

# REPRESENTING CHILDREN WHO CAN'T OR WON'T DIRECT COUNSEL: BEST INTERESTS LAWYERING OR NO LAWYER AT ALL?

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*Child advocacy groups argue with increasing force that children's lawyers should function as traditional, client-directed attorneys and that lawyers overstep their professional role when they represent children's interests rather than children's wishes. Consistent with this trend, the American Academy of Matrimonial Lawyers recently revised its standards for representation of children to flatly oppose the appointment of lawyers for children who lack capacity to direct counsel. This Article questions the Academy's stance and contends that the professional role of an attorney is sufficiently flexible to encompass the representation of children who are unable or unwilling to provide coherent direction for counsel. Acting as fiduciary, counselor, and advocate, a lawyer for the non-directive child can maintain professional boundaries and still ensure that the decisionmaker acts with knowledge of the child's perspective. Even for the pre-verbal child, a lawyer can take legal actions to protect the child in the litigation process and convey the child's world to the court through traditional avenues, including witness testimony and documentary evidence. Because Arizona court rules have authorized the appointment of best interests attorneys in family court since 2006, the Arizona experience is instructive. This Article reports on a series of interviews in which Arizona family and juvenile court judges share their perspectives on children's representatives in general and best interests attorneys in particular.*

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\* Mary Anne Richey Professor of Law Emeritus, University of Arizona James E. Rogers College of Law. I want to thank Ted Schneyer for allowing us to celebrate his wonderful scholarship with this Symposium and for the many conversations we have had over the years on the basic question of what it means to be a lawyer. His unflinching intellectual rigor has been an inspiring example. I also thank Paul Bennett, Lynn Baker, and other participants in the Symposium for their thoughtful responses to this paper. In addition, I am grateful to the Arizona judges who agreed to participate in interviews for this Article, to Colleen Zitman for her excellent work in conducting the interviews and carefully reporting them, and to Maureen Garmon, Daneal Grotenhouse, and Brad Nichols for their expert assistance in compiling a current survey of relevant state laws. All errors and missteps are, of course, my own.

## INTRODUCTION

Over the past two decades, children's rights scholars and child advocacy groups have argued with increasing force that children's lawyers should function as traditional, client-directed attorneys and that lawyers overstep their professional role—with the potential to do serious harm—when they engage in discretionary best interests representation.<sup>1</sup> Whether grounded in an insistence on lawyers' professional boundaries<sup>2</sup> or in a vision of child-client empowerment,<sup>3</sup> the end goal has been the same: to confine lawyers to their core role as advocates of clients' wishes.

Until recently, the strongest push for client-directed lawyering had come primarily from those who represent children in juvenile court, either in delinquency or in child welfare proceedings, and it was driven by a robust children's rights perspective.<sup>4</sup> In 2009, however, the American Academy of Matrimonial Lawyers (AAML) released its revised standards for representation of children in custody proceedings<sup>5</sup> and recommended that family courts should

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1. Recent contributions to the literature include Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869 (2007), Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93 (2010) (arguing that the goals of enhancing client autonomy and client empowerment are common to both child representation and representation of marginalized groups), Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009) (explaining AAML's decision to confine children's lawyers to representation of children's expressed objectives), and LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605 (2009) (explaining commitment to client-directed representation in proposed ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings).

2. See, e.g., Guggenheim, *supra* note 1, at 263–64 (explaining that AAML rejected best interests lawyering not because of a children's rights focus but because of the AAML's view "of what it means to be a lawyer").

3. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996) (suggesting that attorneys who represent children can empower their clients through stronger advocacy of children's wishes).

4. Two conferences of child welfare advocates, held ten years apart, proposed frameworks that emphasized representation of children's expressed objectives and developed nuanced "substituted judgment" approaches for children who lack capacity to direct counsel. In 1995, Fordham Law School hosted a conference entitled "Ethical Issues in the Legal Representation of Children" and produced a set of guidelines to improve the quality of children's lawyering. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Recommendations*]. A ten-year anniversary conference was convened at the University of Nevada Las Vegas Law School in 2006. See *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006) [hereinafter *UNLV Recommendations*].

5. See Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIM. LAW. 227 (2009) [hereinafter *AAML 2009 Standards*].

appoint lawyers for children for only one purpose: “to advocate for the outcome desired by the child.”<sup>6</sup> The AAML Standards are not driven by a children’s rights ideology but by the goal of maintaining strict professional constraints on attorneys. Unlike its earlier standards,<sup>7</sup> the AAML’s new guidelines limit the role of children’s lawyers to representing children’s expressed wishes<sup>8</sup> and flatly oppose the appointment of lawyers for children who lack capacity to direct counsel.<sup>9</sup> As explained by the AAML, “when clients are unable to direct the representation, counsel for children may not advocate for any outcome.”<sup>10</sup> Interestingly, the AAML would bar all court-appointed professionals from expressing opinions on the outcome of contested cases unless the person qualifies as an expert under the rules of evidence.<sup>11</sup> The AAML is silent on the relationship between the child’s counsel and any court-appointed professional, but one can surmise that it sees no residual role for the lawyer.

Interestingly, the call for client-directed lawyers for children has gathered steam at a time when a number of ethicists are questioning the underlying norm of the legal profession that requires zealous pursuit of clients’ goals at all costs.<sup>12</sup> Widely publicized accounts of lawyers’ excesses on behalf of clients have contributed to the growing cynicism toward the practicing bar.<sup>13</sup> In the business world, the failure of counsel to exercise independent judgment as to their corporate

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6. Guggenheim, *supra* note 1, at 263.

7. See Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (with Commentary)*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter *AAML 1995 Standards*].

8. *AAML 2009 Standards*, *supra* note 5, Standard 1.1, at 234 (appointment of lawyers for children should be limited to cases in which both parties request such appointment or when “the court wants the objectives sought by the child to be a prominent basis for the outcome”); *id.* Standard 2.2, at 242 (“In no case shall counsel for the child advocate for any objectives other than those established by the client.”).

9. *Id.* Standard 2.1, at 239 (a lawyer should “strive to refuse the appointment” if the child lacks capacity to direct representation).

10. *Id.* Standard 2.2 & cmt., at 243.

11. *Id.* Standard 3.2 & cmt., at 248.

12. See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (Gerald Postema ed., 2007) (stating that, in respecting dignity of their clients, lawyers should distinguish between clients whose goals are lawful and “moral” and those whose demands, though lawful, would violate ordinary morality); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 17 (2000) (stating that lawyers should define their roles by an overarching conception of justice and “accept personal moral responsibility for the consequences of their professional acts”); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 138 (1998) (“Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”). For an influential essay providing an early critique of the “amorality” of lawyering, see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

13. Opinion polls show a steady decline in the public’s regard for lawyers. See, e.g., Bureau of Justice Statistics, *Public Opinion: Lawyers*, SOURCEBOOK CRIM. JUSTICE STAT., [http://www.albany.edu/sourcebook/ind/PUBLIC\\_OPINION.Lawyers.1.html](http://www.albany.edu/sourcebook/ind/PUBLIC_OPINION.Lawyers.1.html) (last visited Mar. 6, 2011) (charting decline of respondents’ ratings of lawyers’ honesty and ethical standards from 2003 to 2009).

clients' objectives has provoked dismay as well as legislative reforms.<sup>14</sup> Similarly, divorce lawyers have provoked criticism for client-driven litigation tactics that inflict emotional and financial harm on opposing parties and children.<sup>15</sup> Notwithstanding the ongoing debates about the merits of client autonomy, child advocates have continued to advance client autonomy arguments for child-directed lawyering with little attention to the broader discourse.<sup>16</sup>

This Article argues that the professional role of attorney is sufficiently flexible to encompass the representation of children who are unable or unwilling to direct counsel. Because the line between a child who lacks capacity and a child who lacks the will to direct counsel is often unclear, I include the latter in this discussion. Nevertheless, I do not mean to suggest that a lawyer should advocate a position contrary to clear instructions from a child client who is *capable* of directing counsel. Rather, my inclusion of the child who refuses to direct counsel is aimed at the child who is unwilling (or emotionally unable) to take sides in his or her parents' conflict.<sup>17</sup>

In light of the fact that the average duration of first marriages ending in divorce is about eight years,<sup>18</sup> one can surmise that many children at the time of custody proceedings are of an age when capacity to direct counsel is at least in question. Because the 2009 AAML Standards may have widespread influence, I focus my defense of best interests representation on the family court cases for which the AAML Standards are intended—typically custody and visitation proceedings. In family court proceedings, where few funding sources exist for children's attorneys, lack of resources limits the practical availability of legal

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14. The collapse of Enron, for example, triggered scrutiny of the role of the company's legal counsel. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Editorial, *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, at A14. The Sarbanes–Oxley Act, with its reporting requirements for client fraud, was a legislative response that, in turn, triggered revisions of the Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2009); see also Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S & L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994) (exploring failure of bar's system of self-regulation to adequately regulate banking lawyers).

15. See, e.g., Leo J. Shapiro & Assocs., *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. REP. 16 (2002) (reporting on survey showing widespread dissatisfaction with tactics of divorce lawyers).

16. Two prominent exceptions are Professors Annette Appell and Katherine Kruse. Professor Appell's writings have thoughtfully highlighted the ambiguities of the role of children's counsel in the larger ethical landscape. See, e.g., Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008). Professor Kruse's work has probed the philosophical underpinnings of child representation. See Katherine R. Kruse, *Standing in Babylon, Looking Toward Zion*, 6 NEV. L.J. 1315, 1320 (2006) (defending holistic child-centered representation as a necessary ideal).

17. For an insightful description of the emotional tensions and divided loyalties that can overwhelm a child in the middle of parental strife, see PATRICK PARKINSON & JUDY CASHMORE, *THE VOICE OF A CHILD IN FAMILY LAW DISPUTES* 194–97 (2008).

18. *Number, Timing, and Duration of Marriages and Divorces: 2004 – Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/marriage/data/sipp/2004/tables.html> (last updated Nov. 17, 2010).

representation. Nevertheless, the appointment of counsel for children may produce several practical benefits. Children's attorneys can enhance the court's understanding of the child's perspective, facilitate the introduction of evidence, sharpen the presentation of factual and legal issues, promote dispute resolution, and protect the child from the harms of litigation itself.<sup>19</sup> In the rare case where a child has both a lawyer and a guardian ad litem (GAL) or other non-lawyer advocate, the scope of the lawyer's professional duties remains unclear. This Article suggests that even when the lawyer takes instruction from the child's appointed fiduciary, some aspect of the lawyer's own professional duties may run to the child. In other words, the child may occupy the status of "derivative client."<sup>20</sup> While the primary-derivative client doctrine is not well-developed in the law of lawyer regulation, it nevertheless offers a conceptual vehicle for recognizing that a lawyer's loyalty may be divided between the guardian and child, triggering a duty to act when the lawyer perceives the child's welfare to be at risk.

Part I explores the continuing preference among legislatures and judges for best interests representation by children's lawyers. I briefly summarize the debate among professional groups in Part I before turning to the views of legislatures and courts on the same topic. As will be explained, statutes and procedural rules of most states authorize best interests representation by lawyers in family court custody proceedings. The disjuncture between the scholarly commentary and the law on the ground seems driven by the perceived *parens patriae* responsibility of lawmakers and courts to protect children's welfare. That responsibility, moreover, is particularly robust in regard to children who are unable to direct counsel. Part I includes a discussion of interviews conducted with trial court judges in Arizona reflecting on the appointment of attorneys for children.

The twin concepts of children's autonomy and children's capacity to direct counsel are explored in Part II. Client-directed lawyering is appropriate for children who have developed a sense of self and the correlative capacity to think independently—to exercise considered judgment, to formulate consistent goals over time, and to articulate directives for the lawyer. For the many children and adolescents who lack that capacity, a lawyer's role will necessarily include consideration of the child's interests. As I contend in Part II, the value of client autonomy, already under fire from some quarters vis-à-vis the adult or institutional client, is even more tenuous when applied to the child client who cannot or will not exercise considered judgment. Part II includes a brief reminder of the advances in brain science showing that children's minds are not fixed or static but are in a dynamic state of maturation through young adulthood.

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19. See UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 6 & cmt. (amended 2007), 9C U.L.A. 26 (Supp. 2010) (describing value of legal representation for children in custody cases); STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES Standard III(F) (2003), reprinted in 37 FAM. L.Q. 131 (2003) [hereinafter ABA CUSTODY STANDARDS]; Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53, 63 (1992) (emphasizing benefits of legal representation for children).

20. See generally 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 2.7 (3d ed. 2007) (discussing primary-derivative client doctrine).

Part III looks more closely at a lawyer's professional competence to advocate that a particular action would serve a child's best interests, locating that competence both in the accepted guidelines for professional conduct and in the larger debate about the nature of a lawyer's professional responsibility. Part III emphasizes that a lawyer's advocacy of a child's interests fits within standard ethical frameworks for representing clients who cannot make adequately considered decisions. Due to the vulnerability of the child, even a lawyer retained to represent a non-lawyer guardian ad litem has a continuing duty toward the child. I also contend that the role of best interests lawyer is at least as acceptable as the "moral activist" model of lawyering urged by some theorists.

The child who is unable or unwilling to direct counsel poses a unique puzzle for legal ethics: unlike the incapacitated adult, the child's sense of identity is often inchoate but evolving, so the risk of paternalistic, value-laden lawyering is real. Professor Ted Schneyer's wide-ranging scholarship includes an exploration of the concept of clienthood<sup>21</sup> as well as the perils of justice-seeking as a norm for lawyers.<sup>22</sup> He has also written about alternative frameworks for lawyer regulation.<sup>23</sup> While quite distinct in focus, these strands of his work provide insights that are relevant to the role of children's lawyers. Just as Professor Schneyer has often steered away from the polarized debates toward more practical regulatory concerns, this Article tries to find common ground among various groups to highlight the practical need for, and benefits of, best interests lawyering.

## I. WHAT LEGISLATORS AND JUDGES WANT

The movement to redefine children's lawyers as client directed and to eliminate best interests representation has gained strength in the twenty-first century but has yet to produce a corresponding transformation in the law on the ground.<sup>24</sup> Debates continue about the value of appointing attorneys for children

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21. See, e.g., Theodore J. Schneyer, *Searching for New "Particles" in the Law of Lawyering: Recent Developments in the Attribution of "Clienthood,"* 1 J. INST. FOR STUDY LEGAL ETHICS 79 (1996).

22. See, e.g., Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 45 (2004) [hereinafter Schneyer, *The Promise*]; Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" over Professional Values*, 70 FORDHAM L. REV. 1831 (2002).

23. See, e.g., Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469 (2000); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008).

24. Recent contributions to child advocacy literature likewise calling for client-directed lawyering for children include Federle, *supra* note 1, Guggenheim, *supra* note 1, Mark Henaghan, *What Does a Child's Right to Be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough*, 42 FAM. L.Q. 117 (2008), Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385 (2006), and Taylor, *supra* note 1. Not all child advocates have joined the call for client-directed lawyering for children. See Donald Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441 (2000).

and about the role such representatives should play once appointed. Children's right of participation—the right to be heard by decisionmakers—in proceedings affecting their interests is now an accepted principle of international law.<sup>25</sup> In some nations that principle translates into a requirement that all children in contested custody proceedings be given reasonable opportunities to express their views, either directly or through a representative.<sup>26</sup> Affording children the right to have their views taken seriously can affirm a child's sense of dignity and self-worth and, concomitantly, enhance the decisionmaker's understanding of the dispute.<sup>27</sup> Nevertheless, the governing legal framework within the United States in most states has stopped short of recognizing a child's right of participation and requiring lawyers to advocate children's wishes. This Part briefly summarizes the positions advanced by professional groups and then turns to the quite different world of codified law, court opinions, and judicial attitudes.

### A. Competing Professional Guidelines

The American Bar Association has taken inconsistent positions on the role of children's lawyers. In 1995 the ABA took a firm but not absolute stance favoring client-directed lawyering for children in abuse and neglect proceedings.<sup>28</sup> While permitting the lawyer to advocate the child's "legal interests" if the child cannot or does not express a position, the ABA Abuse and Neglect Standards generally require a lawyer to maintain a traditional lawyer–client relationship with a child who is capable of directing counsel.<sup>29</sup> Under the Standards, the attorney "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."<sup>30</sup> In 2003, however, the ABA

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25. The widely-ratified United Nations Convention on the Rights of the Child has played a prominent role in the international recognition of children's human rights in general and their right of participation in particular. *See* U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/25 (Nov. 20, 1989). *See generally* Rebecca M. Stahl, Note, "Don't Forget About Me": Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 ARIZ. J. INT'L & COMP. L. 803 (2007) (discussing efforts of countries to comply with terms of the Convention). For an overview of the potential impact of ratification and implementation of the Convention in the United States, see Special Issue, *Convention on the Rights of the Child*, CHILD WELFARE, Sept.–Oct. 2010, at 21–224.

26. *See, e.g.*, Care of Children Act 2004, § 6 (N.Z.) (child's views); *id.* § 7 (lawyer to act for child). According to information distributed by the New Zealand Family Court, a child's lawyer should "find out the child's views and make the Judge aware of them" and ensure that "the child's best interests and all issues affecting their welfare are put before the Court." *See Introduction to the Care of Children Act*, FAM. CT. OF N.Z., <http://www.justice.govt.nz/courts/family-court/what-family-court-does/care-of-children/introduction> (last visited Mar. 24, 2011).

27. *See* PARKINSON & CASHMORE, *supra* note 17, at 9–13, 198–99.

28. PROPOSED STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES Standard A-1 to -2 & cmt. (1995), *reprinted in* 29 FAM. L.Q. 375 (1995) [hereinafter ABA ABUSE AND NEGLECT STANDARDS].

29. *Id.* Standard B-4(1)–(2). The Standards also acknowledge that lawyers may be appointed in a hybrid lawyer–guardian ad litem role, but express a clear preference for the traditional child's attorney role. *See id.* Standard A-2 & cmt.

30. *Id.* Standard A-1.

approached the role of children's lawyers quite differently in formulating standards for child custody cases. The ABA Custody Standards recommend two distinct categories for children's lawyers: the child's attorney, who maintains a traditional attorney-client relationship with the child, and the "best interests attorney," who "provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives."<sup>31</sup> The Standards make clear that lawyers in either category are not to function as witnesses, to submit reports, or to otherwise act as agents of the court.<sup>32</sup> As explained by Reporter Linda Elrod, "a lawyer should always remain a lawyer whether representing a child or a child's best interests."<sup>33</sup>

The Uniform Law Commission (ULC)<sup>34</sup> entered the fray in 2006 with the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, for which this Author was the Reporter.<sup>35</sup> The ULC attempted to accomplish several goals through the project: to require the appointment of a lawyer for every child in an abuse and neglect proceeding; to provide concrete guidance for the discretionary appointment of children's lawyers in family law cases; to differentiate the role of a lawyer from the nonlawyer guardian ad litem model; and to provide clear, child-centered performance standards for children's lawyers.<sup>36</sup> In implementing the last objective, the ULC proposed two categories of children's lawyers: the traditional child's attorney and the "best interests attorney," defined as "an attorney who provides legal representation for a child to protect the child's best interests without being bound by the child's directives or objectives."<sup>37</sup> While the ULC's general goals were noncontroversial, its endorsement of best interests representation as one alternative for children's attorneys provoked heated opposition within the child advocacy community.<sup>38</sup> Although the Act built on the ABA's Custody Standards for the concept of best interests lawyers, a contentious

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31. ABA CUSTODY STANDARDS, *supra* note 19, Standard II(B).

32. *Id.* Standard III(B) (lawyer appointed as child's attorney or best interests attorney should not play any other role in case and should not testify, file report, or make recommendation).

33. Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 117 (2003).

34. The Uniform Law Commission is now the preferred name for the National Conference of Commissioners on Uniform State Laws. See UNIFORM LAW COMMISSION, <http://www.nccusl.org> (last visited Mar. 7, 2011).

35. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (amended 2007), 9C U.L.A. 26 (Supp. 2010).

36. See Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 67 (2008).

37. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 2(3), 9C U.L.A. 26.

38. The criticism of the ULC effort was intense. See, e.g., Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103 (2008); Spinak, *supra* note 24.



debate about the Act arose within the ABA itself, and the ULC ultimately withdrew the Act from consideration by the ABA House of Delegates.<sup>39</sup>

Contemporaneous with the withdrawal of the Uniform Act from ABA consideration, a children's rights group within the ABA was hard at work devising its own model act for representation of children in abuse and neglect proceedings, in part as a response to the earlier work of the ULC. The proposed ABA Model Act, which as of this writing has not received formal approval by the House of Delegates, adheres closely to a client-directed norm but does prescribe a lawyer's role for a child who is incapable of directing counsel.<sup>40</sup> When a child has diminished capacity, the lawyer must try to ascertain the child's "needs and wishes" and make a "substituted judgment" determination.<sup>41</sup> Under the proposed Act, if the child has diminished capacity and is at risk of substantial harm, the lawyer may seek appointment of a nonlawyer best interests advocate.<sup>42</sup> Like the AAML Revised Standards, the Model Act does not address any residual role for a lawyer vis-à-vis the child or the nonlawyer appointee. The Model Act's provision for substituted judgment lawyering, while limited to the child who cannot direct counsel, is an important divergence from the AAML's position on the the role of children's lawyers.

As explained in the Introduction, the AAML is skeptical of the value of children's attorneys in general and is flatly opposed to children's attorneys taking any position in custody litigation other than to represent the child's wishes. In the new AAML Standards, courts are advised to be cautious in appointing counsel for children because of the added costs and the potential disadvantages of adding another attorney to an already contentious dispute.<sup>43</sup> According to the new Standards, "courts should appoint counsel only when they believe that the child's wishes need to be forcefully advocated."<sup>44</sup> In particular, the AAML recommends that counsel be appointed for a child only when both parties to the custody proceeding request it or when "the court wants the objectives sought by the child to be a prominent basis for the outcome of the case."<sup>45</sup> Thus, the AAML's insistence that a child's lawyer should only advocate the expressed wishes of the child has shaped its approach to the appointment decision itself. Since children's

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39. The intriguing story of the Uniform Act's fate within the ABA has been recounted elsewhere. See Atwood, *supra* note 36, at 72–73; Guggenheim, *supra* note 1, at 269–75.

40. The proposed Model Act was drafted by the Children's Rights Litigation Committee of the ABA Section of Litigation, with assistance from the ABA Center on Children and the Law and from First Star, a child advocacy organization focused on law reform. See MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 1 n.1 (Proposed Official Draft Mar. 1, 2011).

41. See *id.* § 7(d) (child's lawyer must "determine what the child would decide if he or she were capable of making an adequately considered decision and represent the child in accordance with that determination").

42. *Id.* § 7(e).

43. The AAML cautions that "[c]ourts should not routinely assign counsel for children in custody or visitation proceedings." AAML 2009 Standards, *supra* note 5, Standard 1.1, at 234–35.

44. *Id.* Standard 1.1 cmt., at 236–37.

45. *Id.* Standard 1.1, at 234.

lawyers are only to function as client-directed attorneys, they should be appointed only when courts want children's wishes to figure prominently in the litigation.<sup>46</sup>

Professor Guggenheim has described with evident dismay the entrenched view among New York family judges that children's lawyers—called “law guardians” under New York law<sup>47</sup>—should be free to advocate a position that will serve their clients' interests, whether or not the position is articulated by the child.<sup>48</sup> He was deeply disappointed in the 2006 Report of the Matrimonial Commission for its failure to reign in children's lawyers and suggests that the Commission “deliberately emphasize[d] the ordinariness of the role and purpose of children's lawyers, thereby obfuscating the complexities raised by using lawyers in [family court proceedings].”<sup>49</sup> Noting that judges *want* children's lawyers to advise them on children's best interests, Professor Guggenheim decried the lack of ethical constraints on the lawyers' advocacy. As he sees it, judges want children's lawyers to tell them what to do because it makes their jobs easier.

Moreover, Professor Guggenheim sees grave danger in best interests advocacy: “The principal danger children's lawyers bring is that they will conclude what is best for their clients based on invisible factors that have more to tell us about the values and beliefs of the lawyers than about what is good for the children.”<sup>50</sup> In his view, the Commission “liberate[d] children's lawyers to advocate what they perceive to be in their clients' best interests,” in apparent disregard of the real dangers that come from lawyers' unbridled discretion.<sup>51</sup> Interestingly, he suggests that best interests lawyering in custody cases may pose

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46. The American Law Institute has struck a similar note of caution, warning that introducing an additional attorney in a custody dispute may increase rather than diffuse the acrimony of litigation. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13 cmt. b (2002). Like the AAML, the ALI recommends that lawyers adhere to traditional client-directed representation and that guardians ad litem (GALs) be appointed for children lacking competence to direct the representation. *Id.* § 2.13 & cmts. d–e. The ALI also recommends that lawyers should seek the appointment of a guardian ad litem or take other protective measures when the lawyer reasonably believes the child cannot act in his or her own interests. *Id.* § 2.13 cmt. e.

47. N.Y. FAM. CT. ACT § 241 (2010) (providing that “Law Guardian” is appointed to “represent” the child and “to help protect [the child's] interests and to help them express their wishes to the court”).

48. Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 808–20 (2007). As Guggenheim sees it, judges want children's lawyers to advocate for their clients' interests rather than their expressed wishes because it makes their jobs easier. “Understandably, courts want any help they can get. For many judges deciding complex custody cases, this neutral child's lawyer is just what they are looking for to help them determine the best interests of the child.” *Id.* at 809.

49. *Id.* at 787.

50. *Id.* at 797. As Reporter for the 1995 AAML Standards, Professor Guggenheim stated in commentary: “The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests.” *AAML 1995 Standards*, *supra* note 7, Standard 2.7 cmt., at 13. This dire warning was repeated in the 2009 Standards. *See AAML 2009 Standards*, *supra* note 5, Standard 2.2 cmt., at 241.

51. Guggenheim, *supra* note 48, at 788.

greater risks than in abuse and neglect cases because the legal standards applicable to custody proceedings are more amorphous and subjective.<sup>52</sup>

### *B. State Law Receptivity*

Despite the position of the AAML and numerous children's rights advocates, the laws of most states in the United States continue to permit children's lawyers to engage in best interests representation. Judicial opinions have recognized with evident approval that the central role of a child's representative is not to zealously advocate what the child wants, but to advocate "what the lawyer believes to be in the client's best interests, even when the lawyer and the client disagree."<sup>53</sup> States vary in their approach to child representation in family court, with the majority authorizing the discretionary appointment of a legal representative—whether denominated an attorney or a guardian ad litem—to represent the child's best interests.<sup>54</sup> Importantly, some states authorize the

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52. Guggenheim, *supra* note 1, at 277–79.

53. See *In re Kristen B.*, 78 Cal. Rptr. 3d 495, 500 (Ct. App. 2008) (quoting *In re Zamer G.*, 63 Cal. Rptr. 3d 769, 779 (Ct. App. 2007)). Other judicial endorsements of a lawyer's duty to represent children's best interests include: *In re Marriage of Hartley*, 886 P.2d 665, 671 (Colo. 1994) (child's appointed attorney in custody proceeding is to act both as guardian and advocate and must consider child's opinions but is not bound by them), *Carrubba v. Moskowitz*, 877 A.2d 773 (Conn. 2005) (child's attorney had primary duty to represent child's interests and was entitled to absolute immunity in father's malpractice action), *In re Nicole VV*, 296 A.D.2d 608, 614 (N.Y. App. Div. 2002) (law guardian is to form opinion about what action, if any, would be in child's best interests), *Rowe v. Rowe*, 218 P.3d 887, 889 (Okla. 2009) (attorney-guardian ad litem for child in custody proceedings is to represent child's best interests even though child's wishes may be otherwise), and *In re Christina W.*, 639 S.E.2d 770, 776 (W. Va. 2006) (paramount concern for lawyers representing children in abuse and neglect cases is best interests of children).

54. See ARK. CODE ANN. § 9-13-101 (2010) (court may appoint "attorney ad litem" or private attorney to represent child); Supreme Court of Arkansas Administrative Order 15 § 5 (Sept. 21, 2001) (attorney ad litem "shall determine the best interest of a child" by considering enumerated factors); CAL. FAM. CODE § 3151 (West 2011) (court may appoint counsel for "representation of the child's best interests"); COLO. REV. STAT. § 14-10-116 (2010) (court may appoint attorney to represent child's best interests); CONN. GEN. STAT. § 46b-54 (2010) (court may appoint counsel to represent child); *Carrubba*, 877 A.2d at 782 (overarching goal of attorney appointed under § 46b-54 is to serve best interests of child); DEL. CODE ANN. tit. 13, § 721(c) (West 2010) (court may appoint attorney to represent child); DEL. CODE ANN. tit. 29 § 9007A(a)(1) (West 2010) (appointment is to ensure representation of children's best interests); D.C. CODE § 16-918(b) (2010) (court may appoint attorney to represent best interests of child); GA. CODE ANN. § 29-9-2 (2010) (court may appoint GAL for child); HAW. REV. STAT. § 571-46(a)(8) (2010) (court may appoint GAL to represent interests of child); IDAHO CODE ANN. § 32-704(4) (2010) (court may appoint attorney to represent child's interests); 750 ILL. COMP. STAT. 5/506(a) (2010) (court may appoint attorney to represent child's best interests, not bound by child's expressed wishes); ILL. SUP. CT. R. 907 (setting out standards of practice for attorneys who represent children); IND. CODE § 31-17-6-1 to -4 (2010) (court may appoint GAL or court appointed special advocate to represent child's interests); KY. REV. STAT ANN. § 403.090 (West 2010) (court may appoint attorney as "friend of the court" to investigate and make report to court); ME. REV. STAT. tit. 19-A, 1507 (2009) (court may appoint GAL for child); MICH. COMP. LAWS § 722.24 (2010) (court may appoint "lawyer-GAL" to represent child's best interests);

appointment of either a traditional attorney or a best interests representative, or both, at the court's discretion.<sup>55</sup> In Alaska, for example, the court has discretionary power to appoint an attorney to function as a guardian ad litem "when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child."<sup>56</sup> Similarly, Iowa gives its family courts the power to appoint a lawyer to represent a child's legal interests and a guardian ad litem to represent the child's best interests.<sup>57</sup> Florida, likewise, authorizes the appointment of a guardian ad litem and legal counsel for the child.<sup>58</sup> In these states, where courts have discretion to choose between types of legal representation, the operative assumption is that courts can designate the nature of a child's representation without compromising an attorney's ethical responsibilities.

In contrast, in a few states attorneys exercise the core responsibility to decide whether they should represent a child's best interests or a child's directives.

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child's wishes are relevant but lawyer-GAL makes final determination on best interests); MINN. STAT. § 257.60 (2010) (court may appoint GAL for child); MO. REV. STAT. § 452.402(3) (2010) (court may appoint GAL if in best interests of child); MONT. CODE ANN. § 40-4-205 (2009) (court may appoint GAL for child; GAL may be attorney); NEB. REV. STAT. § 42-358(1) (2010) (court may appoint attorney to protect interests of minor children); N.H. REV. STAT. ANN. § 461-A:16 (2010) (court may appoint attorney as guardian ad litem to represent interests of children); N.J. STAT. ANN. § 9:2-4(c) (West 2010) (court may appoint guardian ad litem or attorney or both to represent minor child's interests); N.M. STAT. ANN. § 40-4-8(a) (2010) (court may appoint lawyer to act as GAL); N.M. R. CIV. P. 1.053.3 (guardian ad litem is "best interests attorney"); N.Y. FAM. CT. ACT § 249(a) (McKinney 2010) (court may appoint "law guardian" to represent child's best interests); N.D. CENT. CODE § 14-09-06.4 (2009) (court may appoint lawyer to represent child's best interests); OKLA. STAT. tit. 43, § 107.3 (2010) (court may appoint attorney for child to act as guardian ad litem); R.I. GEN. LAWS § 15-5-16.2(c)(1) (2010) (court may appoint attorney or GAL to represent interest of minor child); S.D. CODIFIED LAWS § 25-4-45.4 (2010) (court may appoint counsel to represent child's best interests); TEX. FAM. CODE ANN. § 107.001-.005 (West 2010) (court may appoint GAL, attorney ad litem, or amicus attorney, with enumerated duties); UTAH CODE ANN. § 78A-2-228 (West 2010) (court may appoint private attorney guardian ad litem to represent best interests of minor); VA. SUP. CT. R. 8:6 (role of counsel for child is representation of child's legitimate interests); WASH. REV. CODE § 26.09.110 (2010) (court may appoint attorney to represent interests of minor child).

55. See, e.g., ARIZ. REV. STAT. ANN. § 25-321 (2010) (court may appoint attorney to represent interests of minor for support, custody, and parenting time); ARIZ. R. FAM. L. PROC. 10 (court may appoint child's attorney, best interests attorney, or court appointed advisor); MD. CODE ANN., FAM. LAW § 1-202 (West 2010) (court may appoint lawyer to serve as "child advocate attorney" or to serve as "best interests attorney" for child); W. VA. CODE § 48-9-302 (2010) (court may appoint guardian ad litem to represent child's best interests or lawyer to represent child if child is competent to direct terms of representation).

56. ALASKA STAT. § 25.24.310 (2010); see also FLA. STAT. § 61.401 (2010) (court may appoint GAL or legal counsel for child, with GAL's duties to represent child's best interests).

57. IOWA CODE § 598.12 (2010). The Texas approach is parallel, with the court retaining power to designate the nature of the child's representative. See TEX. FAM. CODE ANN. § 107.001-.005.

58. FLA. STAT. § 61.401 (court may appoint GAL to act in child's best interests and legal counsel to act as attorney or advocate for child).

In this model, the judge appoints an attorney for a child and, after interviewing the child client, the lawyer determines whether the child is capable of directing the representation. In Maryland, for example, a lawyer appointed as a traditional attorney (called a “child advocate”) must determine if the child has “considered judgment,” and if the child does not, the attorney can ask to serve as a “best interest attorney.”<sup>59</sup> In a few states, moreover, legislatures or rule-making bodies have attempted to address the ethical conflicts that can arise when a child’s wishes diverge from the attorney’s determination of the child’s interests.<sup>60</sup>

Although the focus of this Article is the role of children’s attorneys in family court, it should be noted that state laws governing children’s representation in juvenile court in abuse and neglect proceedings reveal the same legislative affinity for best interests representation. The appointment of an attorney or guardian ad litem for the child remains the most common form of child representation across the United States.<sup>61</sup> The duty of the child’s counsel to advocate for the child’s best interests in juvenile court is, in part, a function of the federal mandate for a guardian ad litem role under the Child Abuse Prevention and Treatment Act (CAPTA).<sup>62</sup> Until Congress revises or clarifies the language of CAPTA to explicitly authorize client-directed attorneys, the Act will continue to push states in the direction of guardian ad litem representation.<sup>63</sup> Because of financial constraints, most states are likely to view the cost of appointing an additional client-directed attorney for a child as prohibitive.

Court decisions about children’s lawyers reflect the strength of the best interests model, sometimes to a surprising degree. In *In re Kristen B.*, for example, the California court of appeals rejected an ineffective assistance of counsel

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59. MD. JUDICIAL CONFERENCE COMM. ON FAMILY LAW, MARYLAND STANDARDS OF PRACTICE FOR COURT-APPOINTED LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2005).

60. See, e.g., KAN. STAT. ANN. § 38-1505 (repealed 2006) (GAL represents best interests of child; when child’s wishes differ from best interests, GAL must inform court and GAL or child can request attorney to represent wishes); *In re Georgette*, 785 N.E.2d 356 (Mass. 2003) (noting ethical tension in representing minor child’s wishes and child’s interests, and urging adoption of clear guidelines by court rule).

61. According to a national survey published in 2009, only thirteen states mandate the appointment of client-directed attorneys for children in abuse and neglect proceedings. See FIRST STAR & CHILDREN’S ADVOCACY INST., A CHILD’S RIGHT TO COUNSEL 22 (2d ed. 2009).

62. As a condition of receiving federal funding for child abuse prevention and treatment programs, states must appoint a “guardian ad litem” for every child who is the subject of an abuse or neglect proceeding. See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006). CAPTA requires that the guardian ad litem have appropriate training and “obtain first-hand, a clear understanding of the situation and needs of the child; and . . . make recommendations to the court concerning the best interests of the child.” *Id.* At least a few courts have held that CAPTA may be satisfied by the appointment of either a guardian ad litem or counsel for the child. See, e.g., *In re Josiah Z.*, 115 P.3d 1133 (Cal. 2005).

63. While CAPTA’s mandate may be flexible enough to encompass the appointment of a child-directed lawyer, see Andrea Houry, *Why a Lawyer? The Importance of Client-Directed Legal Representation for Youth*, 48 FAM. CT. REV. 277, 280–81 (2010), the terminology of “guardian ad litem” is a strong impetus to provide best-interests representation.

challenge brought by a mother whose fourteen-year-old daughter had been declared dependent by the juvenile court.<sup>64</sup> The girl had been removed from her home after telling several people that her stepfather had sexually abused her.<sup>65</sup> When she later recanted her statements, her appointed counsel continued to advocate that the girl not be returned home, contrary to the girl's articulated wishes.<sup>66</sup> Indeed, counsel pursued a strategy undermining the client's testimony in court through somewhat hostile questioning.<sup>67</sup> While the trial judge stopped counsel from impugning his client's credibility, the judge did not find the lawyer's representation to be ineffective.<sup>68</sup>

The court of appeals affirmed, emphasizing counsel's core duty to protect the minor's best interests:

Here, minor's counsel performed her duties under [California statutory law] zealously and effectively by conducting a factual investigation and advocating a position, supported by the evidence, which served to protect [the child's] welfare. The record provides no basis whatsoever to conclude Kristen received ineffective assistance of counsel when minor's counsel advocated a position she believed was in Kristen's best interests, notwithstanding Kristen's stated wishes.<sup>69</sup>

The appellate court's endorsement of the best interests advocacy of the child's counsel in *In re Kristen B.* is not unique.<sup>70</sup>

The conduct of Kristen's counsel met the standards of California law for children's lawyers but surely would outrage many child-rights advocates because of the lawyer's divergence from the traditional attorney's role and the concomitant insult to Kristen's autonomy. An alternative course of action would have been for the lawyer to withdraw or to seek the appointment of a guardian ad litem, or both, but even such measures would telegraph to the court the lawyer's misgivings about her client's changed position. While the alternative measures would be appropriate for adult unimpaired clients, California law—and the law of most states—permitted Kristen's counsel to disregard her client's apparent change of heart in order to protect her from harm. One can indulge in a thought experiment, however, to reconceive *In re Kristen B.* If Kristen were under pressure from her mother to recant the allegation of sexual abuse (as her lawyer suspected), she might not have truly wanted to return home to live with her stepfather. If that were the case, Kristen satisfied her mother by testifying as she did. At the same time, Kristen's

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64. 78 Cal. Rptr. 3d 495 (Ct. App. 2008).

65. *Id.* at 498.

66. *Id.*

67. *Id.*

68. *Id.* at 498–99.

69. *Id.* at 500.

70. See, e.g., *In re A.M.*, 339 N.E.2d 135, 138 (N.Y. 1975) (affirming termination of parental rights and noting that law guardian's "highly competent neutral submission is reassuring"); *Carballeira v. Shumway*, 710 N.Y.S.2d 149, 152–53 (App. Div. 2000) (emphasizing Law Guardian's statutory duty to represent child's wishes as well as to advocate child's best interests and noting that child's preference is only "some indication of what is in the child's best interests").

lawyer—advocating for Kristen’s best interests—enabled Kristen to avoid returning to a residence to live with a man whom she had previously accused of sexual abuse. In other words, a best interests lawyer can sometimes serve as an important shield against parental recrimination.<sup>71</sup>

### C. The Arizona Experience

The judicial perspective on children’s lawyers is more nuanced than Professor Guggenheim suggests, as revealed by the experience of the Arizona family law bench. Since 2006, Arizona judges have been operating under a regime very similar to that proposed by the Uniform Law Commission—a framework in which judges not only decide whether to appoint a representative for a child but also choose the role for that representative. The Arizona Rules of Family Law Procedure provide comprehensive guidelines for family law practice, including rules governing pleadings, motions, discovery, temporary orders, trials, and methods of alternate dispute resolution.<sup>72</sup> Among the rules is a provision governing the representation of children in family court. Rule 10 authorizes the appointment of representatives and permits judges to select from three categories: “best interests attorney,” “child’s attorney,” and “court-appointed advisor.”<sup>73</sup>

Rule 10 and its commentary draw a sharp distinction between attorneys—whether child’s attorney or best interests attorney—and the court-appointed advisor. Under the Rule, the child’s attorney and best interests attorney are not to submit testimony or otherwise function as witnesses,<sup>74</sup> and the court-appointed advisor is not to perform actions that can only be performed by an attorney.<sup>75</sup> While the Rule does not define the role of child’s attorney or best interests attorney, the drafters drew on the existing standards developed by other professional groups. The commentary to the Rule refers to the ABA Standards of Practice for Lawyers Representing Children in Custody Cases—the standards that gave rise to the terminology of “child’s attorney” and “best interests attorney.”<sup>76</sup> In addition, for clarification of the role of the nonlawyer “court-appointed advisor,” the commentary refers to the then-current draft of the Uniform Act.<sup>77</sup> That

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71. In a similar vein, children in an Australian study of divorce reported that, while they wanted to have a say in the process, they “were concerned about hurting one of their parents, or being hurt by them.” PARKINSON & CASHMORE, *supra* note 17, at 195.

72. See ARIZ. R. FAM. L. PROC. (compiled in volume 17B of ARIZ. REV. STAT. ANN. (2010)).

73. ARIZ. R. FAM. L. PROC. 10.

74. Under Rule 10(E)(6) of the Arizona Rules of Family Law Procedure, neither category of attorney may “submit a report into evidence” or “testify in court.” *Id.* R. 10(E)(6).

75. *Id.* R. 10(E)(3) (“A court-appointed advisor may not take any action that may be taken only by a licensed attorney, including making opening and closing statements, examining witnesses, and engaging in discovery other than as a witness.”).

76. *Id.* R. 10(E)(3) cmt. The nomenclature of “child’s attorney” and “best interests attorney” originated with the ABA Custody Standards. See ABA CUSTODY STANDARDS, *supra* note 19.

77. *Id.* R. 10 cmt.; See UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2005 Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2005ChildRepDraft.htm>. That terminology was later dropped

category is akin to a guardian ad litem but, unlike traditional guardian ad litem appointments, the Rule provides clarity about the court-appointed advocate's responsibilities and limitations on the advocate's powers.

The best interests attorney is the focal point of controversy among child advocates because of the view that best interests advocacy falls outside an attorney's realm of expertise, violates ethical constraints, and usurps the judicial function. Understandably, critics fear that best interests attorneys will function as expert witnesses, unduly influencing courts without being subject to cross-examination. Anticipating that fear, the drafters of Rule 10 expressly prohibited the best interests attorney from submitting a report into evidence or testifying in court.<sup>78</sup> While critics scoff at such prohibitions as ineffective,<sup>79</sup> judges have found the limitations to be meaningful and not simply a superficial distinction. A recent appellate court opinion from Arizona explored this point in depth. In *Aksamit v. Krahn*, divorcing parents each sought sole legal custody of their two minor children.<sup>80</sup> The trial court appointed a best interests attorney to represent the children, but the attorney went a step further and effectively functioned as a witness at trial.<sup>81</sup> In awarding custody to the mother, the trial judge expressly relied on the "opinion and experience of the Best Interests Attorney."<sup>82</sup> Because the only formal witnesses at trial were the parents themselves, the trial judge necessarily treated the best interests attorney's oral report as evidence.<sup>83</sup>

The appeals court reversed, concluding that "[a]s a practical matter, the [best interests attorney] functioned as a court-appointed advisor, giving a substantive report that was treated as evidence," contrary to the order of appointment and the terms of Rule 10.<sup>84</sup> The court emphasized that the attorney did not simply take a position in the litigation—an appropriate aspect of advocacy—but delivered to the court the results of the attorney's own investigation, filling "six transcript pages of substantive information."<sup>85</sup> In the court's view, "[t]he error . . . is that both the [best interests attorney] and the trial court treated the information or report from the [best interests attorney] . . . as evidence upon which, at least in part, the child custody decision was based."<sup>86</sup>

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by NCCUSL in favor of "best interests advocate," a term that seemed to better capture the functions of this nonlawyer representative. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 2(2) (amended 2007), 9C U.L.A. 26 (Supp. 2010).

78. ARIZ. R. FAM. L. PROC. 10(E)(6)(c)-(d).

79. See Guggenheim, *supra* note 1, at 281-83 (describing as "indefensible" the position that permits a best interests lawyer to strategically marshal evidence in support of the lawyer's determination of a child's best interests).

80. 227 P.3d 475 (Ariz. Ct. App. 2010).

81. *Id.* at 476-77.

82. *Id.* at 476 (quoting trial judge's findings that, in turn, referred repeatedly to best interests attorney's oral report).

83. *Id.* at 476, 480-81.

84. *Id.* at 479.

85. *Id.* at 479-80.

86. *Id.* at 480. Much of the dispute at trial focused on whether the children's older half-siblings could function as adequate caretakers in the mother's home. On that



The court of appeals in *Aksamit* clearly viewed Rule 10's proscriptions as necessary limitations on the best interests attorney's professional role.<sup>87</sup> From the court's perspective, valid distinctions exist between a nonlawyer representative and a best interests attorney.<sup>88</sup> While Professor Guggenheim has argued that permitting attorneys to advocate best interests is fundamentally at odds with the role of a lawyer, the Arizona Court of Appeals saw the question differently. Attorneys may advocate within the constraints of traditional litigation methods: witness testimony, documentary evidence, and legal argument.<sup>89</sup> The problem in *Aksamit* was not the best interests advocacy but the methods chosen by the attorney.<sup>90</sup>

Conversations with family and juvenile court judges in Arizona reveal that judges approach the appointment of children's representatives with thoughtful appreciation for the risks and benefits of introducing an additional lawyer into the litigation mix.<sup>91</sup> The family court judges acknowledged that due to cost, appointments occur in only a small percentage of custody cases.<sup>92</sup> In juvenile

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question, the best interests attorney provided the court with information based on her own observations and interviews over a period of weeks and offered her own opinion regarding custody. *Id.* at 481.

87. *Id.* at 477–79.

88. *Id.*

89. *Id.*

90. This same distinction was endorsed by the Connecticut Supreme Court in a similar context. *See Ireland v. Ireland*, 717 A.2d 676, 687–89 (Conn. 1998) (child's attorney who submitted unsolicited report based only on his personal opinion acted improperly; focus was on *manner* of presenting information to court).

91. This Author and a research assistant spoke with Arizona judges, randomly selected, to glean a sense of the judicial perspective on children's representation. Notes of all interviews are on file with the Author. *See Telephone Interview with Hon. Lisa Ilka Abrams, Comm'r, Pima Cnty. Superior Court* (Aug. 11, 2010); *Telephone Interview with Hon. Gus Aragon, Judge, Pima Cnty. Juvenile Court* (Aug. 16, 2010); *Telephone Interview with Hon. Kyle Bryson, Presiding Judge, Family Law Bench, Pima Cnty. Superior Court* (Nov. 22, 2010); *Telephone Interview with Hon. Hector E. Campoy, Judge, Pima Cnty. Juvenile Court* (Aug. 6, 2010); *Telephone Interview with Hon. Bruce R. Cohen, Judge, Maricopa Cnty. Superior Court* (June 6, 2010); *Telephone Interview with Hon. Suzanna S. Cuneo, Comm'r, Pima Cnty. Juvenile Court* (Aug. 13, 2010); *Telephone Interview with Hon. Elaine Fridlund-Horne, Judge, Coconino Cnty. Superior Court* (June 22, 2010); *Telephone Interview with Hon. Peter W. Hochuli, Comm'r, Pima Cnty. Juvenile Court* (Aug. 5, 2010); *Telephone Interview with Hon. Margaret L. Maxwell, Comm'r, Pima Cnty. Superior Court* (Aug. 5, 2010); *Telephone Interview with Hon. Karen J. Nygaard, Comm'r, Pima Cnty. Superior Court* (Aug. 4, 2010); *Telephone Interview with Hon. Stephen M. Rubin, Comm'r, Pima Cnty. Juvenile Court* (Aug. 5, 2010); *Interview with Hon. Sarah R. Simmons, Judge, Pima Cnty. Superior Court, in Glendale, Ariz.* (June 11, 2010); *Telephone Interview with Hon. K.C. Stanford, Comm'r, Pima Cnty. Superior Court* (Aug. 4, 2010); *Telephone Interview with Hon. Joan L. Wagener, Comm'r, Pima Cnty. Juvenile Court* (Sept. 22, 2010).

92. Bryson Interview, *supra* note 91 (fewer than 10% of cases); Campoy Interview, *supra* note 91 (fewer than 5% of cases); Nygaard Interview, *supra* note 91 (about 5% of cases); Stanford Interview, *supra* note 91 (fewer than 5% of cases). As Commissioner Maxwell explained, she appoints a representative in about 1–2% of her custody cases, and “the overriding concern is cost.” Maxwell Interview, *supra* note 91. She

court, in contrast, where children's lawyers are compensated from public funds, attorney appointments are mandated in all dependency cases.<sup>93</sup> While the judges generally viewed the appointment of children's lawyers as very helpful, especially in cases involving allegations of abuse, the judges also recognized the potentially polarizing impact of introducing a new advocate in the litigation.<sup>94</sup> Significantly, a majority of the family court judges preferred the best interests attorney as the norm for Rule 10 appointments,<sup>95</sup> with some judges reporting that they rarely if ever appoint a traditional child's attorney in a custody dispute.<sup>96</sup> Two clear rationales emerged for this preference: the desire for the child's representative to be able to participate as an attorney in the litigation, and the desire for a broader presentation of evidence than would be offered if the lawyer's advocacy were limited to the child's expressed wishes.

According to several judges, the appointment of a lawyer rather than a nonlawyer has distinct advantages. From their perspective, a court-appointed advisor is generally less effective than the other categories of appointment because the advisor's role as a nonlawyer is circumscribed. As one judge put it, "I want a lawyer, someone who can present evidence, file motions, cross-examine witnesses. That's essential."<sup>97</sup> She added that the court-appointed advisor is useful when an "investigator" is needed, but not when a lawyer is desired.<sup>98</sup> Another judge prefers the appointed representative to be a lawyer so that the person can recognize and identify legal issues that may arise in the course of the case.<sup>99</sup> The AAML's new

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generally limits her appointments to cases in which the parents agree to it and can afford to pay for it. *Id.* Judge Simmons, on the other hand, estimated that she appointed children's representatives in about 10–20% of all family law cases. Simmons Interview, *supra* note 91.

93. See ARIZ. REV. STAT. ANN. § 8-221 (2010). The mandatory appointment of attorneys for all children in dependency cases was confirmed by the juvenile court judges. Aragon Interview, *supra* note 91; Cuneo Interview, *supra* note 91; Hochuli Interview, *supra* note 91; Rubin Interview, *supra* note 91; Wagener Interview, *supra* note 91.

94. See, e.g., Fridlund-Horne Interview, *supra* note 91.

95. Campoy Interview, *supra* note 91; Cohen Interview, *supra* note 91; Fridlund-Horne Interview, *supra* note 91; Nygaard Interview, *supra* note 91; Simmons Interview, *supra* note 91. Only one family court judge expressed a preference for a traditional child's attorney, at least for children over the age of ten years. Maxwell Interview, *supra* note 91.

96. Cohen Interview, *supra* note 91 (reporting that only 1% of appointments had been child's attorney); Fridlund-Horne Interview, *supra* note 91 (stating that she only appoints a child's attorney on occasion); Stanford Interview, *supra* note 91 (reporting that he seldom appointed child's attorney). For a practical concern identified by Commissioner Stanford, see *infra* notes 100, 105–106, 123 and accompanying text.

97. Simmons Interview, *supra* note 91.

98. *Id.*

99. Hochuli Interview, *supra* note 91. Among family court interviewees, only one judge preferred the court-appointed advisor, explaining that she appreciates the expertise that such an appointee brings to the process, the ability of the court to identify the areas that need to be explored, and the ability of the parties to call such an appointee as a witness subject to cross-examination. Abrams Interview, *supra* note 91; E-mail from Hon. Lisa Abrams, Comm'r, Pima Cnty. Superior Court, to Author (Dec. 20, 2010, 4:34 PM) (on file with Author) [hereinafter Abrams E-mail]. Judge Abrams also noted that court-appointed advisors are particularly useful when both litigants are self-represented. Abrams E-mail, *supra*.

standards—limiting the court to a guardian ad litem if the child is unable to direct counsel—will not meet this concern unless the court makes an additional appointment of an attorney, an alternative that is both expensive and problematic in terms of the role integration of the two representatives. Finally, since many litigants in family court appear without representation, an attorney for the child can function as a “dispute resolution organizer in the midst of a problem that may otherwise overwhelm parent capacity.”<sup>100</sup>

As between the two categories of attorney appointments, the Arizona judges who strongly preferred the best interests attorney over the child’s attorney gave a variety of reasons relating to the nature and impact of the attorney’s advocacy. While the judges agreed that a child’s attorney would be suitable for a child with sufficient cognitive and emotional maturity to meaningfully direct counsel, their self-reported data suggests that they rarely find such appointments appropriate. One judge speculated that the appointment of a child’s attorney might give greater emphasis to the child’s wishes than is warranted under applicable state law.<sup>101</sup> He noted that the child’s viewpoint is just one factor among several in the custody calculus and that the child is not a formal party to the custody litigation in any event.<sup>102</sup> The same judge also explained that children’s wishes are malleable and can be distorted.<sup>103</sup> The judges appreciated that the best interests attorney can apprise the court of the child’s expressed wishes, if any, but can also place the child’s desires in context through other evidentiary presentations.<sup>104</sup>

One judge identified another advantage to appointing a best interests attorney. A best interests attorney who determines that his or her client is capable of directing counsel may ask to be redesignated as a child’s attorney.<sup>105</sup> According to the judge, such requests are routinely granted.<sup>106</sup> In contrast, a lawyer initially appointed as a child’s attorney who finds that the child lacks ability to direct counsel cannot be redesignated as a best interests attorney without compromising the lawyer–client relationship. Instead, the ordinary course of action in such a

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100. E-mail from Hon. K.C. Stanford, Comm’r, Pima Cnty. Superior Court, to Author (Jan. 21, 2011, 11:47 AM) (on file with Author) [hereinafter Stanford E-mail].

101. Cohen Interview, *supra* note 91.

102. *Id.* Like many states, Arizona gives family courts considerable discretion in fashioning custody decrees that will serve the best interests of children. Under the applicable statutory law, Arizona courts must consider the parent’s wishes, the child’s wishes, the relationship among the parties, the child’s adjustment to home, school, and community, the mental and physical health of all parties, and other factors. *See* ARIZ. REV. STAT. ANN. § 25-403(A)(1)–(7) (2010). Arizona courts, moreover, have held that a child was not entitled to intervene as a party in his parent’s custody proceeding but was entitled to be represented by independent counsel. *See, e.g., J.A.R. v. Superior Court*, 877 P.2d 1323 (Ariz. Ct. App. 1994).

103. Cohen Interview, *supra* note 91.

104. *Id.*; Nygaard Interview, *supra* note 91.

105. Stanford E-mail, *supra* note 100.

106. *Id.*

circumstance would be for the child's attorney to withdraw and for the court to make a new appointment of a best interests attorney.<sup>107</sup>

While Professor Guggenheim is critical of the "reassurance" that courts may seek from best interests lawyers,<sup>108</sup> judges in Arizona voiced an appreciation for the ability of such lawyers to deepen the judges' understanding of the family dynamics in contentious custody disputes. From the judges' perspective, a best interests attorney can present a more comprehensive picture to the court than the focused advocacy of the child's expressed preference.<sup>109</sup> As one judge put it, the best interests attorney provides a mechanism for getting information before the court without it being filtered through the parents' attorneys.<sup>110</sup> Another judge suggested that the appointment of a best interests attorney for multiple siblings is less likely to generate conflict-of-interest problems than is the appointment of a child's attorney.<sup>111</sup> While recognizing that conflicts can arise even for a best interests attorney representing siblings,<sup>112</sup> the judge pointed out that mere differences among children's preferences would not necessarily create a conflict requiring withdrawal of a best interests attorney. Rather, a conflict would occur only if the best interests attorney's advocacy for one child would undermine the attorney's advocacy for another child.<sup>113</sup>

At the same time, the judges recognized the ethical tensions in the role of best interests attorney. As one explained, "The best interests attorneys may be at their best when they are putting on expert testimony, introducing documentary evidence, perhaps without taking an express position in the litigation."<sup>114</sup> Another judge applauded the *Aksamit* decision, noting that lawyers are not trained as mental health experts to offer opinions in court.<sup>115</sup> That same judge observed that best interests attorneys often face challenges in introducing the child's wishes into evidence due to procedural constraints.<sup>116</sup> None of the judges took the position that

107. While this process is not spelled out in the Arizona Rules of Family Law Procedure, the need for different alternatives is addressed in the Uniform Act. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 9 & cmt. (amended 2007), 9C U.L.A. 26 (Supp. 2010).

108. See Guggenheim, *supra* note 48, at 811 (noting that value of children's lawyers to judges is a "reassuring" quality that results when position of law guardian comports with court's decision).

109. Simmons Interview, *supra* note 91.

110. Fridlund-Horne Interview, *supra* note 91.

111. Simmons Interview, *supra* note 91.

112. In *In re Zamer G.*, 63 Cal. Rptr. 3d 769, 775–80 (Ct. App. 2007), for example, the court recognized that a dependency lawyer appointed to represent multiple siblings would not necessarily face a conflict solely because the siblings expressed different preferences, so long as the attorney advocated a position that the attorney believed to be in the minors' best interests. Nevertheless, on the facts the court found an actual conflict of interest.

113. Simmons Interview, *supra* note 91.

114. Fridlund-Horne Interview, *supra* note 91.

115. E-mail from Hon. Bruce R. Cohen, Judge, Maricopa Cnty. Superior Court, to Author (Dec. 20, 2010, 1:00 PM) (on file with Author).

116. *Id.* Judge Cohen noted that the best interests attorney—who clearly cannot testify about the child's wishes—is unlikely to call the child to testify and may be reluctant

the role of the best interests attorney is inconsistent with the Model Rules of Professional Conduct,<sup>117</sup> and one noted that, in any event, Rule 10 is an explicit authorization by rule for an attorney's assumption of the best interests role.<sup>118</sup> Even though lawyers lack special expertise in determining children's interests, another judge explained that best interests advocacy was nevertheless helpful as a means of bringing "the big picture" to the court without being formally aligned with one of the parents.<sup>119</sup> The ultimate task for the court—arriving at a disposition that serves the best interests of the child—will necessarily require weighing and evaluating the evidence. In the judge's view, the best interests attorney can be a valuable asset in that process.<sup>120</sup>

Several judges pointed out that ethical tensions can arise for the traditional child's attorney if a mature child expresses a desire that conflicts with the lawyer's position on the child's best interests.<sup>121</sup> Ideally, such a conflict can be resolved through the dual appointment of a traditional child's attorney and a best interests attorney or non-attorney advocate, but the expense of such dual appointments may be prohibitive.<sup>122</sup> One judge observed that many client-directed lawyers "walked and talked like best interests attorneys" and vice versa, suggesting that the line between the two categories is quite fluid.<sup>123</sup> Interestingly, few of the judges reported that any children had ever complained about their appointed lawyers, and most who had received such complaints characterized them as primarily relating to the lawyers' failure to communicate with their child clients.<sup>124</sup>

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to use a mental health professional to address the child's stated wishes. *Id.* While the attorney may refer to the child's wishes in a position statement, that reference would be advocacy rather than evidence. *Id.*

117. *E.g.*, Nygaard Interview, *supra* note 91. A family court commissioner noted that lawyers who represent children undergo special training and are aware of their ethical obligations. *Id.* Others suggested that lawyers appointed as a traditional child's attorneys need to stick to their basic obligation to advocate the child's wishes and to avoid shading their advocacy to favor an outcome that is not desired by the child. Campoy Interview, *supra* note 91; Hochuli Interview, *supra* note 91.

118. Maxwell Interview, *supra* note 91.

119. Fridlund-Horne Interview, *supra* note 91.

120. *Id.*

121. *E.g.*, Campoy Interview, *supra* note 91; Simmons Interview, *supra* note 91;

122. Campoy Interview, *supra* note 91; Simmons Interview, *supra* note 91; Maxwell Interview, *supra* note 91. Several of the juvenile court judges observed that volunteer Court Appointed Special Advocates (CASAs) can fill this need to some extent, but the supply of CASAs is limited. Cuneo Interview, *supra* note 91. The limitations imposed by costs have been noted by others. In *Clark v. Alexander*, 953 P.2d 145, 153 (Wyo. 1998), for example, the court explained, "We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process."

123. Stanford E-mail, *supra* note 100.

124. Campoy Interview, *supra* note 91; Hochuli Interview, *supra* note 91; Rubin Interview, *supra* note 91. The judges' anecdotal evidence is consistent with empirical surveys of children's attitudes toward their lawyers. See Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's*

An additional set of concerns may underlie the reluctance that many judges felt to appoint a child's attorney. According to several interviewees, the appointment of a child's attorney can pose two distinct risks. One danger is that the attorney, in looking to the child for direction, will push the child into expressing a preference in the custody dispute, thus exacerbating the risk of intense loyalty conflicts for the child.<sup>125</sup> Although children may want to avoid taking sides, the child's attorney needs direction in order to fulfill his or her professional role and may prod the child into giving that direction.<sup>126</sup> One judge shared an intriguing insight about the potential utility of a best interests attorney in this regard: a child's position can be presented through the best interests attorney's advocacy, without forcing the child to expressly claim a position in the litigation.<sup>127</sup> In other words, through witness testimony and evidentiary presentations, the best interests attorney can bring the child's voice into the litigation in a manner that respects the child's desire to remain neutral vis-à-vis his or her parents.<sup>128</sup>

A second and related risk identified by the judges is that children are not fixed beings with settled goals but are constantly evolving toward adulthood. A child's expressed preferences may shift over time, sometimes sharply, and are subject to influence—if not manipulation—by parents and others close to the child.<sup>129</sup> The attorney who advocates the child's wishes in custody litigation, however, in effect “freezes” the child's views at an arbitrary point on the continuum of evolving identity.<sup>130</sup> In that sense, a lawyer's advocacy of the child's expressed desires at one point in time may give undue weight to those wishes in light of the child's overall developmental path. One judge saw a “danger in the child's attorney becoming invested in and committed to a particular litigation objective.”<sup>131</sup> Another judge explained that, due to the shifting preferences of young children, attorneys on occasion have been forced to change their litigation strategies. As she put it, “Children's attorneys have had to stand up in court and say, in effect, ‘your honor, my client has changed his position.’”<sup>132</sup>

The landscape of existing state laws across the United States and the reported experience of judges in Arizona show widespread acceptance of best

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*Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551 (2007) (reporting on survey of youth clients in juvenile court showing that children's most frequent complaint about their lawyers was lawyers' failure to communicate with them on a regular basis).

125. This concern has support in the psychological literature. See Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 624–25 (2003) (describing family therapy case in which feuding parents placed six-year-old child in role of decisionmaker). Professor Emery cautions that judicial reliance on the child's voice in custody disputes may end up “burdening children with the responsibility of making decisions that the adults involved are failing to make.” *Id.* at 625.

126. Simmons Interview, *supra* note 91.

127. *Id.*

128. *Id.*

129. Cohen Interview, *supra* note 91; Nygaard Interview, *supra* note 91; Simmons Interview, *supra* note 91.

130. Simmons Interview, *supra* note 91.

131. *Id.*

132. Fridlund-Horne Interview, *supra* note 91.

interests lawyering for children in family law disputes, at least for children who are unable to reliably tell their lawyers what to do. Recognizing that cost precludes appointments in a majority of cases, most of the judges interviewed preferred that any appointed representative be a lawyer so that the individual could participate fully in the litigation process. As between the traditional child's attorney and the best interests attorney, many of the family court judges preferred the latter because of the independent and comprehensive evidentiary presentations that best interests lawyers can provide. The judges did not indicate that they deferred automatically to a position advocated by a best interests attorney. Instead, in their effort to obtain a real understanding of the family dynamics, the judges appreciated the participation of an attorney who is not aligned with either party nor confined to advocating the child's expressed wishes.

## II. AUTONOMY AND CAPACITY

Two competing concepts in the debate about child representation are the desire to empower children by furthering their autonomy versus the recognition of children's incapacity to be self-determining. This Part examines these concepts with an emphasis on the practical consequences for children of the abstract principles.

### *A. Respecting Children's Autonomy*

Client-directed legal representation empowers clients by giving their voice the added strength of a lawyer's advocacy. Children's rights advocates have argued that children's autonomy is enhanced by client-directed lawyering, and they warn against using a standard of competence that will exclude most children.<sup>133</sup> Professor Katherine Federle, for example, notes that "even in the delinquency context, assessments of client competence provide significant opportunities for infringements on client autonomy."<sup>134</sup> She values autonomy as a corollary of rights-based advocacy and apparently sees children as participants in a continuing class struggle. According to Federle:

When the lawyer advocates for the child's express preferences, she does so in the language of rights. Rights have the potential to challenge political and legal hierarchies that have served to oppress and subordinate the interest of the rights holder by remedying powerlessness. . . . Rights thus command the attention and respect of those with power while providing access to legal and political fora in which rights claims may be heard and resolved.<sup>135</sup>

The notion that client empowerment is the central value of good lawyering leads Professor Federle to urge lawyers to focus, first and foremost, on helping the client engage in autonomous decisionmaking. But what does it mean to enhance children's autonomy?

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133. See, e.g., Henaghan, *supra* note 24, at 123 (suggesting that all children, even infants, are competent to have a "voice" on what is important to them).

134. Federle, *supra* note 1, at 109.

135. *Id.* at 110.

Most children live in a state of dependency and lack the capacity for true self-determination.<sup>136</sup> As reflected in law, “we assume that [children] do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions.”<sup>137</sup> Although lack of cognitive and emotional capacity should not be determinative of children’s constitutional rights, their immaturity is an indisputable reality.<sup>138</sup> As the Supreme Court recently observed, a child’s progress toward “self-definition” is the result of a confluence of factors, including “the language the child speaks, the identity he finds, [and] the culture and traditions she will come to absorb.”<sup>139</sup> While the State has an interest in helping children develop the skills necessary for adult autonomy, the contention that autonomy should be an absolute and immediate goal in the representation of children discounts the dependent nature of children’s lives.<sup>140</sup> The reality that most pre-adolescent children lack the cognitive and emotional maturity necessary for autonomous decisionmaking is reflected in law. With important exceptions, the law denies legal autonomy to minors across a range of contexts—often protecting them from the consequences of their own choices—and mandates that parents or guardians provide care and support and make major decisions on their behalf.<sup>141</sup>

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136. See generally Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703 (2009) (examining dependent status of children as a social and philosophical construct reflected in law). Professor Appell proposes a “critical jurisprudence” of childhood that would envision childhood in broader socioeconomic terms and more actively address structural conditions that produce inequality. *Id.* at 706–07 & n.7.

137. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (reasoning that the Eighth Amendment bars the execution of a defendant who committed his offense at age fifteen, since the ultimate punishment takes as its predicate “the existence of a fully rational, choosing agent”).

138. See Emily Buss, *Constitutional Fidelity Through Children’s Rights*, 2004 SUP. CT. REV. 355, 358–59 (noting that the denial of constitutional rights to children is most commonly justified by their lack of capacity for logical thinking); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 985 (1993) (observing that debate about children’s rights “invariably returns to the capacity of children”).

139. *Abbott v. Abbott*, 130 S. Ct. 1983, 1991 (2010).

140. More than twenty years ago, Dean Martha Minow observed that there is “something terribly lacking in rights for children that speak only of autonomy rather than need, especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive.” Martha Minow, *Intepreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1910 (1987); see also Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. (forthcoming 2011) (explaining that children lack broad range of cognitive, emotional, and imaginative skills necessary to become autonomous decisionmakers and proposing a “developmental theory of children’s constitutional rights” that recognizes the importance of children’s primary caregiving relationships).

141. See generally ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 61–81 (2008) (reviewing legal regulation of minors, including restrictions on minors’ decisionmaking and responsibility as well as mandates for protections of minors’ welfare). In certain contexts involving bodily integrity or physical liberty, the Supreme Court has recognized a limited autonomy for minors. See, e.g., *Bellotti v. Baird*,



The adult seeking direction from the child client turns the child's ordinary understanding of the world upside down, and the child may be psychologically and intellectually unable to grasp the nature of a confidential relationship in which the child is the decisionmaker.<sup>142</sup> Writing about children's developmental immaturity, Professor Emily Buss emphasizes that children may be incapable of comprehending the attorney-client relationship.<sup>143</sup> Children may see judges and lawyers as authority figures without grasping a lawyer's unique role.<sup>144</sup> Children's lack of understanding is not surprising: the client-directed lawyer for a young child upends the child's lived experience of relations between adults and children. Children generally look to the adult world for decisionmaking, direction, and guidance. Asking the child to consider his or her options, formulate goals, and direct the adult lawyer accordingly is unrealistic for many if not most pre-adolescent children. In short, privileging individual autonomy over dependency is a puzzling hierarchy of values for children.<sup>145</sup>

Moreover, the goal of achieving autonomous decisionmaking is problematic even for the adult client. Professor Stephen Ellmann, for example, has argued that clients exercise autonomy best when three conditions are met: they are aware that a decision must be made and that they are entitled to make it, they know

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443 U.S. 622 (1979) (holding that pregnant minor has constitutional right under Due Process Clause to seek judicial authorization to terminate pregnancy without informing parent, and judicial permission must be granted if minor establishes that she is sufficiently mature to make the decision or that abortion is in her best interests); *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that minor child whose parent is seeking to "voluntarily commit" child for mental health care has due process right to have neutral fact-finder decide whether requirements for admission are met); see also Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873 (1996) (applying child development perspective to contexts in which children's choices carry legal weight, including abortion, child custody, medical treatment, and delinquency).

142. See Harry Brighouse, *How Should Children Be Heard?*, 45 *ARIZ. L. REV.* 691, 698-99 (2003) (theorizing that childhood is a process of self-definition and does not fit easily with rights-bearing status as moral or philosophical matter); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *CORNELL L. REV.* 895, 918-48 (1999) (building on child development literature to explain child's inchoate understanding of self in relationship to legal process).

143. See Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699 (1996) (exploring language and comprehension difficulties that impede attorney-client relationship involving young children).

144. See Rachel Ebling, Kyle D. Pruett & Marsha Kline Pruett, "Get Over It": *Perspectives on Divorce from Young Children*, 47 *FAM. CT. REV.* 665, 673 (2009) (surveying forty-one children with mean age of 5.6 years on their perceptions of divorce process, and finding that children primarily viewed lawyers and judges as authority figures and two-thirds of children could not give relevant or accurate description of lawyer or judge).

145. Professor Anne Dailey has explored the unique status of children, who lack autonomous decisionmaking skills, in the context of a "choice theory of rights." See Dailey, *supra* note 140. The privileging of autonomy among a range of values is also inconsistent with the feminist insight that dependency is a reality of the human condition and that the State should assume greater responsibility for caregiving of dependent individuals. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

the choices open to them and understand the costs and benefits of various alternatives, and they are acting with as full an understanding of their own values and emotional needs as possible.<sup>146</sup> That many children would not meet Ellmann's conditions for exercising autonomy is beyond dispute.

The obligations of the child's lawyer might be conceptualized as furthering a different kind of autonomy. Building on the insights of Professor John Eekelaar, I suggest that lawyers should try to maximize children's ability to be self-determining in the future, rather than in the present, and that the adult world can best serve children by keeping paths open until children can define themselves.<sup>147</sup> Eekelaar theorizes that the child possesses a right of "dynamic self-determinism."<sup>148</sup> Under that theory, the child formulates likes and dislikes over time as part of an ongoing process of self-realization, and a process that gives too much weight to a child's short-sighted choice may unduly limit the child's opportunity to become self-actualizing in the future. The practical consequence of Eekelaar's theory, as he describes it, is "that in making decisions about children's upbringing, care should be taken to avoid imposing inflexible outcomes at an early stage in a child's development which unduly limit the child's capacity to fashion his/her own identity, and the context in which it flourishes best."<sup>149</sup>

Consider an illustration inspired by an Oregon case, *In re Marriage of Boldt*.<sup>150</sup> A boy of nine years of age is at the center of a custody modification dispute in which the non-custodial mother has challenged the custodial father's plan to have the boy circumcised in order for the child to be able to convert to Judaism. The mother, who is not Jewish, opposes the procedure and seeks a modification of custody on the ground that circumcision will cause pain, carries some health risks, and is not medically necessary. In the actual case, the trial court denied the modification petition but ordered that the circumcision procedure be

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146. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 727–28 (1987).

147. See John Eekelaar, *Beyond the Welfare Principle*, 14 CHILD & FAM. L.Q. 237 (2002); John Eekelaar, *Children Between Cultures*, 18 INT'L J.L. POL'Y & FAM. 178 (2004) [hereinafter Eekelaar, *Between Cultures*]; John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 INT'L J.L. POL'Y & FAM. 42, 54 (1994) [hereinafter Eekelaar, *Dynamic Self-Determinism*]. A similar insight appears in the work of philosopher Joel Feinberg, who suggested that the adult world should try to preserve a child's inchoate rights so that the child would have an "open future." See Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollett eds., 1980). Applying this concept to the placement decisions of American Indian children, I have argued for placements that can accommodate children's multiple identities. See BARBARA A. ATWOOD, CHILDREN, TRIBES, AND STATES 54–55 (2010).

148. Eekelaar, *Dynamic Self-Determinism*, *supra* note 147.

149. Eekelaar, *Between Cultures*, *supra* note 147, at 186.

150. 176 P.3d 388 (Or. 2008).

delayed pending appeal.<sup>151</sup> The Oregon Supreme Court ultimately remanded to the trial court to obtain direct evidence of the boy's wishes.<sup>152</sup>

If the court in *Boldt* had ordered that the child be represented by counsel, defining the role of that lawyer could be daunting. On the one hand, if the child indicated a firm and considered preference for or against the procedure, the lawyer's task would be relatively straightforward as a traditional attorney. On the other hand, if the child were unable or unwilling to make a decision because of the intense loyalty conflict and his reluctance to take sides between his parents, defining the lawyer's professional responsibility is more challenging. In that circumstance, the lawyer following the AAML 2009 Guidelines would take no position on the ultimate issue in litigation because of the child's silence—a stance that would be of little assistance to the court or the child.

Alternatively, the lawyer could try to ascertain and represent the child's interests. The lawyer might seek out qualified witnesses on the physical, emotional, and spiritual risks and benefits of the circumcision procedure. While it is possible that the evidence would point decidedly in one direction or another, it is more likely that the evidence would be sufficiently in equipoise to preclude a clear resolution.<sup>153</sup> At that point, the lawyer might look to the concept of dynamic self-determinism. A judicial order denying the father's request would, in effect, maintain the status quo for the time being, preserving for the child the opportunity to make the decision himself once he had gained the necessary emotional maturity and sense of identity. A decision to go forward with the circumcision, in contrast, would be irrevocable. In other words, once the lawyer determined that the child was unable to direct counsel, the lawyer's duty to the child could be construed as empowering the child to make decisions in the future. In short, the concept of dynamic self-determinism is a useful counterpoint to the view among some American scholars that children's autonomy is enhanced by limiting lawyers to representation of children's expressed wishes.

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151. *Id.* at 390–92 (finding that the father's decision to have the child circumcised was not a sufficient change of circumstances to warrant an evidentiary hearing on the merits of the mother's request for a change of custody).

152. *Id.* The child in *Boldt* did not have appointed counsel and had given mixed signals as to his position on the circumcision. *Id.* at 391. The Oregon Supreme Court remanded the case for the trial court to ascertain the boy's wishes as to the procedure, holding that the child's wishes "though not conclusive" were a necessary part of the record. *Id.* at 394.

153. In *Boldt*, the state supreme court noted that the two parents offered extensive material regarding the pros and cons of circumcision and concluded:

[A]lthough circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States.

*Id.* at 394.

### *B. Understanding Children's Capacities*

Ironically, the movement to confine lawyers to representation of children's wishes has gained strength just as advances in brain imaging have shown that parts of the human brain, particularly those responsible for impulse control, rational decisionmaking, and self-awareness take longer to mature than previously thought.<sup>154</sup> These scientific leaps have had the most impact in the juvenile justice realm because of their bearing on the question of children's and adolescents' criminal accountability and amenability to rehabilitation.<sup>155</sup> Although criminal accountability is a very different question from children's capacity to direct legal counsel, policy arguments for client-directed lawyering that rest on the desire to enhance children's autonomy need to take account of advances in scientific understanding of brain maturation.

Over the last decade, research has shown that cognitive and emotional maturation in children and adolescents is a protracted process of longer duration than was previously known and that the parts of the brain responsible for decisionmaking and impulse control are particularly slow to develop.<sup>156</sup> Although children and adolescents vary in their individual rates of maturation, improvements in brain-imaging technology have shown that regions of the brain associated with impulse control, decisionmaking, and awareness of long-term consequences remain structurally immature into young adulthood. Neurological development is always influenced by a child's life experience, but brain science can help identify certain common trajectories.<sup>157</sup> Frontal lobe functioning encompasses a number of cognitive and emotional faculties that develop over time, beginning in infancy and continuing at least until early adolescence.

[The changes that occur] include gains in attentional control, working memory capacity, response inhibition, as well as a gradual shift from relatively concrete to increasingly abstract thinking. The

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154. See generally SCOTT & STEINBERG, *supra* note 141, at 28–58; B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008) [hereinafter Casey et al., *Adolescent Brain*]; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241 (2000) [hereinafter Casey et al., *Brain Development*]; Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2000); Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 DEVELOPMENTAL SCI. 55 (2009); Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 465 (2009) [hereinafter Giedd et al., *Anatomic Brain Imaging*]; Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999).

155. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment bars imposition of capital punishment for crime committed before age of 18); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide).

156. SCOTT & STEINBERG, *supra* note 141, at 28–58.

157. Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. ON PSYCHOL. SCI. 59 (2006) (exploring psychological implications of developments in adolescent brain).

maturation of socio-economic components of frontal function includes improved abilities to identify, express, and manage emotions—skills that are elements of the broader construct of “emotional intelligence.”<sup>158</sup>

Thus, as cognitive and emotional abilities of a child develop, the child’s sense of self likewise evolves.

The prefrontal cortex—the part of the brain responsible for emotional regulation, planning, risk assessment, and other “executive functions”—is one of the last brain regions to mature.<sup>159</sup> Scientists have determined that adolescents, as a result of “hard wiring,” experience an elevated impact of stress, resulting in a dramatic loss of judgment during emotional or stressful situations.<sup>160</sup> As Elizabeth Scott and Laurence Steinberg explain:

Although adolescents’ capacities for reasoning and understanding . . . approach adult levels by about age sixteen, the evidence suggests that they may be less capable than are adults of *using* these capacities in making real-world choices. More important perhaps is that emotional and psychosocial development lags behind cognitive maturation. . . . Finally, personal identity is fluid and unformed in adolescence.<sup>161</sup>

The recent research on adolescents shows that adolescence is a critical stage of an individual’s development and emphasizes that the psychological immaturity of adolescents affects their decisionmaking capacity in ways that are relevant to justice policy.<sup>162</sup> Moreover, while adolescents in general are less future-oriented than adults, younger adolescents are more “shortsighted,” with weaker impulse control, than older adolescents.<sup>163</sup> For even younger children, who have not yet experienced the growth in cognitive, emotional, and social functioning that occurs during the transition to adolescence, decisionmaking capacities are even more tenuous.

Neural immaturity of children and adolescents does not mean that children’s viewpoints should be disregarded. The child’s own sense of dignity may be intertwined with the decisionmaker’s willingness to listen to the child’s story.<sup>164</sup> Moreover, a decisionmaker’s understanding of the issues will be enhanced through

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158. Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 356 (2004).

159. Casey et al., *Brain Development*, *supra* note 154, at 243. The complex processes of neural “pruning” and “myelination”—features of brain maturation that sharpen brain functioning—likewise continue past adolescence. See Giedd et al., *Anatomic Brain Imaging*, *supra* note 154, at 469.

160. Casey et al., *Adolescent Brain*, *supra* note 154, at 64.

161. SCOTT & STEINBERG, *supra* note 141, at 14.

162. *Id.* at 15.

163. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 30 (2009).

164. See Barbara A. Atwood, *The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 661–62 (2003).

knowledge of the child's perspective.<sup>165</sup> Neural immaturity, nevertheless, does bear on the child's capacity to direct counsel. The plastic nature of children's brains means that the child's preferences may be short-lived and the result of variable psychosocial conditions. For the child client, the desires that the child expresses on day one may be replaced by quite different goals with a different emotional resonance the following week.<sup>166</sup> Legal representation of a child—an individual who is in a state of becoming—is challenging precisely because of the fluid nature of children's identities.

Various approaches to the question of capacity to direct legal counsel exist, but tests for capacity that are tailored to the adult client would likely exclude a majority of children.<sup>167</sup> Some scholars take the position that every child can communicate his or her views in some fashion and that the competence that is critical is the *lawyer's* competence to read the child's signals, whether conveyed through actual words, body language, or even eye movements.<sup>168</sup> Others have built on the ABA Model Rules familiar baseline of a client's capacity to make "adequately considered decisions"<sup>169</sup> and proposed presumptive age guidelines that are tied to children's developmental milestones. In an early article, for example, Professor Sarah Ramsey suggested that a child's lawyer should advocate the child's stated wishes if the child is capable of making a "considered decision" and that child development research (in the 1980's) indicated that children generally possessed such capacity by age seven.<sup>170</sup>

The original AAML Standards categorized children as "unimpaired" or "impaired," drawing on the framework of Rule 1.14.<sup>171</sup> In determining whether a child was impaired, the AAML directed the lawyer to determine whether the child could meaningfully participate in the attorney-client relationship in light of such factors as the child's "age, degree of maturity, intelligence, level of comprehension, [and] ability to communicate."<sup>172</sup> Relying on prominent child development researchers,<sup>173</sup> the 1995 Standards provided a bright line rule that

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165. *Id.* at 674.

166. According to Professors Scott and Steinberg, two interrelated processes contribute to identity formation in a child: individuation, meaning the process of separating from one's parents, and identity development, meaning the process of "creating a coherent and integrated sense of self." SCOTT & STEINBERG, *supra* note 141, at 50. Although the emergence of personal identity is a key feature of adolescence, individuation typically occurs in early adolescence, and identity development is more salient in late adolescence or even early adulthood. *Id.* at 50–53.

167. *See, e.g.*, Ellmann, *supra* note 146.

168. Henaghan, *supra* note 24, at 120.

169. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2009) (providing framework for maintaining attorney-client relationship when "client's capacity to make adequately considered decisions in connection with a representation is diminished").

170. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 316–17 (1983).

171. AAML 1995 Standards, *supra* note 7, Standard 2.

172. *Id.* Standard 2.1 cmt., at 9.

173. Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, in CHILDREN'S COMPETENCE TO CONSENT 235, 245 (Gary B. Melton, Gerald P. Koocher & Michael J. Saks eds., 1983).

children under the age of twelve should be considered presumptively impaired.<sup>174</sup> A lawyer for an impaired child was not to advocate a position but was permitted to develop facts for the court in a neutral manner.<sup>175</sup>

In its 2009 Standards, the AAML abandoned the bright line approach and directed the lawyer to assess the child's capacity at the outset of an appointment without any age presumption. Under the new Standards, an attorney's inquiry is to focus on the process the child uses in reaching a particular objective and not the objective itself. In particular, the 2009 Standards propose that a child should be treated as possessing sufficient capacity if 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>176</sup>

The AAML's proposed test—with its objective focus on the child's reasoning process—is commendable. Clearly, however, the AAML's test requires more developed reasoning and decisionmaking abilities than many pre-adolescent children will possess. For the many children who fall outside the AAML's definition of capacity, the 2009 Standards flatly prohibit the lawyer from advocating for any outcome in the proceeding.<sup>177</sup>

In short, the literature about children's capacity and the role of lawyers offers a spectrum of approaches. One group rejects the notion of capacity altogether. Child rights advocates such as Katherine Federle and Mark Henaghan view almost all children—whether verbal or not—as possessing the ability to communicate desires, and they argue that competent children's lawyers should be able to get to know their clients and represent their perspectives. Jean Koh Peterson's textured process of substituted judgment—carefully linked to the child's evolving identity—would fit within this group.<sup>178</sup> A separate contingent would hold children to a relatively high threshold of capacity. Within that cluster, scholars such as Martin Guggenheim are wary of lawyer discretion in the service of the impaired child and would tie the lawyer to the child client's expressed (and well-considered) objectives. Both groups would object to transparent best interests lawyering—albeit for somewhat different philosophical reasons. A third camp

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174. *AAML 1995 Standards*, *supra* note 7, Standard 2.2, at 9. AAML commentary relied on studies of children's competence to make decisions regarding their own medical care and emphasized that many researchers had concluded that children may attain full cognitive functioning by age twelve. *See id.* Standard 2.2 cmt., at 11–12.

175. *Id.* Standard 2.12 & cmt., at 23–24.

176. *AAML 2009 Standards*, *supra* note 5, Standard 2.1 cmt., at 241.

177. *Id.* Standard 2.2 & cmt., at 242–43.

178. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001) (proposing intricate child-centered map for developing contextual understanding of child's world).

includes those who accept best interests lawyering at face value for the child who lacks capacity or will to direct counsel.<sup>179</sup>

Thus, if a lawyer is appointed for a child in a contentious custody battle and that child is unable to formulate and express considered goals for the representation, the three camps would take markedly different positions as to the representation: the first group would have the lawyer represent the child's wishes, whether gleaned through careful observation and interaction or formulated as a substituted judgment based on what the child might have expressed were the child able; the second group would not appoint counsel at all; and the third group would have the lawyer engage outright in representation of the child's interests. As established in Part I of this Article, the laws of most states endorse the third approach. The next Part examines whether best interests representation for the child who lacks capacity can be squared with the core obligations of an attorney.

### III. PROFESSIONAL ROLE AND PROFESSIONAL COMPETENCE

Apart from the focus on children's rights and child empowerment, critics of best interests lawyering contend that the role is at odds with the core function of a lawyer and that a best interests lawyer, operating without any specialized expertise, may unduly influence judicial decisionmaking.<sup>180</sup> This Part addresses these concerns and defends the use of best interests lawyers for those children who are either incapable of directing their lawyers or resistant to doing so because of the intense emotional dynamics of the inter-parental dispute. I close by linking the discussion of children's lawyers to the broader debate among legal ethicists about the professional obligations of attorneys.

#### *A. Professional Responsibility by the Rules*

Best interests lawyering for children does not fit comfortably within the lawyer's core function of pursuing a client's expressed goals,<sup>181</sup> but ethical guideposts have always acknowledged the need for flexibility when representing a client who lacks capacity to direct counsel. Rule 1.14 of the ABA Model Rules of Professional Conduct directs that a lawyer for a client whose "capacity to make adequately considered decisions" is "diminished" should maintain a traditional lawyer-client relationship "as far as reasonably possible."<sup>182</sup> For clients with diminished capacity who cannot act in their own interest, the Rule authorizes the lawyer to take "reasonably necessary protective action."<sup>183</sup> A subsection was added

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179. Although people's positions can change, Donald Duquette and Linda Elrod have ascribed to this position in the past. See Duquette, *supra* note 24, at 444; Elrod, *supra* note 1.

180. Guggenheim, *supra* note 1, at 276.

181. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (lawyers must abide by their clients' decisions concerning the objectives of representation).

182. The Rule provides that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." *Id.* R. 1.14(a).

183. *Id.* R. 1.14(b). The threshold for taking protective action is quite high: the lawyer must reasonably believe "that the client has diminished capacity, is at risk of



in 2002 to make clear that client confidences are presumptively protected but the lawyer is “impliedly authorized under Rule 1.6(a)” to reveal information relating to the client to the extent necessary to protect the client’s interests.<sup>184</sup> Despite the Rule’s seemingly objective framework, “difficult questions of law and morality plague this troublesome area.”<sup>185</sup> The commentary does not define “capacity to make adequately considered decisions” but notes that when the client is a minor, “maintaining the ordinary client–lawyer relationship may not be possible in all respects.”<sup>186</sup> Even young children, the commentary reminds us, have opinions that are entitled to weight in court proceedings affecting their custody.<sup>187</sup> Significantly, the commentary states that in taking protective action, the lawyer should be guided by “the *client’s best interests* and the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.”<sup>188</sup>

Although earlier commentary to Rule 1.14 had explicitly recognized that a lawyer might act as a “de facto guardian” under certain circumstances, the ABA Ethics 2000 Commission deleted this suggestion in the 2002 revision of the Model Rules.<sup>189</sup> Commentary to the AAML 2009 Standards characterizes this revision as a “significant change” indicating opposition to the notion of a child’s best interests lawyer.<sup>190</sup> The ABA Reporter’s explanation of the change, however, simply states that “[t]he Commission views as unclear, not only what it means to act as a ‘de facto guardian,’ but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer’s ability to act for an incapacitated client.”<sup>191</sup> The Commission’s concern thus focused on the ambiguity of “de facto guardian” and the need for clearer guidelines for lawyers who represent incapacitated clients. The

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substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.” *Id.* Examples of “protective action,” moreover, are narrow: “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” *Id.*

184. *Id.* R. 1.14(c).

185. HAZARD & HODES, *supra* note 20, § 18.2; *see also* JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 34–45 (2004) (describing ethical tensions in representing children in child protection proceedings against the backdrop of Rule 1.14).

186. MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 1. The commentary recognizes that lawyers have considerable discretion in determining a client’s diminished capacity, suggesting that lawyers consider “the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.” *Id.* R. 1.14 cmt. 6.

187. The commentary explains that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” *Id.* R. 1.14 cmt. 1.

188. *Id.* R. 1.14 cmt. 5 (emphasis added).

189. *See Id.* R. 1.14(b) cmt. (“If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.”).

190. *See AAML 2009 Standards, supra* note 5, Standard 2.2 cmt., at 243.

191. AM. BAR. ASS’N CTR. FOR PROF’L RESPONSIBILITY, ETHICS 2000 COMM’N, REPORTER’S EXPLANATION OF CHANGES: MODEL RULE 1.14, *available at* <http://www.abanet.org/cpr/e2k/e2k-rule114rem.html> (last visited Mar. 7, 2011).

elimination of the reference to de facto guardian leaves the Model Rules at least agnostic on the question of best interests lawyering for children who cannot make “adequately considered decisions.”<sup>192</sup>

Other sources of guidance for professional conduct are more explicit in recognizing the role of best interests lawyers. The Restatement (Third) of the Law Governing Lawyers, for example, sets up a loose substituted judgment standard: a lawyer for a client with diminished capacity should “pursue the lawyer’s reasonable view of the client’s objectives or interests as the client would define them if able to make adequately considered decision on the matter, even if the client expresses no wishes or gives contrary instructions.”<sup>193</sup> It explains in commentary that the lawyer is to base his or her advocacy on “the client’s circumstances, problems, needs, character, and values, including interests of the client beyond the matter in which the lawyer represents the client,” giving “appropriate weight” to the client’s expressed wishes.<sup>194</sup> The commentary, moreover, explicitly acknowledges that a lawyer appointed to represent a young child may function, in effect, as the child’s guardian ad litem.<sup>195</sup>

Similarly, Professors Hazard and Hodes also recognize that lawyers for children may need to represent the child’s best interests in a holistic manner.

[A] lawyer for a client with diminished capacity may use various devices to try to determine what the client “really” wants, including, of course, communicating as fully as is possible with the client. In the end, however, the lawyer will have to process all of the clues, and the lawyer alone will have to make the judgment call how best to act “in the best interests of the client.”<sup>196</sup>

In their treatise, the authors offer as an illustration a case involving a lawyer who is appointed to represent a nine-year-old child in a divorce.<sup>197</sup> In the fact pattern, the child voices a desire to live with his father, but the lawyer is convinced that the child’s reasons would not be accepted by the court and that the child’s long term interests would be better served by being placed with his mother. The authors suggest ways in which the lawyer can ethically pursue the child’s interests, as determined by the lawyer, while still respecting the child’s confidences to the extent possible.

Professor Guggenheim and others question the ability of an attorney to independently determine a child’s best interests and warn that a best interests attorney will unduly influence a court’s decision. Rather than appoint a lawyer for the child who lacks capacity to direct counsel, the AAML 2009 Standards recommend that if any appointment is to be made, it should be a nonlawyer

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192. Even if the role of best interests lawyer were deemed to conflict with the Model Rules, explicit authorization for such a role exists across the United States by legislative action or by court rule. *See supra* Part I.

193. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: A CLIENT WITH DIMINISHED CAPACITY § 24 (2000).

194. *Id.* cmt. d.

195. *Id.*

196. HAZARD & HODES, *supra* note 20, § 18.3.

197. *Id.* § 18.4 & illus. 18-1.

advisor, such as a mental health expert, to investigate the child's situation and submit an opinion to the court, subject to cross examination.<sup>198</sup> Even as to such court-appointed professionals, however, the AAML would prohibit any recommendations regarding the child's best interests in order to avoid "the serious danger of abdication of judicial responsibility."<sup>199</sup>

The view that best interests lawyers' advocacy is based not on any expertise but on bias and subjective whim is, in effect, a criticism of the best interests standard itself.<sup>200</sup> The "best interests of the child" standard is notorious for its subjectivity and unpredictability, but it is the dominant standard in American child custody law.<sup>201</sup> Because it is typically defined by reference to a complex of factors and shaded by various presumptions, the best interests lawyer's job is to engage in a child-centered investigation and arrive at a position in the litigation based on the applicable legal criteria. Lawyers are not educational specialists, clinical psychologists, family counselors, or medical doctors, but lawyers are arguably better suited than any of those specialized experts to formulate a position on the overall legal standard of a child's best interests. Only the lawyer can gather the evidence and elicit testimony from such persons relevant to the merits of the custody dispute. Family court judges, likewise, generally lack specialized expertise but bring their generalized legal acumen to the task of assessing a child's best interests.

The AAML's rejection of best interests lawyering and its proposal to rely on court-appointed professionals for children who cannot direct counsel pose several problems. First, lawyers are uniquely useful in litigation and can apply their professional skills in bringing multiple sources of relevant information to the court's attention and in protecting the child from potentially harmful processes. Rather than relying on the testimony of a single mental health expert—a practice that itself has provoked controversy<sup>202</sup>—a court can appoint a best interests lawyer

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198. *AAML 2009 Standards*, *supra* note 5, Standard 3.1 & cmt., at 247–48.

199. *Id.* Standard 3.2 cmt., at 249. The commentary emphasizes that "[b]y prohibiting everyone from advocating an outcome, the democratic process by which duly elected or appointed judges become the true arbiters of controversies brought to courts is reaffirmed." *Id.*

200. Most proposed standards for children's lawyers that emphasize the client-directed model nevertheless embrace the exercise of considerable discretion under the rubric of "substituted judgment." *See, e.g.*, ABA ABUSE AND NEGLECT STANDARDS, *supra* note 28; *Fordham Recommendations*, *supra* note 4, at 1309; *UNLV Recommendations*, *supra* note 4, at 609. *See generally* Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1242–43 (2006) (suggesting that the ABA Abuse and Neglect Standards, the NACC Revised Version, and the Fordham Recommendations all contain opportunity for lawyer discretion that is unreviewed and unconstrained by objective criteria).

201. *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 390–403 (2008) (tracing evolution of child custody law in the United States from presumptions to discretionary best interests standard).

202. *See, e.g.*, Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. PUB. INT. 1, 1 (2005) (criticizing custody evaluations as lacking legitimate scientific basis); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of*

to seek input from the child, family members, teachers, doctors, and others closely affiliated with the child. The fact that most Arizona family judges preferred to appoint a lawyer as the child's representative rather than a nonlawyer is not surprising. More fundamentally, an approach that leaves the younger child without a legal representative would deprive the child and the court of the benefits that child-centered advocacy can provide.<sup>203</sup>

The prospect of a dual appointment of an attorney and a representative in the role of guardian ad litem—a suggestion from the proposed ABA Model Act<sup>204</sup>—poses separate difficulties. If an attorney continues to represent the child, the lawyer in general may assume that the guardian will define the child's best interests—but the lawyer's role is not easily circumscribed.<sup>205</sup> In *Shult v. Shult*, for example, the Connecticut Supreme Court addressed the competing roles of a child's attorney and his guardian ad litem.<sup>206</sup> There an attorney and a guardian ad litem were appointed in a three-way custody dispute to represent a young child who suffered from developmental and emotional problems.<sup>207</sup> The child's maternal grandmother, who had cared for the child for almost a year before the custody trial, intervened seeking custody based on allegations that the child would be at risk of physical abuse if placed with the mother.<sup>208</sup> While the guardian ad litem recommended that the mother have custody, the child's attorney advocated that custody remain with the intervenor. The trial court granted sole custody to the grandmother.<sup>209</sup>

On appeal, the mother and the guardian ad litem relied on the AAML 1995 Standards and the ABA Model Rules in arguing that the child's attorney should have deferred to the guardian ad litem as the attorney's "client" to make decisions on behalf of the child.<sup>210</sup> The court acknowledged the superficial appeal of a bright line rule but reasoned that custody disputes "do not lend themselves to easy, bright line solutions."<sup>211</sup> Instead, the court held that a trial court has discretion "to determine, on a case-by-case basis, whether such dual, conflicting

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*the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551 (1997) (contending that courts should be cautious about permitting mental health experts to express opinions about a child's best interests, in light of the fallibility of mental health predictions).

203. See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57, 74 (1995) (criticizing diminished role of attorneys for "impaired" children under AAML 1995 Standards).

204. See MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(d) (Proposed Official Draft 2009).

205. See HAZARD & HODES, *supra* note 20, § 18.7.

206. 699 A.2d 134 (Conn. 1997).

207. *Id.*

208. The facts suggested that the child suffered physical abuse by the mother's live-in boyfriend resulting in a broken leg. *Id.* at 135–38.

209. *Id.* at 137 (finding that mother's boyfriend broke child's leg and that mother had cooperated in the cover-up of that serious abuse).

210. *Id.* at 139.

211. *Id.*

advocacy of position is in the best interests of the child.”<sup>212</sup> The court emphasized that discretion was particularly important in cases such as the one before it, where “the child is unable to state a preference directly, there is an allegation of child abuse, and the parties present drastically differing views of the events.”<sup>213</sup> As the court explained, the trial judge’s daunting duty to determine the child’s interests in such a case can be facilitated by hearing “the contradictory positions of the attorney and the guardian ad litem.”<sup>214</sup> Thus, under *Schult*, the attorney for the incapacitated child may have a continuing duty to the child to independently formulate a position on the child’s interests and advocate that position— notwithstanding an opposing position taken by the guardian ad litem.

The doctrine of primary and derivative client leads to a similar result. Under that theory, a lawyer for a client who is acting as a fiduciary for a third party may owe a duty to the third party in order to fully represent the client.<sup>215</sup> As Ted Schneyer has explained:

[T]he lawyer’s duty to the ward turns on the ward’s status as a partial client, not on any general exception to the duties of confidentiality that lawyers owe to their clients as against nonclients. . . . [B]ecause the lawyer has this derivative duty to the ward, the lawyer’s duties of confidentiality and loyalty to the guardian are somewhat reduced, even though the guardian did not knowingly agree to waive any of his rights of full clienthood. By operation of law, one might say, the guardian himself is demoted to the rank of partial client.<sup>216</sup>

Even if a guardian for a child is deemed to be the lawyer’s “primary” client, the attorney may owe a continuing duty toward the child as the “derivative” client to protect the child against actions by the guardian that are contrary to the child’s interests.<sup>217</sup> In other words, because the guardian has fiduciary duties to the child, the lawyer cannot serve the guardian fully without taking into account the child’s welfare.<sup>218</sup> The child, while “strictly speaking a nonclient, may be entitled to the loyalty of the lawyer almost as if he were a client.”<sup>219</sup> Generally, the two “clients” would not have equal claims to the lawyer’s loyalty, and the lawyer will follow the instructions of the primary client. Nevertheless, if the lawyer finds that

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212. *Id.*

213. *Id.* at 140.

214. *Id.* at 140–41.

215. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: DUTY OF CARE TO CERTAIN NONCLIENTS § 51(4) (recognizing lawyer’s duty of care to nonclient when client is fiduciary for nonclient, lawyer knows action is necessary to prevent breach of fiduciary duty where breach is crime or fraud or lawyer has assisted in breach, nonclient is unable to protect its rights, and duty would not significantly impair performance of lawyer’s obligations to client).

216. Schneyer, *supra* note 21, at 80; see also Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 26 (1991) (arguing that we should not “freeze our concept of ‘the client’” but should be flexible enough to contemplate duties owed to a “derivative client”).

217. See generally HAZARD & HODES, *supra* note 20, §§ 2.7, 18.7.

218. *Id.* § 2.7, at 2-11.

219. *Id.*

the guardian's position would harm the child, the lawyer may refuse to follow the guardian's instructions.<sup>220</sup>

Although the primary-derivative client doctrine is not universally followed,<sup>221</sup> it does provide a theoretical framework for recognizing a duty, albeit of secondary status, owed by a lawyer to a child when the child is represented by a guardian ad litem and the lawyer's client is the guardian. The doctrine, moreover, evidences a fluid approach to the obligations of an attorney that go beyond fidelity to the client's directives.

### ***B. Professional Responsibility Writ Large***

The best interests lawyer who operates untethered to a child's expressed wishes has been portrayed as a dangerous phenomenon that constitutes "misappropriating" the concept of lawyer.<sup>222</sup> Legal ethics scholars, however, are in the midst of a debate about what exactly the concept of lawyer means. Embracing a vision of lawyers as moral activists, some scholars see the amorality of lawyering to be at the root of much of what is wrong with the legal profession today.<sup>223</sup> Others call for lawyers to adhere to the traditional norms of partisanship (the duty of lawyers to pursue a client's goals to the limits of the law) and neutrality (the duty of lawyers to act without regard to the moral worthiness of a client's objectives).<sup>224</sup> The debate suggests, at the very least, that the ideals of professional responsibility are in flux.

Lawyers have long pushed for a conception of professional responsibility that goes significantly beyond representation based on a client's directives and, indeed, beyond client representation. The image of the "citizen-lawyer" has been pervasive from the earliest years of this nation's founding, with the attendant obligation to assume leadership roles in civic life.<sup>225</sup> The American Bar Association in its first code of ethics announced that lawyers should maintain "justice pure and unsullied" in fulfilling their civic responsibility.<sup>226</sup> Again in the mid-twentieth century, the ABA and American Association of Law Schools, in a report authored by Lon Fuller, endorsed the idea of the lawyer as public servant with an obligation to contribute productively to society.<sup>227</sup> More recently, lawyers have been urged to take on pro bono work to help meet the increased demand for

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220. *Id.* at 2-12 to -15.

221. *See, e.g., In re Wyatt's Case*, 982 A.2d 396, 408-09 (N.H. 2009) (noting that state supreme court had not adopted primary-derivative client doctrine and that doctrine, in any event, does not address competing loyalties where lawyer purposes to represent both guardian and ward).

222. Guggenheim, *supra* note 1, at 268.

223. *See, e.g., LUBAN, supra* note 12; SIMON, *supra* note 12, at 2.

224. Schneyer, *The Promise, supra* note 22, at 74.

225. *See generally* Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153 (2009).

226. CANONS OF PROF'L ETHICS pmb1. (1908).

227. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958) (discussing value of public service by attorneys as part of "true sense of professional responsibility").

legal services, and to contribute to law reform efforts to improve the justice system.<sup>228</sup>

Contemporary ethicists have proposed more radical reconceptions of the citizen–lawyer that directly impact the lawyer–client relationship and build on the lawyer’s counseling function.<sup>229</sup> In an influential early article Professor Richard Wasserstrom criticized the “role differentiat[ion]” of the legal profession that enables a lawyer, in the service of clients, to engage in immoral conduct that the lawyer would otherwise condemn.<sup>230</sup> He urged lawyers to reinterpret the lawyer–client relationship with sensitivity for “the moral point of view,” tempering the duty to follow client directives through the lawyer’s own moral screening.<sup>231</sup> Wasserstrom also criticized the tendency of the attorney–client relationship to lead to paternalism, noting that “from the professional’s point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult.”<sup>232</sup> He suggested that lawyers might do well to “deprofessionalize” the law to make it more accessible to lay persons.<sup>233</sup>

Others have voiced similar concerns with professional ethics. My colleague Professor Kenney Hegland contends that lawyers should not assert a legal doctrine on behalf of a client “unless the lawyer has a good faith belief that the assertion of the doctrine or rule in the particular case will further a policy behind the doctrine or rule.”<sup>234</sup> Professor William Simon proposes that lawyers should be more concerned with achieving substantive justice in each case than with the traditional norm of zealous representation of client goals.<sup>235</sup> Simon does not contend that lawyers have the moral right to disregard law but argues rather that the “law” is coterminous with substantive justice.<sup>236</sup> He concludes that

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228. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 6.1 (2009) (proposing the aspirational duty to voluntarily render public interest legal service and stating that the responsibility may be met by pro bono client representation as well as by “activities for improving the law, the legal system or the legal profession”). Many law firms today have institutionalized pro bono programs, and such programs are even the subject of rankings. See David Bario, *Recession-Proof?*, AM. LAW., July 2009, at 53. See generally Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357 (2010) (analyzing pro bono practice at large firms and emphasizing that pro bono programs serve pragmatic as well as altruistic objectives).

229. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (permitting lawyer in rendering advice to refer to other considerations beyond law, including “moral, economic, social and political factors”).

230. Wasserstrom, *supra* note 12, at 3–4. As Wasserstrom explains, the role-differentiated thinking “makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive” in their everyday lives. *Id.* at 3.

231. *Id.* at 12.

232. *Id.* at 19.

233. *Id.* at 22–23.

234. Kenney Hegland, *Quibbles*, 67 *TEX. L. REV.* 1491, 1494 (1989).

235. SIMON, *supra* note 12, at 7–9.

236. *Id.* at 79–108. Simon’s substantive justice includes, for example, the fundamental value of assistance for the poor. See *id.* at 148–49.

“[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”<sup>237</sup>

Professor David Luban also voices the view that the virtues of the adversary system do not justify holding lawyers to a different moral scheme when acting on behalf of clients.<sup>238</sup> In his view, the lawyer as “moral activist” shares responsibility with the client for the ends sought in legal representation, and the lawyer should challenge the client if the representation seems “morally unworthy.”<sup>239</sup> At the same time, Luban wants lawyers to honor their clients’ dignity by enabling them to tell their story, and he criticizes lawyers who paternalistically refuse to do what a client wants because it would harm the client.<sup>240</sup> In that respect, he disapproves of strategic lawyering that disregards a client’s deeply held commitments and values.<sup>241</sup>

In a parallel vein, Professor Deborah Rhode has urged lawyers to reconceive their roles to encompass concerns beyond client loyalty.<sup>242</sup> She would impose an alternative framework requiring lawyers “to assess their obligations in light of all the societal interests at issue in particular practice contexts.”<sup>243</sup> In Professor Rhode’s ethical vision, “[c]lient trust and confidentiality . . . must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends.”<sup>244</sup> She would permit lawyers to use “evasive” but not illegal strategies to achieve justice in particular cases, such as a lawyer’s exercise of “selective ignorance” in representing a welfare recipient needing to retain benefits.<sup>245</sup> Rhode calls for a more “contextual” view of legal ethics in which lawyers align their conduct with public values and “commonly accepted ethical principles.”<sup>246</sup>

Pushing against the moral activist model are those who see the calls for morality as undefined, subjective, and paternalistic.<sup>247</sup> The critiques themselves are instructive and can help illuminate the distinct justifications for best interests representation. Professor Ted Schneyer, among others, reminds us that lawyers already have some leeway to heed their own moral compass under existing ethical

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237. *Id.* at 138.

238. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxii (1988) [hereinafter LUBAN, *ETHICAL STUDY*]; LUBAN, *supra* note 12, at 19–64.

239. LUBAN, *ETHICAL STUDY*, *supra* note 238, at xxii.

240. LUBAN, *supra* note 12, at 74.

241. *Id.* at 78–79 (discussing case of the Unabomber, Theodore Kaczynski, and criticizing defense lawyers’ decision to present a defense of mental illness contrary to Kaczynski’s desires).

242. *See* RHODE, *supra* note 12.

243. *Id.* at 67.

244. *Id.*

245. *Id.* at 77–78.

246. *Id.* at 18.

247. *See, e.g.,* Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1726 (2002) (critically reviewing Professor Rhode’s proposed framework for achieving justice in particular cases).



guidelines,<sup>248</sup> but he cautions against a view of professional ethics that would encourage lawyers to evade the law in pursuit of some ideal of justice.<sup>249</sup> Paralleling in some ways the critiques of best interests lawyering described in Part II, Schneyer emphasizes the undefined and malleable nature of Professor Rhode's moral guideposts. The "contextual ethical framework" that Rhode proposes in the pursuit of her vision of justice, Schneyer points out, could be used by lawyers of a different political stripe and applied to justify their own evasive strategies.<sup>250</sup>

Emphasizing client dignity, Professor Monroe Freedman is deeply critical of the moral activist model. In his view, "the attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions."<sup>251</sup> The moral value of client loyalty itself has been championed by Professor Charles Fried, who believes lawyers must take the interests of clients more seriously than the interests of "the wider collectivity."<sup>252</sup> Professor Norm Spaulding, in turn, maintains that the proposals to reform the lawyer's role will cause more harm than good and will convert the lawyer's role into a quest for "self realization."<sup>253</sup>

Less radical proposals take a middle ground in the debate and aim at enriching the lawyer-client relationship. Professors Bruce Green and Russell Pearce want to define professional responsibility to include the obligation to teach clients about "proper civic conduct," including "ideas about fair dealing, respect for others, and . . . concern for the public good."<sup>254</sup> In their model of the lawyer as "civics teacher," Green and Pearce envision that a lawyer would educate clients about civic obligations "that are not legally enforceable and that may be found in

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248. See Schneyer, *The Promise*, *supra* note 22, at 64-65 (noting that current ABA Model Rules of Professional Conduct permit lawyers to advise clients on relevant moral factors, to withdraw from representation if the client insists on taking action that lawyer considers "repugnant," and to divulge confidences to prevent death or bodily harm).

249. See Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" over Professional Values*, 70 *FORDHAM. L. REV.* 1831 (2002).

250. *Id.* at 1846-47; see also Schneyer, *supra* note 216, at 27.

251. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 62 (3d ed. 2004). Daniel Markovitz, who brings a philosophical lens to the debate, finds fault with lawyers' immorality but views client fidelity as a necessary component to acceptance of, and confidence in, the dispute resolution system. See DANIEL MARKOVITZ, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2010).

252. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1066 (1976).

253. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *U. COLO. L. REV.* 1, 7 (2003).

254. See Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 *WM. & MARY L. REV.* 1207, 1212 (2009). Green and Pearce explore ways in which lawyers could teach civic virtues and respect for democratic values directly and by example. *Id.*

the ‘spirit’ of the law.”<sup>255</sup> Like the others discussed above, these scholars reject the “hired gun” approach in which a lawyer’s paramount duty is to pursue the client’s lawful goals at all costs.<sup>256</sup> While not requiring lawyers to refuse representation whenever a client adheres to a lawful but ignoble goal, they do want lawyers to engage in “mutually respectful conversation” that furthers the lawyers’ commitment to the public good.<sup>257</sup> Professor Kate Kruse, on the other hand, would enhance the lawyer’s partisan duties by placing fidelity to client values at the center of the relationship.<sup>258</sup> Drawing on norms from client-centered representation in clinical legal education, she wants lawyers to treat clients as three-dimensional beings and to focus on maximizing values rather than doggedly pursuing clients’ legal interests.<sup>259</sup> According to Kruse, “[w]hen a lawyer approaches legal representation as a problem-solving endeavor shaped around the client’s values, the client’s own values provide a natural check on legal interest maximization.”<sup>260</sup>

The campaign to imbue a lawyer’s professional responsibility with a more self-conscious moral activism shows considerable uncertainty as to the duties inherent in legal representation. The various proposals embrace values that are at least as subjective and amorphous as the legal interests of an incapacitated child. Indeed, notions of “substantive justice” or “public good” are not only subjective but invite lawyers to impose their own moral values on their representation of clients. Unlike best interests representation, the ethical frameworks of scholars such as Simon would redefine the attorney–client relationship by shifting the lawyer’s core loyalty from the client to a moral ideal. Best interests lawyering, on the other hand, keeps the child client at center stage—albeit through the lawyer’s interpretative lens.

The representation of a child’s interests, in contrast to a duty to pursue “moral” or “just” goals, requires a lawyer to be grounded in a child’s individualized circumstances. The lawyer’s position must correlate to legal criteria and must be based on, and conveyed through, evidence in the case, subject to the ordinary screening of the litigation process. The best interests lawyer for the incapacitated child meets the norm of partisanship, flexibly construed: the lawyer’s undivided loyalty is intact, guided by the lawyer’s judgment about the client’s interests rather than the client’s expressed directives. The norm of neutrality—the

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255. *Id.* at 1218. The authors acknowledge the obvious ambiguity of the law’s “spirit.” *See id.* at 1218 n.54.

256. *Id.* at 1219. Other scholars have also criticized the “hired gun” approach. *See, e.g.,* Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1319 (2006). *But see* Schneyer, *supra* note 216 (noting that scholars pushing for moral activism from lawyers mistakenly assume that such activism will always push progressive goals).

257. Green & Pearce, *supra* note 254, at 1219, 1233–34 (suggesting that lawyers might direct these conversations from a focus on self-interest to one’s obligations toward others).

258. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 129–44 (2010).

259. *See id.*

260. *Id.* at 133; *see also* Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 *ARIZ. L. REV.* 493, 529–31 (2011) (providing, through personal anecdote, an example of a lawyer providing information that enabled parties to make a decision based upon their own values associated with law compliance and advantage taking).

duty to pursue client objectives without passing moral judgment—would seem inapposite to the representation of a client who cannot formulate objectives in a considered manner. In contrast, the proponents of the moral activist model would permit lawyers to depart from client directives in the exercise of their moral judgment.

In sum, the debate reveals widespread disagreement about a lawyer's core responsibilities—to clients and to the community at large. Best interests lawyers may satisfy proponents of the moral activists model because of their contribution to the public good—a focused attempt to advance the interests of a child in the midst of legal proceedings triggered by parental strife. If lawyers should take on a broader “moral” view of their responsibilities vis-à-vis their clients with full capacity, a lawyer for a child who cannot direct counsel surely acts within his or her professional role when pursuing that client's interests. Importantly, best interests lawyers may also survive the critics of the moral activist model by their grounded and “partisan” client representation. Under Professor Kate Kruse's framework, the lawyer appointed to represent a child has the obligation to get to know the child as a three-dimensional client, striving “to shape representation *as much as possible* around the unique values of the client.”<sup>261</sup> Because a young child's values are inchoate and malleable, that process is necessarily a fluid one that will reflect the lawyer's judgment brought to bear on the child's individual circumstances.

### CONCLUSION

When a child is capable of directing counsel, that child's voice is an essential piece of the overall picture presented to the decisionmaker, and the child's own sense of dignity and agency will be enhanced by traditional legal representation. But when the child cannot or will not reliably direct counsel, some groups maintain that appointment of a best interests lawyer is not only inappropriate but denigrates the rule of law.<sup>262</sup> This Article has argued that a lawyer for the nondirective child—as fiduciary, counselor, and advocate—can maintain professional boundaries and still ensure that the decisionmaker acts with knowledge of the child's perspective. For the pre-verbal child, a lawyer can take legal actions to protect the child in the litigation process and convey the child's world to the court through traditional avenues, including witness testimony, documentary evidence, and legal argument. For the verbal but immature child whose desires shift over time, the lawyer's representation may include a longer-term assessment of the child's interests than the child's own understanding permits. Finally, the child who refuses to direct counsel because of loyalty conflicts or other reasons may welcome an attorney's best interests representation as a means to an end because of the shield against parental recrimination that it provides. In the adversary system, the best interests attorney's advocacy and evidentiary showings are simply that—a lawyer's presentation. Whether the lawyer's position is accepted or rejected by the decisionmaker, the lawyer's

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261. Kruse, *supra* note 258, at 147.

262. *AAML 2009 Standards*, *supra* note 5, Standard 2.2 cmt., at 244 (warning of “threat to the rule of law” posed by best interests lawyers).

representation of the child can significantly enrich the judge's understanding of the child's world.

While the call for client-directed representation for every child<sup>263</sup> has an appealing ring, that goal has practical and theoretical shortcomings. Drawing on one of Ted Schneyer's many insights about legal ethics, scholars debating the role of children's attorneys would do well to move beyond their "preoccupation with two grand visions in mortal combat"<sup>264</sup> and focus instead on the compelling reasons for permitting best interests lawyering in specific contexts. A blanket rule such as that proposed by the AAML that lawyers for children may only advocate the child's wishes will disserve the most vulnerable children who are at the center of these disputes—children who are too young, too cognitively immature, or too emotionally wounded to provide coherent direction for counsel.

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263. See, e.g., Taylor, *supra* note 1.

264. Schneyer, *supra* note 216, at 27 (referring to the debate between those who embrace a "hired gun" model of lawyering and those who want the lawyer to assume the role of "moral activist").