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## Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings

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# Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings

*Martin Guggenheim\**

*"Although unwanted medical care is recognized to be potentially harmful, the imposition of legal care for a child is presumed to be benign."\*\**

## OPENING REMARKS DELIVERED AT THE ETHICAL ISSUES IN THE LEGAL REPRESENTATION OF CHILDREN CONFERENCE\*\*\*

I am honored to be here tonight and to have the privilege to start this magnificent conference on representing children. It is a particular honor for me because the people in the room include some of the leading practitioners and thinkers in the field, and I am thrilled to have the opportunity to share with you some of my thoughts about our work.

It is also an honor to be at this particular school, because this is the only law school in the country dedicated to my life's work. By its very existence, Loyola's *CIVITAS* Child Law Center acknowledges the central importance of children in our lives, and a concentrated study of the multifarious ways the law impacts the well-being of children deserves the careful attention it receives, and receives only, at this institution.

I also feel privileged in being here to talk about the intricate subject of representing children because there is no topic that is more intriguing to me. I hope to begin this Conference by providing a brief history of the development of the norms and standards for representing children in various legal proceedings, including how we got to where we are now and where I think we are headed. In doing so, I hope to

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\* Professor of Clinical Law; Director, Clinical and Advocacy Programs, New York University School of Law. I wish to thank Eric Dorsch of the New York University class of 1998 for his extremely valuable research assistance and to gratefully acknowledge the financial support from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

\*\* JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* 117 (1986).

\*\*\* Professor Guggenheim delivered the keynote speech at the *Ethical Issues in the Legal Representation of Children Conference* hosted by Loyola University Chicago School of Law's *CIVITAS* ChildLaw Center on April 10-12, 1997. This Article is an expanded version of Professor Guggenheim's keynote speech.

set the stage for what should be a very important day and a half beginning tomorrow morning, when you get the opportunity to meet in groups and begin the crucial work of developing standards for representing children applicable to Illinois.

#### PREAMBLE

*In a new effort to find permanent adoptive homes for newborn African-Americans in Massachusetts, a foster care agency decided to place a three-day-old African-American girl named Lesley with a Caucasian couple. The case is before the Boston Juvenile Court and it has been the object of extended discussion in the Boston media. The judge assigned to decide the case wants to ensure that Lesley is represented by the best lawyer the city has to offer.*

*The judge does a computer search for the names of prominent members of the Boston Bar who are committed to the public interest and have a keen interest in the well being of children. Two names rise to the top of the list: Elizabeth Bartholet, a professor of law at Harvard Law School, and Ruth-Arlene Howe, a professor of law at Boston College School of Law. Professor Bartholet is an eloquent spokesperson for encouraging and expanding the number and opportunities of transracial adoptions.<sup>1</sup> Professor Howe disagrees with this position, believing that it is not necessarily in the best interests of African-American children to make it easier for them to be adopted by white couples.<sup>2</sup>*

*If word leaked before the judge made the appointment that she was going to select one or the other of these two highly qualified lawyers to represent Lesley, the children's rights advocacy network that wants more transracial adoptions would urge the appointment of Professor Bartholet. Those advocates less inclined towards transracial adoptions would urge the appointment of Professor Howe.*

*The question that naturally arises is whether we want a legal services delivery system in which anyone should care which qualified lawyer happened to be assigned to represent a child? In a rational system of law it ought to make no difference to the outcome whether Professor Bartholet or Professor Howe were asked to assist the court in determining Lesley's best interests.*

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1. See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

2. See, e.g., Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, DUKE J. GENDER L. & POL'Y, Spring 1995, at 131.

*Once we agree that it should not matter whether Professor Bartholet or Professor Howe is assigned to represent Lesley, it becomes clear that this necessarily places significant limitations on the various actions these lawyers would be permitted to take in the course of the representation. If we allowed unrestrained professional behavior in the representation of Lesley, Professor Bartholet would seek to retain expert opinion that transracial adoptions are good for children (and make good public policy in the bargain). Professor Bartholet would also undoubtedly prepare a powerful brief in support of the adoption going forward. In contrast, Professor Howe would undertake the identical tasks to demonstrate why the adoption should be denied (and why it makes bad policy to encourage such adoptions).*

*In other words, if we allowed unrestrained professional behavior, the court would actually be inviting a member of the bar to advocate for a particular position, completely leaving the choice of that position to the lawyer. No rational system should want random argument of this kind. Randomness of this sort, when it potentially affects the outcome, is the antithesis of law. In an intelligent system, both Professors Bartholet and Howe should be expected to perform a similar role with as little variation as possible being tolerated that derives from their personal values or opinions.*

*Until very recently, it may have greatly mattered what particular views the attorney assigned to represent a child happened to possess. As this Article will indicate, however, those days appear to be behind us as a growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.*

## I. INTRODUCTION

Nearly everyone would identify 1967 as the most important year in the history of counsel for children in the United States. Starting a process that has been evolving ever since, in that year the Supreme Court held that children whose freedom could be curtailed in delinquency proceedings have the right to court-assigned counsel.<sup>3</sup> Prior to 1967, children were rarely represented by counsel in American courts.<sup>4</sup> Since the Court's decision in *In re Gault*,<sup>5</sup> many

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3. See *In re Gault*, 387 U.S. 1, 41 (1967).

4. A very few states recognized the right to court-assigned counsel in delinquency proceedings, at least in limited circumstances, prior to *Gault*. These states were California, Minnesota, New York, and the District of Columbia. See *id.* at 37 n.63.

5. *Id.*

commentators have recommended the appointment of lawyers to represent children in a wide variety of proceedings,<sup>6</sup> and courts and legislatures have dramatically expanded the circumstances in which lawyers for children are assigned.<sup>7</sup> As a result, today lawyers commonly represent children in a variety of legal matters, including child protection, custody, and visitation proceedings.

If 1967 serves as the field's most important year, the past three years should be regarded as the most active years in the area of legal representation of children. There has been more ferment during 1995-1997 than at any other time in American history. This activity includes the American Academy of Matrimonial Lawyers' ("AAML")<sup>8</sup> and the American Bar Association's ("ABA") drafting of model standards for representing children. The ABA recently contributed two standards: one for representing children in neglect, abuse, and termination of parental rights cases,<sup>9</sup> and a second for representing children in custody and visitation cases, the latter developed with the National Council of Juvenile and Family Court Judges ("NCJFCJ").<sup>10</sup>

In the midst of these important contributions, in December 1995, Fordham University Law School hosted a national conference on representing children,<sup>11</sup> resulting in the *Fordham Law Review's* publication of a special issue discussing ethical issues in the legal representation of children.<sup>12</sup> The Conference was sponsored by

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6. See Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1473 n.1 (1996) (listing examples of some of the many articles on representing children published since 1976).

7. See Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 *FAM. L.Q.* 53, 53 (1992).

8. See *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 *J. AM. ACAD. MATRIMONIAL L.* 1 (1995) [hereinafter AAML Standards]. I served as the reporter for these standards.

9. See Linda Elrod, et al., Representing Children Standards of Practice Committee, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 *FAM. L.Q.* 375 (1995) [hereinafter *Standards of Practice*] (addressing appointed counsel's specific responsibilities in child abuse and neglect cases and providing standards for judges and judicial administrations to ensure quality representation); see also *infra* notes 24-33 and accompanying text.

10. See American Bar Association & National Council of Juvenile and Family Court Judges, *Principles for Appointment of Representatives for Children in Custody and Visitation Proceedings*, June 30, 1997 (on file with the author) [hereinafter *Principles*]. The National Council has formally approved the principles. As of this writing, the Principles have not been approved by the American Bar Association. I served as a member of the working group that recommended the Principles, and as a member of the drafting committee.

11. Fordham University School of Law, *Conference on Ethical Issues in the Legal Representation of Children*, December 1-3, 1995.

12. Special Issue, *Ethical Issues in the Legal Representation of Children*, 64

thirteen organizations that constitute virtually the entire organized bar that represents children.<sup>13</sup> The Fordham Conference produced a remarkably clear consensus among the community of scholars and practitioners working in the field, on the role and purpose of counsel for children.<sup>14</sup> Although differences of opinion still exist,<sup>15</sup> the consensus evidences an understanding among practitioners and scholars on several fundamental points. This general understanding serves as a useful opportunity to reconsider the basic principles behind providing lawyers for children. This Article will explore these basic principles.<sup>16</sup> In addition, this Article will encourage an even more basic reconsideration of the necessity for and wisdom of using lawyers for children now that the practicing bar has reached agreement on the role of such lawyers.<sup>17</sup>

Historically, the legal representation of children has developed differently than one would expect. Logically, one ought to determine first why children should be represented by a lawyer, which would include defining precisely the particular tasks desired of the child's lawyer before reaching the question of when counsel should be appointed. However, the history of appointing counsel for children has taken a very different route, an examination of which reveals two major developmental phases.

Phase One can be characterized principally by the expansion of circumstances that require the representation of children. In the years following *Gault*, courts frequently proclaimed the right of children to representation, but provided remarkably little explanation regarding the reasons or the purpose for the representation.<sup>18</sup> Following this lead, many commentators sought to expand the child's right to representation, but these commentators focused more on the right to

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FORDHAM L. REV. 1281 (1996) [hereinafter *Ethical Issues in the Legal Representation of Children*].

13. See Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1283 n.7 (1996).

14. See *infra* notes 58-59 and accompanying text (discussing the consensus reached regarding the appropriate role for legal representatives of children).

15. See *infra* note 65-66 and accompanying text (noting spectrum of opinions which persist).

16. See *infra* Part II (discussing the rationale for appointing counsel for children and resulting duties).

17. See *infra* Part IV.A.

18. See, e.g., *In re T.M.H.*, 613 P.2d 468, 471 (Okla. 1980) (holding that independent counsel for children must be appointed in cases regarding termination of parental rights due to conflicting interests of child, parent, and State); *In re Child X*, 617 P.2d 1078, 1078-79 (Wyo. 1980) (remanding case where court failed to appoint an attorney to represent child in an abuse and neglect case as required by statute).

representation rather than on the lawyer's role when representing children.<sup>19</sup>

In contrast to Phase One, a much more careful attention to the role of counsel characterizes Phase Two. This phase includes an on-going debate in the literature and the development of standards of representation by commentators and professional organizations.<sup>20</sup> Now that Phase Two is drawing to a close, this Article intends to initiate discussions for a Phase Three, and re-evaluates whether and when lawyers should be appointed to represent children. Because a modicum of agreement has been achieved as to why courts should appoint lawyers to represent children and what the lawyer's role is once appointed, legislatures and judges now need to reconsider when to appoint such lawyers.<sup>21</sup>

One reason courts have felt little need to worry about appointing counsel for children, as this Article's epigraph asserts, is that most judges presume the imposition of legal care is benign.<sup>22</sup> But, as courts become increasingly aware of the possible subversion of the substantive law resulting from universal appointment of counsel for children, a third phase of development should result where courts will be willing to spend more time examining this underlying presumption.

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19. See, e.g., Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 256 (1991) (discussing a child's right to independent counsel in proceedings concerning delinquency, child custody, abuse, neglect, paternity determination, child support, adoption, psychiatric evaluation and commission, and public school actions); Patricia M. Wald, *The Kindness of Strangers*, 97 YALE L.J. 1477, 1489-91 (1988) (reviewing JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986)); Jennifer Bellah, Comment, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 CAL. L. REV. 481, 507-08 (1982) (concluding that separate counsel should be appointed at child's request in cases regarding termination of parental rights in addition to requiring that counsel be appointed when the State's or parent's interests conflict with the child's interests).

20. See, e.g., Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67 (1995); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 BOST. B.J. 6 (1991); Kevin M. Ryan, *Reforming Model Rule 1.6: A Brief Essay From the Crossroads of Ethics and Conscience*, 64 FORDHAM L. REV. 2065 (1996).

21. See *infra* Part II (discussing typical cases in which counsel is appointed to represent children).

22. See, e.g., *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (without addressing the role of counsel, holding that children must be represented in neglect proceedings); *In re Orlando F.*, 351 N.E.2d 711, 716-17 (N.Y. 1976) (without addressing the role of counsel, holding children must be represented in termination of parental rights proceedings).

## II. THE REMARKABLE ABSENCE OF MEANINGFUL GUIDANCE FROM LEGISLATURES AND COURTS

Despite widespread increase in the use of lawyers to represent children, courts have been surprisingly unreflective about their expectations of lawyers once such lawyers are appointed to represent children. For the most part, courts and legislatures have abdicated their responsibilities to the practicing bar and to litigants by failing to clearly identify permissible and impermissible actions by lawyers for children when performing their duties. A 1992 report from the Family Law Section to the ABA House of Delegates summarized this phenomenon as follows:

The duties and ethical responsibilities of lawyers performing the role of counsel or guardian *ad litem* for a child in state-initiated child protective cases, or parent-initiated custody or visitation litigation, have rarely been adequately described by any State laws, court rules, or bar association opinions. This has resulted in a great deal of role confusion for those who provide this difficult and important representation.<sup>23</sup>

### A. Child Protection Proceedings

Every state requires that some kind of adult represent children when their parents or guardians are respondents in local child protection proceedings.<sup>24</sup> However, both the title and the expected duties of this representative vary widely throughout the United States.<sup>25</sup> Moreover, even among different jurisdictions that use the same title for such a representative, the jurisdictions lack a common understanding of the representative's duties. Jean Koh Peters, who completed a national survey of representation for children in child protection proceedings, recently made the following description of the haphazard national

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23. Kenneth G. Raggio, Report to the House of Delegates, 110A A.B.A. SEC. FAM. L. 2, 5 (1992). The Report also added:

Many attorneys who are appointed to serve [as representatives for children] . . . are often confused about their responsibilities to either advocate for the expressed wishes of the child or for the best interests of the child as the attorney perceives it. . . . They often wonder whether or not to aggressively challenge the positions of other parties to the litigation. Finally, they are often confused about whether to defer to the judgments of social workers and other child welfare agency personnel and when to seek out other, independent expert opinions.

*Id.* at 4.

24. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 2-3(b), at 24-26 (1997).

25. Examples of these titles include: "counsel," "guardian *ad litem*," and "Court Appointed Special Advocate."



system: "If our survey revealed one thing, it was *chaos*. We joked in our office that the 'fifty-plus state' survey revealed fifty-six state systems for representing children in child-protective proceedings."<sup>26</sup>

In one sense, Congress federalized this system by enacting the Child Abuse Protection and Treatment Act of 1974 ("CAPTA"), which requires representation of a child's interests and rights in all child protection proceedings.<sup>27</sup> This federalization, however, is misleading because Congress leaves the determinations of the representative's functions entirely to the states.<sup>28</sup> Presently, virtually no two states have identical understandings of the role and purpose of the child's representative. According to Professor Peters,

even though forty-six states use the term guardian *ad litem* . . . [n]othing guarantees that a guardian *ad litem* in one state would play the same role as a guardian *ad litem* in the next state or even that two guardians *ad litem* in the same state but different counties would play the roles similarly. Frankly, there is not even a guarantee that the same guardian *ad litem* would represent two similarly situated children similarly!<sup>29</sup>

The same observation holds true with regard to all other terms acknowledging a child's representative.<sup>30</sup> Even under a precise term such as "counsel," the desired role of the lawyer representing a child encounters disagreement between members of the bar in the same jurisdiction, between judges in the same jurisdiction, or, perhaps most seriously, between the judge appointing the "counsel" and the appointed lawyer. As Professor Peters concludes, "in almost any state . . . one will encounter within the state a deep disagreement about the role of the child's lawyer."<sup>31</sup>

The most common instruction given to representatives of children in child protection proceedings is that they must "represent," or "protect" the child's "interests" or "best interests."<sup>32</sup> An instruction to lawyers

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26. PETERS, *supra* note 24, § 2-3(b), at 26.

27. See 45 C.F.R. § 1340.14 (1996). CAPTA requires all states, in child protection proceedings, to "insure the appointment of a guardian *ad litem* or other individual whom the State recognizes as fulfilling the same functions as a guardian *ad litem*, to represent and protect the rights and best interests of the child." *Id.* § 1340.14(g) (italics added).

28. See *id.*

29. PETERS, *supra* note 24, § 2-3(b), at 32 n.17.

30. See *supra* notes 24, 26-27.

31. PETERS, *supra* note 24, § 2-3(b), at 33.

32. See, e.g., HAW. REV. STAT. ANN. § 587-34 (Michie 1997) (requiring that a guardian *ad litem* "shall protect the best interests of the child . . ."); MINN. STAT. ANN. § 260.155(4) (West Supp. 1997) (providing that a guardian *ad litem* shall advocate and monitor the child's best interests); MONT. CODE ANN. § 41-3-303 (1997) (requiring guardians *ad litem* to represent the best interests of the child).

to act in accordance with the child's best interests does not provide counsel with a meaningful mandate or clearly defined standards of conduct. Such a vague instruction to counsel merely invites inconsistent behavior, and virtually ensures non-uniformity of professional conduct. As Hillary Rodham Clinton wrote, the "best interests standard . . . is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."<sup>33</sup>

### B. Custody and Visitation Proceedings

A comparable level of chaos exists in the matrimonial field.<sup>34</sup> Remarkably, legislatures have said little to nothing about either the reasons to provide children with legal representation in custody or visitation proceedings arising out of divorce, or the duties associated with such representation. Although several states have established criteria setting forth when legal appointments should be made,<sup>35</sup> only

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33. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973).

34. See *infra* part II.B.

35. At least five states mandate the appointment of counsel after meeting certain criteria. Florida, Minnesota, Missouri, South Dakota, and Tennessee require the appointment of a guardian *ad litem* or an attorney in custody and visitation proceedings involving allegations of abuse or neglect. See FLA. STAT. ANN. § 61.401 (West Supp. 1997) (requiring that the court appoint a guardian *ad litem* for the child in custody and visitation cases involving allegations of abuse or neglect verified and determined by the court to be well-founded); MINN. STAT. ANN. § 518.165(20) (West Supp. 1997) (requiring appointment of guardian *ad litem* in custody or visitation rights cases where court suspects child abuse or neglect); MO. ANN. STAT. § 452.423(1) (West 1997) (providing that the court shall appoint a guardian *ad litem* when child abuse or neglect is alleged); S.D. Codified Laws § 25-4-45.4 (Michie 1997) (providing that court may appoint counsel for a child in divorce or custody proceedings where child abuse or neglect is alleged); TENN. CT. R. ANN. OF JUV. PROC. R. 37 (requiring appointment of guardian *ad litem* where the parent or other guardian is absent, has conflicting interests, or where child abuse or neglect is alleged). Three other states do not set forth criteria mandating the appointment of counsel, but they do articulate circumstances requiring appointment of counsel. See OR. REV. STAT. ANN. § 107.425(3) (Supp. 1996) (requiring appointment of counsel if one or more of the children so request); VT. STAT. ANN. tit.15, § 594(b) (1997) (requiring appointment of counsel whenever a child is called as a witness in a custody, visitation, or child support proceeding); WIS. STAT. ANN. § 767.045 (1) (West 1997) (requiring counsel for children in all contested custody proceedings).

Some other states provide only limited 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 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). In contrast, Maryland prohibits the appointment of counsel over the objection of the parties, unless there are contested issues. See *Van Schaik v. Van Schaik*, 603

about a dozen jurisdictions provide any guidance to these representatives regarding their duties once assigned to a case.<sup>36</sup> Of this number, only very few jurisdictions specifically describe the tasks expected of the child's legal representative.<sup>37</sup> Instead, most jurisdictions that even bother to discuss the role of a child's representative, including New Mexico, Virginia, and Wisconsin, do little more than instruct the representative to "exercise his best professional judgment on what disposition would further the best interests of the child."<sup>38</sup>

Just as the legislatures have provided little guidance in defining the representative's role, courts have not attempted to resolve these existing inconsistencies. Generally, courts have not been called upon to define or clarify the roles of children's legal representatives, and have remained startlingly silent even on the rare occasions when asked to explain the reason for appointing a lawyer. The Supreme Court of Connecticut serves as a prominent example of such silence. In *Knock v. Knock*,<sup>39</sup> an appeal brought by a father and child in a custody case raised the claim that the trial judge committed reversible error by

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A.2d 908, 912 (Md. Ct. Spec. App. 1992).

36. These jurisdictions include Colorado, Florida, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, South Carolina, Virginia and Wisconsin. See COLO. REV. STAT. ANN. § 14-10-116 (West Supp. 1997); FLA. STAT. ANN. § 61.403 (West Supp. 1997); ME. REV. STAT. ANN. tit. 22, § 4005 (West 1964 & Supp. 1997); MASS. ANN. LAWS ch. 119, § 55 (Law. Co-op. 1997); MO. ANN. STAT. § 452.423 (West Supp. 1995); N.H. REV. STAT. ANN. § 464A:41 (1997); N.M. STAT. ANN. § 32A-1-7 (Michie Supp. 1997); S.C. CODE ANN. § 20-7-1570 (Law. Co-op. 1997); VA SUP. CT. R. 8:6, WIS. STAT. ANN. 767.045(4) (West Supp. 1997).

37. Colorado, for example, requires guardians *ad litem* to present all available evidence concerning the child's best interests. See *In re Marriage of Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988). Florida law 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. See FLA. STAT. ANN. § 61.403 (West Supp. 1997). Similarly, in Maine, the duties of guardians *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).

38. *Collins v. Tabet*, 806 P.2d 40, 50 (N.M. 1991) (quoting *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977)). See also VA. SUP. CT. R. 8:6 (instructing guardians *ad litem* to "vigorously represent the child, fully protecting the child's best interests and welfare," and 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"); WIS. STAT. ANN. § 767.045 (4) (West 1993) (providing that guardians shall act "independently," and shall "consider, but not be bound by, the wishes of the minor child or the positions of others as to the best interests").

39. 621 A.2d 267 (Conn. 1993).

admonishing the child's lawyer for being too active an advocate at trial.<sup>40</sup> As the supreme court described:

During the trial, counsel for the child examined witnesses, made evidentiary objections and otherwise participated in the court proceedings. On the fifth day of trial, as a result of an evidentiary objection by counsel for the minor child, a colloquy took place on the record between the court and counsel relating to the role of counsel for the minor child.

In the course of that exchange the court admonished the child's attorney for making evidentiary objections that the court viewed as favoring the [father's] position. Specifically, the court discouraged the child's attorney from raising objections and suggested that the child's attorney should wait for someone else to raise such objections. The court accused the counsel for the child of improperly "prejudging" the case. The court also admonished counsel for "making up her mind before hearing all the evidence" and suggested that she should properly remain neutral throughout the trial and, after hearing all the evidence, make a recommendation to the court at the end of the proceedings. Finally, the court indicated that counsel's actions would influence the court and diminish the weight given by the court to counsel's position.<sup>41</sup>

On appeal, the father and child argued that the undisguised threat that any further advocacy by counsel would result in the court giving "diminish[ed]" weight to counsel's position constituted impermissible judicial bias.<sup>42</sup> Although the Connecticut Supreme Court agreed that the trial court's remark was of "questionable propriety,"<sup>43</sup> it held that the father and child failed to demonstrate any prejudice resulting from the trial court's actions.<sup>44</sup>

The *Knock* Court acknowledged that the state legislature failed to inform lawyers and judges of their expectations of those assigned to represent children.<sup>45</sup> In an understatement, the court further "recognize[d] that representing a child creates practical problems for an attorney and that this important issue, at some point, needs to be

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40. See *id.* at 275. In a marital dissolution case, the trial court awarded custody of the minor child to the wife. See *id.* at 270. The father appealed, claiming that the trial court's award of custody to the wife was improper. See *id.* at 269.

41. *Id.* at 275.

42. *Id.* at 276.

43. *Id.*

44. See *id.*

45. See *id.* (stating that, "the legislature has not 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").

addressed.”<sup>46</sup> Nonetheless, the court refused to state what it expects from lawyers representing children, reasoning that “courts may not be used as a vehicle to obtain judicial opinions upon points of law if no actual and existing controversy exists.”<sup>47</sup>

Astonishingly, the Connecticut Supreme Court believes, on the one hand, that it is acceptable to set lawyers loose to represent children and, on the other, that it is unimportant to tell those lawyers what is expected of them. The Connecticut Supreme Court appears content knowing that lawyers throughout the state are “representing” children absent any guidance, and acting strictly in accordance with their own perception of their roles. Furthermore, it is almost beyond comprehension that a court would regard telling lawyers their duties in advance of an assignment to be an “advisory opinion.”<sup>48</sup>

In the absence of a clear mandate from courts or legislatures on the role of a child’s legal representative, appeals courts, trial courts, and attorneys, acting separately, have created a hodgepodge of methods and goals for representing children.<sup>49</sup> An unfortunate result of this hodgepodge is that the behavior of attorneys remains unpredictable with individual attorneys applying their own personal set of values to determine the course of action in each case.<sup>50</sup>

### III. A STRONG CONSENSUS ON REPRESENTING CHILDREN EMERGES

Into this abyss, the organized Bar has now stepped to resolve the vagaries of the role of a child’s representative. The Bar of children’s lawyers is comprised of many factions, ranging from strong proponents of child empowerment, to advocates who are much more reluctant to involve young children in shaping the outcome of a case

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46. *Id.*

47. *Id.* (citing *Harkins v. Driscoll*, 334 A.2d 901, 903 (1973)).

48. Subsequent to the decision, a Connecticut appellate court echoed the *Knock* court’s view that “representing a minor child creates practical problems for an attorney and that this important issue needs to be addressed.” See *Jaser v. Jaser*, 655 A.2d 790, 794 n.4 (Conn. App. Ct. 1995) (citing *Knock*, 621 A.2d at 276). In some cases, parties have complained that they have a right to know the purpose and scope of the child’s attorney’s from the beginning of the attorney’s entry into the case. See, e.g., *Leary v. Leary*, 627 A.2d 30, 36 (Md. Ct. Spec. App. 1993). In 1997, the Connecticut Supreme Court squandered another opportunity to define the role of the child’s representative in divorce proceedings. See *Schult v. Schult*, 699 A.2d 134, 140 (Conn. 1997) (holding that a child’s attorney may advocate a different position than that recommended by the guardian *ad litem*).

49. See *PETERS*, *supra* note 24, § 2-3 to 2-4, at 23-45 and accompanying text.

50. See *supra* note 23 and accompanying text.

concerning their interests.<sup>51</sup> Despite these philosophical differences, the Bar has reached a consensus on some of the most important principles establishing the parameters of representing children.<sup>52</sup> This consensus creates a relatively uniform role for lawyers assigned to represent children in virtually any type of legal proceeding. Indeed, perhaps the first principle of the Bar is that, to the greatest extent possible, lawyers should perform a uniform role when representing children.

To achieve uniformity, the Bar adopted principles aimed at reducing the exercise and range of discretion by lawyers when determining what outcome to advocate in order to fulfill their responsibilities as a child's lawyer.<sup>53</sup> The Bar employed three basic strategies to reduce lawyers' discretion, two of which focus on the duties of lawyers when representing children. The first strategy emphasizes that, whenever a child client is old or mature enough to express a preference on the outcome of the case, the child should control the choices of the lawyer by being empowered to set the objectives of the litigation.<sup>54</sup> The second strategy dictates that when lawyers are required to choose which position to advocate on their client's behalf, lawyers may only advocate for a particular result that clearly appears as the correct result.<sup>55</sup> When more than one result could reasonably be reached, lawyers are expected to present these multiple options to the court.<sup>56</sup>

In addition to these two strategies, a third strategy has gathered momentum in the past two years. This strategy, which has been

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51. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Roles of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655 (1996); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child*, 37 *HARV. INT'L L.J.* 449 (1996).

52. See *infra* Part IV.

53. There is, of course, a wide degree of discretion that lawyers representing any client, of whatever age, are always expected to exercise. It is not that kind of discretion the Bar has sought to constrain, but rather the discretion that is unique to representing children, particularly very young children.

54. See *infra* Part IV.A.

55. See *infra* Part IV.C. As used in this Article, the term "correct" means the result that is most in accord with the child's rights as expressed in the substantive law controlling the case.

56. Applying this consensus to Professors Bartholet and Howe in the hypothetical, see *supra*, Preamble, the lawyer assigned to represent Lesley would be obliged to conclude that more than one result reasonably could be reached and, therefore, the lawyer would be expected to present multiple options to the court. Accordingly, Professors Bartholet and Howe would both be expected to present all arguments in favor of transracial adoptions along with all arguments against it. This situation would place the judge in the best position to determine Lesley's best interests.

employed only where the appointment of lawyers for children has not yet become a well-established or routine practice, is to lessen the appointment of lawyers for children.<sup>57</sup> Fearing more the random power of lawyers for children to advocate for results the lawyers want than that children might go unrepresented, this strategy rejects the concept that lawyers for children are necessarily good, and requires that the purpose for the use of a lawyer be clearly stated before a lawyer is assigned to represent a child.

A. *Mitigating the Discretion of the Child's Lawyer to Choose Which Result to Seek*

The first principle of this new consensus clearly asserts that, to the greatest extent possible, legal representatives for children, regardless of the child's age, should undertake a true lawyering role that is distinct from either a specialized guardian-like role or a hybrid lawyer-guardian role.<sup>58</sup> As the Fordham conferees stated:

The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labeled, be it guardian *ad litem*, attorney *ad litem*, law guardian or other. The lawyer should not serve as the child's guardian *ad litem* or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.<sup>59</sup>

This principle is basic to developing a role for a child's court-appointed representative. It should also be regarded as directed both to appointing authorities, such as courts and legislatures, and to the practicing bar. Ultimately, however, its major impact will be on lawyers assigned to represent children. This consensus is elegant and clear: whenever possible, lawyers assigned to represent children (regardless of the child's age) should serve as traditional lawyers.

This consensus arose out of deep skepticism toward allowing lawyers to exercise independent judgment about what is best for their clients.<sup>60</sup> There are a number of reasons the Bar would choose to

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57. See *infra* Part IV.B.

58. The Fordham Conference reached a consensus that lawyers should be appointed to represent children in child protection, termination of parental rights, and foster care proceedings, as well as cases involving delinquency, juvenile status offenses, and mental health commitment. The attendees, however, did not agree whether lawyers for children should be appointed routinely in adoption, custody and visitation and other proceedings. *Recommendations of the Conference On Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1320-23 (1996) [hereinafter *Conference Recommendations*].

59. *Id.* at 1301.

60. In their recommendations, the Bar noted that, "[a]lthough other issues remain unresolved, the profession has reached a consensus that lawyers for children currently

diminish the discretion exercised by representatives for children. First, curtailing the lawyer's discretion to pursue the lawyer's desired result, as opposed to the child's legal rights and preferences, reduces the danger of interjecting the lawyer's personal opinions and values into the proceedings.<sup>61</sup> Second, only by eliminating this discretion is it possible to expect the same performance from all lawyers, regardless of who happens to perform the role in any given case.<sup>62</sup> Third, limiting discretion will operate to restrict the lawyer's role to that which lawyers are best trained to perform: trying to obtain an outcome someone else has instructed them to reach rather than deciding which outcome is best for the client. Finally, as will be demonstrated later in this Article,<sup>63</sup> mandating that attorneys act in accordance with the statute's intentions ensures that the purpose of the substantive rules is met.<sup>64</sup>

*B. Avoiding the Danger of Children's Lawyers Unduly Influencing the Outcome of a Case*

Many issues concerning children's rights are rife with controversy and disagreement. These disagreements often represent radically different visions of what is best for children. For example, many commentators believe that children's rights often are subjugated to the rights of their parents and that, as a result, children are frequently treated like property, rather than autonomous persons.<sup>65</sup> Other

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exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations." *Id.* at 1309.

61. The Bar noted that, "[r]eferences to the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyer's, and the lawyer's lay understanding of child development and children's needs should be considered highly suspect bases for decision-making on behalf of a client who lacks capacity." *Id.*

62. On this point, the Bar noted that decision-making on behalf of a child must be made in a "contextual, self-aware, deliberate, and principled manner" and that the process outlined in the recommendations is "intended to assist the child's lawyer in identifying the legal interest or interests to be pursued." *Id.*

63. See *infra* Parts V.A, B.

64. For these and still other reasons, Jean Koh Peters has concluded:

It is . . . necessary to abandon the guardian *ad litem* role for the following reason: Lawyers playing the role of guardian *ad litem* often have felt unconstrained by traditional lawyering duties. They have acted as witnesses, they have abrogated duties of confidentiality, they have disregarded or downplayed their client's desires, and they do not always include their client in decision making in the representation.

Jean Koh Peters, *The Roles and Content of the Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1523 (1996).

65. See, e.g., Barbara Bennett Woodhouse, *Out of the Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 *B.Y.U. J. PUB. L.* 321, 325-27



commentators protest compelling children in foster care to return to their parents' custody even after they have formed psychological bonds with their foster parents.<sup>66</sup> These debates form the foundation

(1994).

Parental rights are closely linked with an historic legacy of viewing the child as the family patriarch's private property, which like other economic rights, is secured from state expropriation, confiscation, or regulatory taking. The parental rights of control and custody, constitutionalized . . . in cases like *Meyer v. Nebraska* [262 U.S. 390 (1923)], and *Stanley v. Illinois* [405 U.S. 645 (1972)], confer a strange liberty that consists in the right to control not one's self or one's goods, but another human being . . . .

. . . . [T]he current discourse, in which children's mere "interests" are easily overwhelmed by parents' powerful "rights," entails less obvious but equally problematic choices about allocating power over children and about when action or inaction constitutes state "intervention" or "oppression." Perhaps children, as the least powerful members of both the family and the political community, are also the least dangerous of rights-bearers and the most in need of an affirmative rights rhetoric in order to be heard. By defining children's rights as flowing from their needs, we can affirm rather than undermine an ethic of care for others. By listening to children's voices and experiences as evidence of their needs, and by trying to come to terms with the children's reality, we can confront our own adult ambivalence and conflicts of interest regarding children's rights.

*Id.*; see also Katherine Hunt Federle, *Looking for Rights in all the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1550-60 (1994) (commenting on children's powerlessness).

Tying rights to children's needs and incapacities, therefore, disadvantages and disempowers children in the non-adjudicatory dispute resolution process. Because an interest theory cannot accommodate children's powerlessness, parents are free to treat their children as property and to use them as bargaining chips with which they may obtain financial or emotional concessions. . . . This property metaphor runs deep below our notions of family integrity and autonomy and is reflected in the reluctance of many mediators to interfere with parties' custody agreements, even when those resolutions suggest that children's interests have been compromised. The impoverishment of children's rights theories also explains why children have no independent representation in the bargaining process; without a rights theory that recognizes the value of claims made by children for themselves, children will not gain the respect and power that comes with being a rights holder.

*Id.* at 1562.

66. See, e.g., JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

Whether any adult becomes the psychological parent of a child is based on day-to-day interaction, companionship and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

. . . . But once the prior tie has been broken, the foster or other temporary placements can no longer be considered temporary. They may develop into or

of the law's development. Advocates who disagree with the current law should be encouraged to express their views. But one thing ought to be intolerable: children's lawyers should be prohibited from taking the law into their own hands and choosing the particular results to advocate for their clients based on the lawyer's own sense of what the law should be.<sup>67</sup>

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substantially begin to become psychological parent-child relationships, which in accord with the continuity guideline deserve recognition as a common-law adoption . . . .

*Id.* at 19, 39; *see also* George H. Russ, *Through the Eyes of a Child*, "Gregory K.": *A Child's Right to be Heard*, 27 FAM. L.Q. 365 (1993) (providing a personal account by the adoptive father of an eleven-year-old boy who petitioned a court in his own name to terminate the rights of his biological parents and to allow adoption by his foster parents).

When the psychological parent is someone other than the biological parent, the devastating effects of removing the child from that parent are no less tragic to the minor child. Yet, our courts and our social services systems routinely and mechanically remove children from long-term placements with persons they have come to believe and feel are their parents by considering only blood ties to identify their "family" and thus return them to their "rightful" parents. Children are literally "repossessed" by their biological parents in the same manner as though they were property, capable of ownership, without independent human rights of their own. It is time to reevaluate the entire panoply of assumptions for dealing with our children and develop a new "child-centered" perspective on parents' rights.

*Id.* at 388; *see also* Claudio DeBellis & Marta B. Soja, Note, *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 J. LEGAL COMMENT. 501 (1993).

It is undisputed that extremely close emotional bonds may develop between a foster parent and a foster child. These bonds usually form when a child has lived with a foster family continuously over a period of time, and where contact with the natural parents has been minimal or nonexistent. This recognition is predicated upon the principle that "every child requires continuity of care, an unbroken relationship with at least one adult who is and wants to be directly responsible for his daily needs." Notwithstanding the protection traditionally accorded to relationships between children and their natural parents, bonds between foster children and foster parents merit protection as well. Indeed, "rights which are normally secured over time by biological or adoptive parents may be lost by their failure to provide continuous care for the child and earned by those who do."

*Id.* at 528-29 (quoting JOSEPH GOLDSTEIN, ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 40, 10 (1979)).

67. This danger lies, of course, in the hypothetical case, *see supra*, Preamble, in which Professors Bartholet or Howe might have been selected to represent Lesley. Professor Bartholet may well be right that Lesley's best interests would be served by permitting the adoption. Unfortunately, Professor Howe might be right that Lesley's interests would be disserved by such a result. But whomever is right, our legal system is designed so that a judge will make that decision, not a randomly chosen member of the bar. What is deemed an adequate system for representing children will remain elusive until rules are developed ensuring that it will not make a difference whether, for example,

A recent public health issue illustrates the need to curtail the lawyer's freedom to choose the best result for a young client. Lately, observers have paid careful attention to the health problems associated with second-hand smoking. In 1993, an American Bar Association committee ("ABA committee") drafted a resolution supporting "the enactment of state and federal legislation to protect children from the health hazards of secondary smoke and to discourage children from smoking."<sup>68</sup> One of the ABA committee's proposals sought to "make parental smoking habits a factor to be considered in custody determinations."<sup>69</sup> The ABA committee concluded that "[i]t is fully justified for the state to interfere with the parental prerogatives of those who elevate their own smoking needs above the obvious and substantial health needs of their children."<sup>70</sup> In addition, the ABA committee recommended that states "mandate consideration of the smoking habits of competing potential adoptive families . . . in making placement decisions."<sup>71</sup>

Although lawyers and committees act properly by promoting their views, it should be unacceptable for an individual lawyer or committee-member to represent a child in a custody or adoption case in order to secure the child's rights in accordance with such views. Until the legislature or case law<sup>72</sup> establishes second-hand smoking as a factor for consideration in deciding custody or adoption cases, lawyers for children should be barred from recommending a particular result on a young child's behalf based on second-hand smoking factors. Any recommendation by court-assigned counsel against adoption by a smoking couple because the lawyer believes that the child's best interests would be served by securing non-smoking adoptive parents should similarly be impermissible.<sup>73</sup>

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Professor Bartholet or Professor Howe is appointed.

68. Comm. on the Rts. of Children, A.B.A. Sec. of Individual Rts. and Responsibilities, *Draft Resolution and Report*, 1993 A.B.A. SEC. INDIVIDUAL RTS. AND RESPONSIBILITIES I.

69. *Id.* at 2.

70. *Id.* at 14.

71. *Id.* at 17-18. The American Bar Association has not adopted these recommendations.

72. *See, e.g.*, *Smith v. Smith*, No. 03A01-9603-CV-00078, 1996 WL 591181 (Tenn. Ct. App. Oct. 11, 1996) (prohibiting father from smoking when in the presence of the children to avoid endangering their health).

73. This is not to say it would be impermissible for lawyers to introduce the subject to the judge so that the judge could take that factor into consideration. Thus, it would be permissible for a lawyer for a six-month-old child to bring to the court's attention scientific studies that demonstrate the harm and the risk of harm to children resulting from parental smoking. The New York Times reported a study in 1997 by researchers at the Department of Pediatrics, University of Wisconsin Medical School for example, that

Some readers will agree it is difficult to justify this degree of arbitrariness in the course of representing a young client, but will consider it an exaggeration to suggest that such conduct by lawyers constitutes taking the law into their own hands. These readers would insist that the lawyer is simply one voice among many involved, and that the final arbiter is, after all, the judge.

This objection is important and should be thoroughly examined. For a number of reasons which are not obvious, the child's lawyer can be a dispositive influence on the outcome in the vast majority of cases. For one thing, judges are the final arbiter of only a fraction of contested cases.<sup>74</sup> The overwhelmingly probable method of disposition of most custody disputes is a judicially ordered settlement. Even when judges formerly approve settlements, they commonly have little involvement in the process or outcome. In those cases that are settled that include the services of a child's lawyer, the child's lawyer often is a key player in shaping the outcome.<sup>75</sup>

Even when judges do act as the final arbiter, judges freely admit to listening very carefully to the child's representative, sometimes confusing the representative's voice with the child's, and other times regarding the voice as "neutral."<sup>76</sup> Experienced lawyers recognize as

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"[a]t least 6,200 children die each year in the United States because of their parents' smoking, killed by such things as lung infections and burns." *Parents Warned on Smoking*, N.Y. TIMES, July 15, 1997, at C2 (citing C. Andrew Aligne, MD & Jeffrey J. Stoddard, MD, *Tobacco and Children: An Economic Evaluation of the Medical Effects of Parental Smoking*, 1997 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 643, 651 tbl. 2).

There is a sharp distinction, however, between providing a judge with facts that might be relevant to his determination of the case's outcome and advocating on behalf of the child for a particular outcome based on those facts. The former acknowledges and retains the judge as law enforcer, while the latter elevates the lawyer to the role of private lawmaker.

74. See *infra* note 178, and accompanying text.

75. See Kim Landsman & Martha Minow, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1173 (1978).

The possibility of talking to all parties directly gives the child's attorney unique advantages in obtaining information about the parents and the child, since this information would rarely, if ever, be available to a parent's attorney. As an investigator and as a representative of the person whose interests are, by law, to prevail, the child's attorney is perceived by the parents as a powerful, occasionally threatening, figure. Minimally, the attorney is recognized as someone having leverage with the judge; some parents and their lawyers attempted to cajole, lobby, or educate the child's attorney as though arguing in court.

*Id.*

76. See, e.g., *In re Ray A.M.*, 339 N.E.2d 135, 137 (N.Y. 1975) (stating, "[i]t is significant too that the Law Guardian for the child, a lawyer on the staff of the Legal Aid Society, has submitted a useful and thoughtful brief and argument, urging that the Order

“a practical reality in many cases,” that “judges will simply defer to the child’s attorney’s position.”<sup>77</sup> This reality does not mean that the view advocated by the child’s lawyer always controls.<sup>78</sup> It does mean, however, that the child’s lawyer’s view is quite important and that it can be devastating to a party’s hopes for success if the child’s lawyer proves to be a foe.

Allowing children’s lawyers to make law as they see fit on a case-by-case basis sets into motion a version of private lawmaking by randomly chosen lawyers.<sup>79</sup> Little is gained and much is lost when

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of the Appellate Division be sustained. Since the child obviously cannot speak for herself, this highly competent neutral submission is reassuring”); *In re Adoption of D.M.H.*, 682 A.2d 315, 322 (Pa. Super. Ct. 1996) (stating “[i]t is evident that the trial court incorporated the child’s advocate’s opinion into its decision”), *appeal denied*, 690 A.2d 237 (Pa. 1997).

77. Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 J. AM. ACAD. MATRIMONIAL LAW. 57, 92 (1995) (noting that it is a “dereliction of the judge’s duties” to simply defer to the child’s advocate).

My own experiences have coincided with these practical realities as well. I have been involved, on a regular basis, in cases where young children are represented by counsel and the one constant that exists through those cases is the crucial need to win the child’s attorney to one’s side in order to maximize the chances for success.

78. Reaction to this reality has been varied. As Landsman and Minow found,

[i]n practice, attorneys for the child perceived that they could wield a powerful influence in court, but admitted that they did not control the custody determination. The lawyers almost uniformly expressed the view that in cases resulting in a contested hearing the judge relied heavily on their investigations and recommendations. The extent of the judge’s dependence on them was a source of pride to some attorneys; others were annoyed and troubled by the sense that some judges shifted the responsibility for the ultimate decision to the child’s lawyer.

Landsman & Minow, *supra* note 75, at 1184 (referencing a survey of several Connecticut child custody attorneys).

79. Randomness in results generally is something to be avoided, not cultivated, in any rational system of law. But this particular brand of randomness is the product of lawyers’ varying personal notions of right and wrong which are ultimately based on their own values and prejudices. See ROBERT H. MNOOKIN, *IN THE BEST INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 50-51 (Robert H. Mnookin ed. 1985); Martha L. Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1889 (1987) (noting that “[t]he adult who offers the child’s view, unmediated, may advance an irrational or misguided position; the adult who supplies a preference other than the child’s has no obvious tether and lands in the thicket of general uncertainty over what is good for the child”). Furthermore, this unfettered discretion is generally not reviewable.

Returning once again to the hypothetical adoption case, laid out in the Preamble of this Article, it is useful to observe that only those who prefer a particular outcome in the adoption case are likely to care which lawyer is appointed to represent Lesley. In contrast, those who do not prefer any particular outcome, but only want to ensure that the judge is placed in the best position to decide the case in accordance with the law and the child’s best interests, will not prefer the appointment of one lawyer over the other.

lawyers for children are allowed to become private lawmakers. Among other implications, when lawyers become private lawmakers, it becomes impossible to distinguish between well-intentioned changes that advance the law and deliberate efforts to vitiate enlightened law. Inevitably, these distinctions are futile because they are in the eye of the beholder.

#### IV. DIFFERENT METHODS FOR MITIGATING THE INFLUENCE OF THE VIEWS OF A CHILD'S ATTORNEY

##### A. *Empowering Young Children*

The Fordham consensus' preferred method of constraining a child's lawyer's discretion generally requires that lawyers take their instructions from their clients. According to the organized Bar, in

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Nevertheless, even those preferring a particular outcome—that is, those who either would or would not want the adoption to go forward—should recognize that their long-term interests would be ill-served by an attorney-assignment system in which the child's lawyer is allowed to advocate for a particular preferred result. Under such a system, those favoring the adoption would be unsatisfied if Howe were appointed and submitted a brief in opposition to the adoption. Conversely, opponents of the adoption would regard Bartholet's appointment as a similar misuse of the representation of children.

Those without an opinion on which lawyer should be appointed would likely expect both lawyers to perform uniformly. Indeed, that is the precise reason they do not care. In the long run, however, those who do care about the outcome should prefer that both lawyers perform reasonably identically and not secretly prefer one to the other. Statistically, their chances of securing the services of an attorney who wants the same result as they do is only as high as the base rate in the population of the attorneys in the assignment pool. In other words, their chances of benefiting from the assignment of a particular person is directly a function of the extent to which their substantive preferences are already embraced by other attorneys. But these advocates must come to appreciate that when an attorney is appointed whom they would not prefer, that attorney will be empowered to make choices antithetical to what the advocates really want. Paradoxically, the only advocates who will benefit from this scheme are those advocates who have already lost the substantive argument underlying the issues involved, or who do not have realistic hopes of winning the argument. These advocates, in short, would want an attorney-assignment mechanism that maximizes the chance to undermine law—even to subvert the substantive law—precisely because only by subversion can they hope to achieve the results they covet. All others—those who have already won the substantive debate, as well as those who have no interest in the first place in impacting substantive law through the device of providing lawyers for children—should prefer the establishment of rules and procedures to minimize the capacity of an attorney assigned to represent a child to influence the outcome based on the values, preferences or beliefs of the attorney.

Whatever else may be said on the subject of representing children, certainly all advocates must agree that personality, opinion, values, mores, and biases should play as limited a role as possible in carrying out the responsibilities of representing children in legal proceedings. To be more precise, the objective must be to develop a system in which such influences play a negligible role, like cases are decided alike, and the best interests of children are served as often as achievable.

child protection proceedings, “[t]he lawyer for a child who is not impaired (i.e., who has the capacity to direct the representation) must allow the child to set the goals of the representation as would an adult client.”<sup>80</sup> This is extraordinarily important because, aside from the question of deciding which children have the “capacity to direct the representation,”<sup>81</sup> the organized Bar now insists that an unimpaired child is the principal in charge of the litigation, and the lawyer is the principal’s agent.<sup>82</sup>

The American Bar Association also endorses this view under its recently adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“ABA Standards”).<sup>83</sup> These ABA Standards apply in child protection proceedings, termination of parental rights proceedings, and other custody disputes based on allegations of abuse or neglect.<sup>84</sup> Whenever possible, the ABA Standards insist that “the child’s attorney must advocate the child’s articulated position.”<sup>85</sup> Like the Fordham consensus, the ABA Standards prefer that lawyers regard their children clients as sufficiently mature to set the case’s objectives, and also recommend that lawyers err on the side of overempowering their young clients.<sup>86</sup>

Under the ABA Standards, once the lawyer “ensure[s] that the decision the child ultimately makes reflects his or her actual position,” the lawyer has the duty to attempt to achieve the outcome the client desires.<sup>87</sup> In particular, the standards instruct that “[t]he child’s

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80. See *Conference Recommendations*, *supra* note 58, at 1301.

81. See text accompanying *infra* note 124 (describing ages eleven and under as the mark of impairedness under the AAML Standards).

82. See *supra* text accompanying notes 52-56 (endorsing the child’s control in setting the objectives of the litigation).

83. See *Standards of Practice*, *supra* note 9. The Standards were approved by the Council of the Family Law Section in August, 1995. See *Standards of Practice*, *supra* note 9, at 375.

84. See *Standards of Practice*, *supra* note 9, at 375 (stating that the standards are only meant to apply when a lawyer is appointed for a child in any legal action based on (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based upon allegations of abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights). The ABA Standards, therefore, do not purport to include custody disputes arising from divorce proceedings.

85. *Standards of Practice*, *supra* note 9, cmt. A-1, at 376 (providing that “[t]o ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position”).

86. See *supra* notes 80-82 and accompanying text (discussing the need for representatives to empower their child clients).

87. *Standards of Practice*, *supra* note 9, cmt. A-1, at 376 (providing that a “child’s attorney” owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as due an adult client).

attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation."<sup>88</sup> This position is in accord with many children's advocates' position on the appropriate role of the child advocate. For example, Frank Cervone and Linda Mauro recently wrote:

The ethic of self-determination remains the touchstone of most forms of lawyer-client relationships; for lawyers, the client's wishes govern virtually all choices and decisions, even that of the lawyer's role. This principle was a fundamental tenet of the Fordham Conference and is part of the proposed American Bar Association's *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* . . . .<sup>89</sup>

The virtue of such a precise and uniform standard of conduct lies in its clarity. In every case, all lawyers must allow their client to set the goals of the representation, provided that the client is "not impaired." Pursuant to the ABA Standards, all unimpaired children are empowered with the same fundamental rights as adults for the purpose of being in charge of the attorney-client relationship.

It is important to underscore that this uniformity is achieved by instructing lawyers to err on the side of empowering children. The ABA Standards explicitly direct lawyers to advocate the position articulated by the client "[i]n all but the exceptional case, such as with a preverbal child[.]"<sup>90</sup> The drafters of the ABA Standards do not assign a minimum age for empowering children. To the contrary, the ABA Standards

do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally 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.<sup>91</sup>

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88. *Id.* Standard B-4, at 380. The Comment to Standard B-4 emphasizes the familiar distinction ceding to lawyers the authority to make procedural decisions but preserving to the client all substantive decisions. Thus, the Standards "do not require the lawyer to consult with the child on [procedural] matters which would not require consultation with an adult client." *Id.* at 381. But the standards stress that "the child is entitled to determine the overall objectives to be pursued." *Id.*

89. Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures, and Professions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975, 1985 (1996).

90. *Standards of Practice*, *supra* note 9, cmt. A-1, at 376.

91. *Id.* Cmt. B-3, at 379-80.



Many children's advocates share this view. According to Jean Koh Peters, for example, a child who can express opinions and be "effectively counseled" must be empowered to control the lawyer's advocacy:

The only time the child's lawyer may advocate for a position other than that stated by the client, is after the lawyer, based upon independent evidence arising outside of the representation, has determined that the client's development or circumstances preclude the client from either expressing a position or being effectively counseled as to the viability of the position. Only then may the lawyer seek appointment of a guardian or take other protective action pursuant to Rule 1.14(b) or make decisions on behalf of the client pursuant to EC 7.12.<sup>92</sup>

The ABA Standards do not envision that lawyers will automatically yield to the child's initially articulated position. Instead, they expect lawyers to advise the child on all of the available options and the advantages and disadvantages of each option.<sup>93</sup> Like the position of many commentators, however, the standards also exhort lawyers to avoid attempting to overly influence children in a particular direction favored by the lawyer.<sup>94</sup> Professor Peters, for example, warns the lawyer to control the temptation "to impose her own belief upon the client."<sup>95</sup> In addition, she adds that although

[i]t may be easier . . . for a lawyer to seek to manipulate her client into accepting the lawyer's position instead of disciplining herself to advocate zealously for the client's position . . . [b]ecause children are even more likely than adults to be cowed by a lawyer's strong recommendation, the lawyer must approach a child client's choice with particular restraint.<sup>96</sup>

Martha Matthews issued a similar warning to lawyers representing children when she stated, "[t]he child's lawyer has an ethical duty to avoid using her superior skills and social position to silence the child's voice, or coerce the child into passive compliance with the lawyer's

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92. Peters, *supra* note 64, at 1565. Rule 1.14(b) of the Model Rules of Professional Conduct provides, "A lawyer may seek the appointment of a guardian or take other protective action . . . only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983). Ethical Consideration 7.12 states, "[i]f a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1980).

93. *See Standards of Practice, supra* note 9, cmt. B-4, at 380-81.

94. *See id.*

95. Peters, *supra* note 64, at 1521.

96. *Id.* (footnote omitted).

views.”<sup>97</sup>

### B. *Curtailling the Use of Lawyers for Children*

In 1995, the American Academy of Matrimonial Lawyers (“AAML”) adopted standards for representing children in custody and visitation proceedings.<sup>98</sup> Two years later, in 1997, a committee of the American Bar Association’s Family Law Section and the National Council of Juvenile and Family Court Judges promulgated Principles for Appointment of Representatives for Children in Custody and Visitation Proceedings (“Principles”).<sup>99</sup> The AAML Standards and these Principles<sup>100</sup> are remarkably in accord with one another. To a somewhat lesser degree, these documents also echo the consensus reached at the Fordham Conference.<sup>101</sup> Like the Fordham consensus, both documents, above all else, seek to create and implement uniformity in the roles of all counsel for children.<sup>102</sup>

Of the recent efforts to define the role of counsel for children, only the AAML Standards and the Principles directly address the question whether lawyers ought to be appointed for children in custody and visitation proceedings. Both the AAML Standards and the Principles were crafted from the view that the appointment of lawyers to represent children is not invariably good. These documents take the position that, at least in divorce and custody proceedings, appointment of counsel should not be made unless a special reason exists. As the Principles state,

[t]he failure to appoint a representative for a child . . . should not be regarded as denying a child some kind of procedural or substantive right. Instead, these Principles view the appointment of a representative for a child as a tool that should be available to courts—but not one that must be invariably used—to assist courts to decide a contested case in accordance with the child’s best interests . . . .<sup>103</sup>

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97. Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases*, 64 *FORDHAM L. REV.* 1435, 1458 (1996).

98. See AAML Standards, *supra* note 8.

99. These Principles have not yet been adopted by the American Bar Association. See Principles, *supra* note 10.

100. The AAML Standards and Principles are collectively referred to as “documents.”

101. See *Ethical Issues in the Legal Representation of Children*, *supra* note 12, at 1281.

102. See *supra* notes 80-101; *infra* notes 103-149.

103. Principles, *supra* note 10, at 1-2.

While both the AAML Standards and the Principles focus heavily on the issue of whether and when courts should appoint lawyers,<sup>104</sup> the Fordham Conference focused exclusively on those areas of the law that already require the presence of lawyers for children. The Fordham conferees reached a consensus partly because they avoided an extended discussion of whether and when lawyers ought to represent children. For better or worse, case law and statutory law already insist that children be represented in all child protection and delinquency cases.<sup>105</sup> By concentrating on the areas of law that already require the appointment of lawyers for children, the Fordham consensus developed parameters for what lawyers should do when representing children in such cases. However, this consensus was maintained only because the conference participants refused to answer the question whether lawyers ought to represent children in situations where neither case law nor statutes currently require representation.<sup>106</sup>

In contrast, the AAML Standards and the Principles focused on an area of law where lawyers are not required by constitutional law, common law, or statute to represent children.<sup>107</sup> Despite the absence of a mandate to use lawyers for children in custody and visitation cases, courts' use of such lawyers in these proceedings has proliferated.<sup>108</sup> Both the AAML Standards and the Principles conclude that there is not an obvious need for lawyers to represent children in custody and visitation cases and, therefore, there should be clearly articulated reasons in each case before the appointment of a lawyer.<sup>109</sup>

The Principles prohibit an appointment except when one of three conditions exist: "[1] the failure to make . . . an appointment would impede the judge's capacity to decide the case properly,"<sup>110</sup> "[2] the failure to make . . . an appointment would risk harm to the child,"<sup>111</sup> or "[3] the child's choice should become a more prominent part of the

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104. See AAML Standards, *supra* note 8; Principles, *supra* note 10.

105. See *In re Gault*, 387 U.S. 1, 1 (1967); see *supra* note 24 and accompanying text.

106. See generally *Conference Recommendations*, *supra* note 58.

107. See, e.g., Elrod, *supra* note 7, at 56 (arguing in favor of mandatory appointments, but recognizing the current lack of any requirement of counsel); David Peterson, *Judicial Discretion is Insufficient: Minors' Due Process Right to Participate With Counsel When Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 GOLDEN GATE U.L. REV. 513, 527 (1995).

108. See *supra* note 107 and accompanying text.

109. See AAML Standards, *supra* note 8, Standard 1.1, at 1; Principles, *supra* note 10, cmt. 1, at 3 (providing that although judges always retain discretion to appoint a representative for a child, "these Principles contemplate that judges will exercise that discretion sparingly").

110. Principles, *supra* note 10, Principle 2.A, at 3 (capitalization omitted).

111. *Id.* Principle 2.B, at 4 (capitalization omitted).

case.”<sup>112</sup> Even when a court is authorized to appoint counsel for a child, the Principles recommend that the court “consider appointing persons who are not lawyers . . . whenever the tasks to be performed do not require legal advocacy.”<sup>113</sup>

Somewhat less restrictive in its limitation on the circumstances in which counsel may be appointed, the AAML Standards simply state that the “[a]ppointment of counsel or guardians should be reserved for those cases in which . . . the court finds after a hearing that appointment is necessary in light of the particular circumstances of the case.”<sup>114</sup> Unlike the Principles, the AAML Standards spend more time discussing the actions lawyers for children must undertake or may not undertake once they are appointed.<sup>115</sup>

In stark contrast with the Fordham consensus and the ABA Standards, both the AAML Standards and the Principles reconceive the purpose behind court-appointed representation of children. Under the AAML Standards and the Principles, the type of representative to be appointed and the representative’s expected duties vary depending on the purpose of the appointment. The Principles are more explicit in this reconceptualization. The Principles regard the court-appointed representative as “a tool that should be available to courts—but not one that must be invariably used—to assist courts to decide a contested case . . . .”<sup>116</sup>

Both the AAML Standards and the Principles require that a lawyer representing an “unimpaired” child act as a traditional lawyer who advocates the objectives the client desires.<sup>117</sup> Drawing upon the Model Rules of Professional Conduct, the AAML Standards distinguish between “unimpaired” and “impaired” clients.<sup>118</sup> When dealing with unimpaired clients, a lawyer must allow the child to set the objectives of the case, and attempt to secure the outcome desired by the client.<sup>119</sup>

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112. *Id.* Principle 2.C, at 5 (capitalization omitted).

113. *Id.* Principle 6, at 7.

114. AAML Standards, *supra* note 8, Standard 1.1, at 1.

115. *See id.* Standards 2.6 through 2.13, at 2-4.

116. Principles, *supra* note 10, cmt. 1, at 2-3. The Principles make this point even more clear in Principle 4: “The appointed representative for a child is accountable to the judge for performance of the assigned functions.” *Id.* at 6.

117. *See* Principles, *supra* note 10, cmt. to Principle 2.3, at 6 (noting that “[t]hese Principles recognize that, pursuant to Rule 1.2(a) of the Model Rules of Professional Conduct, lawyers for most clients are to abide by the client’s decisions concerning the objectives of representation”).

118. AAML Standards, *supra* note 8, Standard 2.1, at 2.

119. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1992). This rule provides:

A lawyer shall abide by a client’s decisions concerning the objectives of

The AAML Standards set a higher threshold than both the Principles and the ABA Standards for designating a child as “unimpaired.” As mentioned previously, the ABA Standards strongly prefer that lawyers err on the side of overempowering their child clients rather than advocate for the outcome preferred by the lawyer.<sup>120</sup> The AAML, in contrast, was reluctant to make it too easy or too common to obligate a lawyer to represent a child in a contested custody or visitation proceeding in order to secure the outcome preferred by the child.

Recognizing the significance of empowering children to set the objectives for their lawyers, including the increased probability that forceful advocates will secure the outcome desired by their children clients,<sup>121</sup> the AAML Standards utilize two devices for decreasing the use of such advocates. First, the standards establish a presumption that only children above a certain age are “unimpaired,” thereby liberating the lawyer in other circumstances from obligations to secure the client’s desired objectives.<sup>122</sup> Second, the Standards set a relatively high age for presuming the child is “unimpaired.”<sup>123</sup> For this purpose, the AAML Standards consider children ages twelve and above presumptively unimpaired.<sup>124</sup> Like other recent efforts to define the role of a child’s lawyer, the AAML Standards permit lawyers to treat children below the age of twelve as “unimpaired,” and fail to establish a minimum age limit for the purpose of determining impairment.<sup>125</sup> Nonetheless, the Fordham consensus and the ABA Standards favor empowering children younger than age twelve. The AAML, however, is unwilling to encourage this empowerment.

The symmetry of the AAML Standards and the Principles is striking. Both contemplate and endorse the rule that lawyers for unimpaired children must seek their clients’ desired objectives. Further, neither document requires the appointment of lawyers to

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representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

*Id.*

120. See *supra* note 90 and accompanying text.

121. The norm of the legal profession is that lawyers are to “abide by a client’s decisions concerning the objectives of representation . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1992).

122. See AAML Standards, *supra* note 8, Standard and cmt. 2.2, at 17-23.

123. See *id.*

124. See *id.* at 19-21.

125. See *id.*

represent unimpaired children, and both allow unimpaired children to go unrepresented.<sup>126</sup> Both the AAML Standards and the Principles seek to constrain the capacity of the child's representative to do what he or she thinks is best for the child by (1) requiring that courts give specific instructions to the representative at the time of the assignment and (2) clarifying the tasks and duties of representatives when their client is not "unimpaired."<sup>127</sup> Of all recent efforts, the Principles do the most to reconceptualize the role of the court appointed representative for the child. The Principles reconceive this representative as the judge's aide, who performs a task needed by the judge that, for whatever reason, the parties had not performed to the judge's satisfaction.<sup>128</sup>

### C. Representing Preverbal and Very Young Children

If adolescents represent the vast majority of children in child protection proceedings or custody and visitation proceedings then the information provided thus far by this Article would define the role of counsel in the majority of cases. Alas, most of the children in these proceedings are considerably younger.<sup>129</sup> For this reason, much remains to be discussed. In particular, it is essential to clarify what lawyers should do on behalf of children who are too young or

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126. See AAML Standards, *supra* note 8; Principles, *supra* note 10.

127. See Principles, *supra* note 10, cmt. 3, at 6 (noting that "[t]he wise course is to articulate precisely at the outset of the appointment the reason the appointment is being made and the duties the judge will expect the representative to perform").

128. See *id.* at 1.

129. This is a difficult proposition to prove. From the author's research, there appears to be no national data on the age of children in child protective proceedings. There is no question that many children in these proceedings are very young. The difficult task is obtaining an accurate picture of the numbers.

To accomplish this, I contacted two court systems known to have complete computer tracking capabilities and obtained figures showing the age of children at the time child protective proceedings involving them were filed. In the first jurisdiction (Hamilton County, Ohio), court officials reported that in 1994, 15.1% were less than one year old, 29.2% were less than three years old, 40.0% were less than five years old, 51.4% were less than seven years old, and 65.1% were less than ten years old. See Letter from Lisa H. Portune, Supervisor, Abuse, Neglect and Dependency Department of Court Services, Juvenile Court, Hamilton County, Ohio 2 (Oct. 2, 1996) (on file with the author). In 1995, 14.3% were less than one year old, 27.5% were less than three years old, 41.3% were less than five years old, 54.0% were less than seven years old, and 69.3% were less than ten years old. See *id.* In the second jurisdiction (Vermont), court officials reported that in fiscal year 1995-96, 50.1% were eight years old or younger. See Letter from Lee Suskin, Court Administrator, Supreme Court of Vermont 2 (Jan. 22, 1997) (on file with the author).

In Chicago, 36% of children in child protection cases are under two years old. Interview with Patrick Murphy, Public Guardian of Cook County, Chicago, Illinois in Chicago, IL (April 11, 1997).

immature to instruct their lawyer to pursue a specific outcome. Unquestionably, determining whether, and, if so, what to advocate on a child's behalf, constitutes the most perplexing feature of representing children who are too young to be empowered to direct their representatives. Even the ABA Standards recognize that circumstances will exist when children are too young to articulate a position or to be empowered to instruct the lawyer to seek a specific outcome.<sup>130</sup> The organized Bar has spoken on the "whether" component, and authorizes lawyers, at least in certain instances, to aggressively attempt to ensure that a court reach a particular result.

### 1. Advocating the Child's Legal Interests

The "what" component of the representation is more complicated. Although both the Fordham consensus position and the ABA Standards continue to regard the lawyer for a preverbal child as the child's "advocate," both sharply constrain the choices of advocacy available to the child's representative. For very young and preverbal children, the ABA Standards instruct the lawyer to advocate for a result based on one of several factors. The lawyer is authorized to advocate for the child's "legal interests,"<sup>131</sup> which are "based on objective criteria as set forth in the law that are related to the purposes

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130. Though the ABA Standards charge the lawyer as the person to determine whether the client should be regarded as being "under a disability," they are completely silent on advising lawyers how to distinguish between children who are under a disability and those who are not. *See Standards of Practice, supra* note 9, Standard B-3, at 379.

Many cannot help but regard the ABA Standards as extreme. For example, even when a lawyer regards a client as being under a disability, the ABA Standards prefer that the expressed wishes of the client bind the choice of the attorney. *See id.* Standard B-4, at 380. The Standards even prefer lawyers of children too young to express a preference to "make a good faith effort to determine the child's wishes and advocate accordingly." *Id.* Standard B-4(1), at 381. They then take this notion still further. Even when children are too young to be empowered to set the objectives of the case, the ABA Standards make clear that the child's preferences must control on such matters as whether the child wants the lawyer to take a position or remain silent with respect to any or all particular issues. *See id.* Standard B-4(2) cmt., at 381. When the child has a view on this, "[t]he position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference." *Id.* Similarly, whether or not the child testifies or gives any evidence is for the child to decide, not the attorney. *See id.* Standard D-6, at 390.

The organized Bar recognizes that,

the lawyer's responsibilities with respect to the child whom he represents will vary depending on whether the child has capacity to direct the representation. If the child is preverbal or otherwise cannot direct the representation, the lawyer must decide what position or range of positions to present to the court on the child's behalf.

Green & Dohm, *supra* note 13, at 1295.

131. *See Standards of Practice, supra* note 9, Standard B-5 cmt., at 383-84.

of the proceedings.”<sup>132</sup> The Fordham conferees use the identical concept and require lawyers to “narrow the area of inquiry by determining the *legal* interests of the child.”<sup>133</sup> More particularly, in child protection cases, the ABA instructs lawyers to follow the objective criteria established by law that define the child’s legal interests. These criteria should “address [1] the child’s specific needs and preferences, [2] the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and [3] the use of the least restrictive or detrimental alternatives available.”<sup>134</sup>

## 2. Proposing Multiple Options or Not Advocating Any Result

It is not sufficient merely to identify the client’s legal interest. Before advocating for an outcome, it is also necessary that the lawyer first conclude that there is only one clearly correct result to achieve. Specifically, the organized Bar expects lawyers to identify the “definitively preferable option” for their child clients.<sup>135</sup> To minimize the danger of disparate advocacy stemming largely from the assigned attorney’s values,<sup>136</sup> the Fordham consensus position requires that lawyers first be certain that the position they want to advocate is definitively preferred. At the same time, however, the Bar recognizes that, in many cases, “the lawyer may be left with more than one option.”<sup>137</sup> In the many situations when a lawyer is not certain, the Fordham consensus directs that “[t]he lawyer then should ensure that evidence is presented on the remaining options to the court, and in opposition to all options that were actually available[,] but that have been eliminated from the child’s legal interest . . . .”<sup>138</sup>

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132. *Id.* Standard B-5, at 383.

133. Green & Dohrn, *supra* note 13, at 1310. A “legal interest” is defined as “any interest that the legal proceeding has authority to address.” *Id.*

134. *Id.*

135. *Conference Recommendations, supra* note 58, at 1311.

136. As Robert Mnookin warns, when lawyers are liberated in this way there can be no “assurance that the advocate is responsive to the children’s interests, and is not simply pressing for the advocate’s own vision of those interests, unconstrained by clients . . . .” MNOOKIN, *supra* note 79, at 43. See also David L. Chambers & Michael S. Wald, *Smith v. Offer, in MNOOKIN, supra* note 79, at 69 (discussing litigation in which “a number of lawyers who appeared in [a case] each claiming to speak for the interests of the children . . . were pitted against each other”).

137. Robert Schwartz, Group Leader, *Report of the Working Group on Determining Best Interests of the Child*, 64 FORDHAM L. REV. 1347, 1350 (1996) [hereinafter Working Group] (stating that even after a methodical winnowing of the child’s legal options, the lawyer may not be able to determine one single option to be the best).

138. *Conference Recommendations, supra* note 58, at 1311.

At the end of this sifting, spiral-like search for best interest, the lawyer may



The AAML Standards attempt to avoid disparity of lawyer advocacy by prohibiting lawyers from advocating any result when the client is too young to set the objectives of the case. Of all the guidelines recently promulgated, the AAML is the most restrictive regarding what lawyers may do for children who are too young to set the case objectives. While the Fordham consensus, the ABA Standards, and the Principles all allow lawyers in limited circumstances to advocate for a particular result, even when representing a child too young to set the objectives for the case, the AAML flatly prohibits the lawyer from advocating any outcome in such circumstances.<sup>139</sup> This restriction is so broad that it prohibits all representatives of children—whether they are called lawyers, law guardians or guardians *ad litem*—from making any recommendation about the outcome or from advocating any particular result to the court.<sup>140</sup>

The AAML Standards prohibit attorneys for impaired clients from advocating an outcome even when the Model Rules of Professional Conduct (“Professional Rules”) permit a lawyer to recommend a particular result.<sup>141</sup> The AAML understood it was limiting the lawyer’s role to a greater degree than current law and rules require. The AAML Standards do not run afoul of the Professional Rules because the Professional Rules permit, but do not require, attorneys representing impaired clients acting as de facto guardians to recommend an outcome in the case.<sup>142</sup> The AAML concluded that

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be left with more than one option. The Working Group felt that it would be ultra vires for the lawyer to choose one of those legitimate options to present to the decision maker. Indeed, in order for this process itself to be legitimate, the lawyer should not become the decision maker, but must recognize that for the impaired client, presenting more than one option to the decision maker offers an ethically permissible result. The lawyer should also explain why she excluded other apparent options, and advocate against those options.

Working Group, *supra* note 137, at 1350.

139. See AAML Standards, *supra* note 8, Standard 2.7, at 3.

140. *Id.* Standard 2.7 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. See *id.* Similarly, Standard 3.2 prohibits a guardian *ad litem* from recommending a particular result. See *id.* Standard 3.2, at 4.

141. See AAML Standards, *supra* note 8, Standard 2.7, at 27; *infra* note 142.

142. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt., at 45 (1983). Rule 1.14 directs:

(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 reasonably believes that

representatives for young children should attempt to ensure that the adversary process results in the "correct" outcome by ascertaining all relevant facts and placing them before the judge, thereby enabling the judge to decide the case based on the child's best interests.<sup>143</sup> For this reason, the AAML Standards instruct lawyers to "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."<sup>144</sup>

Because the AAML Standards flatly prohibit advocacy in the representation of impaired children while the organized Bar permits such advocacy,<sup>145</sup> one might imagine that these rules contain significant discrepancies. Certainly, when the rules result in a lawyer advocating a particular outcome in one case and not doing so in another, the rules could not be more disparate. Two aspects of this difference, however, require further elaboration. First, it will greatly matter how often lawyers conclude that a particular outcome is

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the client cannot adequately act in the client's own interest.

*Id.*

Instructively, nowhere do the Professional Rules demand that a lawyer, or a guardian for that matter, advocate an outcome on behalf of "impaired" clients. The Commentary to Rule 1.14 states 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." *Id.* Rule 1.14 cmt., at 45.

143. See AAML Standards, *supra* note 8, Standards 2.11 - 2.13, Standards 3.6 - 3.8, at 31-36, 42-44. The AAML 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 proceeding." See *id.* at 22 n.20 (quoting Institute for Judicial Administration/American Bar Association's Juvenile Justice Standards—Standards Relating to Counsel for Private Parties, Standard 3.1(b) and cmt. (1982)).

144. *Id.* Standard 3.1(b) cmt. A possible criticism of the neutral lawyer role which uncovers evidence the lawyer reasonably believes a careful judge would want to know is that there really is no such thing as neutrality. Therefore, since neutrality is not really possible, somehow it is believed that partisanship should be encouraged.

It is interesting to observe, by contrast, how the public ultimately regards the judge. The judge's formal role is to do what is legally possible to advance the child's interests. In one sense, the judge is to act as the child's representative. However, the public is often wary of judicial power when judges decide the fate of people before them under the fiction that they are acting as a faithful representative, charged to protect the person's well-being. Rather, the public is much more comfortable regarding the judge quite differently, provided the conceptual underpinnings are fully satisfactory. The public comfortably regards the judge as a neutral factfinder. If one reconceives the function of a very young child's lawyer from being an advocate for the child to creating a fair record for the judge, it is unclear why there should be such cynicism about deeming the lawyer neutral.

145. See *supra* notes 139-40 and accompanying text.

“definitively preferable.”<sup>146</sup> This conclusion is a precondition to advocating for only one outcome. If it turns out there is a very small universe of cases with “definitively preferable” outcomes, then the practice of advocating for particular results will rarely occur. The less such cases occur, the smaller the differences between the organized Bar and the AAML become.

Moreover, if this “definitively preferable” outcome category constitutes only a narrow class of cases, then the worst dangers of randomly selected lawyer advocacy will have been eliminated. Because it can safely be assumed that virtually all lawyers assigned to represent children in this narrow class of cases will reach the same conclusion about the correct outcome, the threat of arbitrariness is reduced. Indeed, the core meaning of a “definitively preferable” outcome must be that all rational observers would agree with the outcome. In this sense, the best test the lawyer should use when determining whether or not a particular outcome is “definitively preferable,” is not whether the lawyer strongly believes that the outcome is correct, but whether the lawyer could conceive of another lawyer disagreeing with the outcome. If lawyers use the “Is-it-conceivable-that-another-lawyer-could-disagree-with-me?” standard, then the danger of arbitrary behavior is reduced to almost nothing. Because every lawyer would pursue the same result if given the opportunity, the significance of which lawyer is assigned completely diminishes.

Yet another viewpoint suggests that there is little danger of random advocacy affecting a case’s outcome. In the narrow band of cases with “definitively preferable” outcomes, the likelihood that the judge will decide the case “correctly” similarly increases despite the advocacy by the child’s lawyer. Even for policy makers and children’s advocates who do not have the highest regard for judges in custody and divorce proceedings, it is difficult to imagine that these judges would be unable or unlikely to decide a class of “definitively preferable” outcome cases correctly. For these reasons, there may be little to fear from lawyers for children advocating for a particular result that is not based on the outcome desired by the child, provided lawyers really limit the occasions on which they choose to advocate for such a result to those few cases in which the outcome is definitively preferable.

Whether and to what extent the views of the organized Bar clash with the views of the AAML in the real world will thus depend on the

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146. See *supra* notes 136-38 and accompanying text.

frequency that lawyers deem an outcome as “definitively preferable.” In all other respects, however, the two policies achieve a useful symmetry. In practice, the AAML’s solution of prohibiting advocacy of any kind<sup>147</sup> amounts precisely to the same course of action as when lawyers present all options. Indeed, the AAML’s meaning of non-advocacy derives from an unarticulated reconceptualization of court-appointed counsel, which the Principles expressly articulate.<sup>148</sup>

In the final analysis, the extent of agreement between the AAML Standards and the other proposals remains unclear because such a comparison depends on how lawyers actually behave. Under all of the proposals, including the AAML’s proposal, lawyers continue to possess a wide degree of discretion concerning client empowerment.<sup>149</sup> In addition, when lawyers treat their clients as unable to set the case’s objectives (for whatever reason), a lawyer’s determination that there is only one definitively preferred outcome—which thereby allows the lawyer to be a forceful advocate for that result—is practically unreviewable.

Conversely, lawyers remain free to conclude that no one particular result is “definitively preferable.” Thus, lawyers unavoidably continue to have a substantial degree of discretion. They remain free to decide not only whether their clients should be empowered, but also whether they should provide the court with one option or a range of different options. Because each of the discussed proposals prohibit a lawyer from advocating for particular results which are not conclusively correct, a greater symmetry among the proposals will occur if lawyers rarely conclude that only one result is clearly best.

## V. RECONSIDERING WHEN CHILDREN SHOULD BE REPRESENTED

To summarize the previous section, a unifying purpose forms the core of the organized Bar’s consensus: increasing the probability that different lawyers will seek like results in like cases. Achievement of this purpose can occur by allocating decision-making authority to the client whenever possible, binding the lawyer to seek the result desired by the client. When lawyers cannot be bound to advocate the preference of their clients, they may advocate for a particular result only when that result is definitively preferred.<sup>150</sup> Moreover, this

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147. See *supra* text accompanying note 139.

148. See *supra* note 116 and accompanying text (describing the court appointed representative as ideally a “tool” to help in deciding the case which need not always be used).

149. See *supra* Part IV.A.

150. See *supra* note 135 and accompanying text.

“preference” should be based not on what the lawyer wants or would want, but on the law’s definition of the child’s legal rights.<sup>151</sup> Finally, when no one result appears clearly “correct,” lawyers should present multiple options to the court without advocating for a particular result.<sup>152</sup>

This is an important statement by the Bar and courts are advised to pay it careful attention. It may become increasingly difficult to determine when a lawyer for a child is aggressively advocating a particular outcome because the client wants the outcome or because the lawyer independently thinks the outcome is best. Effective children’s advocates will recognize that the force of their advocacy diminishes once the judge comprehends that the lawyer’s advocacy is merely the product of the client’s wishes without the lawyer’s endorsement. For this reason, the most effective lawyers for children will deliberately blur their advocacy to prevent judges from detecting the lawyer’s actual basis for arguing for a particular outcome.

Decision-makers responsible for allowing representation for children should now rethink what they have wrought. As lawyers increasingly look to their young clients for what outcome to seek, courts and legislatures should re-evaluate the wisdom of providing children with lawyers in the first place. In child protection and custody and visitation proceedings, for example, it is unclear whether judges or legislators would want a child’s preference in the outcome to become more influential merely because the child is provided with legal representation. This is unclear because courts and legislatures consistently refuse providing children with rights to obtain the outcome they desire. Indeed, in certain areas of the law, such as child protection cases, the child’s preferences may be literally irrelevant to the decision-maker.<sup>153</sup> In other areas, such as custody or visitation cases, the child’s preferences are supposed to be little more than one factor a court should consider when deciding the case.<sup>154</sup>

One might anticipate that legislatures and courts prefer a better symmetry between children’s substantive rights and their procedural rights. Outside the right to counsel area, courts routinely reject children’s claims of entitlement to particular procedural rights when granting such rights would be inconsistent with substantive rights. A

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151. See *supra* note 131 and accompanying text.

152. See *supra* note 138 and accompanying text.

153. For a more detailed discussion of this proposition, see Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1428-30 (1996).

154. See *infra* note 179 and accompanying text.

1995 Illinois appellate case illustrates this point. In *In re Marriage of Thompson*,<sup>155</sup> a fifteen-year-old child petitioned the court for a change of custody after the court awarded custody to one parent. The trial court denied the child standing to petition to modify court orders.<sup>156</sup> The appellate court affirmed, rejecting the child's claims that he had standing under the relevant state statute and that the failure to accord him standing violated his constitutional rights to due process and equal protection of the laws.<sup>157</sup>

The *Thompson* court interpreted the statute as precluding children from petitioning for reconsideration or modification of judgments.<sup>158</sup> Although the child wished to live with nonparents who obtained custody of the child following his mother's death, the court reasoned that,

there is no discernible legitimate benefit from granting a minor standing to bring a petition on behalf of nonparental parties. If the nonparents wish to obtain custody of the child and believe that they can show that the child is not in the physical custody of a parent, they may file a section 601(b)(2) petition themselves. If the nonparents do not desire custody, it would be untenable to allow the minor to bring an action to force the court (and the natural parent) to give the nonparents what they do not want.<sup>159</sup>

According to the court, children have neither the substantive right to live without adults, nor the substantive right to pick which adults rear them.<sup>160</sup> A child's substantive right in this context can best be described as simply the right to be ordered by a court to reside with someone chosen by the court. The court concluded that because the law allows persons who might conceivably be granted custody to petition the court for custody, a child is deprived of nothing when denied the independent power to petition the court.<sup>161</sup> The court further rejected as "meritless" the claim that the decision denies the child the constitutional right to be heard.<sup>162</sup> Though this ruling may

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155. 651 N.E.2d 222 (Ill. App. 2d Dist. 1995).

156. *See id.* at 223-24.

157. *See id.* at 226. The statute to which the court referred is the Illinois Marriage Act which states, "a child custody proceeding is commenced in the court . . . by a person other than the parent, by filing a petition for custody of the child in the county in which he is permanently a resident or found, but only if he is not in the physical custody of one of his parents[.]" 750 ILL. COMP. STAT. ANN. 5/601(b) (West 1992) (amended 1993).

158. *See In re Marriage of Thompson*, 651 N.E.2d at 225.

159. *See id.* at 226.

160. *See id.*

161. *See id.*

162. *See id.*

appear harsh or crude, the court reached the correct conclusion. As the court stated:

Petitioner claims that he has been deprived of his due process right to be heard on his petition for a change of custody. He maintains—or assumes—that the right of a minor to pursue an action for a change of custody is akin to one of several constitutional rights (such as counsel in criminal cases or abortion rights) that unemancipated minors share with adults. However, a minor child has no due process liberty interest in remaining in the physical possession of relatives against the wishes of the natural parent.<sup>163</sup>

In addition to due process, the child asserted that “denying him standing to bring his petition creates an impermissible classification that denies him his fundamental right to counsel.”<sup>164</sup> In rejecting this claim, the court correctly reasoned that,

[p]etitioner begs the question: he has no right to counsel in bringing his action if he has no right to bring the action in the first place. That a minor is entitled to counsel when the State seeks to deprive him of his liberty in no way demonstrates that he is constitutionally entitled to bring a civil action to determine his own legal guardians.<sup>165</sup>

As demonstrated by the reasoning employed in *Thompson*, an important relationship exists between substance and procedure. One ought not succeed in claiming a violation of the procedural right to counsel (something which some courts are loath to deny) without first demonstrating the violation of a substantive right in the absence of this procedural protection. Not all procedural rights advance a child’s substantive rights or are necessary to ensure the respecting of a child’s substantive rights. The child’s claim in *Thompson*, though superficially appealing, is a splendid example of question-begging. So, too, are the many calls for counsel for children without or before a discussion of the other related rights children enjoy.<sup>166</sup>

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163. *Id.* at 226.

164. *Id.*

165. *Id.*

166. *See* *McDowell v. McDowell*, 868 P.2d 1250 (Mont. 1994). In *McDowell*, the Montana Supreme Court held that counsel for children is required only “when the child needs an advocate to represent his position as to the issues in dispute or to insure the development of an adequately complete record concerning the best interests of the child.” *Id.* at 1255 (quoting *In the Matter of Inquiry into J.J.S., Youth in Need of Care*, 577 P.2d 378, 381 (Mont. 1978)). The *McDowell* court overruled a 1977 case, *see In re Gulette*, 566 P.2d 396 (Mont. 1977), which had held that when custody is in “serious dispute,” a trial court must appoint independent counsel for the child or state why such appointment is unnecessary. *See* *McDowell*, 868 P.2d at 1255. Because issues were carefully considered and a complete record was developed concerning the children’s best

Courts and legislatures must take responsibility for the odd development of the law in this field. By affording lawyers for children before carefully examining the lawyers' duties, courts and legislatures created a vacuum which the organized Bar has finally attempted to fill by defining the role of counsel. The organized Bar has rejected the practice of many courts that depend on lawyers for children to recommend a particular result even when the client is too young to express a preference. The Bar has concluded that, in a choice between empowering lawyers and empowering clients, it will empower clients, even when they are very young.<sup>167</sup>

Courts and legislatures are now left with several choices. First, they can leave the state of the law as it is, knowing that lawyers increasingly will advocate the outcomes preferred by their clients. Second, through judicial opinions and statutes, they can redefine the role of counsel for children in ways that disagree with the Fordham consensus, for example, by removing altogether the lawyer's capacity to advocate any outcome for the child.<sup>168</sup> Finally, courts and

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interests, it was not error to have refused a request to appoint counsel. *See id.* at 1254.

167. *See supra* Part IV.

168. This invitation for legislatures to define the duties of court-appointed representatives for children admittedly may lead to results which I personally disfavor. California's recent efforts to define legislatively the duties of counsel for children in child protection proceedings represent a perfect example. In 1996, the California legislature amended its statute authorizing the appointment of counsel for children to provide explicit guidelines for counsel's actions. The statute now contains a mandate that "[a] primary responsibility of any counsel appointed to represent a minor pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the minor." CAL. WELF. & INST. CODE § 317(c) (West Supp. 1997). In addition, the statute now states:

In any case in which the minor is four years of age or older, counsel shall interview the minor to determine the minor's wishes and to assess the minor's well-being, *and shall advise the court of the minor's wishes. Counsel for the minor shall not advocate for the return of the minor if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor.*

CAL. WELF. & INST. CODE § 317(e) (West Supp. 1997) (amended provision in italics).

The California legislature does not appear to want a child in child protection proceedings to have "counsel." It actually wants a second prosecutor assigned to the case who will veto any proposal to return a child to his or her family unless this second prosecutor is confident such return will not endanger the child. Such a scheme is plainly within the legislature's power to create. Unfortunately, the legislature chose to continue calling this person the child's counsel.

The question that remains is which set of rules prevail when a lawyer is appointed as counsel for an unimpaired minor? Rule 1.2 of the MODEL RULES OF PROFESSIONAL CONDUCT unambiguously demands that the lawyer allow the client to set the objectives of the representation and instruct the lawyer on what outcome to seek. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983). Another set of rules, section 317(e) of the CALIFORNIA WELFARE AND INSTITUTIONS CODE, forbids counsel from advocating a result that, in the lawyer's best judgment, conflicts with the client's protection and safety.



legislatures can eliminate the use of lawyers for children in a variety of proceedings in which the appointment of lawyers occurs only because of case law or statute. But if they do nothing, we can expect lawyers representing children to act in conformity with the consensus the Bar has achieved.

A. *What Can Now Be Expected from a Lawyer Representing an Average Ten-Year-Old in a Contested Custody Case*

Because disagreement no longer exists about the role of counsel representing unimpaired children, forceful advocacy for these children's desires can be expected, whether or not a court or legislature would want such advocacy.<sup>169</sup> Moreover, the Bar's consensus entrusts the lawyer to determine the client's capacity to establish the case's objectives. In the words of the AAML:

Under both the Model Rules of Professional Conduct (Model Rule 1.14) and the Code of Professional Responsibility (Ethical Consideration 7-12), 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.<sup>170</sup>

Of the guidelines discussed in this Article, only the AAML Standards attempt to use an objective chronological criterion to distinguish among children: children aged 12 or older are presumed to be capable of directing the lawyer's actions.<sup>171</sup> Even the AAML Standards, however, permit treating children under twelve as impaired, and children older than twelve as unimpaired. The other standards make it clear that no age is too young for empowering verbal children.<sup>172</sup>

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See CAL. WELF. & INST. CODE § 317(e) (West Supp. 1997). Whatever the answer to this puzzle, the law is better served when the legislature recognizes a duty to define the role of a child's representative, even if I disagree with what the legislatures ultimately decide.

169. See generally Federle, *supra* note 51 (discussing various techniques for becoming an effective advocate).

170. AAML Standards, *supra* note 8, Standard 2.2(c) cmt., at 22-23. This statement is in accord with all of the recent proposals. See Principles, *supra* note 10, Principle 2.2(1), at 32; *Standards of Practice*, *supra* note 9, Standard B-3, at 379-80.

171. See Part V.

172. See *supra* notes 90-91 and accompanying text.

The AAML Standards also more explicitly than the other model proposals describe what lawyers should consider when determining a client's impairment. They instruct lawyers to "focus on the process by which a client reaches a position, not on the position itself."<sup>173</sup> In particular, these standards direct lawyers to "evaluate the child's ability to engage in a coherent conversation and to comprehend the nature of the proceedings."<sup>174</sup> At least for children aged twelve and older, the lawyer must treat a client as unimpaired as long as he or she,

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 . . . .<sup>175</sup>

The Principles, by contrast, are silent as to how lawyers should determine whether their client is unimpaired.<sup>176</sup>

In light of the strong consensus toward client empowerment, courts and legislators now must face the real challenge of reconsidering the wisdom of appointing counsel for children in the first place. A hypothetical case will serve to illustrate this point. In this case, divorcing parents are contesting the custody of their eleven-year-old son, Robert. The mother has served as the primary caregiver, having put aside her career as a teacher. She spent more time raising Robert than the father, and assumed the role of disciplinarian. She insisted that Robert adhere to a strict study schedule, and always imposed a shorter curfew on Robert than the parents of Robert's friends. The mother, however, occasionally uses marijuana. The father is a recently retired professional athlete. Unlike the mother, the father does not believe in being a strict disciplinarian. Since his parents' separation last year, Robert lives primarily with his mother, while only living with his father for about two months each year.

Robert tells his court-assigned lawyer that he wants to live with his father. When asked for more information by his lawyer, Robert explains that he prefers living with his father because he can stay up later each night, have a later curfew, and does not have to do his homework for as long as he does when living with his mother.

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173. AAML Standards, *supra* note 8, Standard 2.2(b) cmt., at 21.

174. *Id.* at 21-22.

175. *Id.* at 22 (footnote omitted).

176. The only direction the Principles provide is that "lawyers will continue to make the determination whether their client is empowered to set the objectives of the case or not." Principles, *supra* note 10, Principle 7 cmt., at 8.

In accordance with the organized Bar's consensus of her role, the attorney concludes that her proper role is to advocate Robert's position.<sup>177</sup> Accordingly, the lawyer chooses to litigate the case vigorously with the goal of securing a final order that places Robert with his father. This advocacy increases the probability that the outcome of the case is in accordance with what Robert wants, which is to live with his father.

This result is more likely for two reasons. First, the lawyer's advocacy for the father's custody may succeed in pretrial conferences with other counsel, the court, or both. Consequently, the powerful influence of the child's lawyer may induce settlement and give custody to the father.<sup>178</sup> Second, should no agreement be reached, the lawyer will proceed to investigate the case, hoping to uncover facts to introduce at trial supporting Robert's position. (In the process of investigating the lawyer will not seek to uncover negative facts about the father or favorable facts about the mother, except to avoid being surprised at trial.) The lawyer also retains an expert who will be used at trial to support the awarding of custody to the father and to demonstrate why the mother would be an inferior custodian. Although the case is closely contested, the lawyer's skill at amassing facts, tenacity in cross-examining adverse witnesses, and eloquence in summation contribute substantially to the court's final order awarding custody to the father.

In this hypothetical, it might be said that the court's appointment of a lawyer for Robert increased the danger of thwarting the substantive law of the jurisdiction by giving Robert's preference more weight than his best interests. In every sense, the lawyer's skilled advocacy remained consistent with the Model Rules of Professional Conduct and the highest standards of the legal profession. In the process, however, frustration of the law may result because the child's views are only supposed to serve as one factor (frequently a minor one) that the judge

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177. See *Conference Recommendations*, *supra* note 58, at 1312-13. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). Even under the AAML Standards, Robert's lawyer could easily consider Robert to have sufficient capacity to set objectives once he demonstrated an understanding of the choices raised by his case and advanced coherent reasons for his preference. See AAML Standards, *supra* note 8, Rule 2.4, at 2 (stating that "[u]nimpaird clients, regardless of age, have the right to set the goals of representation").

178. Many commentators have observed that most matrimonial cases are resolved without an actual trial through negotiation and settlement; moreover, settlements are accomplished because the parties assess the various risks and probabilities of prevailing at trial, taking into account the prevailing substantive law. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

takes into account in deciding the case.<sup>179</sup>

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179. *See, e.g.*, TENN. CODE ANN. § 36-6-106 (1996). This provision states that courts must consider the reasonable preferences of children ages twelve and older and must “listen” to any preferences expressed by younger children, thus giving greater weight to the preferences of older children.

Currently, no jurisdiction mandates that the child’s preference be dispositive. Rather, at most, the child’s preference is to be considered as one factor among many in determining the outcome. *See Calhoun v. Calhoun*, 179 So. 2d 737, 740 (Ala. 1965) (giving weight to child’s age and preference among other factors in child custody proceeding); ALASKA STAT. § 25.24.150(c) (Michie 1996) (allowing for consideration of child’s preference if of sufficient age and capacity); ARIZ. REV. STAT. ANN. § 25-403(A) (West Supp. 1997) (providing that court should consider all relevant factors in custody determinations including the child’s wishes); COLO. REV. STAT. ANN. § 14-10-124 (West 1997) (directing the court to consider child’s wishes in custody cases); DEL. CODE ANN. tit. 13, § 722(a) (1997) (requiring court to consider all relevant factors bearing on custody, including child’s preference); D.C. CODE ANN. § 16-911(a)(5) (1997) (requiring court to consider all relevant factors where practicable in determining custody, including child’s wishes); *Whaley v. Disbrow*, 166 S.E.2d 343, 344 (Ga. 1969) (noting that for children under 14 years of age, the court has wide discretion in awarding custody based on any factors in the child’s best interests); HAW. REV. STAT. ANN. § 571-46(3) (Michie 1997) (providing that court will consider child’s wishes regarding custody if child has sufficient capacity and age); IDAHO CODE § 32-717 (West 1993) (providing that the court may consider all relevant factors, including the child’s wishes); 750 ILL. COMP. STAT. ANN. 5/602 (West 1996) (requiring court determination of custody according to the child’s best interests, including the child’s preference as one factor of consideration); IND. CODE ANN. § 31-17-2-8 (West Supp. 1997) (requiring the court to determine custody according to the best interests of the child, including consideration of the child’s wishes, with more consideration given to the child’s wishes if the child is at least 14 years old); IOWA CODE ANN. § 598.41(3) (West 1993) (excluding from a determination of the child’s best interests consideration of the child’s wishes); KAN. STAT. ANN. § 60-1610(a)(3)(B) (1994) (providing that the court should consider all relevant factors, including the child’s wishes); *Burton v. Burton*, 211 S.W. 869 (Ky. Ct. App. 1919) (considering the wishes of a child who is of the age of discretion, but stating that those wishes are not controlling on the court); *Bowman v. Bowman*, 233 S.W.2d 1020, 1022 (Ky. Ct. App. 1950) (holding that the wishes of the child were not necessarily binding on the court); *Haymes v. Haymes*, 269 S.W.2d 237, 238 (Ky. Ct. App. 1954) (finding that the wishes of the child were outweighed by the financial stability of the mother); *Shepherd v. Shepherd*, 295 S.W.2d 557, 559 (Ky. Ct. App. 1956) (holding that the child’s wishes were not dispositive, but could be given weight in the custody determination); LA. CIV. CODE ANN. Art. 134 (West 1996) (requiring the court to consider all factors relevant to the child’s best interests, including the reasonable preference of the child if the court deems the child to be of sufficient age to express a preference); ME. REV. STAT. ANN. tit. 19A § 1653(3) (West Supp. 1996) (requiring the court to consider factors relevant to the child’s best interests, including but not limited to, the child’s wishes); *Bak v. Bak*, 511 N.E.2d 625, 631 (Mass. App. Ct. 1987) (reasoning that child’s preference in custody proceedings is not to be given decisive weight, but is a factor for the court to consider); MICH. COMP. LAWS ANN. § 722.23, 722.25 (West 1993) (providing that in a custody dispute, a child’s best interests control and defining the best interests of child as including the reasonable preferences of the child if of sufficient age); MINN. STAT. ANN. § 257.025 (West 1992) (providing that custody be determined according to the best interests of child, including the child’s reasonable wishes if of sufficient age); MO. ANN. STAT. § 452.375(2) (Vernon 1997) (including the wishes of the child in the best interests of child standard controlling a

custody decision); MONT. REV. CODE ANN. § 40-4-212(2) (Smith 1997) (requiring courts to decide custody according to the best interests of the child, including consideration of the child's wishes); NEB. REV. STAT. § 42-364(2) (1997) (providing that one factor in the determination of custody is "the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning"); NEV. REV. STAT. § 125.480(4) (1994) (providing that the "best interests of child" control a custody decision and including as a factor of consideration "the wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody"); N.H. REV. STAT. ANN. § 458:17(VI) (1995) (the court may take into consideration any preference shown by the child if the court determines that it is in the best interest and welfare of the child); N.J. STAT. ANN. § 9:2-4(c) (West 1993) (requiring a child custody decision according to the best interests of the child, including the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision); N.M. STAT. ANN. § 40-4-9(A) (Michie 1988) (directing the court to determine custody according to the best interests of the child, including consideration of the child's wishes); *Jones v. Payne*, 493 N.Y.S.2d 650, 651 (3d Dep't. 1985) (holding that a child's desire to live with one parent over the other was not exclusively determinative of the long-term best interests of the child); *Lyons v. Lyons*, 490 N.Y.S.2d 871, 872 (2d Dep't 1985) (holding that a child's preference to live with one parent over another was not a controlling factor in the custody proceeding); *Hinkle v. Hinkle*, 146 S.E.2d 73, 79 (N.C. 1966) (explaining that the court may consider the preference or wishes of a child of suitable age and discretion, but the expressed wish of a child is never controlling upon the court); *Campbell v. Campbell*, 304 S.E.2d 262, 264 (N.C. 1982) (holding that "while not controlling, the judge may consider the preferences and wishes of the child to live with a particular person"); *In re Custody of Peal*, 290 S.E.2d 664, 667 (N.C. 1982) (holding that the judge may properly consider the preference or wishes of a child of suitable age and discretion); *Novak v. Novak*, 441 N.W.2d 656, 658 (N.D. 1989) (holding that "the child's preference is 'only one factor' to consider and is not usually determinative"); OHIO REV. CODE ANN. § 3109.04 (B)(1) (West 1992) (providing that the court shall take into account that which would be in the best interest of the children, including, in certain circumstances, the wishes of the child); OKLA. STAT. ANN. tit. 10, § 21.1 (c) (West 1988) (providing that "the court may consider the preference of the child in awarding custody of [the] child if the child is of sufficient age to form an intelligent preference"); *Altus-Baumhor v. Baumhor*, 595 A.2d 1147, 1150 (Pa. Sup. Ct. 1991) (stating that the child's preference must be considered, but is not controlling); *Kenney v. Hickey*, 486 A.2d 1079, 1084 (R.I. 1985) (stating that the expressed preference is not conclusive on the issue of what best promotes the child's welfare, but the preference is competent and highly probative evidence on the particular issue); *Smith v. Smith*, 198 S.E.2d 271, 274 (S.C. 1973) (noting that "the significance to be attached to the wishes of the child in a custody dispute depends upon the age of the child and the attendant circumstances"); *Jasper v. Jasper*, 351 N.W.2d 114, 119 (S.D. 1984) (allowing, but not requiring, consideration of the child's wishes if the child is of a sufficient age to form an intelligent preference); *Harris v. Harris*, 832 S.W.2d 352, 354 (Tenn. Ct. App. 1992) (explaining that the court must consider the wishes of a child over 14, but if the child is under 14, the court may consider the child's preference, but need not do so); *Bennett v. Northcutt*, 544 S.W.2d 703, 708 (Tex. Civ. App. 1976) (holding that the child's preference for custody is only one of the factors to be considered); UTAH CODE ANN. § 30-3-10 (1) (Supp. 1997) (allowing the court to consider a child's preferences for custody, but providing that the preference is not controlling); VT. STAT. ANN. tit. 15, § 665 (Supp. 1997) (requiring a court to decide custody according to the child's best interests, but not listing as a specific factor for consideration the child's preference); VA. CODE ANN. § 20-124.3(7) (Supp. 1997) (stating that in a custody determination according to the best interests of the child, the court should

Opponents of the best interests standard may deem such an outcome as an advancement of the law: the more cases decided in accordance with what children want, the better. However, advocates who favor increasing the probability of cases decided on the basis of controlling substantive principles, (something that courts and legislatures inherently should prefer) ought to carefully consider whether they want to provide Robert with a lawyer.

In contested custody proceedings, children have been purposely disempowered from choosing the parent with whom they want to live. Although a child's preference is to be made known to the judge, it is fully consistent with a child's right to require that the child live with the parent the judge believes is best for the child, even when the child disagrees. The scope of a child's substantive rights in a given area of the law defines a child's rights. This definition, in turn, not only impacts the role of counsel for young children in that area, it also directly implicates the need for counsel in the first place.

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consider "the reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference"); WASH. REV. CODE ANN. § 26.09.187(3)(a)(vi) (West 1997) (listing as a factor for consideration the wishes of a child who is sufficiently mature to express reasoned and independent preferences); *Garska v. McCoy*, 278 S.E.2d 357, 363 (W.Va. 1981) (stating that "[w]here a child is old enough to formulate an opinion about his or her own custody the trial court is entitled to receive such opinion and accord it such weight as he feels appropriate"); WIS. STAT. ANN. § 767.24(5)(b) (West 1993) (requiring the court to consider all facts relevant to custody, including the wishes of the child); *Curless v. Curless*, 708 P.2d 426, 429 (Wyo. 1985) (explaining that "the children's wishes are only one factor for the court to consider when awarding custody"); *Douglas v. Sheffner*, 331 P.2d 840, 844 (Wyo. 1958) (stating that although a court may consider a child's preference for custody determination, those wishes are not conclusive).

Moreover, in the custody proceedings of most jurisdictions, even lawyers representing impaired children are obliged to express the wishes of their clients to the court. This is so because the substantive rules of custody cases that authorize courts to take into account the preferences of children make no distinction among children based on "impairment." Presumably judges choose to give less weight to the preferences of impaired children (usually meaning younger children but perhaps including older children whom the judge believes were unduly influenced by one parent) than they give to unimpaired children. However, under current substantive law, impaired children have a right to make their views known to the judge. It is inconceivable that children would have their rights limited or curtailed as a result of being provided with counsel. Because judges also consider the wishes of "impaired" children, lawyers must not silence or distort their clients wishes.

In a very few jurisdictions, the preferences of children over a particular age are dispositive of the custody dispute. *See, e.g.*, MD. CODE ANN. FAM. LAW § 9-103 (1994) (providing that a child of age 16 or older may designate which parent to live with); MISS. CODE ANN. § 93-11-65 (Supp. 1997) (providing that if both parents are fit and "it would be to the best interest and welfare of the children, then any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live").

*B. What Can Now Be Expected from a Lawyer Representing an Average Ten-Year-Old in a Contested Child Protection Proceeding*

Just as empowering a child to set the objectives in a custody case can subvert substantive law, the same holds true in child protection proceedings. Because the substantive law fails to take into account the child's views in determining whether the child has been abused or neglected, it is legally irrelevant whether or not a child desires the court to enter an order declaring the child neglected or not neglected. Commonly, children who require protection are forcibly removed from their parents' custody, even when the children prefer remaining at home. At the same time, when a child's parents have not been abusive or neglectful, the child is legally obligated to live with them, regardless of the child's preferences.<sup>180</sup>

The organized Bar, however, now insists that children, whenever feasible, be empowered to set objectives that their lawyers must zealously seek to obtain.<sup>181</sup> In other words, it is quite likely that providing children with aggressive lawyers who will attempt to tilt the outcome of the case in the direction of the child's wishes will make it less likely, not more likely, that the "correct" legal result be reached.<sup>182</sup> If this concept is new to judges, it has been fully appreciated by various children's advocates over the years. It is easy to describe the modus operandi of these advocates. These advocates seek indirectly to effect changes in substantive law by advocating for increased procedural rights of children. In particular, when advocates are displeased with certain substantive principles used to decide children's issues, they turn to the apparently more neutral procedural claim of a "child's right to be heard."

A good example of this is found in the area of foster care. In this area, many children's rights advocates have expressed displeasure over the court's consistent failure to recognize a child's substantive due process right to remain with a long-time foster parent with whom the child has developed a significantly equivalent parent-child relationship.<sup>183</sup> These child advocates lament the substantive rule that foster children do not ordinarily have a constitutionally protected liberty interest to remain with long-term foster parents.<sup>184</sup> In recent

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180. See N.Y.F.C.A. § 1012(e), (f) (McKinney's 1984).

181. See *supra* notes 83-91 and accompanying text.

182. The use of the term "correct result" in this context signifies the result that is most consistent with controlling substantive principles.

183. See *Child v. Beame*, 412 F. Supp. 593, 603 (S.D.N.Y. 1976) (holding that a permanent stable home is not a constitutionally protected fundamental right).

184. See, e.g., *Kyees v. County Dep't of Pub. Welfare of Tippecanoe County*, 600

years, many children's rights advocates left with few places to turn to change this substantive rule have sought to provide children with a certain kind of counsel in foster care proceedings.<sup>185</sup> Under the guise of procedural due process, these advocates argue for a child's right to be heard and represented, disguising their hidden agenda of changing substantive due process law already established by courts and legislatures.

In many states, the substantive law of foster care and termination of parental rights is well settled. In most jurisdictions, whether a child enters the foster care system through a voluntary placement or a judicial finding of parental abuse or neglect, the child must be returned to the parents' custody under certain circumstances. When the placement is voluntarily made, it is revocable by the parent at will. When an agency receives a revocation notice, it must either return the child or obtain a court order that finds returning the child to the parents contrary to the child's best interests.<sup>186</sup>

Many states will not terminate parents' parental rights even when children have been in foster care for a number of years unless the state agency can prove by clear and convincing evidence,<sup>187</sup> that meaningful efforts were made to reunite the child with the parent or that the agency was justified in not making such efforts.<sup>188</sup> In basic form, this is also the law in Florida. A petition to terminate the rights of a parent whose child has been in long-term foster care will falter upon a showing that

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F.2d 693, 697-99 (7th Cir. 1979) (holding that the relationship between a child and foster parents did not create a liberty interest); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206-09 (5th Cir. 1977) (holding that a hearing prior to a child's removal from a foster home was not constitutionally required).

185. See Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200 (1994).

186. See, e.g., 42 U.S.C. § 672(f), (g) (Supp. 1997).

187. See *Santosky v. Kramer*, 455 U.S. 745, 748 (1982).

188. See 42 U.S.C. §§ 675(1); 675(5)(A), (B) (Supp. 1997). This federal provision has been codified in many States. See, e.g., CAL. CIV. CODE § 232(a)(7) (West Supp. 1997); CONN. GEN. STAT. ANN. § 45a-717(i) (West Supp. 1997); KAN. STAT. ANN. § 38-1583(b)(7) (1993); N.Y. SOC. SERV. LAW §§ 384-b(7)(a), (8)(a)(ii), (8)(b)(ii) (McKinney's Supp. 1997-98); OR. REV. STAT. § 419.523(2)(e) (1987); R.I. GEN. LAWS § 15-7-7 (1996); WIS. STAT. ANN. § 48.415(2)(b) (West 1997). See also *In re Derek W. Burns*, 519 A.2d 638 (Del. 1986) (holding that the state is obligated to preserve the family unit when feasible and must make efforts at reunification prior to termination); *In re Sheila G.*, 462 N.E.2d 1139 (N.Y. 1984) (holding that only after the agency has proved by clear and convincing evidence that it has fulfilled its statutory duty to attempt to reunite the family may the court consider whether a parent has fulfilled his or her duties); *In re William*, 448 A.2d 1250 (R.I. 1982) (holding that the state agency is obliged to do everything in its power to assist a family before termination will be permitted).



the agency failed to perform or improperly performed its duties to help reunify the family.<sup>189</sup> This substantive rule, which is the product of legislative judgment attempting to balance the rights of foster families, natural parents, and children, especially poor children who are disproportionately subjected to placement in foster care, strikes certain child advocates as unwise and unfair public policy.<sup>190</sup> According to these advocates, children ought to have the right to insist on remaining in a foster parent's home after having lived there for a certain period of time. As such, these advocates believe that the law discussed above violates a child's right to self determination.

One such advocate is George Russ, the adoptive father of Gregory K., an eleven-year-old Florida foster child whose efforts to have his mother's parental rights terminated caused a sensation several years ago.<sup>191</sup> Gregory first entered foster care at the age of nine, when his mother voluntarily placed him in foster care. After about one year, he returned to his mother's home where he remained for less than three months before being readmitted to foster care.<sup>192</sup>

Shortly thereafter, Gregory's mother executed a Performance Agreement with Florida's Department of Health and Rehabilitative Services ("DHRS"). Less than two years after Gregory's reentrance into foster care, DHRS concluded that Gregory's mother satisfactorily complied with the Performance Agreement, and deemed it safe to return Gregory to his mother's care. By the time DHRS made this decision, however, Gregory was living with a foster family, the Russes, who promised to adopt Gregory if he so desired. Before DHRS sent Gregory back to live with his mother, the foster parents arranged for Gregory to retain his own lawyer, who promptly petitioned the court, seeking an order that would permanently sever his legal relationship with his mother and allow the Russes to adopt

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189. See, e.g., *Williams v. Department of Health and Rehabilitative Services*, 482 So.2d 1371 (Fla. 1986) (requiring a performance plan or agreement as a precondition to initiation of termination proceedings); *Burk v. Department of Health and Rehabilitative Services*, 476 So.2d 1275 (Fla. 1985) (holding that before termination of parental rights may be ordered, the agency must first offer the abusing parent a performance agreement which allows him or her an opportunity to eliminate the conditions that caused the abuse).

190. See, e.g., Woodhouse, *supra* note 65, at 326-27.

191. See *Kingsley v. Kingsley*, 623 So.2d 780 (Fla. Dist. Ct. App. 1993); William Booth, *Tangled Family Ties and Children's Rights: Teen's Change of Mind Revives Debate*, WASH. POST, March 11, 1994, at A3; Jeff Kunerth, *Gregory K. Ruling Evokes Outrage, Praise, Disappointment*, ORLANDO SENTINEL, August 20, 1993, at B1, available in 1993 WL 5755043; *Child 'Divorce' Upheld*, NEWSDAY, August 20, 1993, at 16.

192. See Russ, *supra* note 66, at 367.

him.<sup>193</sup>

Florida law provides that families with children in foster care have the substantive right to reunification services.<sup>194</sup> This law is based on the fundamental concept that children are best served by being raised by their families and the state owes children the duty of using its resources to reunite children with their families whenever such reunification can be accomplished without endangering the health or safety of a child.<sup>195</sup> Under Florida law, it is quite clear that children do not have the substantive right to choose who will raise them, nor do they have the substantive right to refuse a judicial order to live with their parent.<sup>196</sup>

Nonetheless, according to Russ, children ought to have a right to representation in termination proceedings by a lawyer who will forcefully argue for the result the child seeks.<sup>197</sup> However, by articulating this view, Russ appears to undermine the substantive law, which he regards as ill-advised and violative of a child's substantive rights. In other words, he is actually advancing his own substantive agenda of making it possible for a child's preference to become a prominent factor in termination proceedings. The more that children are represented by forceful advocates, the more cases involving children who want to be adopted will result in terminations. Until the substantive law is modified to allow for consideration of the child's desire, however, a different justification is needed for insisting that children be represented other than that children have a right to have their views forcefully presented in court.

Perhaps young children should be empowered with self determination in many areas of the law than the law currently allows. Perhaps, for example, children should be empowered to have their preferences serve as the deciding factor regarding whether their parents should be declared unfit in child protection proceedings, or whether children should be placed in foster care, permitted to remain in foster care, or freed for adoption. Perhaps, too, in contested custody proceedings, children should be empowered to choose which parent with whom they want to reside. But, if these changes take place, the substantive law should change before the role of counsel changes.

Even more significantly, it is important to keep an eye on the impact of substantive law when children are provided representation. The

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193. See *id.* at 367-68.

194. See *supra* note 189 and accompanying text.

195. See *supra* note 189 and accompanying text.

196. See *supra* note 189 and accompanying text.

197. See Russ, *supra* note 66, at 378-80.

court-assigned lawyer for a ten-year-old foster child, such as Gregory K., will forcefully seek to have the court terminate parental rights for no other reason than the fact that the client wants the lawyer to do so. When this happens, the preferences of the ten-year-old will be given more weight, through the indirect route of the lawyer's strong advocacy, than the law intends children to have. Given this, courts and legislators may not want to unleash a forceful advocate to undertake this role.

*C. What We May Now Expect from a Lawyer Representing a Very Young Child in a Contested Custody Case or a Child Protection Proceeding*

Judges may prefer that a lawyer represent a young child for a variety of reasons. One reason commonly is the judge's desire to obtain a recommendation from the lawyer to assist the judge when making the ultimate determination in the case. For better or worse, judges must now begin to recognize that lawyers representing children will begin refusing to make such recommendations. Instead, judges should now begin to expect lawyers to disagree with them about their role and explicitly refuse to recommend a particular result.

For example, when asked to give a closing statement at the end of a contested custody proceeding on behalf of a five-year-old child, an increasing number of lawyers will now refuse to advocate any result. Judges should begin to expect the following response:

After considering all of the evidence, I leave it to Your Honor to decide which parent best meets the child's best interests. I have reflected carefully on the utility of my sharing with Your Honor my own sense of which outcome would best serve my client and I have respectfully concluded that it could not conceivably be of value. When Your Honor asks me to tell the court what I think it should do, I must decline on the grounds that I would be performing an injustice both to the court and to my client.

It is my professional judgment that I fully discharge my responsibilities both to the court and to my client by ensuring that all of the factors that went into the decision are placed on the record and that all of the facts that a thorough, responsible decision-maker would want to know have been made available to the decision-maker. I believe I have accomplished that. Through my involvement the court has been placed in a ideal decision to decide the case.

My own view regarding how the court should decide the case cannot help but contaminate the record. I acknowledge

having views on the best outcome in this case. I hope the court will forgive me for doing everything within my power to ensure that those views remain hidden from view, not only in the sense that Your Honor will not be able to discern them from my remarks today, but at the deeper level that they have not influenced my remarks. Although I have formed opinions in this case, I cannot conclude that those opinions would necessarily be shared by all members of the Bar. I can well conceive that had the court appointed an equally qualified different member of the Bar in my place, that individual could responsibly have reached a different view of this case than I happened to have reached.

That led me to think more deeply about the correctness of my role in this case. In reflecting on that further, I realized that I would be rather upset if this other lawyer were now given the privilege of addressing this Court and telling this Court how to decide this case. I would be upset for two reasons. First, the lawyer would purportedly be speaking on behalf of the child. And I am keenly aware that fiction does not ring true. Second, and related to the first, I would not agree with the recommendations being made.

If I would be upset were a different member of the Bar arguing for a particular outcome in this case, then I should not permit myself the extraordinary power of arguing for any outcome. I recognize that I might feel differently if I believed all lawyers would advocate the same result that I prefer. But as I have already said, I do not believe that in this case. (Moreover, in the peculiar circumstance in which all lawyers invariably would recommend the identical result, it seems highly improbable that the court would need such advice in the first place. In those cases in which the correct result is so obvious that all lawyers would reach it, I cannot imagine any circumstances in which the court would somehow reach a contrary result.)

But I speak this way not only to emphasize the sense of unfairness I think allowing me to make a recommendation would cause, I have also reflected on how I can be of most use to Your Honor. Since we do not know each other nearly well enough for you to know my personal values or biases, and since there would be no way for you to conclude confidently that I did not rely on them (either explicitly or unconsciously) in making whatever recommendation I chose to make, I have come to appreciate that my particular recommendation would not place Your Honor in nearly as helpful a position as my choosing simply to remind you of all of the relevant facts and

legal principles involved here and leaving to you the difficult task of reaching a decision.

If my own views were interjected into the record, I would have failed in the first mission I set out to accomplish: to place on the record all of the factors that went into the decision. Many factors that went into my personal view on the outcome invariably will be excluded from the record. Additionally, you may inadvertently give more weight to my views than you should. You may confuse my views with what is best for the child or as an expression of the child's views. They are neither.

I trust I have helped you perform your job to the best of my ability. I believe I have made a very important contribution to the case. You are now in an ideal position to make your decision. There is nothing further I can do to help you decide it that would not, in my opinion, distract from my work already. I respectfully decline to do more.

When attorneys representing very young children give such a closing statement, courts should be pleased for at least two reasons. First, in cases involving children too young to express a preference, such a closing statement eliminates the danger that the lawyer's advocacy is the product of his or her own personal values. Second, when young children have a preference about the outcome, a closing statement such as this eliminates the concern that the lawyer's advocacy will simply be a disguised application of the child's preferences.

On the other hand, if courts continue to expect lawyers to advocate for a result, it is likely that lawyers seeking to adhere faithfully to the Bar's consensus on the lawyer's role will begin, more and more, to advocate for the result desired even by their very young client. This advocacy is likely because the basic principle of the consensus was to eliminate the danger that lawyers would seek different results in like cases based on the personalities and values of the randomly assigned lawyers.<sup>198</sup> One way to avoid this danger is to avoid advocating for any result. But, if courts insist that lawyers advocate for a particular result, lawyers who are unwilling to disobey the court and unwilling to inject their own values into the proceedings will naturally look to some source for guidance in determining what result to ask the court to reach. For many of these lawyers, the only available source will be their client's preferences, however young the children may be.

When this occurs, courts will eventually be unable to discern when

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198. See *supra* Part III.A.

the lawyer is arguing for a particular result because the lawyer "believes" the result is best for the client, or only derivatively because the client wants such a result. Good lawyers will mask reliance on the client's preferences before courts known not to give much weight to a child's preferences. As Jean Koh Peters has sagely advised children's advocates, once lawyers know their client's wishes, it is strategically sound for the lawyers to "translate" the legal argument into the "best interests" language so that judges will be more likely to decide the matter in accordance to the child's wishes.<sup>199</sup>

Whether or not courts will be pleased with this new form of advocacy, they should begin to become accustomed to it. Indeed, legislatures and courts should now reexamine the economics of appointing counsel in all cases involving impaired children. Once attorneys for impaired children stop advocating an outcome, they become a type of procedural grease, principally concerned with making sure that the child receives all the appropriate procedural protection. While some situations may still justify the appointment of an attorney to assure these protections, in many cases, the judge, along with counsel for the two competing parties, could just as effectively safeguard the rights of the child.<sup>200</sup> By not appointing attorneys in situations where their role could be filled by the other mechanisms of the court such as the judge or an independent investigating agency, there should be a substantial savings to the parties or the state.<sup>201</sup>

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199. See Peters, *supra* note 64, at 1515.

200. In particular, when children enter the state's care, as, for example, when children become foster children, it plainly makes sense to provide them with an attorney to protect their legal interests while they are state wards.

201. 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* not only increases fees; but also 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. See generally ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICAN'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 3-8 (1993) (discussing ABA recommendation that attorneys volunteer to represent children).

## VI. CONCLUSION

In light of the expected role attorneys for children will assume, judges must carefully weigh the costs of appointing an attorney in each situation. In many child custody proceedings, the appointment of an attorney for the child may actually undermine the substantive law. In child protection proceedings, courts must pay closer attention to the expectations of lawyers for children. Now is an opportune time for legislatures and judges to redefine and limit the scope of the right to counsel for children to include only those situations where the attorney will further the interests of the child without the incidental cost of subverting substantive law.