993 & Supp. 1994)); District of Columbia (D.C. CODE ANN. § 16-911(a) (Supp. 1995)); Georgia (Whaley v. Disbrow, 166 S.E.2d 343 (Ga. 1969) (for children under fourteen years of age)); Hawaii (HAW. REV. STAT. § 571-46 (Supp. 1992)); Idaho (IDAHO CODE § 32-717 (1993)); Illinois (ILL. ANN. STAT. ch. 750, para. 602 (Smith-Hurd 1991)); Indiana (IND. CODE ANN. § 31-1-11.5-21(a) (West 1992)); Iowa (IOWA CODE ANN. § 598.41 (West Supp. 1995)); Kansas (KAN. STAT. ANN. § 60-1610(3) (1994)); Kentucky (Burton v. Burton, 211 S.W. 869 (Ky. Ct. App. 1919) (age of discretion); Shepherd v. Shepherd, 295 S.W.2d 557 (Ky. Ct. App. 1956); Haymes v. Haymes, 269 S.W.2d 237 (Ky. Ct. App. 1954); Bowman v. Bowman, 233 S.W.2d 1020 (Ky. Ct. App. 1950)); Louisiana (LA. CIV. CODE ANN. art. 134 (West Supp. 1995)); Maine (ME. REV. STAT. ANN. tit. 19, § 752(5) (West Supp. 1995)); Massachusetts (Bak v. Bak, 511 N.E.2d 625, *review denied*, 513 N.E.2d 1288 (Mass. 1987)); Michigan (MICH. STAT. ANN. § 722.23 (Callaghan Supp. 1995)); Minnesota (MINN. STAT. ANN. § 257.025 (West 1992)); Mississippi (MISS. CODE ANN. § 93-11-65 (Supp. 1994)); Missouri (MO. ANN. STAT. § 452.375(2) (V. Supp. 1996)); Montana (MONT. CODE ANN. § 40-4-212(1) (1995)); Nebraska (NEB. REV. STAT. § 42-364(1) (Supp. 1994)); Nevada (NEV. REV. STAT. § 125.480(4) (1991)); New Hampshire (N.H. REV. STAT. ANN. § 458:17(VI) (Supp. 1995)); New Jersey (N.J. STAT. ANN. § 9:2-4 (West 1993)); New Mexico (N.M. STAT. ANN. § 40-4-9(A) (Michie 1994)); New York (Jones v. Payne, 493 N.Y.S.2d 650 (N.Y. App. Div. 1985)); Lyons v. Lyons, 490 N.Y.S.2d 871 (N.Y. App. Div. 1985)); North Carolina (Hinkle v. Hinkle, 146 S.E.2d 73 (N.C. 1966); Campbell v. Campbell, 304 S.E.2d 262, *review denied*, 307 S.E.2d 362 (N.C. 1983); *In re* Custody of Peal, 290 S.E.2d 664 (N.C. 1982)); North Dakota (Novak v. Novak, 441 N.W.2d 656 (N.D. 1989)); Ohio (OHIO REV. CODE ANN. § 3109.04(B)(1) (Baldwin Supp. 1992)); Oklahoma (OKLA. STAT. tit. 10, § 21.1(C) (Supp. 1996)); Pennsylvania (Altus-Baumhor v. Baumhor, 595 A.2d 1147 (Pa. Super. Ct. 1991)); Rhode Island (Kenney v. Hickey, 486 A.2d 1079 (R.I. 1985)); South Carolina (Smith v. Smith, 198 S.E.2d 271 (S.C. 1973)); South Dakota (Jasper v. Jasper, 351 N.W.2d 114 (S.D. 1984)); Tennessee (Harris v. Harris, 832 S.W.2d 352 (Tenn. Ct. App. 1992), *appeal denied* (May 4, 1992)); Texas (Bennett v. Northcutt, 544 S.W.2d 703 (Tx. Ct. App. 1976)); Wyoming (Douglas v. Sheffner, 331 P.2d 840 (Wyo. 1958); Curless v. Curless, 708 P.2d 426 (Wyo. 1985)).

how much weight to give the children's preferences, based on such factors as age, maturity, and the appearance of undue parental influence. However, under current substantive law, impaired children have the same right as all other children to make their views known to the judge.

c. *At the conclusion of a trial or hearing, counsel for an impaired child shall not make a closing argument or submit a memorandum to the court.*

Comment

Standard 2.7 prohibits counsel for an impaired child from advocating or recommending a particular result. Under these Standards, counsel's role at trial is to monitor the information being made available to the court so that counsel is satisfied that the court has heard all relevant information that counsel reasonably believes the court should know. Once that role has been fulfilled, counsel for an impaired child should not be further involved in the trial phase of the proceeding and shall not comment on the evidence.

3. *Standards Relating to Guardians ad Litem*

The following Standards apply when the guardian ad litem is the only representative for the child. These Standards are inapplicable when the guardian ad litem is separately represented by counsel. In the event a guardian is so represented, the guardian is the client and counsel is obliged by ordinary rules of profes-

sional conduct to represent an unimpaired client (the guardian). These Standards are applicable to all guardian ad litem appointments when the guardian is not separately represented, whether or not the guardian is an attorney.[48] However, when attorneys assigned as a guardian ad litem intend to represent a child as counsel, Standards 2.1 through 2.13 are controlling under these standards.

3.1 *A guardian ad litem who is also an attorney should not combine the roles of counsel and guardian except in accordance with the provisions of Standards 2.1 through 2.13.*

Comment

This Standard rejects the hybrid arrangement by which attorneys who are appointed as guardians ad litem in effect retain themselves as counsel for the guardian and, in their role as "counsel," take their instructions from the "guardian." Such an arrangement is inconsistent with these Standards. It is inconsistent because the assigned adult, wearing the title "guardian," would be permitted to make decisions on behalf of the child (in violation of Standard 3.2) and would then be able to engage counsel who would effect the goals sought by the guardian.

Under this Standard, when an attorney assigned as a guardian for a child acts as counsel, the provisions in Standard 2 are controlling. When acting as a guardian, whether or not a member of the bar, the provisions in Standard 3 are controlling.

[48] When attorneys are assigned as guardians ad litem, they are not performing a role as an attorney. As a result, they are not bound by the ethical rules constraining the performance of attorneys as attorneys. In addition, when attorneys are performing guardian ad litem functions, they may not be covered by their ordinary malpractice insurance policy. As these Standards further develop, in many jurisdictions, guardians may be called as witnesses in the proceeding.

3.2 *The guardian ad litem shall not make a recommendation on the outcome of the proceeding or on contested issues during the litigation.*

Comment

Commonly, guardians ad litem are appointed for the purpose of making a recommendation concerning the best interests of the child. This Standard rejects the two implicit assumptions underlying that traditional purpose. First, that there are adults with special abilities to determine a child's best interests and that when such adults are assigned to find them they will succeed. Second, that children are better off when an adult — other than the judge — whom they do not know is assigned the task of determining their best interests and seeking to effect a result consistent with the adult's perception of them.

Guardians ad litem can be useful in these proceedings but they should not be encouraged to permit their own ideas about child rearing or children's best interests to make a difference in how the case is decided. To avoid this, guardians should shift their focus from what is the best *outcome* for the child to what is the best *process* by which the case should be decided.

Standard 2.7 prohibits lawyers in the role of counsel from advocating a position based on the lawyer's personal beliefs as to the child's best interests. This prohibition is not based on any professional rules of attorney behavior; to the contrary, as the Commentary to Standard 2.7 discusses, those rules actually appear to permit counsel, acting as "de facto" guardian, to advocate such positions. Rather, the prohibition is based on the same principles that lead to this Standard.

This prohibition avoids a common pitfall in these proceedings when guardians are permitted to take sides: cases often result in a form of double teaming with the guardian and attorney for one of the parties joining in concert to thwart the interests of the other party. It also avoids the serious danger of abdication of judicial responsibility. By prohibiting the guardian from advocating an outcome, the democratic process by which duly elected or appointed judges become the true arbiters of controversies brought to courts is reaffirmed.

These Standards reject empowering adults — whether they are labeled counselor, guardians ad litem, or anything else — to

decide what outcome is best for the children they are representing based on their own values, beliefs and ideas. If anyone is ever allowed to state such an opinion, it should only be an expert witness subject to full cross-examination.

An outright prohibition against guardians recommending an outcome can best be explained by placing all cases into two categories: easy and hard cases.

In the first category, it is clear what outcome is best for children. In easy cases, it may be assumed that virtually all guardians would advocate the same outcome. In these cases the risk of arbitrary behavior is at its lowest when guardians are appointed. Since the principal concern in these Standards is the avoidance of arbitrary behavior, it would appear that permitting guardians to advocate the result they want in easy cases is consistent with this principle.

However, two problems remain. First, it is not possible to develop standards for determining which are the easy cases. Allowing guardians to decide what result they want for the child whenever the guardian believes the case to be easy is an open invitation to guardians to constrain their own freedom only when they choose to do so. Without meaningful boundaries, it would not be long before guardians were making these decisions even in the harder cases. Second, when cases are obviously easy, a question naturally arises: why is it so important that there be a guardian to seek the obviously correct result? In easy cases, the need for guardians is at its lowest since the court almost always will find the "correct" result on its own. Indeed, presumably guardians will rarely be appointed in such cases.

In the second category, by definition, deciding what is best for the child is difficult. Paradoxically, although it would appear that children particularly deserve advocates in difficult cases precisely to ensure that the "right" outcome is reached, these are the cases in which the risk of a guardian's arbitrary behavior is greatest; in these cases, different guardians are most likely to recommend different outcomes. Moreover, the danger is compounded. Not only is it likely that different guardians will advocate different results in close cases, but it is to be expected that in close cases judges will be grateful to have the opinion of the child's guardian to help decide the case. It is therefore quite possible that the deciding factor in the court's decision will be the guardian's advocacy. This is inconsistent with the rule of law. For these reasons, these Standards prohibit representatives from providing their opinion or from seeking to obtain a particular outcome.

3.3 *Whenever possible, the guardian ad litem should advise the child of the guardian's role and inform the child of all significant developments in the case. When communicating with the child, the guardian should use terms and concepts comprehensible to a child of client's age and intellect.*

Comment

This Standard parallels the expectations of counsel representing an impaired child. The Commentary to Standard 2.8 is applicable to this Standard except for the discussion of the ethical roles concerning the conduct of counsel. Among the important differences between attorney-client and guardian-child conversations is that the latter are not protected by the attorney-client privilege.

3.4 *The guardian ad litem should be notified to appear at all court appearances and conferences with the judge and should appear unless excused by the court.*

Comment

Once a guardian ad litem is appointed, the guardian should be notified of all court appearances and, unless excused by the court, the guardian should be expected to appear at them. This Standard does not expand the purpose of the guardian appointment and would not require notice to the guardian or guardian's involvement in financial matters that are not a part of the custody or visitation issues for which the guardian was appointed.

The Standard is not meant to take up the guardian's, the parties', or the court's time unnecessarily. It is only meant to remind all involved that once a court takes the extraordinary step of appointing a guardian for a child, the guardian should routinely be included in all notification of court proceedings, and a specific decision regarding the necessity of the guardian's involvement should be made. Before the parties or the guardian

may assume the guardian's presence is unnecessary, this Standard requires the court to excuse the guardian.

3.5 *The guardian ad litem should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.*

Comment

This Standard parallels the obligations of counsel representing an unimpaired or an impaired child. The Commentary to Standard 2.10 is fully applicable to this Standard.

3.6 *As a general rule, the guardian ad litem should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where the guardian reasonably believes that the court would not approve the settlement if it were aware of certain facts, the guardian should bring those facts to the court's attention.*

Comment

The Commentary to Standard 2.12 is applicable to this Standard.

3.7 *During the pretrial stage of a case, the guardian ad litem should use all appropriate procedures to develop facts which the decisionmaker should consider in deciding the case and which otherwise would not be brought to the decisionmaker's attention.*

Comment

This Standard, like Standard 2.12, instructs the child's representative to be an investigator who attempts to place the judge in the best position to decide the case on the basis of the child's best interests. Although the guardian will not possess most of the tools available to counsel to develop the facts, the guardian should ascertain whether relevant facts about the case will be brought to the court's attention. When the guardian concludes that additional relevant facts exist, the guardian should strive to

supplement the information that the other parties or the court have developed.

3.8 *At a trial or hearing, the primary function of the guardian ad litem is to make the decisionmaker aware of all facts which the decisionmaker should consider.*

Comment

These Standards are written so that the guardian's role can be performed by attorneys, non-attorneys, and Court Assigned Special Advocates (CASA). Indeed, courts should consider using professionals from disciplines other than law as guardians.[49] Since guardians will not necessarily be members of the bar and thus will not be qualified to examine witnesses during trial, Standard 2.13(a) was not carried forward to the guardian's role. Under this Standard, guardians may participate in a proceeding to the extent currently allowed by law in the particular jurisdiction.

a. *If the guardian offers evidence or submits a report, the guardian should be duly sworn as a witness and be subject to cross-examination.*

Comment

Consistent with current practice in many jurisdictions, it is permissible under this Standard for the guardian to offer evidence to the court based on the guardian's own investigation into the case. However, when the guardian's submission is based on his or her independent fact-gathering, the guardian should be treated as all other persons in possession of relevant information and required to testify under oath so that the limitations of the investigation, if any, can be brought to the court's attention. As discussed in the Commentary to Standard 2.13(b), even a young

[49] "While many lawyers may, with training and experience, become intelligent consumers of psychological information and devices, they usually will not be expert in diagnosis and evaluation. Accordingly, it would not seem irresponsible to suggest that a professional trained in psychology, psychiatry, social psychology or social welfare be assigned the initial responsibility for protecting children under these circumstances." JUVENILE JUSTICE STANDARDS, *supra* note 27, at Standard 2.3(b).

child has the right to have his or her views made known to the court. The guardian should ensure that the court is aware of the child's preferences, at least where the child has requested that the guardian so inform the court.

b. *At the conclusion of a trial or hearing, the guardian shall not make closing argument or submit a memorandum to the court.*

Comment

The Commentary to Standard 2.13(c) is applicable to this standard.

The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective

by
Martin Guggenheim†

I. Introduction

As the Reporter to the American Academy of Matrimonial Lawyers (the Academy) for Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings,[1] I was asked to write this brief article introducing the Standards. The principal functions of this article are to describe the process by which the Academy developed the Standards, to highlight the principles upon which the Standards are based, and to discuss several of the most important features of the Standards.

II. Creation of the Committee on Special Concerns of Children

In the family law context, the issues a lawyer confronts — and the interpersonal contexts in which those issues are set — present unique difficulties. Although litigation almost invariably involves a dispute between parties, family law cases have a particular poignancy (and often an enhanced level of intensity) because the parties once aspired to a lifelong commitment to someone now designated as an "adversary." Moreover, in these cases the parties often will continue to have a relationship after

† Professor of Clinical Law; Director, Clinical and Advocacy Programs, New York University School of Law. I would like to thank my colleagues, Randy Hertz and Madeleine Kurtz, for reviewing an earlier draft of this article and making valuable comments.

1 REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (American Academy of Matrimonial Lawyers 1994) [hereinafter *A.A.M.L. Standards*].

the litigation is complete. Unfortunately, they are unable to resolve their differences without resort to the legal system and lawyers as intermediaries. Compounding this, these matters commonly involve disputes concerning the custody or care of children.[2] These qualities only begin to suggest the complexities of this area of practice. These unique features of the practice directly affect the decisions and behavior of family law practitioners.

In 1991, the Academy produced the Bounds of Advocacy,[3] a comprehensive set of principles for lawyers in family law cases. The explicit purpose of that publication was to establish a set of operating rules for lawyers' conduct in the area of family law. Traditional rules focus on the minimum standards of conduct, delineating acts that lawyers must perform to avoid disciplinary sanctions. The Academy recognized that lawyers may engage in conduct that is inappropriate even if it is not actionable. The Academy therefore set out to "provide guidance for attorneys who wish to practice at an ethical and professional level well above the duty of care defined for purposes of either professional discipline or malpractice liability."[4]

Upon completion of that project, the Academy turned its attention to a second effort. In 1992, Arthur Balbirer, then President of the Academy, created the Committee on Special Concerns of Children's Committee (hereafter simply "the Committee") and asked Meredith Cohen to be its chair. The Academy left to the Committee the determination of the particular issues it would address and the order in which it would address them. At its first meeting, the Committee chose to develop standards for lawyers and guardians *ad litem* who represent children in matrimonial proceedings. This decision was reached for two reasons. First, most members had noticed an increase in the number of cases in which children are individually represented

2 *See* Bill Miller, *Divorce's Hard Lessons: Court Ordered Classes Focus on the Children*, WASH. POST, Nov. 21, 1994, at A1 ("About 60 percent of divorces involve children. . ."). In approximately 90 percent of these cases, custody is not litigated. Alice Sternbach, *Career v. Children: Women Face Difficult Choice*, BALTIMORE SUN, Mar. 13, 1995, at 1D.

3 BOUNDS OF ADVOCACY (American Academy of Matrimonial Lawyers 1991), *reprinted in* 9 J. AM. ACAD. MATRIM. LAW. 1 (1992).

4 Robert H. Aronson, *Introduction: The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW. 41 (1992).

by counsel. Second, the Committee members perceived that the conduct of the lawyers for these children varied widely because there were no standards or other sources of meaningful guidance for representation of this type.

Employing the practice used to develop the Bounds of Advocacy, the Committee secured the services of a law professor to serve as Reporter in the drafting of the standards.[5] In January 1993, I became Reporter to the Committee. Over the next two years, the Committee met a total of eight times.

III. The Committee's Methodology

The Committee began its deliberations by making the broadest inquiry possible. It carefully avoided preconceptions, even including the question *whether* children should have legal representation at all. By explicitly making this a topic of inquiry, the Committee was able to approach the subject in a logically coherent way. Had the Committee regarded the first issue to address as *what* lawyers should do when assigned to represent children, it would have addressed an issue that cannot fully be answered without inquiring into other, more basic, questions. One cannot say what a lawyer representing a child should do without knowing why the child was given a lawyer in the first place.

Although this approach is logically coherent, the Committee recognized that the approach may be in tension with the already existing practice in certain jurisdictions. Some jurisdictions invariably or routinely appoint counsel for children in particular types of family law cases or in particular circumstances.[6] Thus, the Committee had to decide at the beginning of its inquiry whether it should simply accept existing practices without questioning their prudence or whether it should develop optimum standards even if they conflict with actual practice in some juris-

5 Professor Robert Harris Aronson of the University of Washington School of Law was the Reporter for the Bounds of Advocacy.

6 Oregon, for example, requires the appointment of counsel if "one or more of the children" so request. (ORE. REV. STAT. § 107.425(3) (1994)); Vermont requires the appointment of counsel whenever a child is called as a witness in a custody, visitation or child support proceeding. (VT. STAT. ANN. tit. 15, § 594(b) (1993)); Wisconsin requires counsel for children in all contested custody proceedings. (WIS. STAT. § 767.045(1) (1995)).

dictions. The Committee concluded that the latter course was the only responsible choice. Merely cataloguing or surveying the law as it presently exists would disserve the parties whose needs and interests are inadequately protected under existing practice. Moreover, it would abrogate the Committee's obligation to "assist in improving the legal system."[7] Finally, it would have been impractical to accept all states' existing practices as inviolable, since there are conflicting standards in different states.[8]

The course chosen by the Committee meant that the Standards could only be advisory. As the Standards make clear from the outset, they are not intended to supersede the law in any jurisdiction.[9] In those jurisdictions in which state statutes or other controlling law requires conduct at odds with the Standards, judges and lawyers necessarily must follow local law. It is hoped that eventually the Standards will lead to reform of the law in those jurisdictions. In the many jurisdictions in which the Standards do not conflict with the prevailing law, it is hoped that judges and lawyers will adhere to the Standards. In this sense, the Standards are addressed to the public, to judges, to legislators, and to representatives of children.

7 MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 8 (1981). *Accord*, MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Rule 6.1 (1994).

8 For example, a number of states *mandate* the appointment of counsel when certain criteria are met. Florida and Missouri are among several states that require the appointment of a guardian ad litem or an attorney if allegations of abuse or neglect are involved. (FLA. STAT. ANN. § 61.401 (West 1995); MO. ANN. STAT. § 452.423(1) (Vernon 1994)). Oregon requires the appointment of counsel if "one or more of the children" so request. (ORE. REV. STAT. § 107.425(3) (1994)). Vermont requires the appointment of counsel whenever a child is called as a witness in a custody, visitation or child support proceeding. (VT. STAT. ANN. tit. 15, § 594(b) (1993)). Finally, Wisconsin requires counsel for children in all contested custody proceedings. WIS. STAT. § 767.045(1) (1995).

Arkansas, on the other hand, authorizes an appointment "where the evidence is either nonexistent or inadequate to determine the comparative fitness of the parents and to determine where the best interests of the child lie, or in cases where it is apparent that the dispute is centered on the desires of the parents rather than the best interests of the child." Kimmons v. Kimmons, 613 S.W.2d 110, 113 (Ark. Ct. App. 1981).

9 *A.A.M.L. Standards*, *supra* note 1, Preamble.

When the Committee turned to the subject of representing children, it quickly came to appreciate that any discussion concerning "children" is simply too broad unless it is sub-divided. Some children are mature and intelligent enough to make decisions and to express their opinions with a reasonable degree of clarity. Other children, however, are too young even to have opinions or to express themselves.

By discussing children in terms of these distinctions, it was easier for the Committee to recognize the complexities of the topic. If it makes sense to provide a sixteen-*year*-old with a lawyer, does it necessarily follow that a sixteen-*day*-old child also should receive a lawyer? And, if so, should the lawyers in these two very different situations follow the same model for representing a "child"? The Committee immediately appreciated that the chronological and developmental distinctions between "children" demand careful calibration of the conception and duties of a legal representative for a child.[10]

The Committee realized, therefore, that its task would be significantly different from the work that went into developing the Bounds of Advocacy. When developing standards for representing adults, there is no comparable need to investigate the underlying assumptions of the role of counsel or counsel's purpose in representing a client. Lawyers for competent adults are obliged by the Model Rules of Professional Conduct to "abide by a client's decisions concerning the objectives of representation."[11] This central premise of professional responsibility for lawyers cannot be applied to a large number of children (those too young even to communicate their views) and may be inappropriate to apply to an even larger number of children (those old enough to express themselves but who may lack the maturity or competence to have their views dictate their lawyers' conduct). For this reason, the Committee chose to explore territory

10 *See, e.g.*, Arnold Samenoff & Susan C. McDonough, *Educational Implications of Developmental Transition: Revisiting the 5-to-7 Year Shift*, 76 PHI DELTA KAPPAN 188 (1994); Charles Brainerd, *The Stage Question in Cognitive Developmental Theory*, 1 BEHAV. & BRAIN SCI. 173 (1978); Barbara Ragoff et al., *Age of Assignment of Roles and Responsibilities to Children*, 18 HUMAN DEV. 353 (1975).

11 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994). Lawyers are only obliged to abide by client's instructions when those instructions are lawful.

ordinarily irrelevant when drafting standards of professional behavior. Before addressing how lawyers for children ought to behave, it studied a number of underlying issues that ultimately would bear upon the role these lawyers should perform.

Much of the Committee's first meeting was devoted to cataloguing the benefits and drawbacks of providing children with representation. The Committee identified a number of powerful justifications for appointing representatives for children in custody proceedings.[12] First, representatives for children may be able to perform a number of tasks that are beneficial for children. These include: protecting children from the scars of battle that sometimes are inflicted during acrimonious litigation; lessening conflict by encouraging parents to focus on the needs and best interests of the child above all other considerations; facilitating settlement; uncovering material information that both parents may be disinclined to disclose; even-handedly explaining the proceedings to the child client and thus ensuring that the child is made to feel as good as possible about the case; and providing the child with an opportunity to be heard. Without their own representatives, children commonly are heard, if at all, through one or both of their parents. Under such circumstances, there is a risk that the children will be silenced or manipulated.[13] There was a time in American legal history when married women were "heard" only through their husbands; no one today would dispute that under such a regime, women did not really have any voice at all. Providing children with a representative may ensure that the children's own voices will actually be heard.

In addition, appointment of representatives for children may maximize the probability that cases will be decided based on what is best for the child. Of course, courts already are expected to decide cases on that basis. However, courts may need assistance to help them discharge their *parens patriae* function because they often are limited in their capacity to acquire or become familiar with essential facts. Finally, if only as a symbolic measure,

[12] The term "representatives" is meant to embrace both lawyers and guardians *ad litem*. In this article, this term and "lawyers" are used interchangeably. The term "guardian *ad litem*" is used when addressing matters that apply only to guardians and not to lawyers.

[13] *See e.g.*, Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988).

appointing representatives for children emphasizes the child-focused purpose of these proceedings. Providing an independent representative for children sends a powerful message that children are independent persons, not extensions of their parents, and that they have independent needs, wants, and rights.

But the Committee also identified some reasons to have serious reservations about assignments of counsel for children. First, it is not clear that giving children a voice is always a good thing. Custody proceedings are emotionally very difficult, often involving a mixture of feelings of rejection, guilt, pain, and anger. Placing children at the center of the dispute by informing them that their preference as to custody is the primary, or even a central, factor in deciding custody may disserve children's best interests by making them feel the need to choose — and thereby reject — one parent over the other.[14] Protecting children from being forced to feel responsible for choosing where to live may, in the long run, best serve the interests of most children. In addition, when the child's preference will be accorded prominence by the child's lawyer, there is a danger that the parents will be encouraged to attempt to influence the child to prefer one over the other. When this occurs, children become pawns of a different order. It rarely will serve children's best interests to have parents actively trying to persuade children to tell their lawyers that they want to live with one parent rather than the other.

After this broad inquiry, the Committee reviewed the rules in every jurisdiction. In particular, this review included identifying the statutes and caselaw setting forth the circumstances under which a representative should be assigned for a child and the actions expected of that representative. In addition, for reasons that will be explained, this review included the statutes and caselaw setting forth the weight to be given a child's preference in a custody or visitation proceeding.[15]

[14] *See, e.g.*, ROBERT E. EMERY, MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT 132-33 (1988) ("If being caught in the middle of the parents' conflict is one of the greatest sources of distress for children then soliciting their opinion as to who is their preferred custodian is hardly a solution. The articulation of a preference can be tantamount to asking children to choose between their parents.").

[15] This undertaking resulted in an eighty-two page document which was shared with the Committee. The document was prepared by Allison Armour, a member of the 1995 N.Y.U. Law School graduating class.

After a second meeting which continued the wide-ranging discussion, I prepared a "working paper" that synthesized the issues the Committee had addressed and laid out the choices before the Committee. This paper included a review of the literature on the subject of representing children. At this point, the Committee felt it was important to expand its discussion and to include all Academy members in a conversation. To accomplish this, the Academy set aside the better part of an entire day at its Annual Meeting in Chicago in November 1993. At this program, several Committee members addressed a plenary discussion of the general issues of representing children; thereafter, Committee members led small group discussions at which the entire Academy was encouraged to comment on all potentially relevant facets of representing children. Finally, Academy members were encouraged to send their written comments to the Committee. The Committee received a large number of letters from Academy members as well as recent opinions or reports on the subject of representing children.[16]

After the Annual Meeting, the Committee began the process of actually drafting the Standards. By this point, each Committee member felt reasonably well-versed with the broad issues raised by the subject of representing children. Having postponed consideration of what the Standards should look like until this background inquiry was completed, the Committee turned to the task of drafting with the assurance that it had identified the relevant issues and surveyed the range of issues and views as much as it practically could.

The Standards went through a series of six drafts. Each draft was reviewed by the entire Committee and then revised to reflect the Committee members' concerns and suggestions. In addition, the Committee twice presented a draft of the Standards to the Executive Committee and made modifications in accordance with its reactions. Finally, the Standards were presented to the Board of Governors at the Annual Meeting in November 1994, at which time the Board adopted them.

16 One of the obvious benefits of working with a national organization like the Academy is that it is virtually impossible to miss a new decision anywhere because members exist in every jurisdiction and so many were eager to keep us abreast of recent trends.

IV. A Brief Comment on the Standards Themselves

As already indicated, the Standards followed from certain principles developed by the Committee over the course of its deliberations. Three principles in particular are at the core of the Standards. First, and most basic, the Committee regarded it as crucial that whatever standards were developed would provide meaningful guidance to professionals so that the things they do and the decisions they make will not be based on their own personal values or beliefs. The greatest challenge for the Committee was to create a set of guidelines that establishes a uniform set of rules of behavior applicable to everyone performing the same role. This principle explains Standards 2.7 through 2.13 and 3.2 through 3.8. In particular, this principle undergirds Standard 2.7, which prohibits a lawyer from advocating a position with regard to the outcome of the proceeding when representing a client who is unable to set the goals of the representation, and Standard 3.2, which prohibits a guardian *ad litem* from recommending a particular result.

Second, the Committee felt it necessary to develop standards for attorney behavior in conformity with the Model Rules of Professional Conduct regulating the behavior of lawyers already in existence. From this principle, the Committee adopted the distinction utilized by the Model Rules between "unimpaired" and "impaired" clients.[17] Once this distinction was drawn, it became clear that a lawyer's role for unimpaired clients was already firmly established by the Model Rules themselves and needed only to be further elaborated as applied to children in divorce or custody proceedings.[18]

In developing standards for the impaired client, the Committee recognized that the Model Rules are considerably more

17 *See A.A.M.L. Standards, supra* note 1, §§ 2.3, 2.4.

18 Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility are unambiguous in setting forth the role of counsel when representing a competent client. Rule 1.2(a) of the Model Rules require that lawyers representing unimpaired clients "abide by a client's decisions concerning the objectives of representation." Ethical Consideration 7-7 of the Model Code provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

vague with regard to what a lawyer may or must do.[19] As a result, the Committee spent much more time discussing the role of a lawyer representing an impaired client than it did in discussing the unimpaired client. Ultimately, the Committee adopted standards that prohibit attorneys for impaired clients from advocating any outcome even when the Model Rules would permit a lawyer to recommend a particular result.[20] The Committee consciously limited the lawyer's role to a greater degree than current law and rules demand. At the same time, the Standards do not conflict with the Model Rules; those Rules permit — but do not require — attorneys representing impaired clients to act as *de facto* guardians and to recommend an outcome in the case.[21] By applying the first principle of achieving uniformity of role, the Standards sought to eliminate the possibility that a lawyer's advocacy would be shaped by the lawyer's personal values or beliefs. This was attainable, in the Committee's view, only by prohibiting attorneys for impaired clients from advocating any outcome in a case.

Once standards for impaired clients were developed, it followed clearly that the role of a guardian *ad litem* (whose behavior, by definition, is not constrained by the Model Rules for attorneys — even when the guardian happens to be an attorney) should parallel the role the Standards defined for lawyers for impaired clients. Accordingly, the Standards also prohibit guardians *ad litem* from recommending an outcome to the court.[22] Here again, the Standard followed logically from the goal of

[19] In contrast with the clarity of role when representing a competent client provided by both the Model Rules and the Model Code, neither the Model Rules nor the Model Code provides any meaningful guidance to counsel who represents an incompetent or impaired client. The Comment to Model Rule 1.14 unhelpfully informs lawyers that when representing a client with a disability, "the lawyer often must act as de facto guardian," but is silent on what that means or what precise steps a de facto guardian should take. Similarly, Ethical Consideration 7-11 of the Model Code of Professional Responsibility merely states that "the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client." It, too, is silent on just what this means.

[20] *A.A.M.L. Standards*, *supra* note 1, § 2.7.

[21] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

[22] *A.A.M.L. Standards*, *supra* note 1, § 3.2.

eliminating arbitrariness and establishing a uniform set of standards and procedures for representing children.

The third principle was that the Committee would not attempt to tinker with the substantive rules by which custody or visitation cases are to be decided. The Committee regarded its charge as involving only the procedural matter of whether children should be represented, not the criteria judges should apply in deciding these cases. Thus, for example, the Committee did not endorse, or even independently review the merits of, substantive rules that authorize courts to decide custody cases by considering the child's preferences as merely one factor among many.[23] Indeed, one of the reasons the Committee opted against routine appointment of lawyers for children[24] is that such a practice significantly increases the potential for a court's according greater weight to a child's preferences (forcefully expressed by the child's lawyer) than legislation and caselaw currently permit.

A. *The Centrality of the Principle of Uniformity of Behavior*

Surprisingly few jurisdictions provide any guidance at all regarding a lawyer's role in custody disputes. Even those that do attempt to define the lawyer's role do not meaningfully constrain lawyers in the performance of their role.[25] As a result, current law allows lawyers a wide range of latitude in doing what they

[23] *See id.* § 2.13(b) cmt.

[24] *See id.* § 1.1.

[25] Only about a dozen jurisdictions provide meaningful guidance. Colorado requires guardians ad litem to present all available evidence concerning the child's best interests. *In re* Marriage of Barnthouse, 765 P.2d 610, 612 (Colo. Ct. App. 1988), *cert. denied*, 490 U.S. 1021 (1989). Florida sets forth a long list of duties of guardians ad litem, including investigating, interviewing, petitioning the court to inspect records, requesting the court to order medical examinations, assisting the court in obtaining impartial expert examinations, making recommendations, filing pleadings, motions, or petitions, participating in depositions and hearings, and compelling the attendance of witnesses. FLA. STAT. § 61.403 (1995). Louisiana requires lawyers to "interview the child, review all relevant records, and conduct discovery as deemed necessary to ascertain facts." LA. REV. STAT. ANN. § 345(D) (West Supp. 1995). In Maine, the duties of the guardian ad litem are "to evaluate the parties, their children, and any other appropriate individuals and to provide a report and recommendations to the Court as to an appropriate disposition of the parental rights and responsibilities regarding" the child. Gerber v. Peters, 584 A.2d 605, 606 (Me. 1990). Massachusetts requires guardians to "report in writing to the court the results of the

investigation." MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1995). Missouri instructs that:

> The guardian ad litem shall: (1) Be the legal representative of the child at the hearing, and may examine, cross-examine, subpoena witnesses and offer testimony; (2) Prior to the hearing, conduct all necessary interviews with persons having contact with or knowledge of the child in order to ascertain the child's wishes, feelings, attachments and attitudes. If appropriate, the child should be interviewed; (3) Request the juvenile officer to cause a petition to be filed in the juvenile division of the circuit court if the guardian ad litem believes the child alleged to be abused or neglected is in danger. MO. ANN. STAT. § 452.423(2) (Vernon 1994).

New Hampshire authorizes the court appointing the guardian to "specify the concerns to be addressed by the guardian ad litem, and otherwise limit the scope of the appointment." N.H. REV. STAT. ANN. § 458:17-a(I) (1993). New Mexico expects the guardian to:

> exercise his best professional judgment on what disposition would further the best interests of the child, his client, and at the hearing vigorously advocate that position before the court. [W]hen a child needs a guardian ad litem, he needs an advocate — someone who will plead *his* cause as forcefully as the attorneys for each competing custody claimant plead theirs. The basic premise of the adversary system is that the best decision will be reached if each interested person has his case presented by counsel of unquestionably undivided loyalty. Collins v. Tabet, 806 P.2d 40, 50 (N.M. 1991) (*quoting* Veazey v. Veazey, 560 P.2d 382 (Alaska 1977) (emphasis in original)).

South Carolina considers the guardian to be "a representative of the court appointed to assist it in properly protecting the interests of an incompetent person." Shainwald v. Shainwald, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990). Virginia instructs counsel for a child to represent "the child's legitimate interests" and instructs guardians to "advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare." VA. R. 8:6. In Wisconsin, guardians are to decide for themselves what is in the child's best interests, but, unless instructed by the child not to, they must inform the court of the child's wishes. Guardians are expected to make recommendations and are permitted to cross-examine witnesses. WIS. STAT. ANN. § 767.045(4) (West 1995).

Even when courts recognize that the role of counsel in custody proceedings has not been defined, they have failed to address the issue. *See, e.g.*, Knock v. Knock, 621 A.2d 267, 275, 276 (Conn. 1993):

> It is clear that the trial court and counsel for the minor child disagreed as to the proper role of the attorney for a minor child in a custody proceeding . . . . The legislature has not yet delineated, nor has this court yet been presented with the opportunity to delineate, the obligations and limitations of the role of counsel for a minor child. We recognize that representing a child creates practical problems for an attorney and that this important issue, at some point, needs to be addressed . . . . Because counsel has failed to demonstrate any prejudice resulting from her difference of opinion with the trial court, however, this case is not an appropriate vehicle for a discussion of the role of counsel for a minor child.

think best on behalf of their young clients in custody proceedings. Thus, the greatest challenge facing the Committee, and, in the Committee's view, the greatest contribution it could make, was to craft rules of conduct that reduce the discretion available to lawyers representing children.

The Committee regarded the most serious threat to the rule of law posed by the assignment of lawyers for children to be the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests. The danger perceived by the Committee is that this extra person will make a difference in the outcome of the proceeding without providing any assurance that the outcome will be "better" than if no representative had joined the case. This holds true whether the representative is called "counsel" or a "guardian." The Committee concluded that unless lawyers assigned to "represent" young children were given specific tasks to perform which did not depend on the lawyers' values or personal beliefs, it would be inviting arbitrary role behavior on the lawyers' part and arbitrary outcomes even in similarly situated cases.[26]

26 In their article, *Practical and Theoretical Problems With the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57 (1995), Ann M. Haralambie and Deborah Glaser criticize the Standards' prohibition against allowing advocacy of an outcome by the impaired client's lawyer. However, their analysis of this issue is very limited and ultimately flawed. First, they assert in a conclusory fashion that the Standards "constitute a radical departure from the generally accepted practice for children's attorneys." *Id.* at 70. Even assuming that this is the case (which Haralambie and Glaser do not show, since the only authority upon which they rely is a student authored law review note from almost a decade ago), the mere fact that a certain practice is followed does not establish either the legal or ethical propriety of that practice. Second, they attempt to justify a practice of lawyers substituting their own judgment for that of an impaired client by declaring that attorneys for adult clients in matrimonial cases also inject their own "values, biases, and prejudices" into the process by means of counseling their clients. *Id* at 80. However, there is a great — and quite obvious — difference between adult clients, who are always free to reject the advice given by a lawyer, and a very young child client who will have no voice in the proceedings. The whole point of the Standards is to reduce to a minimum the insertion of

The Committee reached this conclusion by carefully examining and discussing the decisionmaking processes required of an adult who is authorized to recommend an outcome to the court when representing a young child. It considered, as an example, a hypothetical case in which a trial judge, unaided by a representative for the child, would be inclined to award custody to the primary caretaker even though the evidence disclosed that the primary caretaker is an occasional user of marijuana and will be entering the job market on a full-time basis once the divorce is final. The assigned representative, however, believes that children should never, or almost never, reside with a parent who uses illegal substances, even on an occasional basis. As a result, the representative takes the position early in the litigation that the child's best interests will be served by awarding custody to the other parent and vigorously advocates placement with the non-primary caretaker. It was unclear to the Committee how it could even be said that the best interests of the child were being advanced; all that was clear is that an adult's perception of the child's best interests was forcefully advocated.

The Committee was also troubled by the prospect that the outcome of the case could be changed because of the introduction of the representative into the proceeding. If the forcefulness of the representative's advocacy would cause the primary caretaker to settle the case on terms less favorable than originally sought, this outcome would take the decision out of the judge's hands.[27] Indeed, it would produce a result directly contrary to

arbitrary factors such as the personal beliefs of a randomly assigned member of the bar.

27 Judge Patricia S. Curley and Gregg Herman, in their article, attempt to justify the widespread use of court-appointed representatives for children by describing the experiences with that practice in Wisconsin. *See* Patricia S. Curley & Gregg Herman, *Representing the Best Interests of Children: The Wisconsin Experience*, 13 J. AM. ACAD. MATRIM. LAW. 123 (1995). Yet, in my view, the Wisconsin experience actually underscores the wisdom of the Standards' prohibition against representatives being permitted to advocate an outcome. As Curley and Herman acknowledge, "the GAL's recommendation is commonly the eventual order of the court" whether that result is achieved by settlement or trial. *Id.* at 130. The authors add that the outcome of emergency hearings usually is based exclusively on the guardian's recommendation. *Id.* This is precisely what the Standards seek to avoid. It is difficult to appreciate how justice is furthered by delegating the awesome power to affect the outcome

the judge's perception of the child's best interests. The Committee strongly believed that judges, not individual members of the bar who are randomly selected to be the child's representative, should be the final arbiters of child custody disputes. Moreover, assuming the accuracy of the judge's perception of the case, the Committee was troubled that the representative's intrusion would produce an outcome which is not in the child's best interest.

For these reasons, the Committee concluded that justice is best served if representatives for young children — whether these representatives are denominated "lawyers," "guardians *ad litem*" or whatever — are prohibited from advocating a particular outcome.[28] Representatives for young children can attempt to ensure that the adversary process will result in the "correct" outcome by gathering all relevant facts and placing them before the judge, who will then be in an ideal position to decide the case based on the child's best interests.[29]

B. *The Controlling Principles of the Rules of Professional Conduct*

1. *The "unimpaired" client*

The Model Rules of Professional Conduct are explicit in requiring counsel to treat all unimpaired clients alike, regardless of age. For unimpaired clients, including children, the Model Rules direct lawyers to "abide by a client's decisions concerning the objectives of representation."[30] Exceptions to this basic injunction are made only when clients are "impaired." Rule 1.14 instructs:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) A lawyer may seek the appointment of a guardian to take other protective action with respect to a client, only when the lawyer reason-

of a judicial proceeding to a private member of the bar whose personal values and beliefs unavoidably will shape the lawyer's ultimate recommendation.

28 *See A.A.M.L. Standards*, *supra* note 1, §§ 2.7, 3.2.

29 *See id.*, *supra* §§ 2.11, 2.12, 2.13, 3.6, 3.7 & 3.8.

30 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994).

ably believes that the client cannot adequately act in the client's own interest.[31]

The comments to Rule 1.14 emphasize the basic maxim that the attorney-client relationship is established to further the client's desires. "The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[32] Thus, the Model Rules clearly and unambiguously require lawyers representing children to treat them precisely in the same manner as they treat competent adults *unless* the child's ability to make decisions is impaired.

These clearly defined rules led the Committee to conclude that it had little discretion when defining the role of an attorney representing an unimpaired client. As a result, the Standards require lawyers for unimpaired children in custody and visitation cases to treat them just as they would treat any other unimpaired client.

The Standards should not be regarded as requiring or even calling for appointment of counsel for unimpaired children.[33] The Standards merely define the role and functions of a lawyer — if appointed by the court. Judges should carefully consider whether they want such a lawyer in the proceedings. If they do not, it is fully consistent with the Standards not to appoint anyone to represent the child. But it is important for courts (and the other parties) to know what they should expect from a lawyer who *is* assigned to represent an unimpaired child.

2. *The "impaired" client*

The truly difficult issues arise when decisions have to be made about the position to be advocated for an "impaired" client. The comments to Rule 1.14 state only that: "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."[34] In the vast majority of custody cases, courts

31 *Id.* § 1.14.

32 *Id.* Rule 1.14 cmt.

33 *See A.A.M.L. Standards*, *supra* note 1, § 1.1.

34 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1994).

are unwilling to appoint both a guardian and an attorney.[35] Thus, even when lawyers believe there is a need for a guardian and would like the court to appoint one, the lawyer may be obliged, in the words of the commentary, to "act as de facto guardian."[36] As a "de facto guardian," it would appear that the Model Rules authorize a lawyer to advocate a position contrary to what the client wants.[37] Presumably, this would permit counsel to decide what outcome is best for the client and to seek to achieve that result through the ordinary means available to lawyers.

At the same time, the Model Rules do not require lawyers acting as "de facto guardians" to advocate any particular outcome. It is consistent with the Rules for an attorney acting as "de facto guardian" to refuse to take a position on the ultimate outcome of the case. Guardians who choose to protect their clients' interests by ensuring that the proceedings are conducted expeditiously and sensitively and that they take into account the needs and best interests of the child have not violated any rules of conduct.

As emphasized earlier, inviting lawyers to recommend a particular outcome based on the lawyers' personal values or beliefs does relatively little to ensure that the case is more likely to be decided in accordance with the child's best interests. The Committee concluded that cases are most likely to be decided on the basis of what is best for children when lawyers representing impaired children "inquire thoroughly into all circumstances that a careful and competent person in the [child's] position should consider in determining the [child's] interests with respect to the

35 In any event, appointing a guardian *ad litem* would be of no help under the Standards, since they prohibit guardians from advocating any outcome. *See A.A.M.L. Standards*, *supra* note 1, § 3.2. A guardian would not be permitted to instruct his or her lawyer to advocate an outcome of the guardian's choice any more than the guardian would be authorized to instruct him or herself to advocate an outcome for a child.

36 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1994).

37 At the same time, there is reason to believe the Model Rules contemplate that lawyers are obliged to seek the outcome desired even by impaired clients. The annotated commentary to the Model Rules states that "[o]rdinarily, as in any client-lawyer relationship, the lawyer has the duty to advocate the wishes of the disabled client." *Id.*

proceeding."[38] In all events, lawyers should "refuse to adopt any particular posture in the case and limit all activities to investigation, presentation and examination of evidence material to the proceeding, including the expressed wishes of the client."[39]

C. *Development of a Uniform Role for Guardians Ad Litem Even Though Unconstrained by Rules of Professional Conduct*

Few, if any, Committee members thought when they began work on the Committee that they would recommend that guardians *ad litem* be prohibited from expressing an opinion on the outcome of the case. Most Committee members were familiar with the practices in jurisdictions in which guardians routinely make such recommendations. Indeed, a number of Committee members had substantial personal experience as court-assigned guardians and had made recommendations to courts in a number of cases.

Nonetheless, the Committee achieved a consensus by the time it completed its work that guardians should be constrained to precisely the same degree as lawyers in advocating results. It is unlikely this consensus would have been achieved had the Committee developed the Standards in a less systematic fashion. By the time the Committee reached the question of the guardian's role, its earlier decisions led ineluctably to the standards that were adopted. The Committee sought to produce a document that was coherent and consistent.

The Committee had already decided against permitting lawyers to advocate an outcome when representing impaired clients. This conclusion was not based on an interpretation of the Code of Professional Responsibility or the Model Rules of Professional Conduct. Rather, it was based on policy considerations. As the Committee realized when it took up the subject of guardians, the policy considerations have equal force whether applied to attorneys or non-attorneys. Once these concepts were settled, it quickly became clear that the original understanding of the proper role of a guardian had to be reconsidered. Ultimately,

38 JUVENILE JUSTICE STANDARDS, Counsel for Private Parties, Standard 3.1(b)(ii)(c) (Institute of Judicial Administration/American Bar Association 1981).

39 *Id.* Standard 3.1(b)(ii)(c) cmt.

the Committee concluded unanimously that guardians should not be permitted to express an opinion on the outcome of the case. In the event that a guardian does express such an opinion, the Standards require that it be given in the form of sworn testimony subject to cross examination,[40] the same as would be required of any other expert testimony.[41]

D. *Impact on the Substantive Standard by Which Cases Are to Be Decided*

The Committee spent considerable time assessing the relationship between standards for counsel in family law cases and the substantive law and procedure governing such cases. Ultimately, as explained earlier, the Committee concluded that it would not take a position on the substantive law or procedure of family law cases.

The Committee realized, however, that at least one aspect of its task of defining standards for appointment of counsel and responsibilities of lawyers could have an indirect effect upon the substantive law of many jurisdictions. In the vast majority of jurisdictions, the standards for determining custody of children provide that a child's expressed preference for a particular parent or guardian is one — but only one — factor for the court to consider.[42] But appointment of a lawyer for a child runs the risk of elevating the expressed wishes of the child to a degree of prominence and weight in the ultimate calculus that is at odds with the current law. With a lawyer forcefully articulating the

40 *See A.A.M.L. Standards, supra* note 1, § 3.8(a).

41 Since ordinarily only experts may give opinion testimony, Federal Rules of Evidence, Rules 701 & 702, guardians should first be qualified as an expert to be able to render an opinion. Unless the guardian is so qualified, the opinion testimony should be inadmissible. Once the guardian is so qualified, the testimony should be subject to the rigors of cross examination in order to reveal the limitations of the expert's knowledge or expertise, or to explore other traditional topics of cross examination such as bias or mistake.

42 *See, e.g.*, CONN. GEN. STAT. ANN. § 46(b)-56(b) (West 1995); IDAHO CODE § 32-717 (1994); IND. CODE ANN. § 31-1-11.5-21(a) (West 1995); OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson 1993). The relevant Tennessee statute states: "The preference of such child or children shall not be binding upon the court but shall be a factor the court shall consider in determining which parent, if either, should be awarded care, custody and control of such child or children." TENN. CODE ANN. § 36-6-102(a) (1994).

child's preference with all of the rhetorical devices available to a trained advocate, that position inevitably will assume far greater weight than it would if merely expressed by the child himself or herself. While a judge assuredly would endeavor to treat the child's wishes as merely one factor among many, it will be very difficult actually to do so.[43]

The dilemma presented here is a consequence of the unique nature of child custody cases. In all other areas of the law, a party's expressed wish is presumed to be (and generally is in fact) identical to that party's best interests. Accordingly, when the legal system confers upon a party a right to counsel, that entitlement increases the likelihood that the case will be resolved in a manner consistent with that party's best interests. For example, when the United States Supreme Court ruled in *Gideon v. Wainwright*[44] that indigent defendants have a constitutional right to court-appointed counsel in criminal proceedings, the Court understood that this ruling would increase the likelihood of an acquittal, an outcome that would be consistent with criminal defendants' expressed wishes and interests.

In the child custody context, however, it is often the case that the child's expressed preference is *not* consistent with his or her "best interest." It is precisely for this reason that the substantive law of most jurisdictions provides that the child's preference is merely one of the many factors a judge should consider when making custody decisions. Thus, although appointing counsel for a child furthers the goal of making the client's wishes known to the court, it does not necessarily advance the goal of securing an outcome that will best serve the child's interests. Indeed, as indicated above, appointment of counsel may undermine the latter goal by increasing the likelihood that the judge will rule in favor of the child's preference even though careful deliberations would reveal that this outcome would not be best for the child. The child's preferences are supposed to be a weight on the scale of the decisionmaker, not to tip the scale against the child's best interests.

For these reasons, among others explained above, the Committee forbore from requiring or even calling for appointment of counsel for children. The Committee simply was unwilling to adopt standards that would indirectly undermine the substantive law of child custody in ways that would often be undetectable — and unremediable — in individual cases. If the prevailing substantive law regarding the weight to be accorded a child's preferences were different, it is highly likely that the Committee would have proposed different standards. If the law of child custody should change in the future, it would be appropriate for the Academy to reconsider the Standards.[45]

V. Conclusion

The drafting of these Standards proved to be an exciting learning experience for the entire Committee. Speaking personally, it was one of the most rewarding professional experiences of my career. I believe the Academy has produced the most coherent and thorough standards ever developed on the subject of representing children. They provide guidance for judges, lawyers and guardians. They also pave the way to still further refinements in our understanding of the best ways to represent children and to ensure that child custody cases are resolved in a manner that best serves the interest of the children at the center of these cases.

43 Haralambie & Glaser, *supra*, note 26, at 65 attempt to distinguish between the weight a judge will give to a child's preference and the weight a judge will give to the advocate's expression of that preference. Their distinction is, in my view, illusory. As the article by Curley and Herman make clear, judges routinely decide the case precisely in accordance with the advocate's recommendation. *See* Curley & Herman, *supra*, note 27. Indeed, this is to be expected. It is perfectly understandable that judges who would be disinclined to give substantial weight to the expressed preference of a nine-year-old child will end up being persuaded by the carefully crafted arguments of an experienced litigator even when those arguments are based principally upon the preference of the child.

44 372 U.S. 335 (1963).

45 If, for example, the substantive law in a particular jurisdiction adopted a presumption that the wishes of a child over the age of six should control the outcome in a custody case, it might make sense to provide all children age six and older with counsel; and it would surely make sense to define counsel's role as including determining the child's wishes and forcefully advocating them on his or her behalf. Indeed, in such a jurisdiction, if a lawyer were free to disregard the child's wishes and advocate an outcome that the lawyer personally believed was best for the child, it would be clear that the lawyer breached the client's right to be heard.

Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children

by
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Introduction

The American Academy of Matrimonial Lawyers (A.A.M.L.) has recently adopted Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings ("Standards").[1] This article discusses the aspects of the Standards which apply to "impaired" children, arguing that the categorization of children is impractical in application and not based on sound empirical evidence concerning child development, and that the diminished role of attorneys for "impaired" children, precluding such attorneys from advocating a position, deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney. Finally, the article recommends that attorneys for all children take strong, informed advocacy positions on behalf of their clients, and that organizations seeking to promulgate standards for such attorneys focus on assisting attorneys to make the case- and issue-specific decisions necessary for accommodating children's developmental limitations.

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[1] REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (American Academy of Matrimonial Lawyers 1994) [hereinafter *A.A.M.L. Standards*].

I. The Distinction Between "Impaired" and "Unimpaired" Children

A. *The Standards*

A major structural component of the Standards is the distinction between "impaired" and "unimpaired" child clients, as determined by the attorney. Standard 2.1 states: "In order to define the appropriate nature of his or her role and responsibilities as counsel for a child, counsel should determine whether the child client is 'impaired' or 'unimpaired.'" The Comment to Standard 2.1 indicates that children may be impaired "depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors."[2]

Standard 2.2 provides a rebuttable presumption that children twelve and older are "unimpaired" and that children under twelve are "impaired." The Comment to Standard 2.2 indicates that "the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives."[3] Further, according to the Comment, the presumptive dividing line at age twelve was based on the literature concerning cognitive development,[4] the fact that children as young as twelve have been afforded various constitutional rights, including free speech[5] and abortion privacy rights,[6]

2 *Id.* § 2.1.

3 *Id.* § 2.2 cmt.

4 The Comment cites Gary B. Melton, *Children's Competence to Consent*, *in* CHILDREN'S COMPETENCE TO CONSENT 1 (Gary B. Melton et al. eds., 1983); Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, *in* CHILDREN'S COMPETENCE TO CONSENT 235 (Gary B. Melton et al. eds., 1983); Lois A. Weithorn & Susan A. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589-91 (1982); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING (1958).

5 The Comment cites Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

6 The Comment cites Belotti v. Baird, 443 U.S. 622 (1979); Ohio v. Akron Reproductive Health Ctr., 497 U.S. 502 (1990); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

and the views of judges who consider children's custodial preferences.[7]

B. *Problems with the Presumptive Age of Impairment*

1. *Child Development Literature*

The literature on cognitive development cited in the Comment to Standard 2.2 is somewhat dated, the literature cited does not consistently support the Standard's position, and the Piagetian concepts of rigid, linear developmental stages upon which the Standard's position is based have been called into question.[8] Child development (which encompasses more than only cognitive development) is meaningful in a forensic context only with respect to specific issues. Therefore, developmental abilities must be seen in a contextual and functional light.[9] Viewed in this way, child development experts have reached conclusions different from those reflected in the Comment to Standard 2.2.

7 The Comment cites Elizabeth S. Scott et al., *Children's Preferences in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1050 (1988).

8 *See, e.g.*, ROSEMARY ROSSER, COGNITIVE DEVELOPMENT: PSYCHOLOGICAL AND BIOLOGICAL PERSPECTIVES 11, 24 (1994) ("Detection of early competence is damaging to Piaget's analysis since he constrained knowledge acquisition to specific time frames"; "[t]he stage hypothesis has not fared all that well empirically"); Richard A. Shweder et al., *Culture and Moral Development*, *in* THE EMERGENCE OF MORALITY IN YOUNG CHILDREN 1, 13 (Jerome Kagan & Sharon Lamb eds., 1987) ("It has come to be acknowledged that human cognitive growth is not very stagelike, and no single cognitive stage (preoperational, concrete operational, formal operational) is a characteristic property of an individual's cognitive functioning."); Rochel Gelman & Renee Baillargeon, *A Review of Some Piagetian Concepts*, *in* 3 MANUAL OF CHILD PSYCHOLOGY 167 (John H. Flavell & Ellen M. Markman eds., 1983) ("the experimental evidence available today no longer supports the hypothesis of a major qualitative shift from preoperational thought"). *See generally* Elizabeth S. Spelke, *Where Perceiving Ends and Thinking Begins: The Apprehension of Objects in Infancy*, *in* 20 PERCEPTUAL DEVELOPMENT IN INFANCY: MINNESOTA SYMPOSIUM ON CHILD DEVELOPMENT 197 (A. Yonas ed., 1988); JOHN H. FLAVELL, COGNITIVE DEVELOPMENT (2d ed. 1985); CHARLES J. BRAINERD, PIAGET'S THEORY OF INTELLIGENCE (1978); ALTERNATIVES TO PIAGET: CRITICAL ESSAYS ON THE THEORY (Linda S. Siegel & Charles J. Brainerd eds., 1978).

9 For a discussion of determining competency contextually in criminal cases, see, *e.g.*, Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by their Attorneys*, 10 BEHAV. SCI. & L. 385, 386 (1992).

One of the book chapters cited in the Comment points out the important limitation that there has not been systematic research on the competence of children to participate in the decisionmaking process concerning their custody.[10] In another book chapter cited by the Comment, the following qualification is expressed: "Although it is unlikely that children younger than age 7 will be judged competent according to the more stringent standards, it is likely that many may have reasonable preferences and ideas about what happens to them."[11]

It is difficult to use cut-off points, even rebuttable presumptions, for determining competency, or "impairment," because as Allen Buchanan and Dan Brock point out in the context of medical decisionmaking, "[f]or children as well as adults, competence is relative to a specific decision, and an adolescent's competence may vary over time with changes in his or her condition and so may be intermittent or fluctuating."[12] Therefore, it is difficult to speak in terms of child clients being "impaired" or "unimpaired." Older children, who may be deemed "unimpaired," may actually be incompetent with respect to certain issues involved in the representation. If one instance of "impairment" were to render a child "impaired," thereby altering the attorney-client relationship, then no child (and perhaps no adult) could be deemed "unimpaired." Buchanan and Brock further explain:

> The statement that a particular individual is (or is not) competent is incomplete. Competence is always competence *for some task*—competence *to do something*. . . . [T]he notion of decision-making capacity is itself incomplete until the nature of the choice as well as the conditions under which it is to be made are specified. Thus competence is decision-relative, not global. A person may be competent to make a particular decision at a particular time, under certain circumstances, but incompetent to make another decision, or even the same decision, under different conditions. A competence determination, then, is a determination of a particular person's capacity to perform a particular decision-making task at a particular time and under specified conditions.[13]

It is not helpful to look at children's competency in terms of a theoretical "reasonable person"; rather, their competency should be compared to that of adults, whose own competency may vary over time and who may not in fact "make important life decisions in a manner that would be judged competent according to prevailing legal standards."[14]

A number of sources show the fragility of the empirical base upon which Standard 2.2 rests, and we may seriously underestimate the competence of children. For example, one study of six- to nine-year-old children concerning the decision to receive an inoculation against swine flu found that even such young children made decisions comparable to those of adults, causing the researcher to state, "our major conclusion is that children are far more competent in decision making than adults believe them to be. Children *can* learn decisionmaking and, when given the opportunity, make remarkably responsible decisions."[15] Similarly, with respect to psychoeducational decisionmaking Donald Bersoff argues that we should presume that children are capable of making decisions as well as adults and that the burden should fall on those seeking to deprive children of choice to prove a "significant risk of irreversible damage or clear and convincing empirical evidence that at particular ages children do not have sufficiently developed skills to exercise discretion."[16]

The recognition by psychologists that competency is contextual, incremental, and changing, even for adults, makes the attempt to label a child as either "impaired" or "unimpaired" *in toto* a misleading and disempowering responsibility, and one for which the attorney *qua* attorney has no particular qualifications.

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[10] *See* Melton, *supra* note 4, at 15. Melton's caveat was echoed in the context of delinquency cases: "We have no social science research evidence, however, with which to determine the importance of these elements of functioning and knowledge (actually, or as perceived by legal professionals) for a juvenile's participation in the trial process. Further, different abilities may be more or less important for different types of juvenile court proceedings." *See* Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J. OF L. & PSYCHIATRY 11 (1987).

[11] *See* Weithorn, *supra* note 4, at 246.

[12] *See* ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 217 (1989).

[13] *Id.* at 18. (Footnote omitted; emphasis in original). In a book chapter cited in the Comment to Standard 2.2, Lois Weithorn takes a similar position. Weithorn, *supra* note 4, at 243.

[14] Weithorn, *supra* note 4, at 243.

[15] *See* Charles E. Lewis, *Decisionmaking Related to Health: When Could/Should Children Act Responsibly?, in* CHILDREN'S COMPETENCE TO CONSENT, *supra* note 4, at 75, 91 (emphasis in original).

[16] *See* Donald N. Bersoff, *Children as Participants in Psychoeducational Assessment, in* CHILDREN COMPETENCE TO CONSET, *supra* note 4, at 149, 170.

It is important to realize that the various experts quoted above are talking about decisionmaking, which is a part of directing legal representation. However, the child's attorney can form a decisionmaking *partnership* with the child, a relationship which may influence the child's decisionmaking. This model is discussed in part in more detail below, but in determining "impairment" it is useful to realize that a functional definition must include the attorney's part of the relationship as well as the child's.

2. *Children's Constitutional Rights*

The United States Supreme Court has recognized constitutional rights in children under twelve as well as for older children. Most relevant are the pronouncements in *United States v. Kent*[17] and *In re Gault*[18] that children accused of delinquent offenses have a constitutional right to counsel. There was no specified age triggering the right to counsel, even though most delinquency statutes permit prosecution of children as young as seven or eight years. There is no question that alleged delinquents younger than twelve have the right to have counsel competently represent them.[19] Similarly, children in delinquency proceedings have the Fifth Amendment right against self-incrimination, must be given *Miranda* warnings, and have the Sixth Amendment right to confront and cross-examine adverse witnesses.[20] Children are entitled to require that the state prove delinquency allegations against them beyond a reasonable doubt.[21]

The Supreme Court also made clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[22] Children are considered to be "persons" to whom the Constitution applies.[23] For example, First Amendment[24] and Fourth

17 383 U.S. 541 (1966).

18 387 U.S. 1 (1966).

19 Of course, a child will not continue in the delinquency process if he or she is found incompetent to stand trial, a fact which ensures as a practical matter a certain degree of competency.

20 *See In re* Gault, 387 U.S. 1 (1966).

21 *See In re* Winship, 397 U.S. 358 (1970).

22 *See In re* Gault, 387 U.S. at 13 (1967).

23 *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).

Amendment[25] rights are extended to children, although not identically to their application to adults.[26] In the abortion context the Court has recognized that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[27] Due process is required in school disciplinary proceedings; although, the scope of protection depends on the severity of the punishment.[28] In none of these cases did the Court put an age limit on the exercise of the constitutional rights involved.

Children have a right to attend public schools which are not legally or factually racially segregated.[29] They have a right to be free from discrimination based on national origin.[30] If they are civilly committed, they have the right to reasonable care and safety.[31] The Supreme Court has intimated that foster children may also have the right to state protection from physical abuse.[32] These rights are particularly illustrative because they are designed to protect children who have done nothing wrong. Children involved in a domestic relations dispute are similarly without fault and in need of protection. The rights guaranteed by the cases cited in this paragraph do not depend on the child's abilities to make decisions, but they do recognize that there are certain basic needs of children which are worthy of protection. Children's interests in living in a safe and stable environment with people they feel close to and in contact with significant persons in their lives are similar interests worthy of protection.

24 *Id. See also* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 64 (1943).

25 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985).

26 *Id. See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

27 *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

28 *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975).

29 *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).

30 *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974).

31 *See, e.g.*, Youngberg v. Romeo, 407 U.S. 307 (1982).

32 *See* DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 201 (1989) (such children, unlike Joshua DeShaney, who had been returned to parental care, may be in a situation "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect").

Having the assistance of independent counsel can help to promote and protect those interests. Counsel can present evidence of the child's attachments, preferences, and individual needs, as well as the ability and willingness of the respective parents to meet those needs. Counsel can highlight any dangers posed by the parents or their circumstances and any insensitivities to the child's needs. Further, counsel can suggest ways to maximize the child's best interests or expressed wishes. Expert witnesses and other adults involved with the child client can assist in the attorney's formulation of a child-oriented position even without direct instructions from the child.

In the delinquency context the Supreme Court has stated that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."[33] In the custody and visitation context, young children may be in the same position: having no voice and receiving no advocacy, despite the fact that they are the most directly affected by the court's decision.

3. *Judicial Views of Children's Preferences*

The Comment to Standard 2.2 refers to a survey of Virginia judges[34] which was conducted "to determine whether and to what extent they are interested in the views of children who are the subject of the custody dispute."[35] In that survey, 89% of the judges surveyed ranked the preferences of children fourteen or older as dispositive or extremely important, 96% ranked the preferences of children ten to thirteen as extremely or somewhat important, and 92% ranked the preferences of children six to nine as somewhat important or not important.[36] There was no indication that the judges surveyed were responding with reference to *represented* children. One would certainly hope that represented children would have the benefit of independent and trained input into their preferences and that the expression of those preferences would include an objective basis for the preference, something which judges may or may not ascertain on their own while eliciting the preference.

The issue of whether a child's custodial *preference* is given great weight by the judge is an entirely separate issue from whether the child's *position* should be presented independently to the court.[37] Having a child's attorney advocate a position simply means that certain evidence is presented to the court and interpreted to the court from the child's perspective, not that the court will order what the child's attorney has advocated. The fact that a judge does not follow a preference does not mean that the child should be deprived of an advocate. In addition, the child's attorney advocates a much more comprehensive position than merely the child's custodial preference, which is only one of many factors to be considered. Therefore, the fact that judges may be more likely to give considerable weight to a twelve-year-old's preference than to a six-year-old's is not an indication that a six-year-old's overall position in the case will not be adopted or given considerable weight by the court.

Further, basing a standard on the actual practices of judges, especially based on a survey of judges in one state, without regard for the judges' knowledge of child development, should not constitute a basis for determining whether there is empirical support for a standard that would deprive children of a meaningful voice in court. Judges, who are themselves attorneys, have no particular expertise to determine custody and visitation issues. They are as vulnerable to their own values, biases, and philosophies as untrained children's lawyers are. Choosing a particular

33 *See* Kent v. United States, 383 U.S. 541, 556 (1966).

34 *See* Scott, *supra* note 7.

35 *A.A.M.L. Standards*, *supra* note 1, § 2.2 cmt.

36 *Id.* at 1050. It is interesting to note that in a survey of 156 California judges and 82 mental health professionals, the latter accorded more weight to the preferences of five-year-olds than judges did. *See* Thomas Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 84 (1989). *See also* Carol R. Lowery, *The Wisdom of Solomon: Criteria for Child Custody from the Legal and Clinical Points of View*, 8 L. & HUM. BEHAV. 371, 377 (1984).

37 It is interesting to note that the Comment to Standard 2.13 states that "impaired children have the same right as all other children to make their views known to the judge." Therefore, even though the Comment to Standard 2.2 notes that judges do not give much weight to young children's preferences, one rationale for presuming that children under twelve are "impaired," the Standards nevertheless expect the "impaired" child's attorney to communicate his or her preference, unless specifically prohibited by the child. It is also interesting to note that the attorney is *bound* by the directions of the "impaired" child with respect to this nondisclosure issue. This seems to be inconsistent with the rationale for denying "impaired" children attorneys who are advocates.

age of assumed competency based on actual judicial practices could merely reflect uninformed stereotypes and prejudices rather than a critical empirical assessment of children's capacities.

C. *The Attorney's Incompetence to Determine Impairment*

The Standards point out that attorneys are not trained to be able to make decisions about the "impaired" child's best interests.[38] It is illogical to assume, then, that attorneys *qua* attorneys have the capacity to assess whether a child is "impaired" or not, something few mental health professionals are skilled to assess,[39] even in the forensically common situations of determining juvenile capacity to waive *Miranda* rights or competency of juvenile delinquents to stand trial as adults.[40]

Further, there is no empirical basis for the idea of global impairment or unimpairment. No child will be competent across the board, with respect to all decisions which need to be made or positions which need to be taken during the course of custody/visitation litigation.[41]

The Comment to Standard 2.2 states that "the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation,

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38 *A.A.M.L. Standards, supra* note 1, § 2.7 cmt. n.27 indicates that making a recommendation on the outcome of the case is beyond the competence of an attorney.

39 *Cf.*, in the context of incapacities in elderly clients, Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1138 (1994) (footnotes omitted) ("The rule [Model Rule 1.14] does not state which of the many tests and medical models for determining competency the lawyer should use in exercising this judgment. It offers no clue about how to determine task-specific, partial or intermittent incapacity, nor does it acknowledge what an unrealistic expectation it places on lawyers. As Professor Allee remarked, '[d]etermining competency is difficult for medical and behavioral experts, much less for lawyers . . . .'").

40 Personal conversation with forensic psychologist, professor, and expert on competencies Thomas Grisso, Ph.D., University of Massachusetts, January 21, 1995.

41 *See, e.g.*, BUCHANAN & BROCK, *supra* note 12; Bersoff, *supra* note 16, at 149, 151, 172-73; Michael J. Saks, *Social Psychological Perspectives on the Problem of Consent*, *in* CHILDREN COMPETENCE TO CONSENT, *supra* note 4, at 41, 50; Weithorn, *supra* note 4, at 235, 243.

to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives."[42] The Comment recognizes that attorneys must be given "meaningful guidance" in determining whether or not the child is "impaired" in order to avoid "dramatically disparate behavior" by different attorneys. However, the Standards do not provide adequate guidance nor indicate how the attorney is to gain that guidance apart from the Standards.

What does the attorney do if the child comprehends some of the issues in the case but not others? What if the child speaks thoughtfully about some aspects of the case but not others? What if the child appreciates only short-term consequences or only some of the alternatives? The Standards require an all-or-nothing determination of impairment, but impairment itself is not an all-or-nothing condition. This is a fundamental empirical flaw in the Standards' distinction between "impaired" and "unimpaired" children.

The Comment to Standard 2.2 advises the attorney to "focus on the process by which a client reaches a position, not the position itself."[43] So long as the child is old enough to be presumed

42 *A.A.M.L. Standards, supra* note 1, § 2.2 cmt.

43 *Id.* § 2.2(b) cmt. In the context of impaired elderly clients, one commentator has written:

> [I]n reaction to the paternalism of the substantive view of capacity, lawyers have fallen back on what they know best: procedure. The result is an abstract view of capacity that purports to rely on an individual's decision-making processes. This process-based view suffers from the impossibility of considering process separate from substance, and from a lack of attention to human connection. A balanced, contextual view of capacity considers both process and substance, and situates the senior citizen in a network of family, care-givers, and peers.
>
> . . .
>
> The process-based standard . . . raises a new set of problems. The flight from substance leads to a denial of context—a quest for some pure kernel of capacity free of the ambiguity of concrete situations. We tend to reify capacity—to make it into a thing to be discovered. This view misconceives capacity. Rather than being a thing, capacity is a shifting network of values and circumstances. Separating substance from process in decisions about capacity is both wrong and impossible.

Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073,

unimpaired, the lawyer must treat the child as unimpaired if the child is able:

> (a) to understand the nature and circumstances of the case, (b) to appreciate the consequences of each alternative course of action, (c) to engage in a coherent conversation with the lawyer about the merits of the litigation, and (d) to express a preference that similarly situated persons might choose or that is derived from rational or logical reasoning . . . .[44]

No guidance is given, however, with respect to determining that a particular child under the age of twelve is "unimpaired." Assuming that the same four criteria are to be applied, attorneys still have no particular competence to assess how the child fares under each criterion. Subjective values are just as likely to influence the attorney's decision concerning impairment as they are to influence the attorney's advocacy position for an "impaired" child client.[45] Further, why is "rational or logical reasoning" the only touchstone? Many adults make important decisions about important issues based on other domains of functioning.

As discussed more fully below, properly trained children's attorneys may be able to make some determinations about the competencies of children with respect to particular issues in the case. However, this same ability is what gives those attorneys the right to participate in formulating the position of an "impaired" child client. To assume that the attorney is unable to perform the second function is inconsistent with the requirement that the same attorney perform the first, especially in an all-or-nothing way.

1075, 1083 (1994) (footnote omitted). The same criticism can be made of the process-based view reflected in the Standards.

44 *A.A.M.L. Standards, supra* note 1, § 2.2(b) cmt. (footnote omitted).

45 *See, e.g.*, Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 700 (1987) ("a private assessment [of the child's competence] is open to the danger that the attorney, either consciously or unconsciously, will judge the child to be incompetent simply because she disagrees with the child's substantive decision. The problem is exacerbated by the possibility that the child's attorney might be inflexibly committed to specific positions regarding a child's competence, autonomy and best interests.")

II. Differences in Representation of "Impaired" and "Unimpaired" Children Under the Standards

A. *The Standards*

The nature of the representation and duties owed to the court and client are different under the Standards depending on whether the attorney deems the child to be "impaired" or "unimpaired." In general, the attorney's relationship with an "unimpaired" child client is in most respects the same as it is for adult clients not under a disability.[46]

However, the role of the attorney for an "impaired" child client is vastly different. As conceptualized by the Standards, the attorney for an impaired child client should keep the client informed[47] and should adduce facts which the decisionmaker should consider,[48] but should not advocate a position with regard to the outcome of the case or contested issues.[49] The Standards advise counsel not to accept appointment as attorney for the child if the attorney is required to make a recommendation on the outcome of the case.[50] Similarly, attorneys serving as guardians ad litem, whether for "impaired" or "unimpaired" children, are not to make such recommendations.[51] Therefore, under the Standards, attorneys representing "impaired" children (or as guardians ad litem for "impaired" or "unimpaired" children) are primarily directed to provide factual information for the court, with no advocacy duties whatsoever.

46 *See A.A.M.L. Standards, supra* note 1, § 2.3 ("Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client."). Standard 2.6 makes some accommodations based on children's special vulnerabilities by requiring the child's attorney to protect the child by expediting the proceedings and encouraging settlement in order to reduce litigation-related trauma. *A.M.M.L. Standards, supra* note 1, § 2.6.

47 *See id.* § 2.8.

48 *See id.* §§ 2.11, 2.12 & 2.13.

49 *See id.* § 2.7.

50 *See id.* § 2.7 cmt. n.27.

51 *See id.* § 3.2.

B. *Attorney as Fact-Finder But Not Advocate is a Perversion of the Role of Attorney*

Under the Standards attorneys for "impaired" children are not zealous advocates of any position, which seems to conflict with an attorney's basic ethical duty to represent the client zealously within the bounds of the law.[52] The Standards regarding the representation of impaired children constitute a radical departure from the generally accepted practice for children's attorneys, adopting the minority view of attorney-as-investigator, which had not been advocated seriously for more than a decade.[53] As Robyn-Marie Lyon notes "If an interested party is entitled to an attorney, surely it is not merely to counsel him, but also to speak for him to the court and to other parties. Independent counsel for a minor is no less obligated to speak for the child-client."[54]

While the various guidelines,[55] cases,[56] and statutes[57] concerning the representation of children differ in many respects, to

52 One commentator states:

> The argument against the appointment of counsel is that the attorney filling the role is unable to perform the proper job of an attorney because there is no client who is able to give directions on how to proceed with the case. This view overlooks the fact that there are circumstances in which there are identifiable steps which the attorney can take in the course of the representation, even without direction.

Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW. 45, 48-49 (1993) (footnote omitted).

53 *See, e.g.*, Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) (it is of note that Professor Guggenheim was a primary architect of the A.A.M.L. Standards); JUVENILE JUSTICE STANDARDS, Counsel for Private Parties, Standard 3.1(b) (Institute of Judicial Administration/American Bar Association 1976).

54 *See* Lyon, *supra* note 45, at 693 (1987) (footnote omitted).

55 *See, e.g.*, COLORADO GUARDIAN AD LITEM MISSION STATEMENT (Colorado State Bar Guardian ad Litem Standards Committee 1992) (2.7: "The GAL should advocate a legal position on behalf of the child rather than use litigation as an investigative tool;" 5.1: "The GAL should formulate an independent position after considering all relevant information . . . ;" 5.2: "The GAL should make clear recommendations to the court concerning the best interests of the child at every stage of litigation . . . ."); NEW HAMPSHIRE GUIDELINES FOR GUARDIANS AD LITEM #5 (Guardian ad Litem Committee of the Justices and Clerks of the Superior Court 1983) (the guardian ad litem's report or reports "shall set forth findings and conclusions or recommendations"); LAW

the extent that they address the issue, the majority of them do expect the child's attorney to advocate *something*, whether it is the child's expressed wishes or the attorney's view of the child's

GUARDIAN REPRESENTATION STANDARDS VOLUME II: CUSTODY CASES (New York State Bar Association Committee on Juvenile Justice and Child Welfare 1992) (Standard A-7: "The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations;" Standard B-2: "The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings;" Standard C-4: "The law guardian should deliver a summation, and prepare any necessary memoranda of law."); SERVING AS A GUARDIAN AD LITEM IN FAMILY COURT (State Bar of Wisconsin Family Law Section 1993) ("The GAL is an advocate for the best interests of a minor child regarding legal custody, physical placement and support;" "The GAL should prepare a recommendation for the court at the pretrial;" "The GAL may submit a trial brief setting forth a recommendation for his or her ward.").

56 *See, e.g.*, Carter v. Brodrick, 816 P.2d 202 (Alaska 1991) (role of guardian ad litem in custody disputes is to zealously represent child); Veazey v. Veazey, 560 P.2d 382 (Alaska 1977) (guardian ad litem has the power and responsibility to represent the client zealously and to the best of his ability; the child needs an advocate who will plead his cause as forcefully as the attorneys for competing custody claimants plead theirs); *In re* Marriage of Barnthouse, 765 P.2d 610 (Colo. App. 1988), *cert. denied*, 490 U.S. 1021 (1988) (attorney permitted to make a recommend contrary to the child's wishes); John O. v. Jane O., 601 A.2d 149 (Md. Ct. Spec. App. 1992) (child's attorney must present child's expressed position but is not obligated to advocate for that position); *In re* Marriage of Rolfe, 699 P.2d 79 (Mont. 1985) (appointed attorney must advocate child's interests); *In re* Dewey S., 573 N.Y.S.2d 769 (N.Y. App. Div. 1991) (law guardian for three-month-old child is to help arrive at an appropriate outcome); *In re* Baby Girl Baxter, 479 N.E.2d 257 (Ohio 1985) (first and highest duty of child's attorney is zealous representation and championing of client's cause); *In re* Davis, 465 A.2d 614 (Pa. 1983) (court criticized attorney's lack of representation on behalf of the child but suggested that the attorney should have submitted the child's preference to the court and explained why he disagreed); Welderholt v. Fischer, 485 N.W.2d 442 (Wis. Ct. App. 1992) (guardian ad litem must advocate child's best interests); de Montigny v. de Montigny, 233 N.W.2d 463 (Wis. 1975) (guardian ad litem is more than an adjunct to the court; nominal representation breaches professional responsibilities).

57 *See, e.g.*, IND. CODE ANN. § 31-1-11.5-28 (Supp. 1992) (the court may require a report from the guardian ad litem); MASS. GEN. LAWS ANN. ch. 215, § 56A (1986) (requiring written report to court); WIS. STAT. ANN. § 767.045(4) (Supp. 1992) ("The guardian ad litem shall be an advocate for the best interests of a minor child as to legal custody, physical placement and support. . . . The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation . . . .").

best interests.[58] The Commissioners' Note to Section 310 of the Uniform Marriage and Divorce Act[59] states that "[t]he attorney is not a guardian ad litem for the child, but an *advocate* whose role is to represent the child's interests."[60]

New Hampshire previously mandated appointment of counsel for children in contested custody or visitation cases.[61] In New Hampshire counsel serve as guardians ad litem. The statute provides that "[w]hen the child's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or some other reason, the guardian ad litem shall be the holder of the privilege [of confidential communications with the child], and have authority to waive the privilege, but only so long as the guardian ad litem reasonably believes that the child cannot act in the child's own interest."[62]

In discussing the role of the guardian ad litem Tara Muhlhauser points out the need to combine the roles of investi-

58 The debate of the last two decades has been waged primarily over the issue of whether the child's attorney should advocate the child's expressed wishes or the child's best interests (or both), not whether the attorney should remain neutral or be an advocate. *See, e.g.*, DONALD T. KRAMER, 1 LEGAL RIGHTS OF CHILDREN § 2.25 (2d ed. 1994); LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE §§ 12.01-12.19 (1993); THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 24-52 (Ann M. Haralambie ed., 1993) [hereinafter *The Child's Attorney: A Guide*]; JEFF ATKINSON, 2 MODERN CHILD CUSTODY PRACTICE §§ 13.01-13.16 (1986); Marvin Ventrell, *The Child's Attorney*, FAM. ADVOC., Winter 1995, at 73. Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 317 (1993); Parley, *supra* note 52; Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993); Angela D. Lurie, *Representing the Child-Client: Kids are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205 (1993); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992); Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 BOSTON B.J. 6 (1991); Martha Fineman, *The Role of Guardians ad Litem in Custody Contests*, *in* WHO SPEAKS FOR THE CHILDREN? THE HANDBOOK OF INDIVIDUAL AND CLASS CHILD ADVOCACY (J. Westman ed., 1991); Catherine M. Brooks, *When A Child Needs a Lawyer*, 23 CREIGHTON L. REV. 759 (1990); Tara L. Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of the Guardian ad Litem*, 66 N.D. L. REV. 633 (1990); Shari F. Shink, *Reflections on Ethical Considerations*, *in* LAWYERS FOR CHILDREN (ABA Center on Children and the Law 1990); Howard A. Davidson, *Child Advocacy*, A.B.A. J., December 1, 1988, at 119. Jacqueline A. Jacobs, *Incompetent Clients*, 2 GEO. J. LEGAL ETHICS 305 (1988); John H. Lightfoot, *Children's Rights, Lawyers' Roles*, 10 FAM. ADVOC. 4 (Winter 1988); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. L. REV. 1 (1987); Lyon, *supra* note 45; Robert Schwartz, *A New Role for the Guardian Ad Litem*, 3 J. DISP. RESOL. 117 (1987); Tari Eitzen, *A Child's Right to Independent Representation in a Custody Dispute*, 19 FAM. L.Q. 53 (1985); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM L. 607 (1982-83); Sarah H. Ramsey, *Representation of the Child in Child Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983); Stephen W. Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. RICH. L. REV. 661 (1979); Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1150 (1978); James R. Redecker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1978); Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W. L. REV. 16 (1976); Monroe Inker & Charlotte Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971). *See generally* ANNOTATED BIBLIOGRAPHY OF GUARDIAN AD LITEM LAW REVIEW ARTICLES (National Legal Resource Center for Child Advocacy and Protection 1980). *Cf.* Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 495 (1973).

59 See ARIZ. REV. STAT. ANN. § 25-321 (1991); COLO. REV. STAT. ANN. § 14-10-116 (West 1989); ILL. ANN. STAT. ch. 750, para. 5/506 (Smith-Hurd 1992); MINN. STAT. ANN. § 518.165 (West 1995); MO. REV. STAT. § 452.490 (1994); MONT. CODE ANN. § 40-4-205 (1994); WASH. REV. CODE § 26.09.110 (Supp. 1995).

60 *See* UNIF. MARRIAGE AND DIVORCE ACT § 310, 9A U.L.A. 443 (1979) (emphasis added).

61 *See* N.H. REV. STAT. § 458.17b (1992) (now providing for discretionary appointment, N.H. REV. STAT. ANN. § 458:17-a (1994). *Cf.* WIS. STAT. ANN. § 767.045 (West 1994) (mandating appointment in contested custody and visitation cases). *See also* MINN. STAT. ANN. § 518.165(2) (West 1990) (mandatory appointment of a guardian ad litem if custody or visitation are in issue "if the court has reason to believe that the minor child is a victim of domestic abuse or neglect," unless those issues are before the court in a separate juvenile dependency and neglect action); MO. ANN. STAT. § 452.423(1) (Vernon Supp. 1994) (mandatory appointment if child abuse or neglect are alleged); OR. REV. STAT. § 107.425(3) (1991) (mandatory appointment where requested by one or more of the children); VT. STAT. ANN. tit. 15, § 594(b) (1989) (mandatory appointment before child may be called as a witness).

62 N.H. REV. STAT. § 458.17-a(II) (1994).

gator, champion, and monitor, because only in a symbiotic combination can the guardian ad litem fully represent the child's interests or wishes.[63] Advocacy provides a great deal of assistance to the judge. Not only can the child's advocate provide a more complete factual record for the court, but he or she can organize and analyze the evidence, which a skilled and attentive judge could probably do also. However, of particular importance is that the advocate can offer creative solutions and alternatives and point out inadequacies and dangers in the positions advocated by the other parties. Nowhere is this more important than in cases involving child abuse. Child advocacy, particularly as it relates to abused children, has emerged as a recognized specialty,[64] with its own multidisciplinary professional organizations,[65] periodic professional literature,[66] ongoing professional conferences, and resource centers.[67] For example, in addition to numerous law school child advocacy clinics, Loyola University Chicago Law School has an integrated three-year curriculum to train child advocates, the Civitas ChildLaw Center. As more attorneys become trained through such resources, more attorneys will have creative, state-of-the art recommendations and options to offer the court. The Standards completely preclude this information from coming before the judge if the child is deemed "impaired," a needless denial of assistance for the child and court.

63 *See* Muhlhauser, *supra* note 58, at 638-639 ("if they become mutually exclusive the champion's advocacy will be diluted by a lack of relevant information and the investigator will not be able to provide facts, alternatives, and recommendations to the court. Without championship and investigation, the monitor role loses effectiveness because advocacy and information must be present for an effective check on the progress of the permanent reunification plan.")

64 *See generally* Davidson, *supra* note 58.

65 Those organizations include the National Association of Counsel for Children, the American Professional Society on the Abuse of Children, and the International Society for the Prevention of Child Abuse and Neglect.

66 *See, e.g.*, THE GUARDIAN, LAW GUARDIAN REPORTER, THE APSAC ADVISOR, CHILD ABUSE AND NEGLECT: THE INTERNATIONAL JOURNAL, THE JOURNAL OF CHILD SEXUAL ABUSE, THE JOURNAL OF INTERPERSONAL VIOLENCE.

67 The primary resource center for attorneys is the ABA Center on Children and the Law.

One of the major benefits of requiring that children's attorneys be specially trained[68] is that attorneys will have particular competence to fulfill advocacy roles which are somewhat different than those ordinarily performed by attorneys for adult clients. They will have more knowledge upon which to make objectively child-oriented decisions in cases of "impaired" children. Such training allows the attorney to function as an advocate, but provides the basis upon which the ethical standards set forth in the Model Rules of Professional Conduct[69] ("Model Rules") and the Model Code of Professional Responsibility[70] ("Code") can be applied to impaired or disabled clients.

C. *Representing an "Impaired" Child Does Not Need to be Unduly Subjective*

The Comment to Standard 2.7 "rejects as fundamentally flawed a rule that gives attorneys the authority to advocate the result they themselves prefer."[71] It is important to realize that requiring or permitting an attorney to exercise independent judgment is a question separate from that of what criteria are used to inform that judgment. For example, there are certain hierarchical needs[72] which do not particularly involve the attorney's subjective values, the child's physical and emotional safety being chief among them.[73] Jinanne S.J. Elder has suggested that the

68 This training is mandated by A.A.M.L. Standard 1.2.

69 MODEL RULES OF PROFESSIONAL CONDUCT (1994).

70 MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982).

71 *A.A.M.L. Standards*, *supra* note 1, § 2.7 cmt.

72 *See, e.g.*, Mary K. O'Connor, *Considering Developmental Needs*, *in* RESOURCE GUIDE FOR CUSTODY EVALUATORS: A HANDBOOK FOR PARENTING EVALUATIONS (Phil Bushard & Dorothy A. Howard eds., Preliminary Symposium Issue, 1994); ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES §§ 24.01-24.09 (2d ed. 1993); Rachel B. Burkholder & Jean M. Baker, *Child Development and Child Custody*, *in* THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES, *supra* note 58, at 145-169.

73 One psychologist has described the following basic characteristics parents must possess to meet the needs of even very young children:

> If the child is to be successful, two elements must be present: (1) The capacity for altruistic behavior must exist in the parent. (2) The parent must have the capacity to understand the reciprocal nature of what the child has to offer, as opposed to a conscious awareness of what it takes

following "presumptions and assumptions" inform decisions regarding children's needs:

> 1. Provision of basic needs. . . .
> 2. Provision and maintenance of nurturance, stability and continuity . . . and the avoidance of unnecessary disruptions that can interfere with [the child's] growth and development.
> 3. Freedom from abuse or neglect . . . .
> 4. Maintenance of the family. . . . This includes retaining ties among siblings . . . and maintaining ties with biological fathers, even in some cases, where a child is born to a married woman whose husband is not the biological father. . . . In certain circumstances, it also includes at least considering the strong emotional bonds that may exist between a child and a nonbiological caretaker.[74]

Robyn-Marie Lyon, who favors the substituted-judgment model of child representation, suggests that an attorney formulate a position based on evidence of the child's current desires, opinions by persons such as teachers, counselors, babysitters, and neighbors about what the child will desire, and "evidence of what similarly situated mature people wish had been advocated," with the most important source of information coming from the child.[75] Lyon suggests that relevant information includes the

from a parent. These two capacities cannot be assumed to be present in all parents.

FRANK G. BOLTON, JR., WHEN BONDING FAILS: CLINICAL ASSESSMENT OF HIGH-RISK FAMILIES 28 (1983). Dr. Bolton describes the first level of the child's needs:

> Early childhood development rests with the secure provision of physical needs. The establishment of a sense of security regarding the physical needs provides the child with the opportunity for developmental risk taking. This risk taking is best described as a movement from a secure base of physical satisfaction to the insecure world of behavioral options. *Id.* at 45.

74 *See* Elder, *supra* note 58, at 6.

75 *See* Lyon, *supra* note 44, at 703-704. There are conceptual problems with the substituted-judgment model, probably more with the label than Lyon's application of the model. Substituted judgment traditionally has been applied in cases where a previously competent person is no longer competent. Under those circumstances, there is a historical basis for extrapolating what the person's position probably would be if he or she were restored to competency. The child, on the other hand, is "impaired" because of his or her immaturity. The child has never been deemed competent, so there is no history to provide the basis for substituted judgment. As Lyon describes her model, however, she is suggesting a standard of representation which combines best interests and the

child's separation behaviors when leaving each parent and any pattern of asking for a particular person when the child is hurt, afraid, or in trouble.

Using such information allows the attorney to make a relatively objective determination of the child's needs from the child's perspective, as an adjunct to the "impaired" child's actual expressions of interest.[76] In addition, children's attorneys can seek the expertise of appropriately qualified medical, mental health, and social work professionals to inform their position.[77] Lois Weithorn points out that professional relationships such as those between attorney and client are working partnerships. She advises professionals not to "underestimate the degree to which children's ideas relative to their own needs and goals will provide essential and valuable information."[78] A properly trained child's attorney should have the information, or ability to acquire information and consultation, which will permit a professional and ob-

child's wishes and a particularized determination of the individual child's needs. The difficulty comes when Lyon asks the attorney to speculate, in effect, as to whether the child would change his or her opinion with increased maturity. *Id.* at 704. There is no reason to believe that attorneys possess the ability to make this kind of prediction.

76 *See also* David Murphey, *Identifying the Best Interests of the Child, in* ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES 23 (Donald N. Duquette ed., 1990).

77 The Honorable Margaret M. Houghton, former Presiding Domestic Relations Judge of the Pima County, Arizona Superior Court, and Ann Haralambie created a multidisciplinary panel of experts who agreed to consult with attorneys appointed to represent children in domestic relations cases. Those experts, as well as the panel of appointed attorneys, agreed to work on a sliding scale. The expert consultation could include evaluations and testimony on behalf of the child. *See generally* Ann M. Haralambie, *Attorneys for Children in Domestic Relations Cases: Pima County's Program, In* NEW ISSUES FOR CHILD ADVOCATES—1993 (Ann M. Haralambie ed., 1993); REPRESENTING CHILDREN IN DOMESTIC RELATIONS CASES: TRAINING MATERIALS (Ann M. Haralambie ed., 2d ed. 1992). This resource allows children's attorneys to obtain objective, professional assistance in assessing the child's maturity and competence to make various decisions and to formulate a position for those who would be deemed "impaired" by the Standards.

78 *See*, Weithorn, *supra* note 4, at 255-57.

jective assessment of what the child's position should be, incorporating any input the child client is capable of providing.[79]

Standard 1.2 and its accompanying Comment require that children's attorneys have special training in representing children. The Comment indicates that the training "should include methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping parties to de-escalate conflict," including an interdisciplinary focus.[80] Without specialized and on-going training, the attorney for an "impaired" child is likely to make subjective decisions. However, with proper training, attorneys can learn some of the more objective criteria for assisting in determining the child's position and how to apply them. The Standards oppose the attorney's using independent judgment because as the result of the opinions and values of individual attorneys, "similarly situated children would be subject to dramatically divergent representation depending on the views of the particular lawyer assigned the task. This arbitrariness is the antithesis of the rule of law."[81]

79 This same suggestion has been made with respect to attorneys representing the impaired elderly:

> The various state bar associations might ameliorate this problem [of dealing with the questionably competent client] while promoting better legal services for the questionably competent elderly by requiring that lawyers who are likely to represent the elderly take a certain number of continuing legal education or other special training courses designed to assist them in providing such representation competently. These courses might cover such topics as geriatric psychology, common physical impediments to the ability to utilize existing mental capacity, the content and pitfalls of legal standards that address competence, and the nature and availability of community services to aid the elderly.

Rein, *supra* note 39, at 1141.

80 *A.A.M.L. Standards, supra* note 1, § 1.2 cmt.

81 *See A.A.M.L. Standards, supra* note 1, § 2.7 cmt. This concern for arbitrariness was previously articulated by Martin Guggenheim. Guggenheim, *supra* note 53. Lyon points out that "the element of arbitrariness depends upon Guggenheim's assumption that the champion makes subjective judgments. To the extent that attorneys are guided by established procedures and explicit factors to determine the child's position, that arbitrariness is reduced, if not eliminated." Lyon, *supra* note 45, at 691. Perhaps the greatest missed opportunity of the Standards is their failure to articulate those "established procedures and explicit factors" which would assist attorneys in representing children. Instead, the Standards take the easy, if controversial, route of simply directing attorneys to take no position at all when the child is deemed "impaired."

The Comment to Standard 2.7 is simply empirically wrong when stating, in the matrimonial context, that "[w]hen lawyers represent unimpaired clients, the individual lawyer's personal views are virtually irrelevant."[82] Adult choices are vulnerable to persuasion, and even to the subtle influence of the way in which issues are presented.[83] Emotional distress, economic duress, family pressure, peer pressure, and a whole host of other things influence "rational" decision-making by adults who are not otherwise considered to be disabled or impaired. The choice of attorney interjects another source of influence and potential manipulation.

Matrimonial practice is replete with examples of divergent outcomes based on the personal values and opinions of matrimonial attorneys.[84] Attorneys may encourage or discourage joint custody based on personal philosophies. They may refuse to press claims of abuse based on personal biases. They may encourage or discourage alternate dispute resolution based on experience and philosophies. Spousal maintenance may be offered or denied based on the attorney's personal opinions. Specific parenting plans and visitation schedules may be proposed or opposed based on the attorney's personal values and opinions.

82 *A.A.M.L. Standards, supra* note 1, § 2.7 cmt.

83 *See, e.g.*, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (decisionmaking by professionals affected by how the choice was framed). *See generally* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

84 *See, e.g.*, Reidy et al., *supra* note 36 at 75; Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 50 (1994). One study showed that in child protection cases in North Carolina black children represented by black attorneys were less likely to be removed from their homes than black children represented by white attorneys. *See* Robert F. Kelly & Sarah H. Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Intervention*, 21 J. FAM. L. 405, 438 (1983). There are similar theoretical and practical biases in custody evaluators. *See, e.g.*, Martha L. Deed, *Court-ordered Child Custody Evaluations: Helping or Victimizing Vulnerable Families*, 28 PSYCHOTHERAPY 76, 80 (1991). *See also* Jack C. Wall & Carol Amadio, *An Integrated Approach to Child Custody Evaluation: Utilizing the "Best Interest" of the Child and Family Systems Frameworks*, 21 J. DIVORCE & REMARRIAGE 39, 46 (1994).

In few areas of the law are the attorney's personal values and views as determinative as in matrimonial law. This is largely because the entire field, especially as it relates to custody and visitation, is highly subjective and discretionary, and because litigants are typically under severe emotional distress during all phases of the litigation, rendering them particularly susceptible to persuasion by their counsel. While statutes may provide lists of factors for the courts to consider, those factors, and even society's views about parenting, do not provide clear guidance in determining custody and visitation.[85] Further, limiting the "impaired" child's attorney to the role of neutral fact-finder does not insulate the attorney from using subjective biases and values to determine which facts are brought before the court.[86]

The Comment to Standard 2.7 recognizes that "cases may be decided differently because of the quality of counsel's skill," a result which is deemed "unavoidable."[87] But the Comment makes the point that attorneys must abide by the client's decisions, making personal values irrelevant to the attorney's conduct. This statement underestimates the power of the matrimonial attorney's persuasion and predictions, which may be dependent on that attorney's values. Those values, as well as the attorney's skill, may be outcome determinative.

The fact is that who the attorney is and what the attorney's values, biases, and prejudices are, may result in cases being decided differently regardless of the minority or impairment of the attorney's client. Even the determination that a child is impaired

85 *See, e.g.*, ROBERT H. MNOOKEN ET AL., IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 18 (1985). Sarah H. Ramsey points out that child protection cases involve significant decisions about the child and family which involve difficult choices and disagreements among experts. She poses the question, "[w]hy not trust the child's judgment about what is right for him, at least to the extent of having his position freely advocated, especially since age is not an accurate predictor of capacity?" Ramsey, *supra* note 58, at 297. There are many areas of disagreement concerning what constitutes child abuse or neglect. *See, e.g.*, Jill E. Korbin, *Sociocultural Factors in Child Maltreatment*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT: FOUNDATIONS FOR A NEW NATIONAL STRAGEGY (Gary B. Melton & Frank D. Barry eds., 1994).

86 *See, e.g.*, Wilber, *supra* note 58, at 355-56.

87 *A.A.M.L. Standards*, *supra* note 1, § 2.7 cmt.

is often an arbitrary, value-laden decision.[88] It is the field of law itself which is discretionary and subjective for all participants, from the parents' attorneys to the custody evaluators to the judge.[89] Allowing the child's attorney a certain amount of discretion in representing the "impaired" child client does not necessarily involve *undue* subjectivity. Rather than eliminating advocacy for "impaired" children because of the attorney's discretion, the Standards would be more helpful if they referred to the objective criteria which can provide guidance in exercising that discretion.

III. Artificiality of the Distinction

A. *The Distinction is Inflexible*

The Standards make the distinction between "impaired" and "unimpaired" all-or-nothing. There are neither degrees of impairment nor scope of issues for which the child is impaired which are recognized by the Standards. Such an inflexible distinction, which deprives "impaired" clients of any advocacy whatsoever, is in stark contrast to an attorney's existing responsibilities under ethical codes.

Rule 1.14 of the Model Rules of Professional Conduct discusses the ethical implications of representing parties under a disability, including the disability of minority.[90] That rule re-

88 *See, e.g.*, ANN M. HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES § 4.06 (2d ed. 1993). *See also*, in the elder law context, Rein, *supra* note 35, at 1144-45.

89 For example, forensic psychologist and professor Thomas Grisso argues that custody decisions cannot be supported by scientific and clinical evidence alone, but rather, include application of legal and social values. *See* Thomas Grisso, *Evolving Guidelines for Divorce/Custody Evaluations*, 28 FAM. & CONCILIATION CTS. REV. 35, 40 (1990). The standard of "best interests of the child" itself contemplates using "community norms, parental experience, and common sense." *See* DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE § 13.02 (2d ed. 1994). There are a number of types of bias which may affect the way an evaluator processes the information received during an evaluation. *See, e.g.*, Arthur Williams, *Bias and Debiasing Techniques in Forensic Psychology*, 10 AM. J. FORENSIC PSYCHOL. 19, 20-21 (1992). Even two highly qualified mental health professionals may reach different conclusions because they accept different theoretical models. *See* Thomas J. Reidy et al., *supra* note 36, at 79.

90 MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

quires attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired. While the Model Rules do not provide more specific guidance for children's attorneys, they do allow a proper amount of flexibility in applying the ethical standard. Under Rule 1.14 a client can be under a disability ("impaired") with respect to some decisions but not with respect to others. Further, an attorney need modify the attorney-client relationship insofar only as it is not possible to maintain a normal relationship.[91]

Similarly, Ethical Consideration 7-11 of the Model Code states that the attorney's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client."[92] The attorney must "consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client."[93] Ethical Consideration 7-12 provides that where a client under a disability has no legal representative, the attorney "may be compelled in court proceedings to make decisions on behalf of the client."[94] EC 7-12 provides further that "[i]f the client is capable of understanding the matter in question or of contributing to the advancement of his interests, . . . the lawyer should obtain from him all possible aid."[95] As the Model Rules do, the Code permits the attorney a great deal of latitude in modifying the traditional attorney-client relationship to meet the particular disabilities of the client.[96]

91 *Id.*

92 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1982).

93 *Id.*

94 *Id.* EC 7-12.

95 *Id.*

96 The Standards missed a wonderful opportunity to provide the guidance that both the Model Rules and the Model Code lack. What children's attorneys sorely need is a set of sensitive and practical guidelines to help them modify their traditional roles when dealing with the real world issues which arise while representing children. Instead, the Standards skirt the issue by drawing an inflexible boundary and denying advocacy to those who fall on the "impaired" side of that boundary. As good procedure is suggested in Jean Koh Peters, *The Roles and Content of Best Interests in Child-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. — (forthcoming 1996). *See generally, Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. — (forthcoming 1996).

While Standard 2.8 also states that "[t]o the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship,"[97] that directive is severely limited by the requirement of Standard 2.7 that the impaired child's attorney "not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation."[98] Zealous advocacy is a basic duty of an attorney in a litigated case. Therefore, it is difficult to imagine a "normal" attorney-client relationship which *prohibits* advocacy.

The Comment to Standard 2.8 refers to the Comment to Model Rule 1.14, which states that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[99] However, the Standards use the Model Rule in support of the requirement that the "impaired" child's attorney inform and advise the child about the case, ironically ignoring the obvious fact that in a custody or visitation case, virtually the entire litigation concerns "matters affecting the client's own well-being."[100] The Standards allow no flexibility for advocating a position for an "impaired" child client with respect to some or all of these personally relevant issues nor for recognizing degrees of impairment and competence.

An example of a partially disabled client which is familiar to matrimonial lawyers is the representation of an economically disadvantaged battered spouse. The competent attorney recognizes the dynamics of spousal abuse and the impairment of the client resulting from those dynamics. The attorney will advise the client to obtain domestic violence counseling and will take special precautions to protect the client from making decisions unduly influenced by the impairing circumstances. That does not mean that the attorney will seek appointment of a guardian ad litem or make a wholesale change in the normal attorney-client relationship. Rather, the attorney will make some adjustments to the representation.[101]

97 *A.A.M.L. Standards*, *supra* note 1, § 2.8 cmt.

98 *Id.* § 2.7.

99 MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.4 (1994).

100 *Id.*

101 *See, e.g.*, Lisa G. Lerman, *Handling Domestic Violence Cases, in* FAMILY LAW AND PRACTICE (Arnold H. Rutkin ed., 1985); Catherine F. Klein &

Similarly, abused children of any age may have impaired ability to make rational judgments concerning their home life.[102] However, they can certainly have input in decisions and may have clearly determinable needs and objectives to advance in a matrimonial proceeding.[103]

The comment to Model Rule 1.14 notes that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[104] Professor of Psychiatry and Pediatrics Stephen Billick has suggested a graduated degree of involvement in decisionmaking by child clients: a seven to eight-year-old child may participate in decisionmaking; from nine to eleven years of age a child may jointly decide with his parent; from twelve to fourteen years of age a child decides with parental ratification; from fourteen years on, the child should decide.[105] Children as young as seven years old have been deemed capable of directing their attorney's representation,[106] and seven is widely seen as an important milestone.[107]

Leslye E. Orloff, *Representing a Victim of Domestic Violence*, FAM. ADVOC., Winter 1995, at 25.

102 *See, e.g.*, David L. Kerns, *Child Abuse and Neglect: The Pediatric Perspective, in* FOUNDATIONS OF CHILD ADVOCACY (Donald C. Bross & Laura Freeman Michaels eds., 1987).

103 For a discussion of the development stages and their relevancy to abuse, custody, and visitation issues, see generally, HARALAMBIE, *supra* note 72, at §§ 24.01-.09.

104 *Id.* Rule 1.14 cmt.

105 *See* Stephen B. Billick, *Developmental Competency*, 14 BULL. AM. ACAD. PSYCH. & L. 308 (1986).

106 *See, e.g., Model of Representation in Dependency Court*, PENNSYLVANIA JUDICIAL DESKBOOK 7 (Juvenile Law Center of Philadelphia 1986). For a summary of the developmental characteristics of seven-year-old children, see generally, Ramsey, *supra* note 58, at 311-14. Ramsey proposes seven as the presumptive age for considered decisionmaking. *Id.* at 316.

107 British Psychologist and child development expert Penelope Leach has written:

> Seven—or six or maybe eight—is acknowledged as some kind of watershed by almost every school of thought in Western culture. Freud's latency period, Piaget's concrete operations and Kohlberg's conventional morality are all located in this time frame, and classical learning theory pinpoints it as the period when mental processes, including speech, begin to mediate between the stimuli children receive and their responses. Whether the focus is on children's feelings, understanding or thoughts, their judgments, beliefs or reasoning, the beginning of middle childhood promises a new maturity and a new desire to learn that is recognized in every culture.

PENELOPE LEACH, CHILDREN FIRST: WHAT OUR SOCIETY MUST DO—AND IS NOT DOING—FOR OUR CHILDREN TODAY 146 (1994). Sarah Ramsey states that the research supports a rebuttable presumption that seven-year-olds are capable of making considered, reasoned decisions. Ramsey, *supra* note 58, at 316.

108 *See, e.g.*, Alayne Yates, *Child's Preference—Developmental Issues*, FAM. ADVOC., Winter 1988, at 34.

109 *See generally*, HARALAMBIE, *supra* note 72, at § 24.17.

110 *See generally* Annotation, *Competency of Young Child as Witness in Civil Case*, 81 A.L.R.2d 386 (1962).

111 *See* FED. R. EVID. 610. The federal Child Victims' and Child Witnesses' Rights Act, 18 U.S.C.A. § 3509 (West Supp. 1995), also presumes the competency of child witnesses. A competency hearing is held only when a party alleges that the child is not competent to testify. *See* 18 U.S.C.A. § 3509(c).

112 *See, e.g.*, ARIZ. R. EVID. 601; ME. R. EVID. 601; MISS. CODE ANN. § 13-1-5; MONT. R. EVID. 601; NEB. REV. STAT. § 27-601 (1993); N.C. GEN. STAT. § 7a-634 (1989); OHIO REV. CODE ANN. § 2151.3511 (Anderson 1990); UTAH R. EVID. 601; WYO. R. EVID. 601. *See, also, In re* Basilio T., 5 Cal. Rptr.2d 450 (Cal. Ct. App. 1992); Gotwald v. Gotwald, 768 S.W.2d 689 (Tenn. Ct. App. 1988). Some states provide that child abuse victims may testify without any competency findings. *See, e.g.*, ALA. CODE § 15-25-3(c) (Supp. 1992); COLO. REV. STAT. § 13-90-106(1)(b)(II) (Supp. 1994); COLO. REV. STAT. § 13-90-117.5 (Supp. 1994); GA. CODE ANN. § 24-9-5(b) (Supp. 1991); MO. ANN. STAT. § 491.060(2) (Vernon Supp. 1994); S.C. CODE ANN. § 19-11-25 (Law Co-op Supp. 1993); UTAH CODE ANN. § 76-5-410 (1990); W. VA. CODE § 61-8B-11(c) (1993). But for states adopting a ten-year presumptive age of competency, *see, e.g.*, ILL. ANN. STAT. ch. 725, 125/6 (Smith-Hurd 1992); MICH. COMP. LAWS ANN. § 600.2163-2163a (West 1986 & Supp. 1994); IOWA R. EVID. 601; MINN. STAT. ANN. § 595.02(1)(f) (West 1988 & Supp. 1994); MO. ANN. STAT. § 491.060 (Vernon Supp. 1994); TENN. CODE ANN., § 24-1-101 (1985).

testify.[113] Competency to testify involves the ability to perceive and relate. Those abilities are also involved in directing representation or, at least, in informing counsel of facts and opinions which allow the attorney to take a position in the case. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses.[114]

It can be argued that even children too young to be competent to testify still benefit from the advocacy model of representation. Children too young to communicate verbally can nevertheless communicate individual needs. For example, physicians and psychologists regularly assess attachment and bonding between infants and their caretakers.[115] Abuse and neglect often

113 *See, e.g.*, Strickland v. State, 550 So. 2d 1042 (Ala. Crim. App. 1988), *aff'd sub nom. Ex Parte* Strickland, 550 So. 2d 1054 (Ala. 1989); George v. State, 813 S.W.2d 792 (Ark. 1991); Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991); State v. Hussey, 521 A.2d 278 (Me. 1987); United States v. Frazier, 678 F. Supp. 499 (E.D. Pa.), *aff'd.*, 806 F.2d 255 (3d Cir. 1986). For other cases permitting testimony by young children, *see, e.g.*, People v. Lamb, 264 P.2d 126 (Cal. Ct. App. 1953) (four-year-old); People v. District Court, 791 P.2d 682 (Colo. 1990) (four-year-old); Feleke v. State, 620 A.2d 222 (Del. Super. Ct. 1993) (nine-year-old); Gallagher v. State, 395 S.E.2d 358 (Ga. Ct. App.), *cert. denied*, (Sept. 4, 1990) (seven-year-old); Watson v. State, 512 N.E.2d 885 (Ind. Ct. App. 1987) (five-year-old); Wombles v. Commonwealth, 831 S.W.2d 172 (Ky. 1992) (eleven-year-old); State v. Bean, 582 So. 2d 947 (La. Ct. App.), *cert. denied*, 586 So. 2d 567 (La. Ct. App. 1991) (eight-year-old); Bowen v. State, 607 So. 2d 1159 (Miss. 1992) (six-year-old); *In re* R.R., 398 A.2d 76 (N.J. 1979) (four-year-old); People v. Chesnard, 572 N.Y.S.2d 719 (N.Y. App. Div. 1991) (seven- and eleven-year-olds); Commonwealth v. Trimble, 615 A.2d 48 (Pa. Super. Ct. 1992) (five-year-old); State v. Evans, 838 S.W.2d 185 (Tenn. 1992) (seven-year-old); Heckathorne v. State, 697 S.W.2d 8 (Tex. Ct. App. 1985) (five-year-old). *See also*, People v. Norfleet, 371 N.W.2d 438 (Mich. Ct. App. 1985) (trial court should have conducted further inquiry on competency of seven-year-old); State v. Dwyer, 440 N.W.2d 344 (Wis. 1989) (trial court should have conducted further inquiry on competency of four-year-old). *See generally*, John E.B. Myers, *The Competence of Young Children to Testify in Legal Proceedings*, 11 BEHAV. SCI. & L. 121 (1993).

114 *See, e.g.*, Parley, *supra* note 52, at 48 ("the law has always recognized that children are different when it comes to competency and that there are no rules about when a child is old enough to be relied on as an accurate reporter of facts nor when a child is able to express an opinion about his or her life").

115 *See, e.g.*, Mary Ainsworth, *Attachment Beyond Infancy*, 44 AM. PSYCH. 709 (1989); BOLTON, *supra* note 73; JOHN BOWLBY, SEPARATION, ANXIETY AND ANGER (1973); JOHN BOWLBY, ATTACHMENT (1969).

can be identified without verbal confirmation by children.[116] As discussed above, attorneys can make a determination of children's objective needs based on certain hierarchical needs.[117] It can be argued that the children who are least able to give voice to their interests may be the most in need of independent advocacy of their interests.[118]

Competency, in general, is largely functional, whether for adults or children, and involves areas of varying scope and complexity.[119] The Academy's Bounds of Advocacy, for example, provide that attorneys representing adult clients with impaired decisionmaking ability (based on emotional problems, substance abuse, or other reasons) should recommend that the client seek counseling or treatment.[120] Children do not mature in a linear or comprehensive fashion.[121] For example, children's intellectual and emotional maturation is not synchronized. As they develop, children's developmental scores will be scattered across various areas, with a different scatter pattern later on.[122] Further, some decisions which must be made in custody or visitation cases are more complex than others, requiring different degrees of maturity, experience, and judgment.[123] Sarah H. Ramsey suggests that

116 *See, e.g.*, HARALAMBIE, *supra* note 72.

117 See discussion at II(C).

118 One commentator in the elder law context recommends that attorneys zealously represent the expressed wishes of the client, without attempting to assess competency. *See* Maria M. das Neves, Note, *The Role of Counsel in Guardianship Proceedings of the Elderly*, 4 GEO. J. LEGAL ETHICS 855, 862 (1991). Another commentator in the child protection context indicates that decisions may be more accurate "not necessarily because the child's view was correct, but because another point of view would be represented." Ramsey, *supra* note 58, at 297.

119 *See, e.g.*, M. Powell Lawton, *Competence, Environmental Press, and Adaptation of Older People, in* AGING AND THE ENVIRONMENT: THEORETICAL APPROACHES 33 (M. Powell Lawton et al. eds., 1982); R. KANE & R. KANE, ASSESSING THE ELDERLY: A PRACTICAL GUIDE TO MEASUREMENT (1981).

120 *See* BOUNDS OF ADVOCACY Standard 2.11 (American Academy Matrimonial Lawyers 1991), *reprinted in* 9 J. AM. ACAD. MATRIM. LAW. 1 (1992).

121 *See, e.g.*, FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 127 (1982).

122 *See, e.g.*, LEACH, *supra* note 107, at 106-07.

123 This is true in the law of adult competency, as well, where impaired adults may be deemed legally incompetent to make some decisions, but competent to make others. *See, e.g.*, Fisher v. Adams, 38 N.W.2d 337 (Neb. 1949) (competent to marry; incompetent to manage business affairs). With respect to

children's attorneys in child protection cases "assess the child's cognitive ability, emotional maturity, language development, and information and experience in relation to the decision to be made."[124]

Children often have strong opinions about where they want to live and with whom. They have opinions about who makes them feel safe and loved, who scares them, and who hurts them. They know what activities they do and do not enjoy and what friends and relatives they want to see often. Emotional needs are not rationally determined issues, and whether or not the child is able to articulate the reasons for why he or she feels a certain

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the desire of seventeen-year-old mildly retarded child who functioned on the level of a six- to ten-year-old to choose which of her divorced parents she should live with, the New Jersey Supreme Court ruled that the child's preference should be honored unless it could be proven by clear and convincing evidence that she lacked the capacity to make that specific choice. *See In re* M.R., 638 A.2d 1274 (N.J. 1994). A case note discussing that case stated that a proper goal is to allow developmentally disabled persons "to make as many decisions as possible while protecting them from the harmful effects of bad decisions they do not fully understand." *See Civil Competency*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 261 (1994).

Forensic psychologist and professor Thomas Grisso has emphasized:

> The *interactive* characteristic of legal competencies requires consideration of the congruency or incongruency between a person's functional abilities and the degree of performance demand that is made by the specific instance of the context in that case. Thus, a finding of legal incompetency speaks to a condition of person-context incongruency, not merely to a condition of the person alone. Therefore, assessments should strive to evaluate and describe the relevant environmental and social situations (e.g., the trial faced by the defendant, or the child for whom custody arrangements are to be made) to which to compare the examinee's abilities.

THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSRUMENTS 30 (1986). In the context of evaluating *parents*, Dr. Grisso states:

> Generally . . . the significance of a particular weakness or deficit in parenting ability will lie in its comparison to the needs or demands of the specific child and the resources or deficits of ancillary caretakers. In theory, at least, a parent may be incompetent or inadequate to care for one child in a particular social context, yet adequate to care for another child or to do so within some other social context.

Id. at 206. *See generally* William Gaylin, *The "Competence" of Children: No Longer All or None*, 21 J. AM. ACAD. OF CHILD PSYCHIATRY 153 (1982).

124 *See* Ramsey, *supra* note 58, at 316.

way and has certain preferences, those feelings and preferences are real.

Even very young children may be able to understand, consider, and direct a position with respect to some decisions (being "unimpaired" with respect to those decisions) while being unable to lend significant aid with respect to others (being "impaired" with respect to those decisions). For example, young children may know who they like to spend time with and what activities are important to them. They may be able to direct counsel to schedule visitation that does not interfere with scouting. They are often able to state whether or not they want third party visitation. On the other hand, they may not be able to appreciate that a "preferred" parent is negligent, abusive, or irresponsible, and therefore an inappropriate physical custodian.

The United States Supreme Court has discussed the differences between a child's maturity to make various types of decisions, distinguishing, for example, between abortion decisions and decisions relating to marriage, voting, and pornography.[125] The Arizona Court of Appeals discussed the various levels of maturity in distinguishing the age limit for various privileges from young children's capacity and standing to file a termination of parental rights petition on their own behalf:[126]

> Children may not marry, drive a car, join the armed services or consent to surgery without the consent of a parent or guardian because the legislature has determined these acts require a certain level of maturity and capacity. The same cannot be said of a severance proceeding. Maturity has nothing to do with a child's interest in the substance of such a proceeding.[127]

Under traditional rules of representing a client under a disability, an attorney would have the flexibility of following the traditional role of attorney with respect to the former decisions, while making an independent judgment with respect to the other decisions. The same rationale applies to the interest of "impaired" children in having independent advocacy in custody and visitation cases dealing with their lives. The children could direct their legal po-

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125 *See, e.g.*, Bellotti, 443 U.S. at 635; McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

126 *See In re* Matter of the Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994).

127 872 P.2d at 1243.

sitions with respect to some issues, and could inform but not direct counsel with respect to issues they were not sufficiently mature to decide.[128]

B. *Trained Children's Attorneys Have the Skills and Duty to Go Beyond an Inflexible Preclusion of Advocacy for Their Most Vulnerable Clients*

The role of an attorney for a young child must take into account a recognition of the fact that the client may be unable to direct counsel because of developmental immaturities. The Standards take the position that because of that inability, the child should not have an attorney. However, attorneys can be trained to learn how to advocate for young children.[129] This clearly goes beyond what legal training provides and requires exposure to multidisciplinary teaching from the fields of mental health, social science, and medicine.[130] The attorney who has this specialized training will learn how to determine a child's objective and subjective needs, how to recognize abusive and neglectful circumstances, and how to maximize the child's interests. Usually consultation with experts already involved in the case will be necessary to determine these matters.

The child's attorney is the only attorney in the case who can focus solely on the needs and perspective of the child. A trained child advocate should be familiar with alternative custody and visitation plans which the parents' attorneys and the judge may not be familiar with. For example, the child's attorney may be able to offer evidence and creative suggestions on how to deal with visitation when there is a high level of conflict between the

128 It is important to remember that a child's decision to take a position in a case is not tantamount to deciding that his or her position will be adopted. The fact that the judge is the final decisionmaker adds another layer of protection against a child's foolish choices.

129 *See, e.g., The Child Attorney: A Guide, supra* note 58; FOUNDATIONS OF CHILD ADVOCACY (Donald C. Bross & Laura Freeman Michaels eds., 1987).

130 Any disabled or "impaired" clients need "seasoned, highly skilled, and ethically sensitive lawyers to handle their more complex legal problems," and those attorneys will need training beyond what can be provided through continuing legal education alone. *See* Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 641-46 (1989/1990).

parents.[131] A trained child advocate may also be better equipped to prove or disprove abuse issues, which is a highly specialized area of the law.[132] For example, the child's attorney may be aware of models for intervention which can protect a preschool aged child as well as allowing parental contact when there is some concern that the child has been sexually abuse by a parent entitled to visitation, but there is not enough evidence to prove abuse.[133]

If the attorney representing the child has special training and experience, the court will benefit from the specialized knowledge the child advocate possess. Few matrimonial lawyers acquire this specialized knowledge and even fewer stay abreast of the rapidly changing body of knowledge concerning child abuse and children's memory.[134] Trained child advocates generally have a particular interest in children's issues and a greater commitment to staying current on those issues.[135]

Ethical standards for attorneys "remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis, typically in business transactions or in litigation."[136] This model is inadequate when applied to legal proceedings involving personal family relations, particularly when the parties may be impaired to some degree. Modification of the ethical standards is appropriate even when the "impaired" client is an adult. For example, attendees at a symposium on the ethical issues involved in representing the elderly recommended that attorneys explicitly be given "discretion to act to protect individuals with diminished capacity from various types of harm," being

131 *See, e.g.*, CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE (1994).

132 *See, e.g.*; HARALAMBIE, *supra* note 72.

133 *See, e.g.*, Sandra Hewitt, *Therapeutic Management of Preschool Cases of Alleged but Unsubstantiated Sexual Abuse*, 70 CHILD WELFARE 59 (1991).

134 *See, e.g.*, HARALAMBIE, *supra* note 72, at §§ 24.10-.15.

135 The existence of such growing organizations as the National Association of Counsel for Children and the American Professional Society on the Abuse of Children as well as the numerous conferences held on child advocacy issues reflects the recognition of child advocacy as a professional specialty.

136 *See* Bruce A. Green & Nancy Coleman, *Forward*, 62 FORDHAM L. REV. 961, 967 (1994) (referring to the inadequacy of ethical standards as applied to representing eldery impaired clients).

authorized to take protective steps even without the client's permission, "guided by the goal of intruding into the client's autonomy to the least extent necessary to protect that person."[137]

Children caught up in custody or visitation litigation have the same need for protection from harm from their own poor judgment as well as from external sources. A major reason for requiring specialized training for children's attorneys is to give them the skills necessary to assess and recognize their clients' interests and potential areas of harm and to present a position which will aid the clients and the court. The judge, who is not an investigator or a confidante to the child cannot adequately provide that protection, and the parents' attorneys have their own client's interests to weigh. Only the child's attorney is in a position to provide advocacy and protection for the child, and that attorney has an ethical duty to do so. Failure to properly investigate the case and advocate the child's position could constitute malpractice.[138]

IV. Conclusion

The judge is responsible for making the ultimate decisions in the case. He or she is not an investigator or an advocate for a position. The child's attorney represents the voice of the child (whether the child's expressed wishes, best interests, or a combination). Presentation of facts underlying the position is only one part of the attorney's responsibility; advocating the child's position is another part.

The Comment to Standard 3.2, concerning guardians ad litem, expresses the fear that the judge will simply defer to the child's attorney's position. While that is a practical reality in many cases, it represents a dereliction of the judge's duties.[139] In law, the position of the child's attorney or guardian *ad litem* is not entitled to any more weight than any other argument or evidence and is not binding on the court.[140] The proper remedy for the problem of improper deference or undue reliance is to educate judges about exercising their mandatory obligation to exercise independent discretion, not to remove the advocacy for the most affected and least powerful person in the case: the child. The judge should no more accept the child's attorney's position automatically than he or she would accept a mother's or father's position automatically.

Children are the least able to present their interests effectively to the court,[141] and the trend towards providing independent counsel for children is the first step towards putting the *child's* perspective into the process of determining the child's best interests. Unfortunately the determination that a child is "impaired" under the Standards denies that child advocacy. The best that the Standards deliver to such a child is the hope that the judge will consider the evidence presented without any independent interpretation, reminders, or organization from the child's attorney, and reach a decision in the child's best interests. With the other parties' attorneys vigorously advocating their respective positions, it is only the child who is left without a voice.

The emasculated view of the attorney for an "impaired" child client mandated by the Standards prescribes a form of lawyering which could amount to unethical conduct and malpractice. In light of the Standards' recognition of the need for specialized, multi-disciplinary training for children's attorneys and articulation of the duties for attorneys for "unimpaired" children, one would have hoped for a comprehensive and enlightened set of standards to guide attorneys for *all* children in how to determine and zealously advocate the child's position.

137 *Id.* at 976.

138 For a more complete discussion of the ethical and malpractice issues involved in representing children, *see, e.g., The Child's Attorney: A Guide, supra* note 58.

139 *See, e.g.*, Wilber, *supra* note 58, at 351.

140 *See, e.g.*, Blake v. Blake, 541 A.2d 1201 (Conn. 1988); Richelson v. Richelson, 536 A.2d 176 (N.H. 1987); Shainwald v. Shainwald, 395 S.E.2d 441, 445 (S.C. Ct. App. 1990).

141 This is particularly true where no independent, child-centered custody/visitation evaluation has been performed.

Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings

by
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I. Introduction

The Standards for Attorneys and Guardians ad litem for Representing Children in Custody and Visitation Disputes, adopted by the American Academy of Matrimonial Lawyers in November of 1994,[1] provide guidance to attorneys in the context

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[1] REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (American Academy of Matrimonial Lawyers 1994) [hereinafter *A.A.M.L. Standards*]. For other discussions of representation of children, *see generally* Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 119 (1984); JUVENILE JUSTICE STANDARDS (Institute of Judicial Administration/American Bar Association 1980); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993); THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES (Ann M. Haralambie ed., 1993). *See also* Howard A. Davidson, *The Child's Right To Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991). *See also* Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice In Defining the Family*, 8 B.Y.U. J. PUB. L. 321 (1994).

> The primary focus to date has been on the child's right to be represented by counsel and the definition of the appropriate function of counsel for children. The A.A.M.L. Standards respond to this debate by adhering to the principle that a lawyer must "abide by a client's decisions concerning the objective of representation," conditioned only on the client's capacity to make decisions. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994). To allow the attorney to substitute his judgment for that of the client in the context of a custody dispute introduces an unacceptably high level of arbitrariness into the process, and risks interfering with and even usurping the decisionmaking responsibility of the court by permitting a third adult to advocate

of pending "private custody and visitation proceedings in which the state is not a party and the standard by which the case is decided is the best interests of the child."[2] While this category includes a majority of the cases encountered by the matrimonial lawyer in private practice, the Standards do not directly address issues raised by those who seek broader direct access to the courts for minor children. For example, reference to the A.A.M.L. Standards alone will not answer the question of whether a minor should have standing to bring an action for the termination of parental rights, whether of biological parents, foster or adoptive parents.[3] The discussion of this issue has not been restricted to academic debate in legal journals; it has received wide coverage in the popular press as the cases of Gregory Kingsley, Kimberly Mays and Jessica deBoer were reported and analyzed.[4]

for an outcome based on his or her own determination of the best interests of the child. *See A.A.M.L. Standards*, § 2.7 cmt.

2 *A.A.M.L. Standards*, *supra* note 1, Preamble n.2. Such actions are usually initiated by one parent or the other in relation to the termination of the marital relationship or a claim for custody of a child born outside a marital relationship. Petitions relating to abuse and neglect brought by governmental agencies are excluded; however, abuse and neglect may be issues in private custody and visitation proceedings.

3 For a discussion of standing to sue, *see generally* Sierra Club v. Morton, 405 U.S. 727 (1972) (All natural persons are guaranteed access to the courts by the United States Constitution.); Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (Children do not have standing to bring an action on their own behalf, nor can they defend actions brought against them.); Pintek v. Superior Court, 277 P.2d 265, 268 (Ariz. 1954) (Minors are treated as if they were incompetent adults who, because of their legal disability, may not initiate civil actions.); Cottrell v. Connecticut Bank & Trust Co., 398 A.2d 307, 310 (Conn. 1978) (A minor may bring an action only by a guardian or next friend, who is responsible for ensuring that the minor's interests are well represented.); Orsi v. Senatore, 645 A.2d 986, 990-91 (Conn. 1994) (The guardian ad litem or next friend stands in the shoes of the minor as "alter ego" for purposes of the proceeding, as distinguished from an attorney who represents the child.); Guggenheim, *supra* note 1; Claudio DeBellis & Marta B. Soja, *Notes: Gregory K.: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard*, 8 ST. JOHN'S L. COMMENT 501 (1993).

4 *See, e.g.*, Lynn Smith, *What's Best for the Children? Gregory K. and Other Cases Have Bolstered Children's Rights. But, Some Say, Instead of Relying On Legal Remedies We Should Increase Public Support of the American Family*, L.A. TIMES, Oct. 18, 1992, at 1; Cory Jo Lancaster, *Joy for Kimberly; Fear for Gregory K: Kids Lose Right to Divorce Parents in Gregory K Appeal*, ORLANDO SENTINEL, Aug. 19, 1993, at A1.

In addition, the A.A.M.L. Standards do not fully resolve the question of whether the minor is a party to a custody or visitation proceeding with the same rights and obligations as the parents or other adults accorded party status by custom or statute. Although the minor's attorney is to be treated as counsel to a party in a procedural sense,[5] the A.A.M.L. Standards appear to stop short of assigning to the minor the status of party equal to that of the parents.

That children have strong interests in the outcome of pending custody and visitation proceedings has long been recognized.[6] Only recently, however, have courts begun to tackle the question of the child's right to initiate such proceedings or to participate with the same party status as a parent.[7] Developing constitutional law notions of due process, with a focus on fundamental rights to family relationships and more ready access to the courts, give strength to advocates of an enhanced role for children.[8] Comparative analysis of various non-custody proceedings in which children have gained the right to participate fully highlights the seeming paradox inherent in a system which continues to place limitations on the participation of children in custody and visitation proceedings.[9]

Nevertheless, traditional restrictions on children's rights to participate in actions involving the family retain their vitality. Long-established constitutional rights of parents to the care, custody, and control of their children,[10] significant state interests in protecting children and the family, the inability of children to comprehend the legal process, and the vulnerability of children

5 *A.A.M.L. Standards*, *supra* note 1, § 2.5. (Counsel to be treated *by other counsel* as party of record as to *custody and visitation*.) (emphasis added).

6 *See, e.g.*, Veazey v. Veazey, 560 P.2d 382, 390-91 (Alaska 1977) ("There is no person more interested in a child custody dispute than the child."); Wendland v. Wendland, 138 N.W.2d 185, 191 (Wis. 1965) (Children "are to be treated as interested and affected parties . . . .").

7 *See* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993); Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993); *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993).

8 *See infra* notes 12-42 and accompanying text.

9 *See infra* notes 48-65 and accompanying text.

10 *See infra* notes 66-71 and accompanying text.

as a class continue to play important roles in determining the child's status in custody and visitation matters.

The analysis which follows first reviews the constitutional arguments and comparative legal analysis most widely used by advocates for granting children legal status co-equal with parents. These theories are then analyzed and found inadequate in the custody and visitation context where the constitutional rights of parents are a necessary and opposing element. The child's ability to exercise judgment is distinguished from cognitive ability and the concept of the state as *parens patriae* is re-examined. The A.A.M.L. Standards serve as a point of reference and as a framework within which guidelines are then formulated for determining when, and in what manner, children should be permitted additional and different access to the legal system when custody and visitation decisions must be made.[11]

11 The differentiation between impaired and unimpaired children adopted in the A.A.M.L. Standards will be honored. In the absence of that distinction, the analysis would have to focus not only on the child and the parents, but also on unrelated third parties who, for one reason or another, are making decisions for the child using their own capacities and judgment, not the child's. *See infra* notes 87-93 and accompanying text for discussion of relevance of child's ability to exercise judgment. "It is well established that a child may bring a civil action only by a guardian or next friend, whose responsibility it is to 'ensure that the interest of the ward are well represented.'" *Orsi*, 645 A.2d at 990 (foster parent brought declaratory action to determine constitutionality of regulations governing removal of child from foster care as next friend of foster child, which child was already represented by a guardian and by guardian ad litem)(citations omitted). In *Orsi*, the Connecticut Supreme Court remanded to the trial court for a determination whether there were exceptional circumstances permitting representation by a "next friend", such as the absence of the guardian, inability or refusal of the guardian to institute or prosecute the required action, or unsuitability of the guardian to prosecute the action for other reasons. *Id.* at 991. The A.A.M.L. Standards, however, clearly reject the notion that in custody and visitation matters a guardian or "next friend" should be empowered to reach conclusions as to the child's best interests or the child's preference. The doctrine of "substituted judgment" favored by many commentators and by some states, which permits counsel or guardian ad litem for the child to substitute his judgment for that of the child who is unable or unwilling to do so for himself, is also rejected. *See A.A.M.L. Standards*, *supra* note 1, §§ 2.7, 3.1 & 3.2.

II. Competing Views of the Minor Child's Right to Participate in Custody and Visitation Proceedings

A. *Theoretical Basis for Elevating the Child's Status to Equality With That of His Parents*

1. *Constitutional arguments*

The United States Supreme Court and state courts in recent years have confirmed minors' constitutional rights in areas ranging from juvenile delinquency proceedings[12] to free speech[13] to abortion[14]. Recognition of minors' rights in these areas suggests that enhancing the ability of children to protect their interests in custody and visitation proceedings is a logical next step in the development of constitutional law.

a. *Due Process*

The most dramatic advances in constitutional law affecting minors' rights have occurred in the area of due process protections. If state court decisions grant enhanced status to minor children in custody and visitation proceedings, the decisions will most likely be based on further expansion of due process protections under state constitutions as well as under the United States Constitution.

The Fourteenth Amendment to the Constitution declares that no state shall "deprive any person of life, liberty or property without due process of law."[15] Most state constitutions contain similar language granting their citizens rights to due process[16]

12 *See In* re Gault 387 U.S. 1 (1967) (confirming that juveniles have the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and the privilege against self-incrimination).

13 *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that school regulation prohibiting students from wearing armband was an unconstitutional denial of free speech).

14 *See* Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); *see infra* notes 52 & 53 and accompanying text.

15 U.S. CONST. amend. XIV.

16 All states except Louisiana, New Hampshire, New Jersey and Wisconsin afford due process protection in their state constitutions. George H. Russ, *Through the Eyes of a Child, "Gregory K": A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 383 (1993) (advocating that children be accorded standing to

and some contain specific provisions extending constitutional rights to children.[17] The United States Supreme Court has held that children are "persons" within the meaning of the Fourteenth Amendment.[18]

A minor's due process rights to notice, appointed counsel and confrontation and cross-examination of witnesses in juvenile delinquency proceedings were recognized by the Supreme Court in *In re Gault*.[19] The Court rejected the notion that the state, through a judge or probation officer, could act as counsel for a fifteen year-old boy in a delinquency proceeding.[20] Finding the child "delinquent" would have subjected him to loss of liberty, implicating his constitutional right to due process.[21] Subsequent Supreme Court decisions have described *Gault* as standing for the proposition that a minor's interest in personal freedom, rather than the Sixth and Fourteenth Amendment right to counsel in criminal cases, triggers the right to appointed counsel.[22] Impermissible denial of the right to counsel includes failure to allow the presentation of an argument by counsel[23] and failure to allow closing argument by counsel.[24] The broad language in *Gault* has served as the basis for arguing that similar protections

commence actions to terminate parental rights and be accorded full party status in all custody cases to spur societal change).

17 *See In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989). *See generally*, Russ, *supra* note 16, at 383.

18 *Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State."). *See also* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994) (justifying inclusion of children in "model of legal personhood" for all purposes).

19 387 U.S. 1 (1967).

20 *Id.* at 36.

21 *Id.*

22 *See* Lassiter v. Department of Social Serv., 452 U.S. 18, 25, *reh'g denied*, 453 U.S. 927 (1981). The states have enlarged the protections accorded to minors in delinquency proceedings. For example, in Colorado, a child in a delinquency proceeding can select his own counsel, a choice that neither the child's parents nor the trial court can prevent.

23 *See In re* F., 520 P.2d 986 (Cal. 1974).

24 *See In re* A.C., 357 A.2d 536 (Vt. 1976).

should be extended to minors in child custody and visitation proceedings.[25]

Freedom of personal choice for adults in matters of family life also has been found entitled to protection under the due process clause of the Fourteenth Amendment as a fundamental interest.[26] Both the Second and Ninth Circuits have recognized that the same due process right to the preservation of family relations "encompasses the reciprocal rights of both parent and children."[27] In describing these reciprocal rights, the Second Circuit Court of Appeals stated that "(i)t is the interest of the parent in the 'companionship, care, custody and management of his or her children' . . . and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association', with the parent."[28] The basis for the child's reciprocal rights in this equation can be found in *Smith v. Organization of Foster Families for Equality and Reform*,[29] where the United States Supreme Court stated: "No one would seriously dispute that a[n] . . . interdependent relationship [exists] between an adult and a child in his or her care."[30] To the extent that the preservation of family relationships creates reciprocal rights, any state decision affecting a child's relationship with his parents im-

25 *See* Hartley v. Hartley, 886 P.2d 665, 674 n.16 (Colo. 1995); Russ, *supra* note 16, at 370-71.

26 *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-43 (1974) (holding school board rules that effectively penalized pregnant teachers constituted an unconstitutional burden on the women's fundamental right to bear children); Santosky v. Kramer, 455 U.S. 745, 758 (1982) (defining the right of parents to choose their family relationships as a fundamental liberty interest).

27 *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (mother and children were deprived of their right to live together by city welfare bureau removing the children); Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1983), *cert. denied*, 484 U.S. 935 (1987) ("The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship."). *See generally* Amicus Curiae Brief of National Association of Counsel for Children at 4-5, Hartley v. Hartley, 886 P.2d 665 (Colo. 1995) (No. 93SC625).

28 *Duchesne*, 566 F.2d at 825 (citations omitted).

29 431 U.S. 816 (1977) (holding state action did not violate foster parents' and children's rights in preserving the "private realm of family life" against state intervention).

30 *Id.* at 844.

plicates not only the parents' due process rights but also the child's.

The United States Supreme Court in *Matthews v. Eldridge*[31] adopted a three-part test to determine the degree of due process required when a liberty interest is implicated: Courts must examine 1) the private interests affected by the proceeding; 2) the risk of error created by the state's chosen procedure; and 3) the countervailing governmental interest supporting use of the challenged procedure.[32] Adopting the Second Circuit's reasoning that a minor child has a fundamental liberty interest in choosing family relationships, the *Eldridge* test can be applied to develop compelling arguments in favor of according children status as full parties to custody and visitation actions as follows:

(1) The private interest affected by custody and visitation proceedings is a minor child's opportunity to interact with parents, grandparents, siblings, and other family relations. Based on the reciprocal rights described in *Duchesne*,[33] children have a right not to be dislocated from these important family relationships without due process.[34]

(2) The risk that the custody court will reach the wrong decision is unacceptably high given the minimal participation most states expect from or allow to children. Most state courts grant discretion to judges in appointing representatives for the child,[35] resulting in many children failing to receive any legal or lay representation whatsoever.[36] Denial of legal assistance is rationalized by state statutes that require judges to consider children's expressed preferences with respect to custody and visitation. This procedure often fails to provide children with an advocate who can help focus the children's presentation to the court and make that presentation more meaningful. Even when a court appoints counsel for a child, counsel may be under no obligation to advocate the child's stated preferences and even may assert arguments in favor of the attorney's perception of the child's "best interests" that are diametrically opposed to the child's expressed interests.[37]

The A.A.M.L. Standards appropriately criticize and reject such inadequate representation of the interests of unimpaired children and require counsel for such children to represent them as they would adult clients, accepting the child's direction as to the goals to be pursued and advocating for those goals.[38] However, the A.A.M.L. Standards may not go far enough to reduce the risk of error that would deprive a child of desired family relationships since they deny the benefits of an advocate to impaired children and do not explicitly permit unimpaired children to initiate proceedings and participate as parties with status equal to their parents.

(3) Government interests in denying children equal status, based largely on claims of judicial efficiency, are insufficient to deprive children of their due process rights. In cases in which children are represented by their own independently retained counsel, there will be minimal increased burden on judicial efficiency.[39] In theory, the child[40] in such cases will pay for retained counsel and will utilize the court only to the extent that no other party represents his or her interests. Additionally, judicial efficiency is entitled to little weight, since "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . ."[41]

If given appropriate weight, the *Eldridge* factors can be used effectively by advocates for expanded legal rights for children. The foregoing analysis suggests that courts can best assure that custody and visitation rulings will protect and advance the due

31 424 U.S. 319 (1976).

32 *Id.* at 334-35.

33 566 F.2d at 817.

34 *See* Brief of Petitioner, Hartley v. Hartley, 886 P.2d 665 (Colo. 1995) (No. 93SC625); Russ, *supra* note 16 and accompanying text.

35 *A.A.M.L. Standards*, *supra* note 1, § 1.1 n.4.

36 *See contra*, *A.A.M.L. Standards*, *supra* note 1, § 1.1 ("These Standards reject the general call for children to be represented in all matrimonial cases.").

37 *See* discussion of *Hartley*, *infra* notes 75-85 and accompanying text.

38 *A.A.M.L. Standards*, *supra* note 1, § 2.2(a).

39 *See* Brief of Petitioner, *Hartley* (No. 93SC625).

40 In reality, it is far more likely that one parent or the other will not only pay the fees of the child's separately retained counsel but will have been involved in selecting counsel, raising questions as to the "independence" of such counsel.

41 Stanley v. Illinois, 405 U.S. 645, 656 (1972).

process rights of children by allowing them status equal to that of adults to initiate and to participate fully at every stage of the legal process.[42]

b. *Access to the courts*

The Fourteenth Amendment to the Constitution guarantees the right to meaningful access to the courts,[43] to be provided by "adequate, effective, and meaningful" judicial procedures.[44] Most state constitutions also contain a provision guaranteeing meaningful court access.[45]

The constitutional right to access is not a substantive right, but a procedural right to a judicial remedy available whenever the legislature creates a substantive right.[46] If the proposition that a minor has a substantive due process right to preserve family relationships is accepted as valid, then any state action that

42 *See* Amicus Curiae Brief at 6-7, *Hartley*, (No. 93SC625) (citing *Lassiter*, 452 U.S. at 27-28. A more urgent government interest, and one which favors raising the status of minors, is in serving the best interests of children in divorce and visitation proceedings); *cf.*, *A.A.M.L. Standards*, *supra* note 1, § 1.1 (rejecting the notion that children should be represented in all custody and visitation proceedings).

43 *See* Boddie v. Connecticut, 401 U.S. 371 (1971) (Due process requires, in the absence of countervailing state interest of overriding significance, that persons forced to use the judicial process to settle their claims have meaningful access to the judicial process. A Connecticut statute effectively denying indigents the opportunity to be heard in divorce actions denied indigents meaningful access to the judicial process.); Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983) ("right of access to the courts [is] one of the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment").

44 *See Ryland*, 708 F.2d at 972.

45 States that have such a provision include Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *See* Russ, *supra* note 16, at 383.

46 *See Hartley*, 886 P.2d at 675-76; Allison v. Industrial Claim Appeals Office, 884 P.2d 1113 (Colo. 1994).

impedes access to the judicial process in relation to those family relationships is suspect and must survive strict scrutiny.[47]

2. *Comparative Legal Analysis*

The rights of children to initiate proceedings, exercise decisionmaking authority, and enjoy full party status is well established in several areas of the law not ordinarily characterized as custody and visitation matters. However, child and family relationships can be impacted significantly by these proceedings. The theme developed from the following cases and statutes is that if a child is permitted to initiate and participate in these proceedings with the same rights as an adult, there can be no justification for denying a child of similar maturity the same status in a custody and visitation proceeding.

a. *Emancipation*

Emancipation is a process by which minors[48] can achieve legal adulthood prior to reaching the age of majority.[49] In Con-

47 *See* Wayne v. Tennessee Valley Auth., 730 F.2d 392, 403 n.9 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); *see also*, Amicus Curiae Brief at 10, *Hartley*, (No. 93SC625).

48 The minimum age for emancipation differs by state. For example, the minimum age under CAL. FAM. CODE § 7120(b)(1) (West 1994) is fourteen years of age and under CONN. GEN. STAT. § 46b-150 (1994) it is sixteen years of age.

49 *See generally* Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REF. 239 (1992). The grounds for emancipation differ among states. In Connecticut, CONN. GEN. STAT. § 46b-150b (1995) requires

> If the court, after hearing, finds that: (1) The minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; or (2) the minor is on active duty with any of the armed forces of the United States of America; or (3) the minor willingly lives separate and apart from his parents or guardian, with or without the consent of the parents or guardian, and that the minor is managing his own financial affairs, regardless of the source of any lawful income; or (4) for good cause shown, it is in the best interest of either or both parties, the court may enter an order declaring that the minor is emancipated.

The A.A.M.L. Standards recognize that some children are more nearly adults than others by differentiating between impaired and unimpaired children for purposes of representation.

necticut, for example, emancipation allows a minor to sign binding contracts, to sue and be sued in her own name, and to consent to medical care without parental permission.[50] Many other states have similar statutory provisions and permit either the minor or the parent to petition the court for emancipation of the minor.[51]

b. *Medical treatment decisions*

Courts and legislatures have empowered some unemancipated minors to make decisions controlling their medical treatment. In *Planned Parenthood of Central Missouri v. Danforth*,[52] the Supreme Court struck down a state statute that required minors to obtain consent from a parent or person *in loco parentis* before exercising the constitutional right to abortion. In *Bellotti v. Baird*,[53] the Supreme Court held that if a minor can prove maturity, a court must permit her to undergo an abortion without parental consent. Some states allow unemancipated minors who can demonstrate maturity by a variety of tests to make their own decisions regarding a wide range of medical treatments.[54]

A.A.M.L. Standards, *supra* note 1, Preamble.

50 CONN. GEN. STAT. § 46b-150d. The procedure for emancipating minors is set out in § 46b-150. A parent, as well as a child, can bring an action for emancipation of the minor. § 46b-150.

51 States that have such a provision include Alaska, Arkansas, Connecticut, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, Texas, Virginia, and West Virginia. *See* Sanger & Willemsen, *supra* note 49, at 245 n.25. For discussion of the common law right to emancipation, see Kowalski v. Liska, 397 N.E.2d 39 (Ill. App. Ct. 1979) and Fremont v. Sandown, 56 N.H. 300 (1876).

52 428 U.S. 52 (1976).

53 443 U.S. 622 (1979).

54 *See, e.g.*, ARK. CODE ANN. § 20-9-602(7) (Michie 1987); MISS. CODE ANN. § 41-41-3(h) (1993). *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision-making*, 37 VILL. L. REV. 1607, 1613 n.21 (1992). Scott's comprehensive and thoroughly researched article provides valuable insights into the differences between cognitive abilities and the exercise of judgment, including a discussion of how medical consent issues are distinguished from other decisions minors may be called upon to make. While her discussion focuses on adolescents, that is essentially the class which is most likely to be identified as "unimpaired" under the A.A.M.L. Standards. *See infra* notes 73 and 74 and accompanying text.

If the United States Supreme Court and state legislatures trust "mature" minors to make significant, potentially life or death choices as to their own medical treatment, child advocates may well ask what justification there is to treat minor children with the same level of maturity differently from competent adults in custody and visitation proceedings.

c. *Paternity*

Minors in all states may initiate a civil action to prove the existence of a father-child relationship.[55] A finding of paternity will establish rights of inheritance, identify family bonds, and may provide information about a genetic parent's medical history.[56] The Uniform Parentage Act[57] specifically states "(t)he child shall be made a party to the [paternity] action."[58] In actions in which the putative father petitions to establish paternity in a child, numerous courts have held that a child is a necessary party to the adjudication and that any judgment in a proceeding in which the child has not been joined is void.[59]

Although not all states provide for mandatory joinder of children,[60] in many states *res judicata* will not bar a paternity action initiated by a child following a decision in an earlier paternity proceeding in which the child was not joined as a party.[61]

55 *See, e.g.*, N.Y. FAM. CT. ACT § 522 (McKinney 1995). *See generally* ARNOLD H. RUTKIN, FAMILY LAW AND PRACTICE § 63.02[4][a].

56 *See, e.g.*, *In re* Paternity of H.J.F., 634 N.E.2d 551, 555 (Ind. Ct. App. 1994); Kieler v. C.A.T., 616 N.E.2d 34, 38 (Ind. Ct. App. 1993).

57 The UNIFORM PARENTAGE ACT (1973) [hereinafter *U.P.A.*] has been adopted in Alabama, California, Colorado, Delaware, Hawaii, Illinois, Minnesota, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming. *See* Rutkin, *supra* note 55, at § 63.02[1].

58 *U.P.A.*, *supra* note 57, § 9.

59 *See, e.g.*, *In re* Paternity of H.J.F., 634 N.E.2d at 551; *See also* Kelly v. Cataldo, 488 N.W.2d 822 (Minn. Ct. App. 1992); People v. J.M., 854 P.2d 1346 (Colo. Ct. App. 1992).

60 *See, e.g.*, ILL. ANN. STAT. ch. 750, para. 4517 (Smith-Hurd 1995); CONN. GEN. STAT. § 46b-160. Many paternity actions brought by men seek to intrude on an existing family or to obtain a finding of non-paternity, which may explain why many jurisdictions treat paternity actions initiated by the mother differently than those brought by the putative father.

61 In the following cases the mother initiated the first paternity action and the child was not barred from initiating a separate action; Kieler v. C.A.T., 616 N.E.2d at 34 (applying Illinois law under which children were not necessary

An agreement of nonpaternity approved by a divorce decree also is not *res judicata* as to a child who was not a party to the divorce.[62]

The status granted to minors in various other proceedings is also cited as evidence that children deserve a greater voice in custody and visitation matters. For example, Connecticut probate courts permit counsel for a minor child to petition at any time for modification or revocation of an order for temporary custody[63] and to apply for the removal of one or both parents as guardian of the minor.[64] Grandparents and other interested persons may intervene as third parties in custody proceedings in the Connecticut Superior Court.[65] These instances of respect for the interests of children are offered as evidence that denial of similar status in custody and visitation matters related to the dissolution of a marriage is outdated and discriminatory.

B. *Theoretical Basis for Limiting the Child's Status in Relation to That of His Parents*

1. *Distinguishing the cases expanding constitutional rights of minors*

There is an obvious similarity between custody and visitation proceedings and the juvenile delinquency, emancipation, paternity, and medical consent proceedings on which the above constitutional arguments are based: at the center of each action is a child who is certain to be significantly affected by the decision of the court. It is indeed seductive to focus on that reality and conclude that because a child is a "person" entitled to the benefits of the Constitution in those cases, a child is necessarily a full party to every action in which his family status or environment is at

parties); R.M.H. v. Messick, 828 S.W.2d 226 (Tex. Ct. App. 1992); Elacqua v. James "EE", 610 N.Y.S.2d 354 (N.Y. App. Div. 1994) (child's interests were not fully represented in earlier paternity proceedings initiated by mother). *Compare* Slocum v. Joseph "B", 588 N.Y.S.2d 930 (N.Y. App. Div. 1992) (res judicata barred action as mother fully represented child's interests in earlier proceeding).

62 Attorney Gen. v. Ridge, 773 S.W.2d 645, 648-49 (Tex. Ct. App. 1989).

63 CONN. GEN. STAT. § 45a-607(e). Probate courts have a long history of reliance upon guardians to protect incompetents and expect counsel to serve as guardian as well as attorney.

64 CONN. GEN. STAT. § 45a-614.

65 CONN. GEN. STAT. § 46b-57.

issue, and should have the right to initiate such proceedings. However, closer examination reveals that the differences between private custody and visitation actions and the proceedings out of which the constitutional pronouncements grew are significant and preclude drawing such a conclusion.

The first critical difference becomes apparent when the constitutional rights of the parents as well as those of the child are made a part of the examination. The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[66] This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.[67]

It is important to recognize that the child's interest and the parental interest are not in conflict in a juvenile delinquency proceeding such as that presented in *In re Gault*.[68] The threat of incarceration or other deprivation of liberty affects not only the child's rights, but also the parents' right to the family relationship, so protection of the child protects the parent as well. The Colorado Supreme Court stated the obvious in *Hartley v. Hartley*, "dissolution of marriage cases cannot be equated to criminal proceedings."[69] Similarly, the cases defining First Amendment free speech rights of children did not require the court to resolve a conflict between parents' rights and children's rights.[70]

66 Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding ban on sale of obscene materials to minors). *See also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding statute forbidding minors from selling magazines, even when they had parental permission, was not unconstitutional); *Bellotti*, 443 U.S. at 637-38 (restrictions on minor's right to abortion were an unconstitutional burden).

67 *See* Michael H. v. Gerald D., 491 U.S. 110, 119 (1989); Santosky v. Kramer, 455 U.S. at 758; Stanley v. Illinois, 405 U.S. at 651.

68 Scott, *supra* note 54, at 1615-1617.

69 *Hartley*, 886 P.2d at 674 n.16.

70 *See, e.g., Tinker*, 393 U.S. at 503 (giving children free speech rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing children voice in resolving dispute between the state and their parents regarding whether the children should remain in school).

The real question is not whether children are entitled to constitutional protections as a general rule, but which constitutional rights must give way in situations where child and parent cannot be accorded the same degree of protection. For example, the preservation of parental rights is likely to receive little support where abuse or neglect has occurred at the hands of a parent. The child's fundamental liberty interest in being " 'free of physical and emotional violence at the hands of his . . . most trusted caretaker' "[71] clearly takes precedence over rights claimed by or on behalf of an abusive parent. The behavior of the parent in such cases can be seen as a waiver of his or her rights in relation to the affected child. The protection of children's rights at the expense of parental rights in connection with actions of this type is both appropriate and distinguishable from what should prevail in an action in which abuse is not present.

Other areas of the law to which children's rights advocates point as supportive of their efforts also lose their force when examined more closely. For example, although older minors have standing to request emancipation from their parents under many statutes, the court generally bases its decision on the minor's demonstrated present ability to manage his life separate from his parents and either grants or denies the request to emancipate. In most cases, the granting of the petition for emancipation merely results in an "official declaration of the status that already exists."[72] The unenviable task before a court issuing custody orders, on the other hand, is to examine the past as well as the present, make predictions about the future, and attempt to fashion a set of orders which will, over time, serve the best interests of the child.

The relevance of medical consent and paternity cases also diminishes on further examination. Consent to certain medical procedures, while potentially involving a life or death decision, is governed by the clearly defined doctrine of legal consent: consent must be knowing, voluntary, and intelligent.[73] There is no requirement that the court find that the minor's choice of treatment is the "right" or the "best" choice for the minor either at the time or in the future. Paternity actions have a superficial identity with custody and visitation proceedings, but the reality of the child's immediate environment and the day-to-day relationships with parental figures are not often significantly affected by the establishment of paternity in and of itself.[74] The task before the decisionmaker in the custody and visitation context is more complex and subjective than that faced in either medical consent or paternity cases.

The comprehensive decision rendered by the Colorado Supreme Court in *Hartley v. Hartley*[75] addresses and dismisses the primary arguments for enhanced status for children. Briefs by the Children's Legal Clinic ("CLC") on behalf of the petitioner and the National Association of Counsel for Children as *amicus curiae* presented the court with the constitutional arguments reviewed above[76] in support of the claim of a thirteen year-old boy that he was entitled to counsel independent of his court-appointed counsel (referred to as guardian ad litem or "GAL" in the decision) to represent him in connection with his parents' divorce and to file a motion to modify the custody portions of the judgment.

An intermediate court in *Hartley*[77] had declined to rule, holding that the issue was moot since the orders to the trial court entered on the merits were consistent with the position favored by the child (but not advocated by the GAL), namely, that he be placed in the custody of his father. The Colorado Supreme Court, however, granted *certiorari* and elected to decide the matter on its merits. In its argument to the court, the CLC presented constitutional arguments to support the child's right to independent counsel, and the related right of the child to petition for post-judgment modification of court orders.

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71 *Kingsley*, 623 So. 2d at 785 n.10 (citing Padgett v. Department of Health and Rehabilitative Serv., 577 So. 2d 565, 570 (Fla. 1991)).

72 *See* Sanger & Willemsen, *supra* note 49.

73 Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). *See generally* Scott, *supra* note 54, at n.37-43; Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982).

74 Paternity proceedings initiated by a parent may be joined with claims for custody and visitation; the fact that many jurisdictions require the child be made a party to a paternity action brought by a putative father recognizes that these actions are different. *See infra* notes 55 & 56.

75 *Hartley*, 886 P.2d at 665.

76 *See infra* notes 12-47 and accompanying text.

77 *Hartley*, 886 P.2d at 665.

In its analysis of the constitutional protections appropriate to a child in a custody proceeding, the court first held that Colorado statutes and procedures adequately provided for the wishes of the child to be fully represented at the custody hearing, resulting in a "full and fair opportunity to be heard."[78] Addressing the claim of CLC that the child's constitutional rights are violated if he is deprived of the ability to select his own counsel, the court first held that a custody determination affects the child's constitutionally protected liberty interest in his relationship to his father.[79] The court then analyzed the "amount of process due when a liberty interest is affected," by using the three-part test established under *Mathews v. Eldridge*.[80] While use of this test was urged by the CLC in its brief,[81] the court reached totally different conclusions as to the outcome of each part, as follows:

(1) the child's private interest will be affected by the court's action, but because the court retains jurisdiction to modify custody and because the child has the opportunity to express his preferences which the court is bound to consider, the "effect is not substantial";[82]

(2) the risk of error given the existing procedures is low because "[t]he child's wishes are an important factor in both the appointed attorney's and the court's determinations";[83] and

(3) the state's interest in avoiding increased costs and delays created by adding another attorney to the case is more significant than any increase in the fairness of the proceeding which might occur.[84]

78 *Hartley*, 886 P.2d at 672. Colorado law requires that appointed counsel (GAL) make the preferences of the child known to the court, but the GAL is permitted to advocate for a different result than that desired by his client on the basis of the attorney's judgment as to the child's best interests; apparently there is no distinction made between children of different ages and capacities. *Id.*

79 *Id.* at 674. Although the Supreme Court has not yet held that a right to family relationships corresponding to the parents' rights must be assigned to children, both the Ninth Circuit and the Second Circuit have so held. *See infra* note 27.

80 *Id.* at 675; *see also, infra* note 31 and accompanying text.

81 *See infra* notes 31-37 and accompanying text.

82 *Hartley*, 886 P.2d at 674-75.

83 *Id.* at 675.

84 *Id.*

Finally, the court held that the child's right to effective access was not violated by denial of independent counsel because the child had no substantive right to choose his own counsel under Colorado law, a holding that fails to address whether the child has a liberty interest in the family relationship that constitutes a substantive right.[85] Parenthetically, had Colorado adhered to the A.A.M.L. Standards for representation of unimpaired minors, counsel would have been bound to advocate the child's preference. In that case, the child's access to the court through his counsel would have satisfied due process in relation to a liberty interest in the family relationship, should such an interest be found to exist. There is no question that the child's right of access is more fully protected when his court-appointed counsel is an advocate for his preference, not merely a fact-finder or one free to adopt a contradictory position.[86]

The preceding analysis demonstrates that the constitutional theories and comparative analysis offered to justify full-party status for children in custody and visitation matters are subject to challenge. However, a closer look at the child's decisionmaking process and role of the state as *parens patriae* is necessary before a choice can be made between the competing views as to the appropriate legal status for children in such matters.

2. *The child's lack of mature judgment and the concept of parens patriae.*

A critical element which further distinguishes private custody and visitation proceedings from the delinquency, emancipation, medical consent, and paternity matters in which children have been accorded constitutional rights and party status is that

85 *Id.* at 675-76.

86 The A.A.M.L. Standards do not authorize appointment of a guardian to act as the child's alter-ego or a fact-finder in addition to an attorney. Yet there is nothing in the A.A.M.L. Standards which suggests that the court should not be able to appoint an appropriate professional to provide additional information or expert opinion addressing the best interests of the child. *See also* CONN. GEN. STAT. § 46b-6 (Court may order investigation into "surroundings of any child, . . . home conditions, . . . character of parents . . . ."). The child's standing to petition for modification was not challenged because the father joined in the motion. *See* Newman v. Newman, 646 A.2d 885 (Conn. App. Ct.), *cert. granted*, 648 A.2d 879 (Conn. 1994) (appealing dismissal of action brought by counsel for minor child). *See also Infra* note 112.

custody and visitation decisions are "inherently subjective and value-laden"[87] to a far greater extent. From the child's point of view, there appears to be a significant difference between the subjective judgment which must be exercised when a child is called upon to make decisions about custody and visitation and the intellectual or cognitive competency required of the same child to effectively participate in many other proceedings.[88]

The A.A.M.L. Standards suggest that three factors should be considered when determining whether or not a child is "unimpaired" for the purposes of his representation in custody and visitation matters: the child must be able to "comprehend the issues; speak thoughtfully about the case and his own interests; and appreciate the consequences of available alternatives."[89] The first two elements focus on cognitive ability, or the ability to "obtain, retain and use information"[90] and are similar

87 Ellen G. Garrison, *Children's Competence to Participate in Divorce Custody Decision-making*, 20 J. CLINICAL CHILD PSYCHOL. 78, 84 (1991).

88 *See* Scott, *supra* note 54. While not addressing custody and visitation matters directly, Scott argues that the analysis of legal competence must take into account capacity for judgment as well as cognitive ability.

89 *A.A.M.L. Standards*, *supra* note 1, § 2.2 (referencing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14b (1993)). Client is impaired only when he or she " 'cannot adequately act in the client's own interest.' " It is significant that the Standards do not suggest what weight courts should give to a child's wishes, but address only how child and attorney should relate to each other. *A.A.M.L. Standards*, *supra* note 1, § 2.2 cmt.

90 Daniel C. Schuman, *The Unreliability of Children's Expression of Preference in Domestic Relations Litigation: A Psychiatric Approach*, 69 MASS. L. REV. 14 (1984). *See also* Weithorn and Campbell, *supra* note 73. The Weithorn-Campbell study was designed to "provide an initial empirical analysis of the degree to which legal age standards governing consent for and refusal of treatment are consistent with the chronological development of the psychological skills required to render competent treatment decisions". Weithorn & Campbell, *supra* note 73, at 1590. The distinction is made between "factual understanding" and "appreciation" of the implications of variables and options. Factual understanding is most often sought in medical consent decisions, while "appreciation" is an element in more complex situations requiring a finding of competency. The authors conclude that adolescents should not be denied self-determination in treatment decisions "on the basis of a presumption of incapacity to provide informed consent." Weithorn & Campbell, *supra* note 73, at 1596. However, they also note that the subjects were dealing with hypothetical questions and were not influenced by ". . . confusion, depression, or anxiety", influences which may well exist for a child in a divorce setting. Weithorn & Campbell, *supra* note 73, at 1596.

to the requirement that medical consent decisions be "knowing and intelligent."[91] The third touches on judgment, the most difficult capacity to identify and evaluate.

The assessment of a child's judgment demands that the outcome he or she desires be evaluated and literally given value as a "good" or "bad" result. This is an exercise deliberately avoided in the A.A.M.L. Standards, because that determination is properly the province of the judge, not the child's representative.[92] The right of the child to advocate a position which may in fact be a "bad" choice is respected,[93] but his right to impose his position is not ensured. In fact, that "right" is limited by the right of his parents to advocate opposing positions, and most importantly, by the ultimate authority of the court to determine the child's best interests.

What makes the cognitively mature child's decisionmaking process different from that of an adult becomes evident when capacity to exercise judgment is added to the analysis.[94] Adoles-

91 The third requirement for a finding of informed consent to medical decisions, that the decision be voluntary, is not a factor in the determination of unimpairment under the A.A.M.L. Standards. While this may be more difficult for the lawyer to evaluate than the cognitive ability of the child-client, the question of the voluntariness of a child's expressed custodial preference can be a significant issue since instances of parental pressure and manipulation are legion. *See* Schuman, *supra* note 90, for a discussion of voluntariness and consistency as elements to be considered when determining competence of minors to make custody decisions. *See also* David G. Scherer, *The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions*, 15 LAW AND HUM. BEHAV. 431, 431-49 (1991) (studying ability of minors to make medical decisions free of parental influence).

92 *See infra* note 1.

93 *A.A.M.L. Standards*, *supra* note 1, § 2.4 cmt. ("(C)ounsel should not be free to second-guess the client or to work against the legitimate ends the client seeks.").

94 While there is mounting evidence that there may not be significant differences between the cognitive abilities of adolescents and young adults, less attention has been paid to analyzing the differences which may exist in respect to the capacity for judgment. It has been suggested, most notably by Scott, *supra* note 54, that it is this aspect of the cognitively mature child's decisionmaking process which distinguishes it from that of an adult. *See* Garrison, *supra* note 87. Garrison compared responses of children aged nine to fourteen to those of eighteen year-olds when presented with hypothetical custody choices. The responses were evaluated by domestic relations judges on a scale ranging from totally unreasonable to totally reasonable. The study concluded that four-

cents, even those who are cognitively mature, are more influenced by others in their decisionmaking, more impulsive, and less averse to risk-taking than adults.[95] Because of the sensitivity of the child and the adolescent to outside influence, whether from parents or from peers, consistency in values and goals is frequently lacking, changing with new friends and new enticements.[96] Therefore, even though the adolescent may weigh alternatives in a simplified cost-benefit analysis, the benefit perceived is measured in terms of his or her own values at that particular moment so that the result of a process which may be as "rational" as that of an adult will be driven by values which are decidedly transient and immature.[97]

A pragmatic justification for limitations on the right of minors to control legal decisions is based on a determination that the social cost of allowing adolescents to exercise this inferior judgment will be too great.[98] The validity of this position is unassailable when the exercise of poor judgment causes harm to persons other than the child making the decisions. Protecting children from the harm they may cause themselves if allowed to exercise their immature judgment in the meantime is also a valid public purpose on the assumption that such protection will allow them to grow into adults with better judgment.[99]

This perspective is consistent with the legal tradition which first calls upon the parent to exercise his or her judgment on behalf of the child, but requires that the state act as *parens patriae*[100] to the child when the parent is unwilling or unable to act for the child or when interests of parent and the child are in conflict. The "best interest" standard which guides custody decisions is actually an extension of this concept; the judge is assumed to have the good judgment as well as cognitive ability to fulfill the role vacated by the parents.[101] The paternalism thus expressed in the state's protection of children is justified in *Bellotti v. Baird* where the Supreme Court, after reviewing various proceedings in which minors have been accorded constitutional protections, stated: "viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.' "[102]

This rationale could be carried to the extreme of arguing that a child should not participate at all in custody and visitation matters because virtually every minor is impaired in terms of the exercise of perfect, or even good judgment, regardless of age and cognitive ability. However, a balance is achieved because the court, representing the state as *parens patriae*, maintains its authority as keeper of the best interest standard and, at the same time, takes into consideration the expressed wishes of any child and, in the case of an "unimpaired" child, the advocacy of his attorney. To the extent that the evidence demonstrates not only a given child's mature level of cognitive ability but also a mature quality of judgment, the child's positions should be more persuasive.

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teen year-olds and eighteen year-olds performed equally well "based on cognitive development theory." Garrison, *supra* note 87, at 84. It is significant that the subjects were from intact families, not affected by "[R]eal life factors, such as the strong emotional reaction experienced by many children at the time of parental divorce . . . ." *Id.* at 85.

95 *See* Scott, *supra* note 54, at 1643, (citing David G. Scherer, *The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions*, 15 LAW & HUM. BEHAV. 431 (1991)); *see also* Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEVELOPMENT 538 (1981).

96 *See* Schuman, *supra* note 90, at 17-18.

97 *See* Scott, *supra* note 54, at 1650-51 (citing Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescent Decisionmaking Perspectives*, 28 (Carnegie Council on Adolescent Development Working Papers (1990)); *See also* Weithorn & Campbell, *supra* note 73.

98 *See* Scott *supra* note 54, at 1638-39.

99 *Id.*

100 BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (" 'Parens Patriae', literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . . .")

101 *See generally* Fitzgerald, *supra* note 18, at 53-64.

102 *Bellotti*, 443 U.S. at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)). "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634.

III. Guidelines for Expanding the Participation of Children in Custody and Visitation Proceedings

By distinguishing between impaired and unimpaired children for the purpose of defining the responsibilities of counsel which flow from the child-attorney relationship, the A.A.M.L. Standards provide a starting point from which to formulate guidelines for an expansion of the scope of participation to be accorded minor children in private custody and visitation matters. If the distinction were to be ignored and each child of any age assumed to be entitled to counsel free to advocate for outcomes based on the child's best interest, questions relating to the competency or maturity of the child would not have great urgency since an adult would be available to make judgments in place of the child. The only conflict to be resolved would be that between the rights of the child, constitutional and otherwise, and the rights of the parents.

However, in the model proposed by the A.A.M.L. Standards and adopted for purposes of this analysis, the unimpaired child is the primary determinant of the substance and direction of the advocacy in his behalf. Therefore, not only must the conflict between the child's rights and those of the parents be taken into consideration, but the maturity of the child, both cognitive and judgmental, must also be measured and found sufficient.

Because of the importance of parental rights and the related value of preserving family relationships, the rights of the child alone do not suffice to mandate increased participation in the legal system. The vulnerability of children as a class continues to justify the state in its role as *parens patriae*. Therefore, the judgment as to capacity of the child should be reserved to the court, not left to counsel, if the action contemplated by the child is one which has the potential to infringe on the rights of the parents or to damage family relationships.[103] These principles are incorporated into the guidelines which follow.

1. The child's standing to initiate actions involving custody and visitation:

103 For example, an action to terminate parental rights, to establish or deny paternity, or to modify existing custody or visitation orders.

When the issue is the ability of a minor to initiate a private action[104] which attacks the integrity of the family relationship, such as the termination of parental rights, the decision as to the child's competence should be made by the court, not the attorney or other individual representing the child before the court.[105] The substitution of an adult other than a parent, whether called "next friend," "guardian,"[106] or "counsel," should not relieve the court from the necessity of determining the child's competence as the real moving party. To do so would be an abdication of the court's responsibility as *parens patriae* to an adult whose qualifications and motivations may be unknown and who may not be accountable to any authority.

The measure of proof required to establish the competency of a child to initiate such an action should reflect the fact that in general, cognitive capacities of children age fourteen and older render them comparable to adults in terms of competency.[107] Therefore, the child-plaintiff fourteen or older should have the burden of proving his competency by a preponderance of the evidence. If the child is less than fourteen years old, evidence of the child-plaintiff's competency to bring the action should be clear and convincing. These burdens are appropriate, because of every child's inherent vulnerability[108] and the significance of parental and family rights as contrasted to the individual child's rights.

Devising a set of standards to guide the court in making the determination of competency for this purpose is a task which should be undertaken by judges, lawyers, and child development

104 In abuse and neglect matters brought by the state against a parent or parents, the issue more likely to be raised is the child's right to oppose, through independent counsel, the action taken by the state rather than to initiate an action. The question, then, is not one of standing but of party status.

105 The minor must also demonstrate a tangible interest in the subject matter of the lawsuit. *See also infra* note 3; DeBellis & Soja, *supra* note 3, at 501 (proposing tests to determine standing of children in parental termination proceedings, including setting burdens of proof).

106 *See Cotrell*, 398 A.2d at 307; *Orsi*, 645 A.2d at 986.

107 *See A.A.M.L. Standards*, *supra* note 1, n.15 (citing Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, CHILDREN'S COMPETENCE TO CONSENT 235 (Gary B. Melton, et al. eds., 1983) and citing Gary B. Melton, *Children's Competence to Conxent*, *in* CHILDREN'S COMPETENCE TO CONSENT (Gary B. Melton et al. eds., 1983)); *see also infra* note 94.

108 *See infra* notes 98-101 and accompanying text.

specialists in a cooperative effort. At the least, such standards must include factors which measure not only cognitive abilities, but maturity of judgment. For example, the ability of the child to act voluntarily and the consistency over time of the positions he expresses need to be considered as well as more conventional measures of ability to understand and communicate information and to select between alternatives.[109]

2. Party status of a child in a pending custody or visitation proceeding:

Because the pendency of a proceeding in which an adult seeks a determination of custody or a change in the nature and amount of parental access has already disrupted family relationships and challenged parental rights, the child is not a potential catalyst but is already in the fray. Therefore, the unimpaired child should not be limited in the ability to raise issues and to appeal final decisions which clearly relate to custody and visitation. An impaired child whose lack of maturity prevents a meaningful attorney-client relationship cannot be permitted the same degree of participation. If the A.A.M.L. Standards are followed, counsel for the child will have already made a decision concerning the ability of the child to participate in the legal process, and the court will not become involved unless one parent or the other challenges that determination. In that event, the court should apply the same standards to evaluate competency as would be followed if the child were seeking to initiate an action affecting custody or visitation.

Neither a guardian nor some other representative should be permitted to assert claims or to appeal on behalf of an impaired child for the same reasons that the A.A.M.L. Standards reject the concept that another adult should be allowed to exercise his or her independent judgment as to the child's best interests and then advocate that result. Granting that authority to a third person allows the bias of that person free rein and upsets the delicate balance of a system which depends upon the court to make the final determination of the child's best interests.[110]

109 *See* DeBellis & Soja, *supra* note 3 (listing 15 measures of a child's maturity and understanding for court's consideration in determining standing in parental termination proceedings).

110 *A.A.M.L. Standards*, *supra* note 1, §§ 2.7, 3.3.

Furthermore, neither the impaired nor the unimpaired child should generally advocate for a particular financial result when the custody and visitation dispute arises in a divorce or other action involving support. Similarly, a child generally should not be permitted to appeal financial orders. However, counsel for a child should take steps to assure that the needs and desires of the child which involve money are made known to the court if neither parent does so. For example, counsel for the child may seek to elicit evidence as to whether a given level of child support is sufficient to cover certain child-related expenditures. A child's ability to weigh all the factors connected with decisions about property, alimony and child support, beyond the recognition of basic needs and the expression of subjective desires, is clearly limited, particularly in the sense of being able to weigh his needs and desires against the needs of others and the available resources.[111] In an unusual case involving an unimpaired and financially sophisticated minor, counsel for such a child may make a determination that advocacy of the child's position on a particular financial issue is appropriate, but this is not likely to occur with any frequency and should be seen as an exception rather than the rule.[112]

3. Party status of a child in proceedings to enforce or modify existing orders:

The right of the unimpaired child to petition the court for the enforcement of custody and visitation orders should be governed by the same principles proposed above to regulate expanded participation in pending matters. Assuming that the orders were entered on the basis of the child's best interests, the court has discharged its duty as *parens patriae* and the unimpaired child has the right to insist on adherence to the family relationships set out by the court. Principles of third-party

111 *See generally* Scott, *supra* note 54, at n.157-67 and accompanying text.

112 *See* Newman v. Newman, 646 A.2d 885 (Conn. App. Ct.), *cert. granted*, 648 A.2d 879 (Conn. 1994), for another possible exception; the trial court modified child support orders to eliminate defendant's obligation to pay any support in the absence of plaintiff or her attorney, and counsel for child appealed decision; question certified to the Connecticut Supreme Court and not decided at time of printing is: "Did the Appellate Court property conclude that minor children, acting through counsel appointed pursuant to General Statutes Section 46b-54 and not through a guardian ad litem or next friend, lack standing to appeal from a court's order regarding their support?"

beneficiary law[113] might be invoked, but the child's status as a party with the right to seek a contempt citation against a non-compliant party who happens to be a parent should make reliance of that body of law supportive rather than necessary.

However, once a new set of family relationships has been established based on the orders entered by the court, even the unimpaired child should not have standing to initiate proceedings to change those orders unless the court, following the same procedure outlined above to determine standing to initiate an action, determines that the child is fully competent and mature. There is no reason to relax that standard; in fact, one could argue that the child in a post-divorce situation is even more vulnerable than before as a result of the tension and dislocation inherent in the divorce process.

113 *See, e.g., In re* Marriage of Goldstein, 593 N.E.2d 102 (Ill. App. Ct. 1992); Miller v. Miller, 516 N.E.2d 837 (Ill. App. Ct. 1987)).

Representing The Best Interests of Children: The Wisconsin Experience

by:
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Wisconsin law goes beyond the Academy guidelines by requiring mandatory representation of the best interests of children in most custody actions. Wisconsin lawyers and judges believe that the Academy guidelines do not go far enough to protect the rights of minor children.

I. Introduction

It is a late Friday afternoon, two days before Christmas, when the runner walks into court asking the judge to sign a temporary restraining order. The affidavit, containing serious allegations against the father, asks the court to invoke the emergency provisions of the Uniform Child Custody Jurisdiction Act and take jurisdiction of the children. The children are in Wisconsin visiting their mother and live in Texas with their father, a man who travels under a Saudi Arabian passport. This Wisconsin county, due to budget cuts, has no staff to investigate the matter and report back to the Court. The Court must decide within the span of a week whether the claims are true and whether they constitute an emergency.[1] Who can the judge turn to during this most hectic of weeks?

Fortunately, in the State of Wisconsin, children involved in a custody dispute are required to have their own legal representative, a guardian ad litem (GAL). In this case the court staff, at the direction of the judge, called several well-known family lawyers and finally secured the promise of one to accept the guardian ad litem appointment and to both investigate the facts and be

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1 These facts are the simplified version of an actual case involving the authors of this article.

in a position to make a jurisdictional argument in one week's time. Not all judges or children are so fortunate.

Wisconsin has historically been a leader in the use of GALs to protect the interests of children in family court actions. Mandatory representation by a GAL goes beyond the recommendations of the guidelines proposed by the American Academy of Matrimonial Lawyers.[2] Nonetheless, it is submitted that the Wisconsin experience shows that mandatory representation is necessary to protect children whose parents have divorced or are divorcing.

Mandatory representation by a GAL raises many issues, including defining the role of the GAL, ensuring that qualified attorneys are appointed and determining financial compensation. This article will examine these issues in light of Wisconsin's experience with mandatory representation.

II. Statutory and Case Law History of the Role of the Guardian Ad Litem

The Supreme Court of Wisconsin has long been a leader in its concern for the rights of children in divorce cases. As early as 1955, in *Edwards v. Edwards*,[3] the Wisconsin Supreme Court recommended to the trial court that a "competent and disinterested attorney" be appointed as guardian ad litem for a minor child.

Ten years later, in 1965, the supreme court restated its concern over whether children were being appropriately represented in divorce cases. In *Wendland v. Wendland*,[4] the court suggested that a GAL may be in a better position to conduct an investigation and produce all the important evidence that the court should consider in looking after the best interests of the children.

In 1969, the Wisconsin court reversed two cases for failure to appoint a GAL.[5] The failure to appoint a GAL in cases where the welfare of children was at stake now became reversible error.

2 REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (American Academy of Matrimonial Lawyers 1994).

3 71 N.W.2d 366, 367 (Wis. 1955).

4 138 N.W.2d 185 (Wis. 1965).

5 Dees v. Dees, 164 N.W.2d 282 (Wis. 1969); Gochenaur v. Gochenaur, 172 N.W.2d 6 (Wis. 1969).

In *de Montigny v. de Montigny*,[6] the Wisconsin Supreme Court held that the guardian ad litem is more than a nominal representative "appointed to counsel and consult with the trial judge." The court held that the guardian ad litem has all the duties and responsibilities of counsel who represent a party to litigation and any failure to live up to these duties could be considered a breach of professional responsibility.[7]

These cases were codified in 1989 when the Wisconsin Supreme Court utilized its rule making authority to adopt Section 767.045 of the Wisconsin Statutes which defines the role and responsibilities of the GAL. This rule clarifies that the prohibitions against ex parte communications with the court apply to the GAL in the same manner as they apply to the lawyers for the parties. The effect is that the GAL is not a surrogate judge or a "super lawyer." Rather, the GAL advocates for the best interests of the child, in the same manner as each parent may have a representative advocate for their best interests.

The role of the GAL has evolved into a critically important and necessary part of any substantial determination of the welfare of children. Given the twenty-four year experience with mandatory guardians ad litem, today an attorney who accepts a guardian ad litem appointment in Wisconsin has a clear definition of the role of a guardian ad litem and of the limitations of the role.

III. Circumstances for Mandatory Appointment of GALs

Wisconsin is one of only two states which mandate GAL appointment where there is a custody or placement dispute.[8] In general terms, the guardian ad litem is an advocate for the best

6 233 N.W.2d 463, 467 (Wis. 1975).

7 *Id.* at 468-69. *See also* Haugen v. Haugen, 262 N.W.2d 769 (Wis. 1978), where the court held that the GAL may call, examine, and cross-examine witnesses just as attorneys for the parents and that the GAL is not an expert witness.

8 Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53 (1992). The other state is New Hampshire. *See* N.H. REV. STAT. ANN. § 458:17a (1983 & Supp. 1991).

interests of a minor child as to legal custody, physical placement, and support.[9]

Wisconsin statutes *require* appointment of a GAL in an action affecting the family if any of the following conditions exists:

1. The court has reason for special concern as to the welfare of a minor child.
2. The legal custody or physical placement of the child is contested.

The court *has discretion* to appoint a GAL if:

1. The child's legal custody or physical placement is stipulated to be with any person or agency other than a parent of the child.
2. If at the time of the action, the child is in the legal custody of, or physically placed with, any person or agency other than the child's parent by prior order or by stipulation in this or any other action.[10]

In practice most trial courts will not necessarily appoint a GAL if the dispute is exceedingly minor, such as a dispute regarding pickup or drop off times for children. If the dispute concerns anything more substantive, and most disputes do, the court will appoint a GAL.

IV. Training of GALs

In 1988, the Wisconsin legislature enacted a law requiring that GALs in family court action have three credits of training. The legislation did not define how courses were to be certified, who would certify courses or any other specifics.

The legislation was attacked in an original action before the Wisconsin Supreme Court. In *Fiedler v. Wisconsin Senate*,[11] the Supreme Court struck down the mandatory training requirement as an unconstitutional infringement of separation of powers between the legislative and judicial branches. The court held that, while the legislature could prescribe minimum standards to determine eligibility to practice law, regulation after admission to practice is the sole province of the judiciary. Thus, the court has

9 Wis. Stat. § 767.045(4) (1993-94). It should be noted that, by tradition, the guardian ad litem rarely participates in negotiations regarding the appropriate level of child support. Generally, the guardian ad litem avoids entering into that fray unless specifically asked to do so by the appointing judge or family court commissioner.

10 Wis. Stat. § 767.045 (1993-94).

11 454 N.W.2d 770 (Wis. 1990).

the sole power to decide whether special training for a particular area of practice is appropriate.[12]

In 1994, the Family Law Section of the State Bar of Wisconsin petitioned the Supreme Court to enact a mandatory training requirement by Supreme Court Rule. The proposed rule would require an attorney who wishes to serve as GAL to certify that he or she has, within the previous five years, completed an approved training course on the roles and responsibilities of a GAL. The requirement can be waived only if the court finds that there are no attorneys in the geographic region where the case is located who have received the requisite training.

A public hearing on the proposed rule was held before the court on November 16, 1994. The proposed rule received widespread positive comments from lawyers, judges, social workers and others. As of the time of the writing of this article, the proposed rule awaits supreme court action.

V. Role of GAL

The guardian ad litem is expected to interview the parents, the children (if practical),[13] and other appropriate references, arrange for custody studies[14] and psychological evaluations,[15] prepare for and participate fully in trial (calling, subpoenaing, and cross-examining witnesses), and act as appellate counsel.[16] These

12 *Id.* at 772.

13 Obviously, an infant cannot impart any useful information. Further, there are occasionally those who have been interviewed by various other professionals and further interviews may create additional harm. Otherwise, normally the GAL will meet with the children, explain the GAL's role and ascertain the degree to which the wishes of the child should play a role in the GAL's ultimate recommendation.

14 Some counties provide funding for social workers and a custody study will have already been performed prior to the appointment of the GAL. In other counties, there is no provision for custody studies. On some occasions, the GAL will apply to the court for funds to retain a social worker to do such a study.

15 Due to the high cost, psychological examinations are not needed or warranted in many cases.

16 *See* de Montigny v. de Montigny, 233 N.W.2d 463, 466-67 (Wis. 1975); *See also* Bahr v. Galonski, 257 N.W.2d 869, 873-74 (Wis. 1977); Allen v. Allen, 254 N.W.2d 244, 247-250 (Wis. 1977). The language in *Allen* and in *de Montigny* which includes consulting with the court among the roles of a GAL is troublesome. The "consulting" role can be interpreted as allowing improper *ex*

various functions can be broken down into two essential, and sometimes overlapping, roles: Investigatory and Advocacy.

A. *Investigatory Role*

Of the two roles, the investigatory one is both the more difficult and usually far more important. The purpose of the investigation is to develop a recommendation to the parties and, if necessary, to the court regarding the best interests of the child.[17] Occasionally, the best interests of the child (at least as perceived by the GAL) are not the same as the child's wishes. In those circumstances, the GAL is to advocate what the GAL believes is best for the child.[18]

Wisconsin provides no definitive age at which a child can make his or her own decision regarding custody and placement.[19] Thus, it is a case by case decision regarding the weight to be given to the child's wishes. This is usually an easy matter when the child is under approximately six to eight years of age, and the GAL endeavors to prevent the parents from soliciting the children's favor.[20] It is also usually an easy matter when the child is more than approximately fourteen years old, when the child

parte contact between the GAL and the trial court. The present statute and cases do not reference "consulting with the trial court" and are consistent with the following description of the GAL's duty in Bahr v. Galonski, 257 N.W.2d at 874:

> [T]he children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. Properly understood, therefore, the guardian *ad litem* does not usurp the judge's function; he aids it.

17 Wiederholt v. Fischer, 485 N.W.2d 442 (Wis. Ct. App. 1992).

18 There may be a difference between best interests of a child and what a child wants, which would be represented by counsel who advocates for the child. In Wisconsin, children are usually not allowed advocacy counsel. On some occasions, there may be a dispute between the GAL and the ward. For an excellent discussion of the role of an attorney as advocacy counsel for children in custody litigation, see Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW. 45 (1993).

19 Additionally, the wishes of the child is only one of a series of factors to be considered in a custody or placement determination. WIS. STAT. § 767.24(5)(a) (1993-94).

20 This solicitation can occur in many forms from unrealistic allowances to insufficient discipline and controls on the child's life.

wishes become usually determinative. It is the ages between six and fourteen where the child's intelligence, maturity and the reasons for the child's preference must be carefully weighed.

Since the investigation often takes on functions of a social worker, lawyers are usually ill-trained for this role. Further, as most cases are resolved by settlement rather than by contested litigation, the recommendation of the GAL becomes critically important. In practical terms, many courts generally will follow the recommendation of the GAL. As experienced attorneys have learned, going to trial with "the GAL against you" is often a suicide mission.

In counties fortunate enough to have family court counseling services, the investigative role is largely performed by social workers. A good argument could be made that the social worker's role should be to perform the investigation and develop an opinion as to the child's best interests, while the GAL's role should be to advocate that opinion. A clear division of these roles would seem to best suit the strengths of each discipline. However, not all counties have counseling services and, as stated above, the role of the GAL, for good or bad, has evolved through statute and case law into one that includes an investigative role for which most lawyers are not trained.

B. *Advocacy Role*

The guardian ad litem is to be principally an advocate for the child's best interests.[21] The advocacy role must be balanced with the role of the guardian ad litem as investigator and officer of the court.[22]

As an advocate, the guardian ad litem has no authority to present facts not in evidence.[23] Thus, the guardian ad litem cannot be a witness and is not subject to cross-examination. This is in accord with the ethical rules applicable to an attorney acting as a witness.[24]

21 Hollister v. Hollister, 496 N.W.2d 642 (Wis. Ct. App. 1992).

22 *Id.* at 644.

23 *See* Allen v. Allen, 254 N.W.2d 244 (Wis. 1977).

24 WIS. SUP. CT. R. 20:3.7(a).

There is a practical difficulty faced by a GAL in serving the dual roles of investigator and advocate.[25] The material facts discovered as a result of the GAL's investigation will need to be introduced as evidence at trial. Since the GAL is serving as an advocate, not as a witness, the GAL must be careful while performing the investigation so that any evidence uncovered can be introduced as evidence at trial independently, without the GAL becoming a witness.[26]

Practices vary by jurisdiction as to how detailed the GAL's recommendation will be, when it is formulated, and to whom it is presented. It is considered good practice to advocate the position informally to the parties, either directly or through the use of alternative dispute resolution mechanisms. In the vast majority of cases, good informal advocacy will succeed in resolving cases since few parties can afford the substantial cost of custody litigation. Informal advocacy succeeds because the attorneys and the parties recognize that the GAL's recommendation is commonly the eventual order of the court. Resolution without litigation is almost invariably in the best interests of the child.

In the event that formal litigation ensues nonetheless, the GAL has the right to call and to cross-examine witnesses. As a practical matter, the party whom the GAL is favoring usually subpoenas the necessary witnesses. The GAL also gives an opening and closing statement and should take care not to argue facts not properly introduced into evidence.[27]

25 This dual role difficulty is exacerbated when one or both parties is unrepresented or when a party's counsel is ill-prepared to advocate a custody dispute. In those situations, the GAL is put in the position of securing all of the trial witnesses and evidence to support the GAL's recommendation. This is the ethical duty of the GAL as advocate, though most GALs would consider putting in the entire custody case "above and beyond" the scope of the GAL appointment.

26 Some GALs submit written recommendations, sometimes referred to as "reports." As noted as far back as 1970 by Justice Hansen, these written reports are in the nature of trial briefs and statements made in them must be proven at trial by competent evidence. Schipper v. Schipper, 174 N.W.2d 474, 481-83 (Wis. 1970) (Hansen, J. concurring).

27 In *In re* Paternity of Stephanie R.N., 498 N.W.2d 235 (Wis. 1993), a transfer of custody based on a GAL's statements at oral argument was reversed in part because the statement was not evidence and not part of the record.

At emergency hearings, the court frequently makes a ruling based upon the GAL's statements because of lack of sufficient time for a full evidentiary hearing. The court usually will ask the parties to waive rights to a full evidentiary hearing or to hold a full evidentiary hearing after making any necessary emergency orders provide interim protection of the children.

A further evidentiary problem is created in attempting to place the child's wishes into evidence without placing the child in the excruciating role of having to testify in court. Many times, the child's wishes can be stated by an expert witness, such as a psychologist or social worker.[28] If not, most courts allow the GAL to state the child's wishes as part of the GAL's role under section 767.045 of the Wisconsin Statutes.

Some courts want a written report by the GAL. In these instances, the report should be in the form of a trial brief. That is, the facts must be proven at trial by competent evidence. The GAL's recommendation will be similar to the requested relief by one of the parents in their trial briefs.

The role of the GAL continues if the case is appealed. The GAL must either file a brief on appeal, or a statement with the court of appeals why no brief is being filed.[29] The GAL's role can also continue after judgment, if necessary, to fulfill orders regarding the child or enforce provisions of the judgment.[30]

Effective advocacy can resolve the vast majority of cases short of trial. For those cases which do proceed to litigation, the GAL must be prepared to advocate a position. While the courts

28 WIS. STAT. § 907.03 (1993-94) provides that if the facts upon which an expert bases an opinion are of a type reasonably relied upon by experts in the field, they need not be admissible in evidence.

29 WIS. STAT. § 809.19(8m) (1993-94).

30 In *In re* Paternity of C.A.S. and C.D.S., 518 N.W.2d 285 (Wis. Ct. App. 1994), the court of appeals upheld an injunction against a putative father brought by the GAL well after the case had ended. While the court held that the putative father waived any right because he had not first raised the issue in the trial court, the court of appeals, in a footnote, held that any error would be harmless as the court could have immediately reappointed the GAL. *Id.* at 288 n.3.

See also In re Interest of Brandon S.S., 507 N.W.2d 94, 99 (Wis. 1993). In *Brandon S.S.*, the court held:

> The difference between a competent adult's attorney and a guardian ad litem is that the role of the guardian ad litem extends beyond making recommendations to implementing the recommendations.

usually follow the GAL's recommendation, both the parents and the court have a right to be assured that the GAL's recommendation was derived only after a thorough investigation which considered all relevant factors.

VI. Negative Aspects to Wisconsin Mandatory Rule

Parents contemplating a custody or placement dispute must remember that the cost of the children's attorney ultimately will be borne by them. The added cost is a small price when one considers the long term consequences. This tends to raise the cost of custody litigation, but it also levels the playing field because the benefits of having the children represented by an attorney in a custody or placement dispute are only gained when the attorney who represents them is a skilled family law practitioner. The Wisconsin proposed minimum training rule accomplishes this. While certainly no guarantee of competent representation, a mandatory training rule ensures that the GAL has a minimum background on the legal, ethical and practical issues associated with the role.

Of course, the addition of another attorney on occasion may lead to more protracted trials since the interests of the children may be at odds with that of their parents. In these trials, the guardian ad litem may produce witnesses that both parents would prefer did not testify. This problem of lengthy trials is often outweighed by the fact that the court gets a clearer picture and not the distorted view presented by the two parents. It is important to remember that a well-trained guardian ad litem will end up settling a higher percentage of custody cases than contested trials with only two attorneys. This phenomenon occurs because the guardian ad litem is freed from some of the difficulties of representing an individual adult client's wishes and can advocate for the best interests of the child. Obviously, there are also untold psychological benefits to the children by having the matter resolved short of trial.

The overwhelming opinion of judges and attorneys actively involved in family law in Wisconsin believe that the positive aspects of mandatory representation far outweigh the negative.

VII. Financial Considerations

Issues concerning payment of GALs is unique since the funding source is usually the two battling litigants. These financial considerations are of considerable importance in a system of mandatory representation.

A. *Public Pay Cases*

When the parties lack the present ability to pay, the county is frequently ordered to advance payment to the GAL, subject to the right of the county to seek reimbursement from the parents. The Wisconsin legislature enacted legislation prohibiting compensation of GALs at higher than rates paid to publicly appointed private attorneys. In *State ex rel. Friedrich v. Dane County Cir. Ct.*,[31] the Wisconsin Supreme Court held that setting fees for GALs fall within the area of power shared by the judiciary and the legislature. The court concluded that the rate established by the legislature should apply unless a trial court concludes that in a particular case it must order compensation in excess of the statutory fee to "secure qualified and effective representation and to ensure the effective administration of justice."[32]

B. *Private Pay Cases*

When the parents have the ability to pay, the GAL may set his or her own rate, subject to review and approval by the trial court. In practical experience, most GALs charge less than their usual hourly rate, considering GAL cases to be a form of *pro bono* services to the court. Typically, the GAL informs the parties at the time of appointment of the hourly rate intended. The parties may object at that point and request the court to review the rate. More commonly, the GAL asks the court to approve the requested hourly rate and the court usually acquiesces.

It seems only fair that the children's attorney have at least the same degree of specialization, training and experience as the attorney for the parties. After all, since the children did not choose to put themselves between their parents their interests should not be compromised in the interests of costs.

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31 531 N.W.2d 32 (Wis. 1995).
32 *Id.* at 35.

C. *Policy Concerns*

Some counties maintain control over rates by contracting GAL services with a set number of attorneys on a salaried basis. This has had mixed results: Where the attorneys are well-qualified, contract GALs have been a benefit to children. However, the limitation on pay also provides a disincentive for the GAL to perform the extra hours of service sometimes necessary in these cases. Also, where the attorney contracts for a set period of time, cases may need a new GAL mid-stream if the GAL does not renew the contract. GAL work will never make attorneys rich, and there is nothing wrong with attorneys doing GAL work as a form of pro bono work.

VIII. The Wisconsin Experience and the Academy Standards

An in-depth study of Wisconsin's experience with mandatory GALs resolves many of the concerns about mandatory GAL appointments raised by the Academy Standards.

The committee feared arbitrary outcomes would result by allowing GALs to freely advocate a preferred outcome in the child's best interests.[33] The Wisconsin experience over the past forty years indicates that the GAL must be free to express an opinion, in the interest of an appropriate determination for the child. The GAL invariably has substantial and detailed knowledge of the parents and the situation of the child that otherwise might be inaccessible to the court.

Another concern was that the GAL's opinion would be based more on the attorney's personal biases, rather than an independent assessment of the situation. Attorneys acting as GALs are no more likely to stray from their professional duties than are attorneys representing the spouses in a divorce. All attorneys possess personal beliefs as to what makes happy marriages and what is the best manner to raise children. In representing their client's wishes, attorneys are required to put their personal feelings aside. GALs, more than any other attorney in the case, are more likely to be able to arrive at a fair opinion because they have the advantage of a full investigation having heard from both sides and having conducted an independent investigation. In any event, a judge has the same sort of biases when making the ultimate decision. Yet, the judge does not have the background obtained by having performed an extensive investigation. Forty years of mandatory GALs in Wisconsin shows that this concern is not a problem.

Finally, the Committee was concerned that the child's preference will be given too much prominence. Of course, without the GAL, the positions before the court rely on the biased advocacy of the lawyers for the parties. This underestimates the fact finder's abilities. As with all issues of fact, the role of a judge is to sift through all the evidence, winnow out that which is unimportant and reach a fair decision. The Wisconsin experience has shown that the degree of prominence given the child's wishes varies according to the developmental age of the child. However, the role of the GAL is to pursue what is perceived to be the best interests of the child, regardless of the wishes of the child.[34] Since teenagers can often "vote" with their feet, mandatory GALs, apart from advocating for a child's wishes, can provide practical guidance to their wards, advice the teenager may not readily accept from a parent. Where the child's wishes are appropriate, the GAL can convey the child's wishes to the judge so the child is not further traumatized by testifying in an open courtroom.

In sum, the actual experience in Wisconsin provides evidence that the advantages of appointing mandatory GALs far outweigh any down side risks - real or hypothetical.

These comments are not intended to detract from the diligent work, nor the noble intent of the Committee. Indeed, without proper GAL training for both judges and the GAL, or without proper compensation of GALs, some of the Committee's fears may become reality. However, to the extent that practice may disprove a theory, mandatory representation, under proper rules and circumstances, performs a positive, substantial and necessary role in protecting the rights and interest of children in contested custody and visitation cases.

33 See Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35 (1995).

34 See, Parley, *supra* note 17.

Trial judges and bar associations should consider petitioning their highest court or their legislature to require the appointment of a lawyer for children when it becomes apparent that parental disputes over children can not be resolved through mediation or other methods. While many jurisdictions have adequate government funded programs in place assisting judges in their custody and placement determinations, without the security of a mandate for these services, they will be the constant target of local officials looking for ways to cut costs. Even in jurisdictions that rely on volunteer services from the bar in investigating and representing children the supply of civic minded attorneys skilled in this area could be overwhelmed by future demands. Without the requirement of a guardian ad litem, some children may go unrepresented. By far, most GALs are extremely cautious to advocate what they feel is best for the child, absent any improper biases.

IX. Conclusion

The best-equipped people to decide the welfare of children are their parents. However, if they cannot agree, it is well to remember that children are the innocent parties in divorce. They do not ask to be born, they do not choose their parents and they are not responsible for the divorce. Children do deserve an independent voice in their future. In Wisconsin, the voice is a guardian ad litem, who represents the child's best interests. By these means, the court has a voice advocating the best interests of the children in addition to the voices advocating what is best for the parents. Although the system is not perfect, and there is a substantial cost, mandatory representation of children in Wisconsin has gone a long way towards protecting these innocent parties.

Independent Counsel for Children

SHANNAN L. WILBER*

I. Introduction

The U.S. Supreme Court first recognized the value of independent counsel for children in its landmark decision, *In re Gault*.[1] Since that time, the courts have appointed attorneys for children in a variety of legal proceedings. The legal profession is still grappling with difficult questions concerning the advisability of separate representation, the circumstances under which separate counsel should be appointed and the proper role of attorneys for children. The extent to which the attorney should be directed by the client's wishes presents perhaps the most controversial issue.

This article takes the position that appointment of separate counsel for children is a positive and necessary development. Under ideal circumstances, independent counsel should be appointed to represent children in any proceeding affecting their custody, placement or treatment. As a general rule, the attorney should advocate the wishes of the child—even if the attorney questions the correctness of the child's view. Only when the child is unable to articulate a reasoned preference should the attorney substitute a judgment for that of the client. The attorney should then advocate the position which she determines her client would take if the client were able to direct the litigation.

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1. *In re* Gault, 387 U.S. 1 (1967).

II. Appointment of Independent Counsel for the Child

A. The Debate Over Separate Representation

Most modern commentators agree that children who are the subject of legal proceedings benefit from independent representation.[2] The trend in favor of independent counsel reflects a growing awareness that the state, the courts, and even parents do not adequately represent the child's interests. The traditional role of the court as *parens patriae*, originally thought to adequately protect the child, has been widely discredited.[3] A judge cannot simultaneously act as an advocate for the child and as an impartial arbiter in the case. Nor can a judge independently investigate the circumstances of a case in order to assist in identifying the child's interests.

Neither the interests of parents nor of the state are always commensurate with those of the child. In protection proceedings, for example, our laws presume that parents generally act to advance their child's welfare. Yet their interests may well diverge from those of the child once the state has intervened on the child's behalf. Moreover, although social services agencies are charged with protecting the child, their recommendations are often influenced by institutional concerns which may overshadow the child's interests. These include budgetary constraints, large caseloads, public pressures, political loyalties, and bureaucratic inertia.

Despite the increasing practice of appointing separate counsel, however, its wisdom and utility are still debated. Many commentators feel that appointing an attorney for the child simply creates other problems. Some assert that counsel for the child is an extraneous figure whose position invariably duplicates the position of another party. These critics contend that this duplication of effort, combined with the typical deference of judges to the position of the child's advocate, injects a "critical degree of arbitrariness" into the proceedings.[4] This argument, though, rests on the misconception that there are two and only two possible resolutions in any proceeding involving a child. There are, however, any number of possible solutions with an equal number of possible

2. Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REF. 341 (1987); Kerin S. Bischoff, Comment, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. PA. L. REV. 1383 (1990); Tari Bitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 FAM. L.Q. 53 (1985).

3. *See* 387 U.S. 1 (1967).

4. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 104-05 (1984).

rationales. Thus, the child's position could easily differ from that of both parents.

When the child's position is different from that of his parents, an independent advocate is necessary to inform the court of that position. Even if that position substantially agrees with one held by another party, the child's counsel should still inform the court of the child's wishes. The child's position is never superfluous. If judges are overly influenced by the child advocate's position or the "majority" position, the solution is not to deprive the child of a voice. Rather, attorneys involved in these proceedings must challenge any apparent bias and insist that the court expressly provide the basis of its rulings.

The child's attorney is more that just a "mouthpiece" for her client. The attorney provides additional functions which further undermine the notion that she is merely an extraneous figure. One critical function is the protection of the child from any unnecessary harm that may flow from the proceedings themselves. Parents engaged in a bitter custody battle or a protracted child abuse proceeding, for example, are often blind to the child's need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order providing counseling or other supportive services for the child.

Others criticize the appointment of separate counsel for the child because it dilutes parental autonomy and that parents are the exclusive representatives of their children's interests.[5] While parental autonomy should be preserved, appointment of counsel for the child in and of itself does not interject the state into the parent-child relationship. Rather, it is the initiation of legal proceedings concerning a child that transfers decision-making power from the parents to the court. Thus, the parents' autonomy has already been diluted—either because they have waived exclusive authority over the decision by submitting it to the court, because allegations have been made which trigger the court's protective jurisdiction, or because the child faces the state as accuser in a delinquency proceeding. Once the court's jurisdiction has been invoked, appointment of counsel for the child merely ensures

5. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 112 (1979):

> The appointment of counsel for a child without regard to the wishes of parents is a drastic alteration of the parent-child relationship. Indeed, it is in effect a disposition by the state. It intrudes upon the integrity of the family and strains the psychological bonds that hold it together. Therefore it cannot take place until the presumption of parental autonomy has been overcome—until the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for intervention.

that the court will be informed of all interests before it issues an order. There are better means for protecting parental autonomy than silencing children. The modern focus on family preservation and the least restrictive alternative protects parental rights without sacrificing independent child advocacy.

B. When Separate Counsel Should Be Appointed

Although there have been attempts to define the circumstances under which separate counsel for children should be appointed, these efforts have not resulted in generally applicable guidelines. Pursuant to the Juvenile Justice and Delinquency Prevention Act,[6] the Department of Justice issued standards which provide that a child should have independent counsel "in any proceeding at which the custody, detention, or treatment of the juvenile is at issue."[7] The Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association similarly recommended the appointment of independent counsel for any child who is the subject of proceedings affecting her status or custody.[8] Strict application of either of these standards would require appointment of independent counsel in numerous proceedings, including guardianships, emancipations, adoptions, proceedings for the termination of parental rights, mental health commitment proceedings, child welfare proceedings, delinquency proceedings, marital dissolution proceedings, status offense proceedings, school discipline proceedings, special education proceedings, immigration proceedings, and others. Although independent representation is increasingly favored, in no jurisdiction is the practice nearly this comprehensive. The more typical approach is to statutorily authorize appointment of an advocate for children in specific types of proceedings. The most common statutes concern delinquency, child welfare, and custody proceedings.[9] These statutes, drafted by people familiar with specific types of proceedings, are concerned with the characteristics and purposes of those proceedings. Thus, these statutes do not reflect a comprehensive approach to the issue of separate counsel for children.

6. 42 U.S.C. § 5657 (1982) (repealed 1988).

7. NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 3.132, at 273 (1980) [hereinafter DEP'T OF JUSTICE STANDARDS].

8. IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, COUNSEL FOR PRIVATE PARTIES (1980) [hereinafter IJA-ABA STANDARDS].

9. *See, e.g.*, CAL. CIV. CODE § 4606; CAL. WELF. & INST. CODE §§ 317, 634 (West 19

The courts and child advocates should develop guidelines identifying the cases in which separate representation is most constructive. The crucial factor is the child's position in the litigation, and not necessarily the type of proceeding. One approach would be to appoint counsel for the child in any matter in which: (1) the child is the petitioner; (2) the interests of every other party potentially conflict with those of the child; (3) the child is accused of committing a criminal or status offense; (4) the proceedings are so contentious or prolonged as to subject the child to unnecessary trauma; or (5) the court determines that appointment of counsel for the child will advance the proceedings or facilitate resolution of the dispute. These proposed guidelines are necessarily based upon assumptions about the purpose and role of separate counsel. Before such guidelines can be drafted, however, it is necessary to reach a general consensus about the function performed by separate counsel. As will become clear, no such consensus exists.

III. The Role of Counsel for the Child

In many cases, the role of the child's attorney is easily discernible. When parents seek services or damages on behalf of their child, for example, the attorney's mission is clear. However, when there is an actual or potential conflict regarding the child's best interests, the role of the child's attorney is not so evident. There is a wide divergence of opinion among legal scholars about the extent to which the role of a child's attorney differs from that of an adult's attorney. The primary controversy centers on the question of whether the child's attorney should advocate a specific outcome, and if so, how the attorney should formulate that position.

A. Client-Centered Decision Making

The function of an attorney in our legal system is to enable litigants to pursue and protect their legal rights. This approach furthers our system's emphasis on individual rights and personal autonomy. Thus, the Model Code of Professional Responsibility provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[10] Client-centered litigation reflects society's consensus that individuals should control their own lives and make their own decisions, even if those decisions seem illogical or unwise.

The same principles of representation should apply when the client

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

is a minor. The Department of Justice practice standards provide that counsel for the child must "represent zealously that individual's legitimate interests."[11] The client determines his interests unless "rationally unable" to do so.[12] The IJA-ABA standards similarly provide that when "the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel."[13] This approach is consistent with the ABA Model Rules, which provide that an attorney for a minor "shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[14]

There are sound reasons to maintain zealous advocacy on behalf of child clients. The ability of children to reach "considered judgments" may be underestimated. Many children, particularly adolescents, are as capable of rational decision making as adult litigants. Moreover, we would hold children to a higher standard than adults if we were to insist that they articulate rational or "correct" choices. Indeed, attorneys are confronted daily with irrational adult clients, and there is no serious suggestion that such clients be stripped of their ability to control the course of their own litigation. Rather, the issue is one of "client control" or the ability of the attorney to educate the client about the options reasonably available to him. It is the attorney's duty to advise her client about the likelihood of achieving the client's objectives. The same approach should be utilized with minor clients.

Furthermore, one must realistically assess the risk of advocating a position on behalf of the child that is arguably ill-advised or irrational. Merely advocating a position does not guarantee its success. Judges are charged with issuing orders which comport with the child's best interests. If the child advocates an obviously unwise course of action, presumably the judge will not adopt it. Again, this is true of any litigant; one is free to advocate outrageous or unpopular points of view. On the other hand, if the child's viewpoint is debatable or reasonable minds might differ, the child's viewpoint should be considered along with other debatable viewpoints.

Advocacy that articulates the child's point of view is consistent with the structure and functioning of our legal system. The essence of the adversarial system is the idea that an equitable result is best reached through zealous and effective representation of all sides of an issue.

11. DEP'T OF JUSTICE STANDARDS, *supra* note 7, § 3.134, at 278.
12. *Id.* at 278.
13. IJA-ABA STANDARDS, *supra* note 8, § 3.1(b), at 79.
14. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14(a) (1983).

Although one can convincingly question the wisdom of adversarial dispute resolution in cases involving children or families, it is unquestionably the system under which we operate. When a cooperative, mediative approach fails, these cases go to trial. The parents and the state are represented by counsel who vigorously defend their clients' positions. Failure to advocate the child's wishes undermines the court's ability to determine a just result.

The participation of the child in the decision-making process empowers him and his sense of alienation is decreased. In the best of circumstances, litigation can be intimidating and confusing to a child. The experience may be worse when the child feels totally powerless and has no meaningful input. This is especially true if the child knows that his attorney—the person who is supposedly his advocate—may take a position contrary to his wishes. If the child perceives that someone is on his side and the court has considered his views, even an unsatisfactory result will be easier to accept.

Although zealous advocacy on behalf of a child client presents the attorney with challenging ethical dilemmas, there is simply no workable alternative. The commonly proposed alternative models of representation fail to accomplish even the basic goals of advocacy and, therefore, are untenable. One such model is that of the neutral factfinder. A neutral factfinder is an impartial investigator appointed by the court who presents objective information to the court but does not offer opinions or advocate a particular outcome.[15] This model treats the child's attorney as an extension of the court and relies on the court's inherent power to protect the child's interests. One commentator aptly observes that the neutral factfinder model reflects a move away from the adversarial approach and toward the inquisitorial approach.[16] Simply put, it solves the dilemma of what position the child's attorney should advocate by removing the advocacy function entirely. Herein lies the model's main shortcoming.

"The fact-finder model fails totally to fulfill the requirements of representation and leaves the child in no better position than if he had a custody evaluator submitting a report as his only 'representation'."[17] The inability of the court to protect the child's interests was one factor that led to the appointment of counsel for children in the first place. Indeed, a "neutral factfinder" may be worse than no attorney at all.

15. Guggenheim, *supra* note 4, at 107-09; Eitzen, *supra* note 2, at 68; Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 690 (1987).
16. Guggenheim, *supra* note 4, at 108.
17. Eitzen, *supra* note 2, at 68.

While the factfinder's job is to present objective information to the court, the information he chooses to present and that which he chooses not to present will reflect his biases and values. Thus, what comes to the court in the guise of facts may actually be subjective information. Without an advocate, the child has no mechanism for challenging the factfinder's "facts."

Another commonly proposed model of representation is that of the guardian ad litem. Traditionally, a guardian ad litem is appointed to make decisions for the client when the client is under a legal disability. The term is used here to refer to an attorney who is appointed to advocate her own conception of the child's best interests, regardless of the child's wishes. This model assumes that children are incapable of identifying their own best interests but their attorneys are better suited to do so. Implicit in this questionable assumption is the more insidious premise that it is the responsibility of the child's attorney not only to articulate a viewpoint, but to articulate the *correct* viewpoint. If this were true, the judge would be superfluous. It is not the province of the child *or* his attorney to decide the case; rather it is the court's responsibility to do so after considering the viewpoints of the parties and experts.

By requiring the attorney to arrive at her own idea of the proper outcome, this model contravenes the traditional prohibition against attorneys expressing their personal views to the factfinder.[18] Typically, an attorney's personal view of the case is considered irrelevant. The guardian ad litem model also gives the child's advocate too much power and deprives the child of a voice. The child is heard only if his viewpoint is consistent with that of his attorney.

Like the neutral factfinder, a guardian ad litem may be worse than no attorney at all. The attorney is treated like an expert witness, except that she is not subject to qualification or cross-examination. Thus, the basis of her opinion cannot be challenged directly. One commentator observes that attorneys who purport to represent the child's best interests more often than not simply adopt the recommendation of the social worker or custody evaluator.[19] When this is true, the attorney serves no independent purpose, and no real advocacy is accomplished on behalf of the child.

Thus, the better view is that an attorney who represents a minor client should advocate the client's wishes if the client is able to articulate a reasoned decision. This conclusion, however, does not solve the more

18. Guggenheim, *supra* note 4, at 101-02.
19. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 302 (1983).

difficult dilemma presented when the child client is either unable or unwilling to articulate a reasoned preference.

B. Assessing Decision-Making Capacity

Even if one accepts the proposition that many, if not most, juvenile litigants are capable of directing their attorneys, it is undeniable that some are simply unable or unwilling to do so. An attorney may be appointed to represent an infant who is too young to communicate; a child who does not want the responsibility of choosing between his parents; or the child who simply is too immature to engage in the reasoning process. This raises the question of how an attorney determines whether her client is capable of directing the litigation.

Some commentators propose that a child's competency to direct his attorney is primarily a function of maturity, which in turn is roughly correlated to age. Thus, these writers propose that a specific age be identified before which it is presumed that the child is incapable of directing his attorney.[20] While two authors identify seven years as the age at which most children would have achieved sufficient cognitive development to make reasoned decisions,[21] many would find this age too young. Although an age-based presumption is somewhat arbitrary, it introduces an expedited, objective step in the assessment process. The presumption would be rebuttable, however, and would constitute only the threshold inquiry. Thus, each child's capacity would be assessed on an individual basis.

One commentator however, asserts that, in order to determine an individual client's capacity, the attorney should focus on the decision-making process rather than the decision itself.[22] She identifies the major components of decision making as the ability to understand, to reason, and to communicate.[23] She suggests that the "lawyer should assess the child's cognitive ability, emotional maturity, language development, and information and experience in relation to the decision to be made."[24] This approach makes sense for several reasons. First, the attorney, rather than the court, determines whether the client is capable of reasoned judgment. Because the attorney presumably has more contact with the client than the court, she is in a better position to assess the client's capabilities. Moreover, the matter is more appropriately resolved in the context of defining the attorney-client relationship.

20. *Id.* at 312.
21. *Id.* at 312-15; Guggenheim, *supra* note 4, at 91.
22. Ramsey, *supra* note 19, at 316.
23. *Id.* at 309.
24. *Id.* at 316.

The suggestion that the court assess the client's capacity is intended to guard against subjectivity. However, the court is no more qualified to make this assessment than the attorney, and the risk of subjectivity is equally present. In any case, the effort to entirely eliminate subjectivity may be misguided; the assessment is inherently subjective to some degree because it involves one person's perception of another person's abilities. Every attorney-client relationship is defined, in part, by subjective judgments made by both the attorney and the client. The more insidious tendency with a child client is undue paternalism—the assumption that the child is incompetent simply because one questions the wisdom of his viewpoint.

Focusing on the ability of the child to engage in the decision-making process rather than the child's ability to arrive at the "correct" decision is the best prescription against paternalistic tendencies. It is not necessary that the child accurately resolve the disputed issues, only that he communicate and explain his position. This is true for any litigant and children should not be held to a higher standard. Thus, the lawyer should be primarily interested in the client's ability to reason and to articulate his motives.

Finally, although this approach seems to require some expertise in developmental psychology, it is actually a matter of common sense and common experience. Regardless of the vocabulary used to describe the process, an attorney who represents children must be able to evaluate her client's capacity to participate in the litigation. There is simply no substitute for the largely intuitive process one uses to define the parameters of each attorney-client relationship, nor is the process easily reduced to written guidelines.

Attorneys who represent children will invariably receive appointments to represent children who are incapable of reaching a reasoned decision. These children may need independent advocates even more than children who are able to articulate their wishes. Since the attorney cannot receive direction from her client, she must engage in a different process to formulate the position she will argue on her client's behalf. Some commentators propose that the attorney representing an immature child should advocate that which she determines is in her client's best interests. However, this approach essentially mimics the guardian ad litem model of representation and suffers from all the same inadequacies. Rather, the attorney should advocate that which best approximates the position her client would choose if he were able to direct the litigation.

One might argue that such an approach requires the attorney to develop powers of prescience not generally required for the practice of law. On the contrary, acting as a surrogate decision maker for another is the essence of the doctrine of substituted judgment; it does not require magic, nor is it without precedent. Substituted judgment, while imperfect, provides the best model for representing very young or immature clients.

C. Substituted Judgment

1. Origins of the Doctrine

In order to discuss the doctrine of substituted judgment and to answer the arguments against its application in this context, one must understand its origins. The doctrine was developed in the nineteenth century as part of the law of lunacy.[25] Under the common law, a "lunatic" was one who was mentally incompetent, but who was once lucid and who could potentially regain mental capacity.[26] An "idiot," on the other hand, was mentally incompetent from birth and had no hope of regaining lucidity. Substituted judgment was developed to make decisions on behalf of lunatics.[27]

The court first applied substituted judgment to provide authority for disposing of a lunatic's property. In *Ex parte Whitbread*,[28] the question was whether the court could make an allowance from the estate of Mr. Hinde (the lunatic in question) for the support of his niece. Mr. Hinde owed no duty of support to his niece and was incompetent to decide whether or not he wished to support her voluntarily. In order to grant the niece's petition without running roughshod over Mr. Hinde's property rights, Lord Eldon rationalized, ". . . the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."[29]

The court in *Whitbread* did not explain the manner in which it divined "that which the Lunatic himself would have done." However, application of the doctrine was subsequently restricted to cases in which there was sufficient evidence from which to infer the lunatic's donative intent.[30] Thus, the court considered evidence of close family ties, mutual affection, prior statements of donative intent, and history of gift giving. Given that lunatics were once competent, there was often some evidence of their former statements and acts from which to such draw inferences.

25. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale L.J. 1, 16 (1990).
26. *Id.*
27. *Id.*
28. 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816).
29. *Id.* at 103, 35 Eng. Rep. at 879.
30. *See, e.g.*, *In re* Evans, 21 L.R. Ch. D. 297 (C.A. 1882); *In re* Blair, 1 Myl. & Cr. 300, 40 Eng. Rep. 390 (Ch. 1836); *In re* Frost, 5 L.R. Ch. App. 699 (1870); *In re* Darling, 39 L.R. Ch. D. 208 (C.A. 1888).

For over a century, the doctrine of substituted judgment was only applied to dispose of property—both in England and in the United States. However, by the mid-twentieth century, American courts began to borrow the doctrine liberally to make all manner of decisions on behalf of those who lacked capacity. The distinction between lunatics and idiots had long since been discarded in favor of a more generic category called "incompetents." Because many incompetents were more akin to idiots—that is, without a history or potential of competency—courts began to substitute their judgment even when there were no prior acts or statements from which to infer the intent of the incompetent. The first of these significant permutations occurred in *Strunk v. Strunk*.[31]

In 1969, a county court in Kentucky granted the petition of a mother who requested authorization for surgery to remove the kidney of her incompetent son, Jerry, for donation to his dying brother, Tommy.[32] The case was appealed and affirmed.[33] Citing *Whitbread*, the appellate court asserted that ". . . the right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."[34] In one fell swoop, the Kentucky Court of Appeals extended the reach of its substituted judgment from decisions to dispose of surplus income to decisions authorizing organ transplants.

Equally troubling was the court's approach to determining that which Jerry would have done if he were able to decide. Jerry was mentally retarded and had never been competent. There were no prior acts or statements from which the court could ascertain his intent to donate his kidney to Tommy. Instead, the county court simply found that "Jerry was greatly dependent upon Tommy, emotionally and psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."[35] Thus, the court dispensed with the traditional evidentiary constraints and applied what amounted to a "best interests" test.

After *Strunk*, the doctrine of substituted judgment became firmly entrenched in the law of informed consent. Courts have provided proxy consent to terminate the life support systems of incompetents,[36] to authorize their sterilization,[37] and to force them to take psychotropic medications.[38] In some of these cases, the court engaged in an inquiry concerning the best interests of the incompetent person, along the lines of the *Strunk* decision. In other cases, the court took a stricter approach, requiring some evidence of the intentions or desires of the incompetent person, expressed when he or she had the capacity to articulate a preference.

31. 445 S.W.2d 145 (Ky. 1969).
32. *Id.* at 145-46.
33. *Id.* at 145.
34. *Id.* at 148.
35. *Id.* at 146.
36. *See, e.g., In re* Quinlan, 355 A.2d 647 (N.J. 1976); *In re* Storar, 420 N.E.2d 64 (N.Y. 1981); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986).

A recent Supreme Court case signaled a return to the evidentiary constraints imposed in some of the early cases. In *Cruzan v. Missouri Dep't of Health*,[39] Nancy Cruzan's parents requested that the court authorize termination of Nancy's life support. The victim of a car accident, she had been in a persistent vegetative state for several years and had been maintained by a feeding tube. Evidence was presented that Nancy had told her housemate that if she were sick or injured and could not live normally, she would not want to continue her life. The trial court relied on this evidence to grant the Cruzans' request.

The Supreme Court of Missouri reversed and adopted a standard requiring clear and convincing evidence of the incompetent patient's former intent in order to terminate life support. The U.S. Supreme Court affirmed and held that, in cases involving informed consent to terminate life support, a state could constitutionally condition the application of substituted judgment upon clear and convincing evidence of the patient's former intent.[40]

The evolution of the law of substituted judgment has been controversial, and indeed, its application by the courts provides ample cause for skepticism. While the purpose of the doctrine is to act in the interests of the incompetent, there is no guarantee that such purposes are achieved. These concerns are heightened when the court is asked to authorize a nontherapeutic invasion of the incompetent's body, and there is little or no evidence from which to infer his or her informed consent. The consequences of mistaken judgment are potentially devastating and the risk of exploitation is disturbing.

Having acknowledged the dangers inherent in a court substituting its judgment for that of an incompetent litigant, one need not reach the same conclusions with respect to the use of substituted judgment by attorneys representing young children. There are fundamental differences between the role of an attorney representing an incompetent client

37. *In re* Grady, 426 A.2d 467 (N.J. 1981); *In re* Moe, 432 N.E.2d 712 (Mass. 1982).
38. *In re* Bryant, 542 A.2d 1216 (D.C. 1988).
39. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).
40. *Id.* at 284.

and a court making a final ruling in a case involving an incompetent litigant. These differences justify, and arguably require, substituted judgment by an attorney representing a child too immature to direct the litigation.

2. Substituted Judgment and the Immature Client

The central argument against the application of substituted judgment by attorneys representing children focuses on the concern that the attorney will make the "wrong judgment." However, if the adversary system works as it should, the dangers present when a court applies substituted judgment are not present when an attorney applies substituted judgment. When a court applies substituted judgment on behalf of an incompetent litigant, its determination is dispositive of the entire case. In a very real sense, the judge's job is to make the correct decision. When an attorney applies substituted judgment on behalf of a child client, however, she is developing her client's position, not deciding the case. The attorney is under no obligation to identify the "correct" position and may well place herself at odds with her client if she attempts to do so.

A more realistic concern is whether an attorney can accurately identify that which her young client would do if he were able to direct the litigation. The question is not whether the position identified reflects the correct outcome, but whether it correctly reflects that which the client would choose. Some commentators convincingly argue that substituted judgment does not make sense in the context of immature clients.[41] Young children, by definition, have never been competent and their past acts or statements are not considered competent evidence. The absence of evidence of past intent makes it difficult to infer intent in the present.

Even if an attorney determines her client is unable to direct the litigation it does not necessarily follow that all subjective evidence of the child's intent should be disregarded. Through the child and others who know him, the attorney can learn about the child's habits, attachments, values, and personality, all of which should inform the attorney's judgment. Nor should the child's stated wishes be disregarded. The attorney should consider the basis of any preference stated by the child, as well as the strength of the child's conviction.

The attorney should also refer to objective evidence in forming her substituted judgment. Some commentators attempt to identify that

41. Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 Conn. L. Rev. 211, 240-41 (1991).

which a reasonable child of the client's age would want;[42] others consider "evidence of what similarly situated mature people wish had been advocated."[43] While both of these formulations seem strained and unworkable, they hint at an approach that makes sense. It is possible to draw indirectly on the experiences of others to determine what reasonable or similarly situated persons would want.

The values which form the foundation of the law and social policy concerning children and their welfare are the product of society's collective experience. These values provide guidance for the resolution of disputes involving children. Such values include protection of the child's physical and emotional safety, preservation of the child's family of origin whenever possible, placement in the least restrictive alternative—preferring family, relatives, or a family-like setting over institutionalization—and minimizing disruption and exposure to prolonged or intense conflict.

In practice, there may be a fine line between applying generally accepted public policies to arrive at a position on behalf of the child and substituting one's own conception of the child's best interest. One might arrive at the same judgment using either process. However, the important distinction between substituted judgment and the "best interests" approach is not the decision reached, but the perspective from which it is reached. One decision is comparable to a decision by the child himself, and the other is one that is imposed on the child. The distinction is not merely academic. The approach taken by the attorney determines all aspects of case development, including which evidence the attorney gathers as well as the manner in which the attorney relates to her client, the other litigants, and the court.

In any event, any attorney who represents children must resolve the ethical dilemmas such representation presents. An inherent tension exists between traditional client-centered advocacy and the undeniable fact that some children are not capable of making decisions for themselves. None of the proposed models perfectly resolves this tension. Careful examination of the alternatives demonstrates that preservation of the traditional approach to client-centered decision making, to the greatest extent possible, best serves the interests of the child client.

IV. Conclusion

Increasing numbers of decisions about the treatment, placement, and custody of children are committed to the courts. Whether this is viewed

42. *Id.* at 226.

43. Lyon, Comment, *supra* note 15, at 703.

as a positive or negative development, it is clear that protecting the interests of children must be the paramount concern. Because their interests are unique, children need vigorous, independent representation. Their experiences, perceptions and wishes are important and must be articulated. Whether the child is mature or very young, articulate or incompetent, the attorney should function as the child's spokesperson. Attorneys should not accept appointments in which they are expected to advance their own idea of the child's best interests. Such an approach skews the adversarial process and compromises the attorney's ability to serve her client. Only by serving as the child's voice can attorneys assist the court to reach fair and informed decisions.

Mandating Appointment of an Attorney for Children in Divorce

WILLIAM D. HORN*

I. Introduction

Children, the ones often most affected by a divorce, are the ones least able to affect the proceedings. Judges and parents make decisions about their living arrangements, future access to parents, grandparents, friends, and others, as well as their religion and primary through college education. All of these decisions are made with little or no control by the children over the proceedings, and usually with an inadequate or even no record made of the basis for each decision.

The status of children in our society has been changing,[1] perhaps spurred in part by changes advocated by commentators since at least the early 1970s, such as the proposed "Children's Bill of Rights."[2] While few proposals have met with universal approval, there seems to be a renewed interest in the "rights" of children. Recent news stories have covered litigation on whether a child may fire appointed counsel,[3] whether a child has standing to bring an action to terminate his parent's parental rights, whether a child has standing to refuse to visit with

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1. For a chronology of the changing status of children, *see* Happy Craven Fernandez, THE CHILD ADVOCACY HANDBOOK 49 (1980). For a perspective on the cyclical nature of interest in children's rights, *see* S.M. WILCOX, U.S. BUREAU OF EDUCATION CIRCULARS OF INFORMATION No. 3 (1880), LEGAL RIGHTS OF CHILDREN: SOCIAL PROBLEMS AND SOCIAL POLICY, *reprinted in* THE LEGAL RIGHTS OF CHILDREN 5, (Sanford N. Katz *et al.* eds., 1974).

2. Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

3. Ellen Joan Pollock, *Child's Right to Fire Lawyer is Contested*, WALL ST. J., Oct. 29, 1992, at B1.

biological parents, among others. Hillary Clinton has long been known as a children's rights advocate and her presence in the new Administration may herald a renewed interest in the area.[4]

What rights for children are we talking about? In the context of divorce some have suggested that children should have the right to see both parents and the right to the benefits that would have been available to the child if no divorce had occurred.[5] In other words, children have the right to be supported, emotionally and financially, by their parents.

When parents divorce, the child is deprived of a basic element in his or her development, the child's family.[6] Initially parents at least chose each other of their own free will and chose to dissolve the relationship. The child, however, had no such choice in selecting a family or in the decision of the parents to divorce. Several commentators feel that all children are harmed by the dissolution of their families by divorce.[7] In light of the harm caused, consideration should be given to statutory procedures that enhance the recognition of the child's best interests.

II. Proposal

One step to protect and advance the interests of children would be to amend section 310 of the Uniform Marriage and Divorce Act (Revised) (hereinafter "Uniform Act"). Amending the Uniform Act would encourage many states to reconsider and revise their existing statutes. The current version of the Uniform Act provides for the permissive appointment by the court of an attorney to represent the interests of a child in divorce. Section 310 reads:

> The court *may* appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].[8]

4. Hillary Rodham, *Children Under the Law*, 43 HARV. ED. R. 487 (1973).

5. Wallace J. Mlyniec, *The Child Advocate in Child Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1, 5 (1977–78).

6. Mary R. Hooten, *The Unrepresented Minor in Matrimonial Action*, 1971 CHI. B. REC. 87, 87 (1971).

7. Judith Wallerstein, *At Issue: Does Divorce Always Have Long Term Effects on Children?*, 1 CONG. Q. RES. 350, 361 (1991); Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study*, 68 NEB. L. REV. 330, 344 (1989) [hereinafter *Child Too Young*]; Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE & FAM. 23 (1993) (analysis of 125 studies revealed that parental divorce was associated with lowered well-being among both children and adult children of divorce).

8. UNIF. MARRIAGE AND DIVORCE ACT § 310, 9A U.L.A. 443 (1973) (emphasis added).

When the Uniform Act was being revised in 1972 through 1973, the American Bar Association's Section on Family Law recommended a version to the American Bar Association House of Delegates. Section 310(a) in this draft read:

> In *any* proceeding brought pursuant to this Act, the court *shall* appoint an attorney, who may be a member of the Court system personnel, to independently represent the interests of a minor, dependent or incompetent child with respect to support, custody, visitation and any other matter dealing with the children's welfare in such proceeding.[9]

A possible replacement for section 310 combines aspects of both versions with some features of current individual states' statutes.[10] Such a version would read:[11]

> The court shall appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. Except that the parents, or other parties in interest, may be allowed twenty-eight days after both have made an appearance in any such proceeding, to come to an agreement on the issues concerning the child. By the twenty-eighth day both parents must certify in writing to the court that there are no remaining issues to be settled regarding the child. If the court allows such certification, no attorney for the child need be appointed. The court may in its discretion reconsider any prior certification allowed.
>
> The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency]. It shall be presumed that the costs, fees, and disbursements of the child's attorney incurred in the ninety-one days starting with the initial appointment of the attorney, shall be divided between the parents or other parties equally. This presumption may be overcome: by clear and convincing evidence that the equal division would be inequitable; by agreement of the parties; or if a party is indigent. Costs, fees, and disbursements after ninety-one days shall be assessed equitably by the court.

III. What the Provision Is Designed to Do

Although the proposed amendment would provide for mandatory representation of children,[12] the amendment seeks to enhance the incen-

9. ABA Family Law Section Special Committee, *Proposed Revised Uniform Marriage and Divorce Act*, 7 Fam. L.Q. 135, 154 (1973) (emphasis added).

10. This provision is modeled in part on the statutes of two states. *See* Ohio Rev. Code Ann. § 3109.04 (Banks-Baldwin 1992); WASH. REV. CODE § 26.09.110 (West 1986 & Supp. 1992).

11. Some portions were suggested in an interview with Howard M. Rubin, Associate Dean, DePaul University College of Law, in Chicago, IL (Nov. 10, 1992).

12. Many states provide for a child's representation in termination of parental rights and other juvenile proceedings brought by the state. These statutes involve the coercive power of the state at the state's instigation rather than at the parent's instigation. While similar in many ways, these statutes are not directly relevant to this proposal.

tives for divorcing parents to make their own agreement as to matters relating to the children quickly. Although the amendment establishes mandatory appointment of an attorney for the children, the parents are given a twenty-eight day period in which they can resolve the issues concerning custody, support, and visitation first.

The mandatory appointment and related costs can be avoided by settling the issues out of court. The court must approve this "Parenting Plan" and may at any time reconsider its approval. A provision apportioning costs to both parents is added so that both parents will have an incentive to settle these issues quickly and out of court.

A. Mandatory Appointment

A requirement for mandatory appointment of counsel is preferable to a provision for permissive appointment. As one author said, "Experience has shown that counsel for the children is not apt to be appointed where such merely is permitted but not mandatory."[13] This quote is as applicable today as when it was written twenty years ago.

Many advantages would flow from the mandatory appointment of an attorney for children. With the prospect of another attorney entering the case to advocate only the children's interests, the parents are given a strong incentive to resolve the children's issues first. The animosity between parents in a divorce usually increases as the process unfolds.[14] If the parents can be brought to an agreement about the children early, there is less possibility that the children will be used as pawns for barter by the parents when animosity increases.[15]

A more complete record of the factors used to determine the child's best interests would be expected with an advocate solely for the child. A good record is essential for an appeal of a case or ruling. A complete record is particularly important when there are requests for later modifications of custody or support. Modification proceedings can occur years after the original decree. Without a detailed record of findings parents may be inclined to have fuzzy memories as to the original justification for certain custody and support arrangements.

An advocate for the child would provide judges with an additional,

13. Henry H. Foster, Jr., *Divorce Reform and the Uniform Act*, 7 FAM. L.Q. 179, 199 (1973).

14. For observations on this topic by a child of a divorced family who has also been divorced as an adult, *see* KRIS KLINE & STEPHEN PEW, FOR THE SAKE OF THE CHILDREN: HOW TO SHARE YOUR CHILDREN WITH YOUR EX-SPOUSE—IN SPITE OF YOUR ANGER 204 (1992) [hereinafter SAKE OF CHILDREN].

15. For a discussion of various ways to barter a child, in this sense, for the parent's gain, *see* MEL KRANTZLER, CREATIVE DIVORCE: A NEW OPPORTUNITY FOR PERSONAL GROWTH 192 (Signet 1975) (1974).

possibly more complete, source of information relevant to the determination of the child's best interests. In theory, a judge decides the best interests of the child on all necessary information.[16] In practice, without an advocate for the child, this may not be true. The child's interests are not necessarily the same as the parents'. Often the child's interests are ignored by the parents who are too preoccupied with their own anger to consider the child's interests.[17] An advocate for the child would be best situated and most likely to bring all necessary information to the attention of the court.

B. Certification of a "Parenting Plan"

The requirement of a certification to the court of a "Parenting Plan" by the twenty-eighth day encourages the parents to resolve the children's issues first. The primary concern in choosing the twenty-eight day limit was to protect the child's interests. Especially for very young children, an extended period of uncertainty in their living arrangements can be harmful. Any period longer than twenty-eight days to resolve custody, visitation, and support is likely to have a detrimental effect on the child. There is also no reason to delay resolution of these issues if the parents are prepared to settle them.

An important secondary concern in choosing the time period is not allowing so much time that the parents become caught at cross purposes. A longer period would provide opportunity for other motives such as revenge for non-child related concerns in the divorce to enter into the resolution of the children's issues.[18]

The countervailing concern, of course, is allowing the parents adequate time to think rationally about their own and their children's future. Most divorces come as no surprise. Most parents will have given at least some thought to the future situation for the children. Because the twenty-eight day period begins when both parents have made an appearance in the proceeding, this will be some time after both parents are aware of the proceeding either by filing or being served. This provides at least four weeks and perhaps up to eight weeks for negotiation on the issues concerning the children. This should be adequate if the parents are initially receptive to an amicable settlement of custody and related issues.

16. Marvin C. Holz, *The Child Advocate in Private Custody Disputes: The Wisconsin Experience*, 16 J. FAM. L. 739 (1977–78) [hereinafter *Wisconsin Experience*].

17. *Child Too Young*, *supra* note 7, at 347.

18. Also, as a practical consideration, twenty-eight days later will fall on the same day of the week.

C. Discretion of the Court

While the parents should be encouraged to settle the children's issues themselves, certain egregious cases require a way for the court to intervene. This is provided by allowing the court the discretion to approve or disallow any "Parenting Plan" that is proposed for certification by the parents. Additionally, the court in its discretion may at any time reconsider any "Parenting Plan" it has previously approved. This allows the court to intervene where the parents together are not acting in the children's best interests.

D. Costs

Perhaps the most controversial part of the proposal is the equal division of the attorney's costs. The mandatory costs associated with failing to agree on child-related issues is intended as an incentive to settle. An equal division of the costs attempts to keep inconsequential quibbling in the initial period after filing from causing harm to the child. Unless these costs are apportioned *equally*, they can be abused as a financial weapon. This destroys the incentive for the parent discriminated against, and delays resolution to the detriment of the child.

Where unequal responsibility for the costs is allowed, the parent paying a smaller or no share may feel (perhaps with justification) that the attorney is biased to the side that is paying. On the other hand, a parent who is relieved of the obligation for costs may unnecessarily hinder the resolution of child issues in order to financially punish the paying spouse. Allowing the possibility of either of these to delay resolution of issues to the detriment of any child is unacceptable. The initial financial obligation for the child's attorney should be apportioned equally to the parents.

There are cases where child-related settlements contain genuine issues of fact which preclude rapid resolution. Limiting the equal division of costs to the first ninety-one days recognizes this limitation on the incentive to settle provided by the equal division of costs. The last sentence of the proposal provides that after ninety-one days the court may determine an equitable division of costs under this section.[19]

Establishing the presumption of equal obligation for costs limits the discretion of the court to apportion the costs unequally, but still allows the court enough discretion to deal with indigent and special circumstances. To order the costs apportioned unequally, the court must find either clear and convincing evidence that unequal division is equitable,

19. Also, as a practical consideration, ninety-one days later will fall on the same day of the week.

or the parents must agree to an unequal arrangement. The clear and convincing standard forces judges to give quality attention to the findings on this issue, so as to avoid being easily overturned on appeal. The high standard also discourages wholesale apportionment of costs on an unequal basis in contravention of the statute.

Where the parents can agree to a different arrangement for costs, their agreement should prevail. To do otherwise would be to invite new and unnecessary sources of animosity between the parents.

The proposal retains the waiver of cost for indigent parties. This is consistent with the purposes of the amendment since it is not likely that the threat of assessed costs will provide any incentive for an indigent party. It should be noted that in some states the costs may also be assessed to the child's separate estate in appropriate circumstances.[20]

E. Ethical Considerations

Several ethical considerations have affected this proposal. First and most important, the attorneys for the parents owe their client the duty of loyalty and must zealously advocate their client's position.[21] In most states the attorneys for the parents owe no duty to the children, except as third parties. This means that where the parents' and the children's interests are not identical, the attorneys for the parents must advocate for the parents' and not the children's interest. Even if such advocacy is detrimental to the children. This is perhaps the single best reason to mandate separate representation for children in divorce and similar proceedings. The children's interests simply may not be adequately protected by their parents and their parents' attorneys.

Second, an attorney has been deliberately chosen to represent the children rather than a guardian ad litem (GAL). The GAL is an officer of the court and as such has a duty to report to the court the basis of any findings or recommendations of the GAL. This duty destroys any privilege of confidentiality the GAL could possibly claim in relation to the child "client."[22] Effective determination of what is in the best interest of the children often necessitates eliciting confidential information from the children. As an advocate for the children alone, the attorney maintains the client privilege of confidentiality, which serves the best interest of the children.

Third, the most troublesome aspect of representing children or other

20. *See* ILL. ANN. STAT. ch. 750, para. 5/506 (Smith-Hurd 1993).

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 and Rule 1.7 (1983).

22. *See* ABA CENTER ON CHILDREN AND THE LAW, LAWYERS FOR CHILDREN 43, 47 (1990); Ross v. Gadwah, 554 A.2d 1284 (N.H. 1988) (holding against a guardian ad litem).

incompetents is determining what they would want if they were competent. Generally, an attorney may not make decisions about the merit of the client's ultimate objectives.[23] A minor or incompetent is, however, legally unable to make such decisions. When an incompetent has a guardian whose interests are not contrary to the incompetent's interests, the attorney for the incompetent can simply defer to the guardian's reasonable determinations. If there is no guardian, or no guardian without contrary interests, much discretion is left to the child's attorney. This would be the situation in many divorce cases. Decisions must be made about what is in the child's best interests even if contrary to the child's wishes.[24] This provides the potential for abuse of discretion and accusations of such abuse for the unwary attorney.

IV. Conclusion

Most commentators and practitioners realize that where there is no monetary or other incentive for *both* divorcing spouses to resolve issues concerning their children, the children's needs are ignored.

> Our divorce had resulted in . . . [a] bitter child custody case. . . . It had raged on for more than ten years; charges were filed with the ethics committees of both lawyer's and psychologist's associations. . . . It was an absolutely brilliant example of our district court system at its most incompetent: several attorneys fattened their bank accounts, judges exploited their prejudices and showed their ineptness, expert witnesses wielded solid credentials and flimsy ethics, and the best interests of the children got lost in the drama of the court official's theater.[25]

In order that the best interests of the children of divorce are not lost in the court official's drama, an advocate for their interests alone is needed.

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23. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 and Rule 1.14 (1983).
24. *See generally, Wisconsin Experience, supra* note 16.
25. SAKE OF CHILDREN, *supra* note 14, at 3.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of
Scott L. THOMASON,
Respondent,
and
Diane THOMASON,
Appellant,
and
Christopher THOMASON;
Gregory Thomason; and Taylor Thomason,
Minor Children.
C93 1262 DR; A103041

Appeal from Circuit Court, Washington County.

Gregory E. Milnes, Judge.

Argued and submitted September 11, 2000.

Timothy J. Sercombe argued the cause for appellant. With him on the reply brief were J. Richard George, Allan F. Knappenberger and Preston Gates & Ellis LLP. On the opening brief were James N. Westwood, William F. Buchanan and Miller, Nash, Wiener, Hager & Carlsen LLP.

Laura Graser argued the cause and filed the brief for respondent.

Herbert A. Trubo argued the cause for minor children. With him on the brief was Sorensen-Jolink, Trubo, Williams, McIlhenny & Williams.

Kristin Paustenbach and Ann Su filed the brief *amicus curiae* for Juvenile Rights Project, Inc.

Before Edmonds, Presiding Judge, and Armstrong and Kistler, Judges.

KISTLER, J.

Reversed.

KISTLER, J.

Mother appeals from the trial court's post-judgment order appointing an attorney for her children. She argues that ORS 107.425 did not authorize the court to make the appointment. We agree and reverse.

On February 28, 1994, the trial court entered a judgment dissolving mother and father's marriage and awarding mother custody of their three children. It appears that, shortly after the judgment was entered, the relationship between mother and one of the children Christopher began to deteriorate, and Christopher began to express a desire to live with father. On June 29, 1995, the trial court appointed an attorney, Susan Svetkey, to represent Christopher. Mother and father were to share equally in the cost. The court cited ORS 107.425(3) as the basis for the appointment.

In December 1995, by stipulation, the court modified the 1994 dissolution judgment and awarded custody of Christopher to father. During a hearing on the motion to modify, mother orally moved to terminate Svetkey's appointment and filed a memorandum in support of her motion. Mother argued, among other things, that ORS 107.425 did not provide authority for the court to appoint counsel because the motion to modify was no longer pending before the court. On January 3, 1996, the court denied mother's motion and entered an order stating that "Svetkey shall remain as attorney for Christopher Thomason until December 5, 1997, or further order of the court."

By its terms, the court's January 3, 1996, order continuing Svetkey's appointment expired in December 1997, and neither party moved to extend the appointment while that order remained in effect. In March 1998, father filed a motion to have Svetkey reappointed. Mother objected to the motion, and father subsequently withdrew the motion before a hearing could be held. Christopher then filed his own motion to reappoint Svetkey, which the trial court granted on April 15, 1998, without a hearing.[1] Mother's attorney sent a

[1] Father explained that he had withdrawn his motion because he thought the trial court would have discretion to deny it, whereas, in his view, if Christopher

Children's Adjustment Following Divorce: Risk and Resilience Perspectives

Joan B. Kelly* and Robert E. Emery

The empirical literature on the longer-term adjustment of children of divorce is reviewed from the perspective of (a) the stressors and elevated risks that divorce presents for children and (b) protective factors associated with better adjustment. The resiliency demonstrated by the majority of children is discussed, as are controversies regarding the adjustment of adult children of divorce. A third dimension of children's responses to divorce, that of lingering painful memories, is distinguished from pathology in order to add a useful complement to risk and resilience perspectives. The potential benefits of using an increasingly differentiated body of divorce research to shape the content of interventions, such as divorce education, by designing programs that focus on known risk factors for children and that assist parents to institute more protective behaviors that may enhance children's longer-term adjustment is discussed.

Parental divorce has been viewed for 40 years as the cause of a range of serious and enduring behavioral and emotional problems in children and adolescents. Divorced families have been widely portrayed by the media, mental health professionals, and conservative political voices as seriously flawed structures and environments, whereas, historically, married families were assumed to be wholesome and nurturing environments for children (Popenoe, Elshtain, & Blankenhorn, 1996; Whitehead, 1998). Although, on average, children fare better in a happy two-parent family than in a divorced family, two essential caveats that distinguish our position from the stereotypical view are underscored. First, unfortunately, many two-parent families do not offer a happy environment for parents or for children (e.g., Cummings & Davies, 1994; Amato, Loomis, & Booth, 1995). Second, although there are differences in the average psychological well-being of children from happy married families and divorced families, it also is true that the majority of children from divorced families are emotionally well-adjusted (Amato, 1994, 2001; Hetherington, 1999).

A continuing stream of sophisticated social science and developmental research has contributed a more complex understanding of factors associated with children's positive outcomes and psychological problems in the context of both marriage and divorce. As a result, most social scientists relinquished a simplistic view of the impact of divorce more than a decade ago. Research demonstrating that children's behavioral symptoms and academic problems could be identified, in some instances, for a number of years before their parents' divorces was particularly important in facilitating this conceptual shift (Block, Block, & Gjerde, 1986; Cherlin et al., 1991). However, compelling stories of negative outcomes for children of divorce continued to be reported by the media in the past decade, stimulated in part by a 10-year longitudinal study of divorced families that emphasized the enduring psychological damage for children of divorce (Wallerstein & Blakeslee, 1989). More recently, two longitudinal studies that report quite different long-term outcomes for children and young adults (Hetherington & Kelly, 2002; Wallerstein, Lewis, & Blakeslee, 2000) have interested the media in taking a more discriminating look at divorce research, although the preference in the media for drama and simple dichotomous answers remains evident (e.g., *Time* Magazine, September 25, 2000).

We believe that social science researchers need to look more closely at the varied evidence on children and divorce within and across disciplines and across methodological approaches. Among the basic empirical issues of concern are (a) the confounding of correlation with cause such that any psychological problems found among children from divorced families often are portrayed as "consequences" of divorce, whereas both logic and empirical evidence demonstrate otherwise; (b) the overgeneralization of results from relatively small, unrepresentative, often highly select samples, most notably clinical or troubled samples as in the widely discussed work of Wallerstein; (c) the too ready acceptance of the null hypothesis of no differences in the face of limited and sometimes superficial assessment, particularly in large, often representative samples; and (d) the failure to distinguish between normative outcomes and individual differences in drawing implications for practice and policy, for example, by noting that the majority of children from divorced families are not "at risk" and that family processes *after* divorce are strong predictors of risk versus resilience. These methodological considerations are of vital importance for the conduct of research, and they point to an interpretation of empirical findings that offers a more nuanced and, we think, more complete understanding of the psychological meaning of divorce for children.

Here we review the empirical research literature on the adjustment of children of divorce from the perspective of the stressors that divorce generally presents for children, the type and extent of risk observed in divorced children when compared with those in still married families, and factors that have been demonstrated to ameliorate risk for children during and after divorce. A third dimension of children's postdivorce outcomes, that of painful memories and experiences, is distinguished from the presence of pathology, and some of the differences and controversies between quantitative and clinical research reports regarding longer-term adjustment are highlighted.

Stressors of the Divorce Process

More than two decades ago, divorce was reconceptualized as a process extending over time that involved multiple changes and potential challenges for children, rather than as a single event (Hetherington, 1979; Wallerstein & Kelly, 1980). The number, severity, and duration of separation and divorce-engendered stressors were observed to vary from child to child, from family to family, and over time. The nature of the initial separation, parental adjustment and resources, parental conflict and

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cooperation, repartnering of one or both parents, stability of economic resources, and children's own individual resources are central to how these stressors affect children's short- and longer-term reactions and outcomes. It is anticipated that unalleviated and multiple stressors encumber children's attempts to cope with divorce and are more likely to result in increased risk and psychological difficulties over time.

Stress of the Initial Separation

Independently of the longer-term consequences of divorce, the initial period following separation of parents is quite stressful for the vast majority of children and adolescents (Hetherington, 1979; Wallerstein & Kelly, 1980). For some children, their stress predates separation because of chronic high conflict and or violence in the marriage. However, the majority of children seem to have little emotional preparation for their parents' separation, and they react to the separation with distress, anxiety, anger, shock, and disbelief (Hetherington, Cox, & Cox, 1982; Wallerstein & Kelly). In general, these crisis-engendered responses diminish or disappear over a period of 1 or 2 years (Hetherington & Clingempeel, 1992; Wallerstein & Kelly).

Complicating children's attempts to cope with the major changes initiated by separation, most children are inadequately informed by their parents about the separation and divorce. They are left to struggle alone with the meaning of this event for their lives, which can cause a sense of isolation and cognitive and emotional confusion (Dunn, Davies, O'Connor, & Sturgess, 2001; Smart & Neale, 2000; Wallerstein & Kelly, 1980). The majority of parents fail to communicate their thoughts with each other regarding effective custody and access arrangements for their children (Kelly, 1993), and they seem even less able or willing to provide important information to their children about immediate and far-reaching changes in family structure, living arrangements, and parent-child relationships. In one study of parent-child communications about divorce, 23% of children said no one talked to them about the divorce, and 45% said they had been given abrupt one- or two-line explanations ("Your dad is leaving"). Only 5% said they had been fully informed and encouraged to ask questions (Dunn et al.).

Intensifying children's stress is the abrupt departure of one parent, usually the father, from the household. In the absence of temporary court orders, some children do not see their nonresident parents for weeks or months. For those children with strong attachments to caring parents, the abrupt and total absence of contact is quite distressing and painful (Wallerstein & Kelly, 1980). Those children who have legal or informal permission to see nonresident parents must begin to deal with the logistics and emotions of transitioning between two households. They must integrate and adapt to unfamiliar schedules and physical spaces imposed on them often without consultation (Kelly, 2002; McIntosh, 2000; Smart, 2002; Smart & Neale, 2000), as well as decide what clothes, toys, and resource materials should be with them in each household. They also must shift from one psychological space to another, in which parents may have different rules and levels of anger toward the other parent (Smart). Children must adapt to unaccustomed absences from both parents without the ability to communicate on an at-will basis. Visiting arrangements that are not developmentally attuned to children's developmental, social, and psychological needs also may be a stressor, particularly for very young children who lack the cognitive, language, and emotional maturity to ask questions about, understand, and cope with the large changes in their lives (Kelly & Lamb, 2000).

Parental Conflict

A major stressor for children is persistent conflict between parents following separation and divorce (Emery, 1982; Johnston, 1994; Johnston & Roseby, 1997). Children in divorcing families have widely varying histories of exposure to marital conflict and violence. Although it often is assumed that parents in high-conflict marriages continue their conflict after separation and divorce, predivorce conflict is far from perfect as a predictor of the amount of postdivorce conflict (Booth & Amato, 2001). Between 20–25% of children experience high conflict during their parents' marriage (Booth & Amato; Hetherington, 1999), and some of these couples reduce their conflict once separated or divorced, whereas others continue to remain entrenched in conflict patterns. Approximately one quarter of divorced parents report low marital conflict (Booth & Amato; Hetherington, 1999; Wallerstein & Kelly, 1980). In some of these families, intense anger and conflict is ignited by the separation itself and the impact of highly adversarial legal processes (Johnston & Campbell, 1988; Kelly, 2002; Kelly & Johnston, 2001; Wallerstein & Kelly). Thus, some children will be burdened by continuing or intensified conflict, whereas others will experience significantly less conflict on a daily basis.

Although the association between intense marital conflict and children's poor adjustment has been repeatedly demonstrated, findings from studies of the impact of postdivorce conflict and children's adjustment have been mixed. Booth and Amato (2001) reported no association between postdivorce conflict and later adjustment in young adults. Others have found that marital conflict is a more potent predictor of postdivorce adjustment than is postdivorce conflict (Booth & Amato; Buehler et al., 1998; Kline, Johnston, & Tschann, 1990), whereas Hetherington (1999) found that postdivorce conflict had more adverse effects than did conflict in the married families. The varied findings may reflect the use of different measures of conflict and adjustment, a failure to differentiate between types of conflict after divorce, parental styles of conflict resolution, and the extent of direct exposure of the child to anger and conflict.

High conflict is more likely to be destructive postdivorce when parents use their children to express their anger and are verbally and physically aggressive on the phone or in person (Buchanan, Maccoby, & Dornbusch, 1991; Johnston, 1994). Parents who express their rage toward their former spouse by asking children to carry hostile messages, by denigrating the other parent in front of the child, or by prohibiting mention of the other parent in their presence are creating intolerable stress and loyalty conflicts in their children. Not surprisingly, such youngsters were more depressed and anxious when compared with high-conflict parents who left their children out of their angry exchanges (Buchanan et al.). When parents continued to have conflict but encapsulated their conflict and did not put their children in the middle, their children did not differ from children whose parents had low or no conflict (Buchanan et al.; Hetherington, 1999). Although high conflict postdivorce is generally assumed to be a shared interaction between two angry, culpable parents, our clinical, mediation, and arbitration experience in high conflict postdivorce cases indicates that it is not uncommon to find one enraged or defiant parent and a second parent who no longer harbors anger, has emotionally disengaged, and attempts to avoid or mute conflict that involves the child.

Diminished Parenting After Divorce

A related stressor for children is the impact of inept parenting both prior to and following divorce. Whereas intense marital conflict by itself has modest negative effects on children's adjustment, the negative impact of high conflict on children's adjustment is substantially mediated through significant problems in the parenting of both mothers and fathers. In particular, mothers in high-conflict marriages are reported to be less warm, more rejecting, and use harsher discipline, and fathers withdraw more from and engage in more intrusive interactions with their children compared with parents in low-conflict marriages (Belsky, Youngblade, Rovine, & Volling, 1991; Cummings & Davies, 1994; Hetherington, 1999; Krishnakumar & Buehler, 2000). Further, living with a depressed, disturbed, or character-disordered parent after divorce clearly places children at risk and is associated with impaired emotional, social, and academic adjustment (Emery, Waldron, Kitzmann, & Aaron, 1999; Hetherington, 1999; Kalter, Kloner, Schreiser, & Okla, 1989; Kline et al., 1990). After divorce, there are few opportunities for competent nonresident parents to buffer the more pernicious effects of behaviors of emotionally troubled custodial parents, and the influence of the nonresident parent on children's adjustment diminishes over time (Hetherington, 1999).

Coupled with this is the frequent deterioration in the parenting of both custodial and nonresident parents in the first several years after separation (Hetherington et al., 1982; Wallerstein & Kelly, 1980). Parents are preoccupied with their own emotional responses to divorce, as well as the demands of integrating single parenting with work and social needs. Not only are divorced parents more prone to emotional lability, but depression, alcoholism, drug abuse, and psychosomatic complaints are more frequent compared with married parents. Some children and adolescents become the sole emotional support for their distraught and needy parents (Wallerstein & Kelly, 1980; Hetherington, 1999). Boys appear to experience more angry exchanges and contentious relationships with their custodial mothers compared with girls (Hetherington, 1999). Boys also experience a greater decline in the quality of the home environment following separation than girls, not only because of more coercive mother-son relationships, but also because fathers typically spend more time with their sons than with their daughters during marriage. These emotional and physical interactions are curtailed or cease following separation (Mott, Kowaleski-Jones, & Menaghan, 1997). Most characteristic of diminished parenting is that children experience less positive involvement with their custodial parent, including less affection and time spent and more erratic and harsh discipline (Hetherington). The children's own increased anger and upset makes it even more difficult for distressed single parents to maintain effective parenting practices.

Loss of Important Relationships

Children from divorced families also face the risk of longer-term erosion or loss of important relationships with close friends, extended and new family members, and, particularly, nonresident parents, who typically are their fathers. Children accustomed to seeing their nonresident parents every day prior to separation often see them 4 days per month following separation and divorce. For many children this may lead to a diminished view of their father's importance in their lives and an erosion of closeness and meaning in these parent-child relationships (Amato, 1987; Amato & Booth, 1996; Kelly & Lamb, 2000; Thompson & Laible, 1999; Wallerstein & Kelly, 1980). Between 18% and 25% of children have no contact with their fathers 2–3 years after divorce (Braver & O'Connell, 1998; Hetherington & Kelly, 2002; Maccoby & Mnookin, 1992; Seltzer, 1998).

The significant reduction in the time children spend with their nonresident parents is due to a number of psychological, interparental, and institutional barriers. Many fathers reduce their involvement or cease contact with their children following divorce because of their own personality limitations (Arendell, 1995; Dudley, 1996; Emery, 1994; Hetherington, 1999; Kruk, 1992; Wallerstein & Kelly, 1980). Some of these fathers were minimally involved during marriage, whereas others become distracted by new partners after separation. Another group of fathers describe a painful depression about the loss of contact with their children that leads to diminished contact (Arendell; Braver et al., 1993; Kruk; Wallerstein & Kelly). Ambiguities in the visiting parent role, including a lack of clear definitions as to how part-time parents are to behave, and paternal role identity issues contribute to reduced paternal involvement (Hetherington & Stanley-Hagan, 1997; Madden-Derdich & Leonard, 2000; Minton & Pasley, 1996; Thompson & Laible, 1999). Maternal remarriage also typically diminishes contacts between children and their fathers (Bray & Berger, 1993; Hetherington & Clingempeel, 1992).

Adversarial processes that restrict timely and regular contacts with fathers also limit more extensive involvement and paternal responsibility (Emery, Laumann-Billings, Waldron, Sbarra, & Dillon, 2001; Kelly, 1991, 1993), as do written or informal guidelines recommending restricted visiting plans that were based on unsubstantiated theory (e.g., Hodges, 1991), rather than empirical research (Kelly, 2002; Kelly & Lamb, 2000; Lamb & Kelly, 2001; Warshak, 2000a). Considerable research has indicated that many children, particularly boys, want more time with their fathers than is traditionally negotiated or ordered; that children and young adults describe the loss of contact with a parent as the primary negative aspect of divorce; and that children report missing their fathers over time (Fabricius & Hall, 2000; Healy, Malley, & Stewart, 1990; Hetherington, 1999; Hetherington et al., 1982; Laumann-Billings & Emery, 2000; Wallerstein & Kelly, 1980). Despite such findings, court policy and practice has been slow to change. Compared with nonresident fathers, nonresident mothers are more likely to visit frequently, assume more parenting functions, and less often cease contact with their children (Depner, 1993; Hetherington, 1999; Maccoby & Mnookin, 1992), particularly when mothers endorse the custodial arrangement. In part, this may be related to the different role expectations of mothers in our society.

Moving after divorce is common and may interfere substantially with the contacts and relationships between children and their nonmoving parents (Braver, Ellman, & Fabricius, 2003; Kelly & Lamb, 2003; Warshak, 2000b). In Arizona, 30% of custodial parents moved out of the area within 2 years after separation (Braver et al.). In Virginia, the average distance between fathers and their children 10 years after divorce was 400 miles (Hetherington & Kelly, 2002). Relocations of more than 75–100 miles may create considerable barriers to continuity in father-child relationships, because distance requires more time and expense to visit and results in the erosion of closeness in the relationships, particularly with very young children (Hetherington & Kelly; Kelly & Lamb). Paternal remarriage and the demands of new children also diminish paternal commitment to the children of the prior marriage (Hetherington & Clingempeel, 1992; Hetherington, 1999).

Aside from the psychological and institutional barriers experienced by fathers, maternal attitudes regarding fathers maintaining postdivorce relationships with their children are influential. Evidence shows that mothers may function as gatekeepers to father involvement after divorce, as they have been found to do during marriage (Pleck, 1997). Maternal hostility at the beginning of divorce predicts less visitation and fewer overnights 3 years later (Maccoby & Mnookin, 1992), and, according to one study, 25–35% of custodial mothers interfere with or sabotage visiting (Braver & O'Connell, 1998). Maternal anger and dissatisfaction with higher levels of father contact, regardless of conflict level, is associated with poorer adjustment in children compared with children whose mothers were satisfied with high father involvement (King & Heard, 1999). In this latter study, it is difficult to know whether mothers' dissatisfaction was caused by poor fathering or by their own upset and anger with their former spouse, although a longitudinal study found that maternal anger/hurt about the divorce and concerns about parenting each predicted maternal perceptions of visiting problems (Wolchik, Fenaughty, & Braver, 1996).

Children themselves also influence the extent of paternal involvement following divorce. Some children limit contact with nonresident parents for both developmentally appropriate and psychologically inappropriate reasons (Johnston, 1993). In response to observing or hearing violence in marriages, frightened and angry children may refuse to visit abusive parents after separation. This choice to reduce or avoid contact may be a healthy response for children who have become realistically estranged, a choice not possible in the married family (Kelly & Johnston, 2001). Some youngsters avoid or reluctantly visit mentally ill parents or those whose disinterest, extreme narcissism, or selfishness interferes with meaningful parent-child relationships. Still other children refuse to visit after separation because they are alienated from a parent with whom they previously had an adequate or better relationship (Gardner, 1998). Although Gardner described this pathological adaptation primarily as the result of an alienating parent's efforts to sabotage the child's other parent-child relationship, a more recent formulation portrays the behaviors of the rejected parent as contributing also to the child's alienation (Johnston, in press; Kelly & Johnston). Mostly, these children (preadolescents and adolescents) are responding to a complex set of factors following separation, including the parents' personality problems and parenting deficits; the hostile, polarizing, and denigrating behaviors of the parents, which encourages alienation; the child's own psychological vulnerabilities and anger; and the extreme hostility generated by the divorce and the adversarial process (Johnston; Kelly & Johnston).

Economic Opportunities

Whereas contradictory findings exist (e.g., Braver & O'Connell, 1998), most scholars report that divorce substantially reduces the standard of living for custodial parents and children, and to a lesser extent, the nonresident parent (Duncan & Hoffman, 1985). Census bureau surveys show that one third of custodial parents entitled to support by court order are not receiving it (*San Francisco Chronicle*, 2002). Although divorce has generally been blamed for this decline in income, it also is apparent that marriages that end in divorce are more likely to have lower incomes *prior* to separation compared with parents who did not divorce in the same period (Clarke-Stewart, Vandell, McCartney, Owen, & Booth, 2000; Pong & Ju, 2000; Sun, 2001). Divorce further accelerates the downward standard of living. The consequences of reduced economic circumstances may be a significant stressor for many children through disruptive changes in residence, school, friends, and child care arrangements. Booth and Amato (2001) found that 46% of young adults recalled moving in the year following separation, and 25% reported changing schools. On average, the women in the Virginia longitudinal study moved four times in the first 6 years, but poorer women moved seven times (Hetherington & Kelly, 2002). Additionally, because child support generally is structured to pay for the basic necessities, children may not be able to participate in sports, lessons, and organizations that brought significant meaning to their lives prior to separation. This is particularly true if there are limited resources, high parent conflict, and poor cooperation.

Remarriage and Repartnering

Divorce creates the potential for children to experience a continuing series of changes and disruptions in family and emotional relationships when one or both parents introduce new social and sexual partners, cohabitate, remarry, and/or redivorce. The effect of serial attachments and losses may hinder more mature and intimate attachments as young adults. Estimates suggest that three quarters of divorced men and two thirds of divorced women eventually remarry (Bumpass, Sweet, & Castro-Martin, 1990), and 50% of divorced adults cohabit before remarriage, whereas others cohabit instead of remarriage. It is estimated that approximately one third of children will live in a remarried or cohabitating family before the age of 18 (Bumpass, Raley, & Sweet, 1995). For some, these new relationships are accompanied by family conflict, anger in the stepparent-child relationship, and role ambiguities (Bray, 1999; Hetherington & Clingempeel, 1992). Repartnering may be most stressful and problematic for children when entered into soon after divorce (Hetherington & Kelly, 2002).

Divorce as Risk for Children

A large body of empirical research confirms that divorce increases the risk for adjustment problems in children and adolescents (for reviews, see Amato, 2000; Emery, 1999; Hetherington, 1999; Kelly, 2000; McLanahan, 1999; Simons et al., 1996). Children of divorce were significantly more likely to have behavioral, internalizing, social, and academic problems when compared with children from continuously married families. The extent of risk is at least twice that of children in continuously married families (Hetherington, 1999; McLanahan; Zill, Morrison, & Coiro, 1993). Although 10% of children in continuously married families also have serious psychological and social problems, as measured on objective tests, estimates are that 20–25% of children from divorced families had similar problems (Hetherington & Kelly, 2002; Zill & Schoenborn, 1990). The largest effects are seen in externalizing symptoms, including conduct disorders, antisocial behaviors, and problems with authority figures and parents. Less robust differences are found with respect to depression, anxiety, and self-esteem. Whereas preadolescent boys were at greater risk for these negative outcomes than girls in several studies (see Amato, 2001; Hetherington, 1999), no gender differences specifically linked to divorce were found in other studies (Sun, 2001; Vandewater & Lansford, 1998). The complex interaction between gender, age at separation, preseparation adjustment, sex of custodial parent, quality of relationships with both parents, and extent of conflict confounds efforts to clarify findings regarding gender.

Children in divorced families have lower academic performance and achievement test scores compared with children in continuously married families. The differences are modest and decrease, but do not disappear, when income and socioeconomic status are controlled (for review, see McLanahan, 1999). Children from divorced families are two to three times more likely to drop out of school than are children of intact families, and the risk of teenage childbearing is doubled. However, it appears that youngsters are already at risk for poorer educational performance and lowered expectations well before separation. For example, the risk for school dropout is associated with poverty or low income prior to separation, and this may be exacerbated by the further decline in economic resources following separation (Pong & Ju, 2000). Further, in looking at parental resources available to children prior to separation, parents provided less financial, social, human, and cultural capital to their children compared with parents who remained married (Sun & Li, 2001), and parent-child relationships were less positive (Sun, 2001). Adolescents from divorced families scored lower on tests of math and reading both prior to and after parental separation compared with adolescents in married families, and their parents were less involved in their adolescents' education (Sun & Li, 2002).

The increased risk of divorced children for behavioral problems is not diminished by remarriage. As with divorce, children in stepfamily homes are twice as likely to have psychological, behavioral, social, and academic problems than are children in nondivorced families (Bray, 1999; Hetherington & Kelly, 2002; Zill, 1998; Zill & Schoenborn, 1990).

Children from divorced families have more difficulties in their intimate relationships as young adults. Compared with young adults in continuously married families, young adults from divorced families marry earlier, report more dissatisfaction with their marriages, and are more likely to divorce (Amato, 1999, 2000; Chase-Lansdale, Cherlin, & Kiernan, 1995). Relationships between divorced parents and their adult children also are less affectionate and supportive than those in continuously married families (Amato & Booth, 1996; Zill et al., 1993). When divorced parents denigrated the other parent in front of the children, young adults were more likely to report angry and less close relationships with the denigrating parents (Fabricius & Hall, 2000). Somewhat surprising is the finding that young adults whose parents had low-conflict marriages and then divorced had more problems with intimate relationships, less social support of friends and relatives, and lower psychological well-being compared with children whose high-conflict parents divorced (Booth & Amato, 2001). Parents in low-conflict marriages who divorced differed in certain dimensions, including less integration in the community and more risky behaviors, and this may place their children at greater risk. Further research is needed to understand the aspects of parenting and parent-child relationships in these low-conflict marriages that negatively affect the later relationships of their offspring.

Higher divorce rates for children of divorced families compared with those in still-married families are substantiated in a number of studies (Amato, 1996; McLanahan & Sandefur, 1994; Wolfinger, 2000). The risk of divorce for these young adults is related to socioeconomic factors, as well as life course decisions such as cohabitation, early marriage, and premarital childbearing; attitudes toward marriage and divorce; and interpersonal behaviors, all of which are associated with marital instability (Amato, 1996, 2000). The number and cumulative effect of family structure transitions is linked to the higher probability of divorce; three or more transitions (divorce, remarriage, redivorce) greatly increase the risk of offspring divorce (Wolfinger).

Protective Factors Reducing Risk for Children of Divorce

In the last decade, researchers have identified a number of protective factors that may moderate the risks associated with divorce for individual children and that contribute to the variability in outcomes observed in children of divorce. These include specific aspects of the psychological adjustment and parenting of custodial parents, the type of relationships that children have with their nonresident parents, and the extent and type of conflict between parents.

Competent Custodial Parents and Parenting

Living in the custody of a competent, adequately functioning parent is a protective factor associated with positive outcomes in children. Overall, one of the best predictors of children's psychological functioning in the marriage (Cummings & Davies, 1994; Keitner & Miller, 1990) and after divorce (Emery et al., 1999; Hetherington, 1999; Johnston, 1995; Kalter et al., 1989; Kline et al., 1990) is the psychological adjustment of custodial parents (usually mothers) and the quality of parenting provided by them. A particular cluster of parenting behaviors following divorce is an important protective factor as well. When custodial parents provide warmth, emotional support, adequate monitoring, discipline authoritatively, and maintain age-appropriate expectations, children and adolescents experience positive adjustment compared with children whose divorced custodial parents are inattentive, less supportive, and use coercive discipline (Amato, 2000; Buchanan et al., 1996; Hetherington, 1999; Krishnakumar & Buehler, 2000; Maccoby & Mnookin, 1992).

Nonresident Parents

There is a potential protective benefit from the timely and appropriate parenting of nonresident parents. Frequency of visits between fathers and children generally is not a reliable predictor of children's outcomes, because frequency alone does not reflect the quality of the father-child relationship. In one study, boys and younger children, but not girls or older children, were better adjusted with frequent and regular contact with their fathers (Stewart, Copeland, Chester, Malley, & Barenbaum, 1997). In the context of low conflict, frequent visits between fathers and children is associated with better child adjustment, but where interparental conflict is intense, more frequent visits were linked to poorer adjustment, presumably because of the opportunities for more direct exposure of the children to parental aggression and pressures (Amato & Rezac, 1994; Hetherington & Kelly, 2002; Johnston, 1995).

Frequency of contact also has beneficial effects when certain features of parenting are present in nonresident parents. A meta-analysis of 57 studies found that children who had close relationships with their fathers benefited from frequent contacts when their fathers remained actively involved as parents (Amato & Gilbreth, 1999). When fathers helped with homework and projects, provided authoritative parenting, and had appropriate expectations for their children, the children had more positive adjustment and academic performance than did those with less involved fathers. More paternal involvement in children's

schooling was also associated with better grades and fewer repeated grades and suspensions (Nord, Brimhall, & West, 1997). The combination of fathers engaging in activities with their children and providing financial support was associated with increased probability of completing high school and entering college compared with activities alone or activities combined with very low financial support (Menning, 2002). Indeed, when both parents engage in active, authoritative, competent parenting, adolescent boys from divorced families had no greater involvement in delinquent behavior than did those in continuously married families (Simon et al., 1996).

New reports about joint custody, compared with sole custody, also suggest a protective effect for some children. A meta-analysis of 33 studies of sole- and joint-physical custody studies reported that children in joint-custody arrangements were better adjusted on multiple objective measures, including general adjustment, emotional and behavioral adjustment, and academic achievement compared with children in sole-custody arrangements (Bausermann, 2002). In fact, children in joint custody were better adjusted regardless of the level of conflict between parents, and they did not differ in adjustment from the children in still-married families. Although the joint-custody parents had less conflict prior to separation and after divorce than did sole-custody parents, these differences did not affect the advantage of joint custody. Lee (2002) also reported positive effects of dual residence on children's behavioral adjustment, although the effects were suppressed by high interparental conflict and children's sadness.

In sharp contrast to the 1980s, some findings suggest that between 35% and 40% of children may now have at least weekly contacts with their fathers, particularly in the first several years after divorce (Braver & O'Connell, 1998; Hetherington, 1999; Seltzer, 1991, 1998). This may reflect changes in legal statutes and social contexts that now encourage shared legal decision-making, less restrictive views of paternal time with children, and greater opportunities for interested fathers to engage more fully in active parenting. Mothers also are more satisfied with higher levels of paternal involvement than they were 20 years ago (King & Heard, 1999), possibly reflecting changing cultural and work-related trends and the increased role of the father in raising children (Doherty, 1998; Pleck, 1997).

Diminished Conflict Between Parents Following Divorce

Low parental conflict is a protective factor for children following divorce. Although we know little about the thresholds at which conflict becomes a risk factor following divorce in different families, some conflict appears to be normative and acceptable to the parties (King & Heard, 1999). Young adults whose parents had low conflict during their earlier years were less depressed and had fewer psychological symptoms compared with those whose parents had continued high conflict (Amato & Keith, 1991; Zill et al., 1993). When parents have continued higher levels of conflict, protective factors include a good relationship with at least one parent or caregiver; parental warmth (Emery & Forehand, 1994; Neighbors, Forehand, & McVicar, 1993; Vandewater & Lansford, 1998); and the ability of parents to encapsulate their conflict (Hetherington, 1999). Several studies found no differences in the amount of conflict between parents in sole- or joint-custody arrangements (Braver & O'Connell, 1998; Emery et al., 1999; Maccoby & Mnookin, 1992), although results from a meta-analysis found more conflict in sole-custody families prior to and after divorce (Bausermann, 2002).

Most parents diminish their conflict in the first 2–3 years after divorce as they become disengaged and establish their separate (or remarried) lives. Studies indicate that between 8% and 12% of parents continue high conflict 2–3 years after divorce (Hetherington, 1999; King & Heard, 1999; Maccoby & Mnookin, 1992). The relatively small group of chronically contentious and litigating parents are more likely to be emotionally disturbed, character-disordered men and women who are intent on vengeance and or on controlling their former spouses and their parenting (Johnston & Campbell, 1988; Johnston & Roseby, 1997). Such parents use disproportionate resources and time in family courts, and their children are more likely to be exposed to parental aggression. When one or both parents continue to lash out during transitions between households, mediation experience indicates that children can be protected from this exposure through access arrangements that incorporate transfers at neutral points (e.g., school, day care).

Related to the level of conflict between parents postdivorce is the effect of the coparental relationship. Research shows that between 25% and 30% of parents have a cooperative coparental relationship characterized by joint planning, flexibility, sufficient communication, and coordination of schedules and activities. However, more than half of parents engage in parallel parenting, in which low conflict, low communication, and emotional disengagement are typical features. Although there are distinct advantages of cooperative coparenting for children, children thrive as well in parallel parenting relationships when parents are providing nurturing care and appropriate discipline in each household (Hetherington, 1999; Hetherington & Kelly, 2002; Maccoby & Mnookin, 1992; Whiteside & Becker, 2000).

Resilience of Children of Divorce

Despite the increased risk reported for children from divorced families, the current consensus in the social science literature is that the majority of children whose parents divorced are not distinguishable from their peers whose parents remained married in the longer term (Amato, 1994, 2001; Chase-Lansdale et al., 1995; Emery, 1999; Emery & Forehand, 1994; Furstenberg & Kiernan, 2001; Hetherington, 1999; Simons et al., 1996; Zill et al., 1993). There is considerable overlap between groups of children and adolescents in married and postdivorce families, with some divorced (and remarried) children functioning quite well in all dimensions, and some children in married families experiencing severe psychological, social, and academic difficulties (Amato, 1994, 2001; Hetherington, 1999). Whereas a slight widening of the differences between children from married and divorced families is found in studies in the 1990s, the magnitude of the differences remains small (Amato, 2001). Both large-scale studies with nationally representative samples and multimethod longitudinal studies using widely accepted psychological and social measures and statistics indicate that the majority of children of divorce continue to fall within the average range of adjustment (Amato, 2001; Hetherington & Kelly, 2002; Zill et al., 1993).

Not to minimize the stresses and risk to children that separation and divorce create, it is important to emphasize that approximately 75–80% of children and young adults do not suffer from major psychological problems, including depression; have achieved their education and career goals; and retain close ties

to their families. They enjoy intimate relationships, have not divorced, and do not appear to be scarred with immutable negative effects from divorce (Amato, 1999, 2000; Laumann-Billings & Emery, 2000; McLanahan, 1999; Chase-Lansdale et al., 1995). In fact, Amato (1999) estimated that approximately 42% of young adults from divorced families in his study had well-being scores above the average of young adults from nondivorced families.

As we indicated here, the differences in children's lives that determine their longer-term outcomes are dependent on many circumstances, among them their adjustment prior to separation, the quality of parenting they received before and after divorce, and the amount of conflict and violence between parents that they experienced during marriage and after divorce. Children from high-conflict and violent marriages may derive the most benefit from their parents' divorces (Amato et al., 1995; Booth & Amato, 2001) as a result of no longer enduring the conditions that are associated with significant adjustment problems in children in marriages. Once freed from intense marital conflict, these findings suggest that parenting by custodial parents improves, although research is needed to explain more specifically what aspects of parent-child relationships and family functioning facilitate recovery in these youngsters. Clearly, the links between level of marital conflict and outcomes for children are complex. For children whose parents reported marital conflict in the midrange, divorce is associated with only slightly lower psychological well-being (Booth & Amato, 2001). If this midrange marital conflict represents approximately 50% of the families that divorce, as others have found, then the large number of resilient children seen in the years following divorce is not surprising.

Understanding Contradictory Findings on Adult Children of Divorce

These broadly based findings of long-term resiliency are at odds with the 25-year longitudinal study that has received widespread attention. In *The Unexpected Legacy of Divorce* (Wallerstein et al., 2000), the authors report that children of divorce, interviewed in young adulthood, do not survive the experience of divorce and that the negative effects are immutable. These young adults are described as anxious, depressed, burdened, failing to reach their potential, and fearful of commitment and failure.

What accounts for these enormously disparate findings? Many of these differences can be traced to methodological issues and may relate as well to the clinical interpretations of participant interviews about their experiences as divorced young adults. An essential methodological concern is that this study (Wallerstein & Kelly, 1980; Wallerstein & Blakeslee, 1989; Wallerstein et al., 2000) was a qualitative study, used a clinical sample, and no comparison group of married families existed from the start. The data were collected in clinical interviews by experienced therapists, and no standardized or objective measures of psychological adjustment, depression, anxiety, self-esteem, or social relationships were used. The goal of the study, initiated in 1969 when information about children of divorce was extremely limited, was to describe in detail the responses of children and parents to the initial separation and divorce, and then to see how they fared over the first 5 years in comparison with their initial reports and behaviors (Wallerstein & Kelly).

The parents in the original sample of 60 families had severe psychological and relationship problems, suggesting that this sample of families was not "normal," as has been widely asserted by Wallerstein in the media (Waters, 2001). Only one third of the parents were clinically rated as functioning psychologically at an adequate or better level during the marriage; approximately one half of the mothers and fathers were "moderately disturbed" or "frequently incapacitated by disabling neuroses and addictions," including chronic depression, suicide attempts, alcoholism, severe relationship problems, or problems in controlling rage. Additionally, 15–20% of the parents were "severely disturbed," including those diagnosed with severe manic depression, paranoid ideation, and bizarre thinking and behaviors (see Wallerstein & Kelly, 1980, Appendix A, pp. 328–329). In part, the pervasive parent pathology found in the original sample may be the basis for the descriptions presented in the 25-year follow-up of inattentive, selfish, narcissistic, abandoning parents intent on self-gratification. In contrast, in Hetherington's multimethod, longitudinal studies using married families as a comparison group, most divorced parents eventually became as competent as the still-married parents and were caring toward their children in the years following divorce (Hetherington, 1999; Hetherington & Kelly, 2002).

It has been stated in the most recent report (Wallerstein et al., 2000) and in personal interviews that the children in the original sample were carefully prescreened, "asymptomatic," and developmentally on track (Waters, 2001, p. 50). In fact, 17% of the children were clinically rated as having severe psychological, social, and or developmental problems (Wallerstein & Kelly, 1980, p. 330) and were retained in the sample. The nonrepresentative sample of convenience was referred from a variety of sources; including lawyers, therapists, and the court, or were self-referred. The parents participated in a free, 6-week divorce counseling intervention from which the data were gathered (see Kelly & Wallerstein, 1977; Wallerstein & Kelly, 1977), and the children were seen for three to four sessions by child-trained therapists.

Objective data is limited in the 25-year report (Wallerstein et al., 2000), and few statistical analyses were available. The qualitative findings were presented primarily as six composites; however, without sufficient data, it is impossible for the reader to determine whether the composites were representative of the whole sample. With rare exception, these composites present stark, failed outcomes. The emotional pain and failures of these young adults has been presented in a consistently negative manner, so the overall impression is one of pervasive pathology. Based on the limited data found in the earlier follow-up, one would expect that among the 93 young adults interviewed at the 25-year follow-up there were some subjects without pain, anger, and depression who were enjoying successful marriages and parent-child relationships. We believe that in the absence of objective questionnaires, standardized measures, and statistical analyses, clinical research is particularly vulnerable to a focus on psychopathology to the exclusion of more adaptive coping and resilience. Certainly, the sweeping generalizations in the 25-year report that none of these youngsters escaped the permanently damaging effects of parental divorce are not consistent with the limited data in an endnote in *The Unexpected Legacy of Divorce* (2000, p. 333), which indicates that 70% of the sample of adult children of divorce scored either in the "average" or "very well to outstanding" range on an overall measure of psychological well-being. Without standardized adjustment measures, it is difficult to compare these numbers with the findings of other divorce research.

Aside from sampling and methodological concerns, another explanation for the marked divergence in longer-term outcomes of divorced offspring may be a confusion of pain and pathology. Like young adults participating in more objective assessments of pain, participants in the Wallerstein study may have reported considerable distress in reflecting upon their parents divorce. However, painful reflections on a difficult past are not the same as an inability to feel and function competently in the present.

Painful Memories as Longer-Term Residues of Divorce

A third perception of the short- and longer-term effects of divorce may be a useful complement and balance to risk and resilience perspectives. Painful memories and experiences may be a lasting residue of the divorce (and remarriage) process for many youngsters and young adults. However, it is important to distinguish pain or distress about parental divorce from longer-term psychological symptoms or pathology. Clearly, divorce can create lingering feelings of sadness, longing, worry, and regret that coexist with competent psychological and social functioning. Substantial change and relationship loss, when compounded for some by continuing conflict between parents, represents an ongoing unpleasant situation over which the child or adolescent may have no control. Research that includes standardized and objective measures of both psychological adjustment and painful feelings is useful in disentangling differences in long-term outcomes reported in young adults from divorced families. Such research may help to explain some of the apparent conflict between studies using clinical and quantitative methods.

A decade after divorce, well-functioning college students reported continued pain and distress about their parents' divorces (Laumann-Billings & Emery, 2000). Compared with students in still-married families, they reported more painful childhood feelings and experiences, including worry about such things as their parents attending major events and wanting to spend more time with their fathers. They did not blame themselves for parental divorce, and 80% thought that the divorce was right for their parents. Feelings of loss were the most prevalent of the painful feelings, and the majority reported they missed not having their father around. Many questioned whether their fathers loved them. Despite these painful feelings and beliefs, these young adults did not differ on standardized measures of depression or anxiety from a comparison sample of students in still-married families. These findings were replicated in a second sample of low-income young adults who were not college students. Among factors associated with more pain among children from divorced families were living in sole mother or father custody, rather than a shared custody arrangement, and higher levels of postdivorce parental conflict. When children's parents continued their high conflict, these young adults reported greater feelings of loss and paternal blame and were more likely to view their lives through the filter of divorce (Laumann-Billings & Emery). Young adults in both samples also reported lower levels of loss when they had lived in joint physical custody and were less likely to see life through the filter of divorce. As would be expected, there is no question that divorce impacted the lives of many of these young adults and that parental attitudes and behavior affected the degree of painful feelings lingering after divorce. Although tempting, this impact should not be confused with or portrayed as poor psychological adjustment.

Feelings of loss also were reported by half of 820 college students a decade after divorce in another study (Fabricius & Hall, 2000). Subjects indicated that they had wanted to spend more time with their fathers in the years after divorce. They reported that their mothers were opposed to increasing their time with fathers. When asked which of nine living arrangements would have been best for them, 70% chose "equal time" with each parent, and an additional 30% said a "substantial" number of overnights with their fathers, preferences that were similar in a sample of young adults in nondivorced families. The typical amount of contact reported in this and other studies between children and their fathers was every other weekend. One can infer from these findings that for many years, many of these students experienced some degree of painful longing for the absent parent that might have been alleviated with more generous visiting arrangements. An analysis of the amount of contact and closeness to fathers indicated that with each increment of increased contact between these children and their fathers, there was an equal increase in young adults reporting closeness to their fathers and a corresponding decrease in anger toward their fathers. Further, the increased feelings of closeness toward fathers did not diminish their reported closeness to mothers (see Fabricius, 2003, this issue). Further, increasing increments of father contact were linked to incremental amounts of support paid by fathers for their children's college (Fabricius, Braver, & Deneau, 2003). In fact, students who perceived their parents as opposed to or interfering with contact with the nonresident parent were more angry and less close to those parents than were students who reported their parents as more supportive of contact with the nonresident parents.

Another source of pain may be the extent to which adult children feel that they had no control over their lives following divorce. As indicated earlier, the majority of children and adolescents are not adequately informed about the divorce and its implications for their lives (Dunn et al., 2001). They also are not consulted for their ideas regarding access arrangements and how they are working for them, both emotionally and practically (Kelly, 2002; McIntosh, 2000; Smart & Neale, 2000). The young adults cited earlier who longed to spend increased time with their fathers either perceived that they had no control over this arrangement or in reality did not have control. In lacking a voice in these divorce arrangements, not only did they miss their fathers over an extended period, but they were left with lingering doubts as to whether their fathers loved them. The substantial presence of involved nonresident parents in children's lives after divorce may be an important indicator to many children that they are valued and loved.

Transitions between two households constitute another arena where many children do not have sufficient input and control, particularly as they move into adolescence, and this may cause lingering angry or painful feelings. Whereas 25% of youngsters had *some* to *many* negative feelings about transitions between households, 73% had *some* to *many* positive feelings about the transitions. There was a significant association between positive feelings about transitions and being given a voice or role in some decision-making about the arrangements (Dunn et al., 2001). Although some research calls attention to the importance of children having a voice in formulating or shaping postdivorce parenting plans, there is the danger of burdening children with decisions that the adults cannot make. Giving children the right to be heard, if not done with sensitivity and care, may give children the responsibility for making an impossible choice between their two parents. There is a distinction between providing children

with the possibility of input regarding their access arrangements and the inherent stresses of decision-making—a distinction with which children themselves seem quite familiar and comfortable (Kelly, 2002; McIntosh, 2000; Smart & Neale, 2000).

Implications for Practice and Interventions

There are a number of important implications for practice and intervention that derive from this analysis of children's adjustment following divorce. Rather than communicating a global or undifferentiated view of the impact of divorce, research has begun to identify particular factors that increase children's risk following divorce and, equally important, those that are protective and promote resiliency in children and adolescents. Understanding this literature is central to promoting policies and developing and assessing services that have the potential to help mitigate family problems so that adjustment problems among children from divorced families are diminished. There are few better examples than the importance of adopting a systems approach (including family systems and broader social and legal systems) to helping these children. Whatever its specific nature or focus, interventions are more likely to benefit children from divorced families if they seek to contain parental conflict, promote authoritative and close relationships between children and *both* of their parents, enhance economic stability in the postdivorce family, and, when appropriate, involve children in effective interventions that help them have a voice in shaping more individualized and helpful access arrangements (Kelly, 2002).

Among the hierarchy of interventions available that strive toward some of these ends are parent education programs for parents and children, divorce mediation, collaborative lawyering, judicial settlement conferences, parenting coordinator or arbitration programs for chronically litigating parents, and family and group therapy for children and parents (Kelly, 2002). Clearly, there is a need for more research on these sorts of interventions; at present, only mediation enjoys a solid base of research support regarding the benefits to divorcing and divorced families (Emery, 1994; Emery, Kitzmann, & Waldron, 1999; Kelly, 1996, 2002). The potential benefits of mediation are substantial in both the short term (e.g., reduced parental conflict and improved parent support and communications; Kelly, 1996) and longer term. For example, a randomized trial of an average of 5 hours of custody mediation led to significant and positive effects on parent-child and parent-parent relationships 12 years later (Emery et al., 2001), including more sustained contact between fathers and children, compared with those in the litigation sample.

Divorce education programs for parents and children have proliferated in the United States in the past decade, particularly those associated with family courts (Geasler & Blaisure, 1999). They are generally limited to one to two sessions in the court sector and four to six sessions in the community or schools. Research on this newer preventive intervention is more limited and has focused primarily on parent satisfaction and parental self-reports of the impact of the interventions on their behavior (Kelly, 2002). Programs that are research-based and focused on skill development showed more promise in educating parents and promoting change than did those that are didactic or affect-based (Kelly, 2002). However, few studies of these programs are designed to demonstrate their efficacy in preventing or reducing psychological or social adjustment problems for children of divorce, or in actually modifying parental behaviors associated with poor child outcomes. Several experimental or quasi-experimental studies of lengthier, research-based programs designed to facilitate children's postdivorce adjustment have been conducted that show promising behavioral and psychological changes in both parents and children (for review, see Haine, Sandler, Wolchik, Tein, & Dawson-McClure, 2003, this issue). The child-focused programs, incorporating aspects of risk and resiliency factors described in their article, have demonstrated significant reductions at follow-up in child externalizing and internalizing behaviors and child self-esteem compared with nontreatment controls. Several investigations of mother-focused programs also found reductions in child psychological and behavioral problems, improvements in mother-child relationship quality and discipline, and changed attitudes toward father-child relationships and visiting (Haine et al., 2003). Few programs and research have focused on fathers to test the efficacy of providing newer empirical information regarding the benefits of active, competent parenting among nonresident parents, rather than the more permissive, weekend entertainment model that so frequently emerges after divorce; however, new research is promising (Braver, Griffin, Cookson, Sandler, & Williams, in press).

Another important implication of these findings for practice is as a reminder to practitioners of several seemingly obvious but easily overlooked points. Children and young people from divorced families seen in counseling or psychotherapy are a select group who surely differ from the general population of children of divorce. We must be careful in generalizing to all children from those in small, unrepresentative, or clinical samples, particularly when contributing to public education or policy. We believe that the public education message needs to acknowledge that when divorce occurs, parents and legal systems designed to assist families can utilize particular research knowledge and skills to reduce the risks associated with divorce for children. Although we also wish to promote more happy marriages, we conclude that although some children are harmed by parental divorce, the majority of findings show that most children do well. To suggest otherwise is to provide an inaccurate interpretation of the research findings. Further, such misrepresentations of research are potentially harmful in creating stigma, helplessness, and negative expectations for children and parents from divorced families. Practitioners and educators need to be reminded and remind others that the painful memories expressed by young people from divorced families are not evidence of pathology. At the same time, we should encourage researchers to develop objective, reliable, and valid measures of the important struggles associated with divorce that might be apparent first in schools or clinical practice.

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