

Notes

Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*

Few decisions are as agonizing for a trial judge or for other public decisionmakers as choosing between disputants for the custody of a child.¹ The decision is particularly difficult when it arises in divorce proceedings rather than in abuse, neglect, or adoption proceedings, because standards of minimal care² or standards identifying the "psychological parent" of the child³ rarely produce determinate results.

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1. [T]he custody matters are the type that I get personally involved in, and when I go home I do lose sleep over them. I worry about whether I have done the right thing or the wrong thing or done what is best for the child. Now, I have had some serious criminal cases where some sentences were given to these defendants and then I felt I was doing my duty, period, and that is all there was to it. But with these custody cases, I take them home with me and I worry about them.

Interview with Hon. Harold Missal, Judge, Connecticut Superior Court, in New Haven, Connecticut, at 11-12 (Dec. 7, 1977) (transcript on file with *Yale Law Journal*) [hereinafter cited without cross reference as Judge Missal]; accord, B. BOTEIN, TRIAL JUDGE 273 (1952); see Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167, 168 (1969) (citing dissatisfaction with methods and results of custody adjudication expressed by state commissions).

2. See, e.g., CAL. WELF. & INST. CODE § 18951(e) (West Supp. 1977) (defining child abuse); N.Y. FAM. CT. ACT § 1012(e), (f) (McKinney 1975 & Supp. 1977) (defining abused child and neglected child); IJA-ABA, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT 10-11 (1977) (proposing standards).

3. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973) ("A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs.") [hereinafter cited as BEYOND THE BEST INTERESTS]. But see A. FREUD, Painter v. Bannister: *Postscript by a Psychoanalyst*, in 7 THE WRITINGS OF ANNA FREUD 247, 253 (1968) (defining child's father as "the adult man to whom the child attaches a particular, psychologically distinctive set of feelings").

Lawyering for the Child

In the typical divorce custody⁴ litigation,⁵ both competing parents have been involved in caring for and fulfilling the psychological needs of the child, and both exceed minimum standards of parental fitness.⁶

Among the many procedural reforms proposed to reduce the ambiguity and uncertainty in divorce custody adjudications, the introduction of legal representation for the child has received widespread support⁷ and has been implemented in twenty-four jurisdictions.⁸

4. The issues for judicial determination may include custody, visitation arrangements, or both. Either issue may be raised when the parents first decide to separate, when the divorce action is heard in court, or during subsequent actions to modify the initial decree. A decision on either issue involves consideration of both issues, because the family's continuing accommodation to the consequences of parental divorce affects all relationships among family members. Although the emotional turmoil in the family may implicate the legal system in other ways—investigation of abuse or neglect, kidnapping charges, or motions for contempt—this Note uses “divorce custody” to refer to custody or visitation disputes brought to court before, after, or at the time of divorce.

5. The custody determination is assumed to be contested. The role of the child's lawyer when custody is uncontested is not discussed in this Note, since legislatures increasingly have established that judicial investigation is to be limited to cases where a contest over custody appears in the pleadings. An example is provided by Connecticut, where appointment of counsel for the child was at one time mandatory when an agreement was submitted with respect to the custody or visitation of the child. This quickly was seen as impractical, and within a year the appointment was made discretionary. Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage*, 50 CONN. B.J. 150, 155 n.19 (1976).

To simplify language, the term “parent” in this Note, except where otherwise indicated, will refer to a parental figure party to a custody dispute, who may in fact be a grandparent, other relative, or other person with no biological tie to the child (e.g., a stepparent). Although divorce custody disputes can include more than two disputants, as when a grandparent is permitted to intervene in addition to the two biological parents, this Note will assume a two-party dispute. Also, except where otherwise indicated, reference to “the child” in this Note includes instances where more than one child is represented by an attorney in the same litigation.

6. See Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1, 14 (1977-1978) (standard preferring psychological parent and disqualifying parent who endangers health of child “has little utility where two fit parents who have lived together and jointly raised a child each seek[s] custody”); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 286-87 (1975) (existing psychological theories do not provide basis for choosing between two adults “where the child has some relationship and psychological attachment to each”).

7. Among the vast and expanding legal scholarship calling for the appointment of counsel for the child are BEYOND THE BEST INTERESTS, *supra* note 3, at 66; Berdon, *supra* note 5; Drinan, *The Rights of Children Whose Parents are Divorced*, 1962 U. ILL. L.F. 618; Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972); Genden, *Separate Legal Representation of Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L.L. REV. 565 (1976); Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964); Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Podell, *The “Why” Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973); Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151 (1974); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

8. Nineteen jurisdictions use the terms attorney or counsel for the child. ALASKA STAT. § 09.65.130 (Supp. 1977); ARIZ. REV. STAT. § 25-321 (1976); CAL. CIV. CODE § 4606 (West

Critics, however, have expressed concern that the role of counsel for the child is dangerously lacking in definition⁹ or that it merely duplicates roles already performed by other actors in the proceeding.¹⁰

Part I of this Note examines the child's interests both in the outcome of divorce custody litigation between his parents—the custody and visitation arrangements—and in the process of litigation itself. Because neither the parents nor the court can adequately protect all of these interests, Part I concludes that separate legal representation for the child is appropriate. Part II then examines the role conceptions of counsel for the child that appear in legal writing and practice. Based on a study of Connecticut attorneys who have acted as counsel for children in divorce custody cases, Part II concludes that the proffered role conceptions are both theoretically inadequate and poorly responsive to the problems faced in actual custody litigation.

Parts III and IV establish a new focus for analyzing the role by examining the lawyer's relations to other actors in the process. Fears about abuses of the role of counsel for the child in each of these relations are considered in light of the experience of the Connecticut practitioners. This experience shows the fears to be unfounded and indicates principles that should guide the attorney's representation

Supp. 1977); COLO. REV. STAT. § 14-10-116 (1973); CONN. GEN. STAT. § 46-43 (1977); DEL. CODE tit. 13, § 721 (Supp. 1977); D.C. CODE § 16-918 (1973); IOWA CODE ANN. § 598.12 (West Supp. 1977); KY. REV. STAT. § 403.090 (Supp. 1976) (friend of the court); MD. CTS. & JUD. PROC. CODE ANN. § 3-604 (Supp. 1977); MONT. REV. CODES ANN. § 48-324 (Cum. Supp. 1977); NEB. REV. STAT. § 42-358 (Cum. Supp. 1976); N.Y. FAM. CT. ACT §§ 242, 249 (McKinney 1975 & Supp. 1977) (law guardian); OHIO R. CIV. P. § 75(B)(2) (court may appoint both guardian ad litem and legal counsel); OR. REV. STAT. § 107.425 (1975); TEX. FAM. CODE ANN. tit. 2, § 11.10 (Vernon Supp. 1978); UTAH CODE ANN. § 30-3-11.2 (1976); VT. STAT. ANN. tit. 15, § 594 (1974); WASH. REV. CODE ANN. § 26.09.110 (Supp. 1977).

Five jurisdictions use only the term guardian ad litem. HAW. REV. STAT. § 571-46(8) (1976); MASS. ANN. LAWS ch. 215, § 56A (Michie/Law. Co-op Supp. 1977); MINN. STAT. ANN. § 518.165 (West Cum. Supp. 1977); N.H. REV. STAT. ANN. § 458:17-a (Supp. 1973); WIS. STAT. ANN. § 247.045 (West Supp. 1977).

9. See Mlyniec, *supra* note 6, at 8 (criticizing general lack of guidance in statutes on tasks to be performed).

10. See, e.g., Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 642-43 (1976) (guardian ad litem system does little but provide fees for young lawyers).

Severe criticism has come from a judge in the New York Family Court:

There is little that counsel for the child can contribute to the fact finding unless by some mere fortuity he is better prepared on the case than the other attorneys or is a more competent interrogator. . . . Legal Aid Society lawyers, who regularly act as "law guardians" for children in the Family Court's neglect and abuse proceedings, do contribute acumen, perspective, and diligence in tapping resources. Save for this exception, however, the experience and expertise of the child's counsel is generally far less than the judge's in making the ultimate custody determination.

Dembitz, Book Review, 83 YALE L.J. 1304, 1312-13 (1974) (reviewing *BEYOND THE BEST INTERESTS*, *supra* note 3).

of the child. Part III discusses the attorney's primary relationship with the child client, and Part IV examines the attorney's interactions with the parents and their attorneys, with investigative agencies and psychological professionals, and with the judge. The Note proposes principles of representation that recognize the child's need for explanation and participation to the extent of his own desire and capacity, that establish an affirmative duty of the child's counsel to the parents in order to preserve the child's emotional attachments, and that guide the attorney in serving the child's interests in the process of litigation itself and not merely in the outcome of the adjudication.

I. The Need for Separate Legal Representation

A. *The Child's Interests in Divorce Custody Litigation*

As the subject of the custody dispute, the child of divorcing parents has immediate and lasting interests in the custody decision before the court. The choice of custodial parent will influence the child's personality and personal attachments, and the process of litigation may itself put the child's well-being in jeopardy. Empirical studies show great variation in the responses of children to the divorce of their parents,¹¹ but the threat to a child's welfare introduced by

11. The most ambitious study to date is the Children of Divorce Project in Marin County, California, which began in 1970 and involves 131 children from 60 divorcing families. Data from observations of the children at the time of divorce and at one year after divorce are reported in Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975) [hereinafter cited as *Preschool Child*]; Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCHIATRY 20 (1976) ("early latency" defined as ages seven to eight) [hereinafter cited as *Early Latency*]; Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCHIATRY 256 (1976) (ages nine to ten) [hereinafter cited as *Later Latency*]; Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 479 (E. Anthony & C. Koupnik eds. 1974) (ages 13 and older) [hereinafter cited as *Adolescence*] [volume hereinafter cited as CHILD IN HIS FAMILY]; Kelly & Wallerstein, *Part-Time Parent, Part-Time Child: Visiting After Divorce*, 1977 J. CLINICAL CHILD PSYCH. 51 [hereinafter cited as *Part-Time Parent*]. Kelly and Wallerstein note that the response of children to parental divorce varies considerably according to developmental stage and, from about age four up, within each developmental stage:

We do not find an observable progression of defined stages in the child's response to his parents' separation and divorce. We see shared, age-related responses to separation and divorce Compared to adults, the child's response is more tied to his developmental stage, his environment, and parent-child relationship vicissitudes, including accessibility to the noncustodial parent. These and other reasons may render the child's response to divorce more idiosyncratic in timing and intensity. Kelly & Wallerstein, *Brief Interventions with Children in Divorcing Families*, 47 AM.

divorce is not disputed.¹² The disruption divorce produces in a child's family relationships and in his sense of security has an immediate impact and may produce serious long-term consequences. Measurable harms to children include loss of self-esteem¹³ and interruption in psychological development.¹⁴ Anxiety and fantasies of personal guilt,¹⁵ as well as an increased incidence of psychosomatic illness,¹⁶ are also fre-

J. ORTHOPSYCHIATRY 23, 29-30 (1977) [hereinafter cited as *Brief Interventions*]; accord, L. TESSMAN, CHILDREN OF PARTING PARENTS 506 (1978) (children's methods of coping with divorce vary according to differences in personality structure); Anthony, *Children at Risk from Divorce: A Review*, in CHILD IN HIS FAMILY, *supra* at 461, 463 (child's general sensitivity, age, intelligence, and level of emotional participation in family affect response to divorce); Kalter, *Children of Divorce in an Outpatient Psychiatric Population*, 47 AM. J. ORTHOPSYCHIATRY 40, 48 (1977) (important to take into account age, sex, and whether child settles into one-parent or stepparent home); McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCH. 1424, 1424 (1968) (child's reactions depend on age, sex, extent and nature of family disharmony before divorce, and character of relationships with parents and siblings).

12. See, e.g., Anthony, *supra* note 11, at 462-63 (summarizing risks that child may become psychiatrically disturbed during period of childhood, that child may turn away from marriage as unsatisfactory mode of human relationship or repeat parents' lack of success in it, and that child may develop psychiatric disorders in adult life); *Brief Interventions*, *supra* note 11, at 39 ("divorce is stressful for most children and constitutes a potential developmental interference").

That children are placed at risk by parental divorce does not mean that they inevitably suffer irreparable damage from it. As one psychiatrist explained: "We should bear in mind that events experienced as traumatic may be either sources of neurotic conflict or spurs to personality growth. The specific circumstances determine whether the divorce is experienced destructively or constructively." Westman, *Effect of Divorce on a Child's Personality Development*, MED. ASPECTS HUMAN SEXUALITY, Jan. 1972, at 38, 41. From the oldest preschool ages, children are capable of experiencing parental divorce without breaking developmental stride. *Preschool Child*, *supra* note 11, at 615. This ability increases as the child grows older. Where older children are able to master "the inner and outer events" of divorce, adversity may actually enhance development. *Adolescence*, *supra* note 11, at 503. The literature indicates that children of divorce referred for therapy have a "lesser incidence of anxiety, neurotic symptoms, and habit formation problems" than children referred who were from "intact" families. Kalter, *supra* note 11, at 41 (emphasis in original). But cf. Anthony, *The Syndrome of the Psychologically Invulnerable Child*, in CHILD IN HIS FAMILY, *supra* note 11, at 529, 540 (reporting study of children in variety of disrupted families; even seemingly "invulnerable child" attains invulnerability at some psychological cost).

13. *Preschool Child*, *supra* note 11, at 606; *Later Latency*, *supra* note 11, at 269; see *Early Latency*, *supra* note 11, at 23 (most striking response to parental separation is pervasive sadness and grieving); *Adolescence*, *supra* note 11, at 485-86 (virtually all adolescents in study experienced parental divorce as extraordinarily painful event accompanied by feelings of shame and embarrassment).

14. Most younger children go into an initial period of regression following parental separation. McDermott, *supra* note 11, at 1431; *Preschool Child*, *supra* note 11, at 602. In older children, the developmental disruption may take the form of precocious, pseudomature behavior. *Later Latency*, *supra* note 11, at 266; cf. *Adolescence*, *supra* note 11, at 483 (hazard carries potential for developmental spurt, which, if not too premature, may facilitate achievement of independence and maturity).

15. *Brief Interventions*, *supra* note 11, at 25; Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 78 (1969).

16. *Brief Interventions*, *supra* note 11, at 26. This effect may be limited to older children. *Id.*

quent effects of parental divorce. When a father is absent because of divorce, a child's ability to develop a healthy self-concept and sexual identity may be impaired.¹⁷

The child is thus necessarily influenced by the court's choice of custodial parent and visitation arrangements.¹⁸ But the child's interests also include a substantial stake in the process of choosing—a stake that may be threatened by the parents' goals and conduct in the divorce custody dispute. During legal disputes arising from divorce, the child may be exposed to manipulation, anger, or rejection by one or both parents.¹⁹ Accusations of blame and unfitness are common²⁰ since parents often use custody proceedings to vent bitter feelings or to gain leverage in the financial settlement.²¹ The result is a contentious, destructive, and often prolonged dispute that may seriously threaten the possibility of a workable arrangement for visitation between the child and the parent who ultimately is denied custody.²²

17. Hetherington & Duer, *The Effects of Father Absence on Child Development*, 1971 *YOUNG CHILDREN* 233, 235, 238; Westman, *supra* note 12, at 42, 46-49, 54. The problem of father absence is not simply one of the absence of a male figure. Living with a stepfather carries problems of its own for children and is particularly stressful for girls. Kalter, *supra* note 11, at 44-47.

Studies of father absence yield varying results depending on the cause of the absence. Hetherington & Duer, *supra* at 234, 242; Herzog & Sudia, *Children in Fatherless Families*, in 3 *REVIEW OF CHILD DEVELOPMENT RESEARCH* 141, 162-63 (B. Caldwell & H. Ricciuti eds. 1973) (widowed family better able to deal with loss than divorced or deserted family). Variations may also exist among families with different demographic characteristics, but these differences have not yet been established. Herzog & Sudia, *supra* at 157-60.

18. See note 4 *supra*.

19. One commentator summarized the possibilities for using the child in manipulative ways:

1. The child is used as a means of depriving a parent of affection in retaliation for the deprivation of affection that the other parent experienced.

.....

2. The child is used as a means of insuring continued attachment to the divorced spouse.

.....

3. Total allegiance to one parent is demanded with the concurrent total rejection of the other so that the child becomes the weakened puppet of parental needs.

.....

4. The child is used as direct hostage for payment of money or services.

Harris, *The Child as Hostage*, in *CHILDREN OF SEPARATION AND DIVORCE* (I. Stuart & L. Abt eds. 1972).

20. L. TESSMAN, *supra* note 11, at 278; Watson, *supra* note 15, at 60-61.

21. See Note, *The Role of the Child's Wishes in California Custody Proceedings*, 6 *U. CAL. D.L. REV.* 332, 346 (1973) (parents use custody battle to vent bitter feelings or to prove innocence in breakup even in state where divorce granted on no-fault basis); Interview with Yale Sappern, Assistant Clerk of New Haven County Superior Court, at 7 (Dec. 17, 1977) (transcript on file with *Yale Law Journal*) (citing frequency of fathers using threat of custody battle to get reduction in alimony) [hereinafter cited as Sappern Interview].

22. See *Part-Time Parent*, *supra* note 11, at 54 (factors associated with divorcing process itself have "central influence" on divorcing parent and on resulting visitation);

Here the child's interests in the process and in the outcome of the proceeding are closely connected: children generally benefit from amicable contact with the noncustodial parent and suffer without it.²³ Parents embittered by a rancorous divorce or custody action often vent these feelings in the presence of the child and may sabotage the child's relationship with the noncustodial parent.²⁴

Less tied to a particular disposition of the custody dispute but no less important to the child is the pace of the litigation. The interval between initiation and final disposition of a custody suit usually stretches for months and may exceed a year.²⁵ Children rarely benefit from delay in custody proceedings,²⁶ yet speedy adjudication may not suit the strategy of one or both parents²⁷ or may be impeded by

E. Hetherington, M. Cox & R. Cox, *The Aftermath of Divorce*, at 32-33 (to be published in *MOTHER/CHILD, FATHER/CHILD RELATIONSHIPS* (J. Stevens & M. Mathews eds. 1978)) (family functioning and positive adjustment of children threatened by "conflict and ill will between the divorced parents") [hereinafter cited as *Aftermath*].

23. *Part-Time Parent*, *supra* note 11, at 53 (where parent lives nearby, unvisited child feels "unworthy and unlovable"). Wallerstein and Kelly note that visitation can be crucial to a child because of "the intense longing that so many children experience in regard to infrequent or nonvisiting parents." Wallerstein & Kelly, *Divorce Counseling: A Community Service for Families in the Midst of Divorce*, 47 *AM. J. ORTHOPSYCHIATRY* 4, 15 (1977) [hereinafter cited as *Divorce Counseling*]. Yet they also note that temporary or permanent loss of contact with one parent may be preferable to ongoing litigation by the noncustodial parent. *Id.* at 16. It has been argued that visitation should be at the sole discretion of the custodial parent. *BEYOND THE BEST INTERESTS*, *supra* note 3, at 38.

24. See *BEYOND THE BEST INTERESTS*, *supra* note 3, at 38 ("Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other."); *Divorce Counseling*, *supra* note 23, at 12 (citing clinical cases where parents used children "as extensions of their angers and their wishes for vengeance" and ruined previously good relationships between children and noncustodial parents); *Part-Time Parent*, *supra* note 11, at 53 (citing cases where court imposed rigid visitation schedule unresponsive to child's needs; schedule necessitated by inability of parents to respond flexibly because of intense "angers," particularly associated with court battles).

25. Telephone Interview with Yale Sappern, Assistant Clerk of New Haven County Superior Court (Feb. 27, 1978) (notes on file with *Yale Law Journal*) (average five-week wait for first hearing on contested custody or visitation motions; average three-to-five month duration of suit involving Family Relations Division investigation and attorney for child; suits stretch beyond one year with modification motions) [hereinafter cited as Sappern Phone Interview].

26. See *BEYOND THE BEST INTERESTS*, *supra* note 3, at 43 (to avoid irreparable psychological injury, custody decisions must be treated as emergencies). *But see* note 101 *infra* (describing case where slowing pace was in child's interests). The Note authors handled a case in which a 10-year-old client wanted a delay over the summer vacation so that he could live with both parents and decide which he preferred.

27. One delaying tactic used by parents' attorneys is to move for custody or visitation pendente lite orders even when the attorney is ready to try the case on the final order. The clerk in charge of family relations in the New Haven County Superior Court described this tactic:

What they do is if they think they're possibly a loser, they won't claim it for trial but will ask for pendente lite orders because you have what they call "two bites at the apple." You lose on the pendente lite motion and you still have the final hearing. The final hearing is de novo. You try the same thing all over. If you're a loser on

congested court calendars.²⁸ The instability and uncertainty brought on by divorce and exacerbated by the nature of the custody proceeding can be especially harmful to infants and preschool children, who have the most difficulty in comprehending uncertainty and in coping with disruption.²⁹

Ultimately, the child's interests in the process and the outcome of the custody proceeding merge because an adjudication by the court does not necessarily make the child's placement secure: subject to certain conditions that vary among jurisdictions, the noncustodial parent may move to modify custody or visitation decrees.³⁰ This opportunity to modify may be detrimental to the children because it prolongs the uncertainty and turns the initial court decision into one step of an ongoing process. Modification actions are particularly harmful to the child when used by a parent to harass the former spouse.³¹ At times, however, modification may benefit the child. The custodial parent's ability to provide competent and supportive care may wane; a child's need for one parent at an early stage of development may give way to a need for the greater influence of the other parent at a later stage.³² Without separate legal representation, the

pendente lite you get another bite at the apple at the final hearing because the judge can't say, "that's been decided already," because pendente lite is not a final order. In fact, you can benefit from your mistakes. If you made a bad presentation, now you know how to go in and change it.

Sappern Interview, *supra* note 21, at 19.

28. See Sappern Phone Interview, *supra* note 25; *cf.* BEYOND THE BEST INTERESTS, *supra* note 3, at 42-43 (criticizing length of time required for custody case to be processed).

29. BEYOND THE BEST INTERESTS, *supra* note 3, at 41-42; see *Preschool Child*, *supra* note 11, at 602, 608.

30. The substantive standard for modification of a custody decree in most jurisdictions is that there be a "substantial change of circumstances since the time of the award under attack" and a demonstration that new circumstances require a change in custody to promote the best interests of the child. Foster & Freed, *Child Custody* (pt. 2), 39 N.Y.U.L. REV. 615, 623 (1964). *But see* *Simons v. Simons*, 172 Conn. 341, 346, 350 (1977) (requirement of material change in circumstances must be balanced against best interests of child and is one element in larger question of what is in child's best interests). Time restrictions may also be imposed on modification motions. UNIFORM MARRIAGE AND DIVORCE ACT § 409(a) (no motion to modify custody decree may be made earlier than two years after its date) (enacted in five states). Most jurisdictions, however, do not set time limits. See, e.g., MINN. STAT. ANN. § 518.18 (West 1977); MO. ANN. STAT. § 452.410 (Vernon 1977).

31. See L. TESSMAN, *supra* note 11, at 281; Watson, *supra* note 15, at 63-64.

32. In their study of 34 preschool children, all of whom lived with their mothers after the divorce, Wallerstein and Kelly conclude:

[I]n our sample, the mother-child relationship following divorce showed a reversal of the pattern observed in the father-child relationship: namely, as studied at the one-year follow-up point, the direction of change in father-child relationships is toward richer, more gratifying relationships, whereas for mothers, the changes are more in the direction of deterioration over this time.

Preschool Child, *supra* note 11, at 614. A study of nursery school children by different researchers drew similar though more qualified conclusions. Parenting ability was found

child's interests are left to the inadequate protection of parents and the court.

B. *Who Represents the Child's Interests?*

Parents are normally entrusted by law with providing for the basic human needs of their child.³³ But when the family unit has been broken in a divorce custody dispute, neither parent can be presumed to be the exclusive representative of the child. Neither parent can be relied on to communicate to the court the child's interests that differ from those of one or both parents.³⁴ Attorneys for the parents may try to take into account the child's interests, but they owe their ultimate loyalty to the interests of their own clients.³⁵

It has been argued, however, that the child's interests are protected by the judge as *parens patriae*. This independent responsibility of

to decline substantially in the year immediately following divorce and was particularly serious in mother-son relationships:

Divorced parents make fewer maturity demands of their children, communicate less well with their children, tend to be less affectionate with their children, and show marked inconsistency in discipline and lack of control over their children in comparison to married parents. Poor parenting is most apparent when divorced parents, particularly the divorced mothers, are interacting with their sons. Aftermath, *supra* note 22, at 21. The authors report that the decline in parenting, particularly that of mothers, is most marked one year after divorce. *Id.* Two years after the divorce, the ability of mothers and fathers generally has improved, *id.* at 21-22, though it never reaches predivorce levels or the level of care and control exercised by other parents in intact families, *id.* at 21-23.

Wallerstein and Kelly emphasize the difficulty in predicting shifts in parenting ability: [D]ivorce, as seen in our study, represents a nodal point of change in the parent-child relationship, for the custodial as well as the noncustodial parent. In fact, the changes in the parent-child relationships in some age groups are at times startling and not predictable from earlier, predivorce modes of relationship.

Divorce Counseling, *supra* note 23, at 6 (footnote omitted); *accord*, Westman, *supra* note 12, at 42.

33. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") *But see* *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (pregnant minor's right to abortion without parental consent); *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (involuntary civil commitment by parent of teenaged child not allowed without hearing).

34. Bersoff, *Representation for Children in Custody Decisions: All That Glitters is not Gault*, 15 J. FAM. L. 27, 31 (1976-1977); cf. *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.44 (1977) (in dispute over custody of foster children, state, foster parents, and natural parents share guardianship responsibilities for children and none speak exclusively for children).

Parents' misperceptions about their children's reactions to divorce are indicated in the accounts of therapists who counseled divorcing families: "Parents who had initiated the divorce generally perceived the children as relatively intact, and wanted these perceptions confirmed by us. Similarly, parents who felt injured or abandoned saw their children as more troubled and damaged by the divorce process and wanted confirmation for these contrary perceptions." *Divorce Counseling*, *supra* note 23, at 11.

35. Berdon, *supra* note 5, at 159; Inker & Perretta, *supra* note 7, at 115.

the court to the child is reflected in the "best interests of the child" standard for custody adjudications;³⁶ this responsibility has been interpreted by some to mandate protection of the child from "the rigors of adversary proceedings"³⁷ and thus to preclude separate legal representation for the child.³⁸

Yet without separate representation for the child, the court may neglect important interests of the child in both the outcome and the process of the proceeding. Because the best interests standard is a general principle or statement of values rather than a precise test, it has been criticized for providing "no indication of the degree of attention paid to the child's needs" in application,³⁹ for reducing judicial opinions to "amorphous platitudes or generalizations,"⁴⁰ and for leaving the custody decision essentially indeterminate.⁴¹ These weaknesses are mirrored in the wide discretion of the trial judge,⁴²

36. With variations as to specific factors, as of 1975, 31 jurisdictions appeared to have had statutes establishing the "best interests of the child" as the standard for divorce custody adjudications. Others had variations on parental fault or unfitness presumptions. Mnookin, *supra* note 6, at 266 n.45. The standard developed in two stages as a response to the father's absolute right of custody. Developed in Roman law and English feudal law and absorbed into common law in the United States, the father's absolute right rested primarily on his guardianship of land and property interests. Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCH. 1369, 1369-70 (1976); Inker & Perretta, *supra* note 7, at 109. As the conception of children evolved from that of chattel to that of precious and impressionable beings, C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED* 4-5 (1977); Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROB. 38, 48 (1975), the courts first responded by articulating paternal duties to the child. Derdeyn, *supra* at 1369. The *parens patriae* doctrine, which developed in the seventeenth century, allowed the Chancery Court to assume child-protective functions and later to deny custody to an unfit father. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147, 166, 178-81 (1970); Foster & Freed, *Child Custody* (pt. 1), 39 N.Y.U.L. REV. 423, 423-24 (1964). Nevertheless, a presumption for the father survived in this country until well into the twentieth century. Derdeyn, *supra* at 1370.

In the second stage, the best interests standard developed to establish equal rights between parents in theory, while favoring the mother in practice through simultaneous development of the "tender years" doctrine that, absent proof of maternal unfitness, younger children need to be with their mother. Foster & Freed, *supra* at 425; Kram & Frank, *The Future of "Tender Years,"* 1976 TRIAL 14.

37. Note, *supra* note 7, at 920.

38. *E.g.*, Leigh v. Aiken, 54 Ala. App. 620, 625, 311 So. 2d 444, 448-49 (1975); Robin v. Robin, 45 Ill. App. 3d 365, 373-74 (1977) (when child allegedly unaware of proceedings, abuse of discretion for trial judge to appoint guardian ad litem without evidentiary showing of need); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their Rights*, 1976 B.Y.U.L. REV. 605.

39. Derdeyn, *supra* note 36, at 1371.

40. Foster & Freed, *supra* note 36, at 423.

41. Mnookin, *supra* note 6, at 249-54 (best interests standard depends on "person-oriented" rather than on "act-oriented" determinations, on predictions rather than on past events, and on interdependent factors; all sharply limiting appellate review and precedential value of individual cases). *But see* Dembitz, *supra* note 10, at 1311 (adjudications of child's welfare must depend largely on past facts).

42. Foster & Freed, *supra* note 36, at 438; Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 23-25 (1965).

which allows little recourse to appellate review.⁴³ Lacking specific criteria for his decision and hearing only evidence introduced by the parents' attorneys, the judge frequently considers relative parental fitness and interests while applying the best interests standard.⁴⁴ Indeed, parental culpability in the divorce has been used as a basis for custody determinations even where the state has a no-fault divorce statute.⁴⁵ Encouraging parents to try to disqualify each other, courts continue to hear testimony and to make decisions based on judicial perceptions of unconventional morality or lifestyles, factors that often have little effect on the parent-child relationship.⁴⁶

The child's interests in the process as well as in the outcome of the adjudication are affected by these difficulties in applying the best interests standard. Without a separate representative for the child, the judge is not well placed to reduce the rancor of the proceedings. The judge is restricted to the courtroom and cannot on his own obtain the facts pertaining particularly to the child's viewpoint.⁴⁷ And with

43. Mnookin, *supra* note 6, at 255-62; Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1210 & n.86 (1978) (reversal rates significantly low for family law cases).

44. Foster & Freed, *supra* note 36, at 441; Note, *supra* note 7, at 922.

45. Derdeyn, *supra* note 36, at 1372-73.

46. Berdon, *supra* note 5, at 157; Inker & Perretta, *supra* note 7, at 115. *But see* Simons v. Simons, 172 Conn. 341, 346 & n.1 (1977) (relationship between parent's emotional problems, drinking, and leaving home unattended "not irrelevant" to welfare of child; adverse effect on child to be logically inferred, though may be rebutted by evidence that child totally unaffected).

47. The child's attorney can be a better factfinder than the judge for several reasons.

(1) The judge usually speaks with the child in chambers, if at all. Although obviously better than testimony in open court, the interview in chambers is still at best brief and takes place in an imposing and unfamiliar environment. Attorneys can and do make efforts to speak to children in surroundings more comfortable to the child. *See* p. 1161 & note 163 *infra*. One judge believed he could talk easily with children in chambers, but stressed that the presence of someone who knew the child, whether it be the child's attorney or a Family Relations Division officer, helped tremendously in setting the child at ease. Interview with Hon. Robert Callahan, Judge, Connecticut Superior Court, in Bridgeport, Connecticut, at 3-4 (Feb. 9, 1978) (transcript on file with *Yale Law Journal*) [hereinafter cited without cross reference as Judge Callahan]. *See* note 300 *infra* (Judges Berdon and Missal stress help of child's attorney in facilitating judge's interview with child). If the parents' attorneys are present at the judge's interview with the child, the child may be even more tense and less willing to be open with the judge.

(2) The child's attorney is an active factfinder. He conducts his own investigation, seeks out facts that he considers important, and can actively discourage attempts to introduce evidence or testimony that he considers irrelevant and likely only to increase the parents' bitterness. *See generally* p. 1174 and notes 231 & 232 *infra*.

(3) The child's attorney can usually interview the parents alone and out of court, *see* p. 1173 *infra*, which gives the attorney at least two advantages over the judge who listens to testimony in court: (a) the child's attorney can talk with and observe the parents before they have been "coached" by their attorneys, *see* Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1094 (1975); and (b) if demeanor is an important clue to credibility, it is important to observe it outside the formality of the courtroom, *see* J. FRANK, *COURTS ON TRIAL* 81 (1949).

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congested calendars and rotating sittings,⁴⁸ the judge is the last person one would expect to be able to decide the pace at which the litigation should proceed. Although reforms have been proposed that do not involve the appointment of counsel for the child and might even appear to make such an appointment superfluous,⁴⁹ such reforms would not eliminate the dominance of parental interests, and a judge who focuses on the parents is not likely to be deterred without a persistent reminder that the child is not merely an object to be awarded to the more deserving parent.⁵⁰

The law cannot prevent all damage to the child's interests caused by divorce, since it cannot compel harmonious human relationships.⁵¹ It can, however, provide a means for reducing the damage by ensuring that the child's interests are not neglected in divorce custody proceedings. Because the child's interests are significantly affected by the process and outcome of the custody suit, they merit legal recognition. Because they may differ significantly from those of the par-

48. Superior Court judges in Connecticut, for example, rotate among counties and among family, jury, civil, and criminal sessions. See CONN. GEN. STAT. §§ 51-181 to 51-182i (1977) (Conn. Pub. Act 76-436, effective July 1, 1978, amends these sections, but does not alter their substance). The judge may retain jurisdiction over a family relations case even after leaving the family court session. CONN. GEN. STAT. § 51-182(f). Such a practice is infrequent and burdensome to individual judges. See, e.g., Judge Missal at 4.

49. The proposals include a return to an explicit presumption for one parent, Ellsworth & Levy, *supra* note 1, at 202-03 (call for return to presumption for one parent); but see Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639-40 (Pa. 1977) (questioning "legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union"); Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737, 746 (1944) (lack of presumptions makes custody determinations less determinate, but appropriately so), court-supervised counseling after divorce, Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 507 (1975), increasing the responsibilities of the parents' attorneys, Rothenberg, *The Lawyer's Role in Child Custody Disputes*, 23 N.Y. COUNTY LAW. ASS'N B. BULL. 95, 99 (1965-1966); but see Berdon, *supra* note 5, at 159 (parents' attorneys can never adequately represent child's interests, which may conflict with parents'); Genden, *supra* note 7, at 587 (parents' attorneys may be precluded from fully representing child by prohibition of dual representation by *Code of Professional Responsibility*), handling modifications through a panel of experts and friends, Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197, 1197-1200 (1964), and techniques to reduce the use of the adversarial system in custody adjudications, see Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1205-12 (1968) (calling for comprehensive family court run on nonadversarial basis).

50. This is common ground for the sources cited in note 7 *supra*. The irony of the metaphor of child as the object of a dispute was suggested by Mr. Justice Jackson in *May v. Anderson*, 345 U.S. 528, 541 (1953) (dissenting opinion): "[C]ourts [in custody suits] are no longer concerned primarily with the proprietary claims of the contestants for the 'res' before the court, but with the welfare of the 'res' itself."

51. BEYOND THE BEST INTERESTS, *supra* note 3, at 50 (law can destroy human relationships but cannot compel them to develop). The law can, at least through devices such as visitation decrees, compel the objective preconditions for the continuation of a parent-child relationship despite opposition from the custodial parent.

ental parties to the suit and are not protected by the judge without assistance, they warrant separate legal representation.

II. Definitions of the Role in Theory and Practice

Proponents of legal representation for children in divorce custody disputes have marshaled a broad range of purposes for the attorney based on a variety of legal theories. Propelled by competing underlying role conceptions, contrasting views have emerged in state statutes and practice as to the appropriate tasks,⁵² title,⁵³ and authority for the appointment⁵⁴ of the child's legal representative. On examination, however, each of these conceptions falls short of the purpose of the role and each is abandoned in practice.

A. *Advocates versus Factfinders*

Should the child's legal representative behave as a lawyer whose client simply happens to be a child? Or do the special characteristics of the child and of the custody determination call for legal assistance of a different sort? These questions suggest a rough division of the rationales for the child's legal representative and their associated role descriptions into two groups—the advocates and the factfinders.⁵⁵

52. A survey of state statutes and cases produced the following catalogue of tasks: to investigate and report; to initiate contempt proceedings; to investigate and cause witnesses to appear; to introduce evidence and oppose the divorce decree; to be heard on all aspects; to supervise support; to be present at depositions and interrogatories and to cross examine; . . . to determine legal rights; to advocate welfare; to advocate best interests; to advocate visitation; to insure support and medical care; to do all things necessary; to make peremptory strikes; to question witnesses; to argue; . . . to recommend to the court what he thinks is in the child's best interests.

Mlyniec, *supra* note 6, at 8-9 (footnotes omitted).

Another suggested task is surveying and opposing agreements between the parents. MICH. COMP. LAWS ANN. § 552.45 (MICH. STAT. ANN. § 25.121) (1967) (friend of court may oppose divorce even though both parents want it); Dissolution of Marriage Act, CONN. GEN. STAT. § 46-43 (1973) (repealed 1974, *see* Berdon, *supra* note 5, at 155 n.19) (mandatory appointment of child's counsel to investigate custody agreements between parents). But opposition to the divorce and to custody arrangements desired by both parents may result in more harm than help to the child. Aftermath, *supra* note 22, at 35-36 (although no victimless divorces, "a conflict-ridden intact family is more deleterious to family members than a stable home situation in which parents are divorced"). *See also* *Divorce Counseling*, *supra* note 23, at 22 (social policy facilitating divorce should be accompanied by provision of supportive services).

53. *See* note 8 *supra* (citing statutes). "Child advocate" is another name frequently appearing in discussions of this subject, but it will not be used here because overuse has drained it of content, *see* B. GROSS & R. GROSS, *THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE* 1-10 (1977).

54. *See* p. 1139 and notes 56, 57 & 62 *infra*.

55. Inconsistent nomenclature and varied views on the child's preference contribute to ambiguity in the role conceptions. *See* p. 1141 & note 71 *infra*.

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To establish procedural protections for the child in a custody dispute, the advocates draw on due process rights to counsel,⁵⁶ the language of statutes governing joinder and intervention,⁵⁷ and analogies to juvenile court reforms.⁵⁸ They generally urge conferral of party status on the child to clear the way for the full legal advocacy available to adults.⁵⁹ Many statutes explicitly require that the representative for the child be an attorney;⁶⁰ these statutes appear to contemplate that the attorney would call and cross-examine witnesses, argue motions, and perform other tasks of a traditional trial advocate.⁶¹

56. *E.g.*, *Brown v. Chastain*, 416 F.2d 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting); *Berdon*, *supra* note 5, at 161; *cf.* *State v. Wade*, 527 P.2d 753, 755 (Or. App. 1974), *appeal dismissed for want of a substantial federal question*, 423 U.S. 806 (1975) (action for termination of parental rights). *But see* *Salaices v. Sabraw*, 400 F. Supp. 367 (N.D. Cal. 1975) (state court did not violate due process by refusing to permit children and their attorney to intervene in proceedings to enforce visitation order); *Leigh v. Aiken*, 54 Ala. App. 620, 311 So. 2d 444 (1975) (due process rights of child not applicable to custody proceedings; judge assures fundamental fairness).

The constitutional argument has theoretical flaws. The argument's principal bulwark, *In re Gault*, 387 U.S. 1 (1967), did not purport to do more than accord due process protections to minors in criminal or quasi-criminal proceedings. Extensions to civil determinations have met with little success. *See* *Middendorf v. Henry*, 425 U.S. 25 (1976) (no constitutional right to counsel in court-martial because not criminal proceeding); *United States v. Holmes*, 387 F.2d 781 (7th Cir.), *cert. denied*, 391 U.S. 936 (1968) (*Gault* protections restricted to delinquency proceedings); *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (no right to counsel at preliminary conference before school suspension). In addition, *Gault* and other Supreme Court decisions furthering the rights of children may be limited to rights claimed by children in concert, not in conflict, with their parents. J. Goldstein, *On Being Adult and Being An Adult in Secular Law*, 105 DAEDALUS 69, 74 (1976).

57. Note, *supra* note 7, at 928 (proposals for separate counsel based on state statutes governing joinder and interpleading); *cf.* FED. R. CIV. P. 19(a)(2)(i) (joinder of person so situated that disposition in his absence may "as a practical matter impair or impede his ability to protect that interest"); *id.* 24(a)(2) (permissive intervention by party not adequately represented by existing parties).

58. The major analogy stems from *Gault*. *See* note 56 *supra*. Other analogies have been drawn to provision of counsel in neglect, probate, and personal injury actions, and also for medical treatment without parental consent. *See* Note, *supra* note 7, at 930.

59. *See, e.g.*, BEYOND THE BEST INTERESTS, *supra* note 3, at 65; *Berdon*, *supra* note 5, at 155-56; *Holman & Noland, Agreement and Arbitration: Relief to Over-litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L.J. 527, 543 (1976).

60. *See* note 8 *supra*. Several authorities conclude that a child should have counsel because a guardian ad litem would not provide as active and effective protection. UNIFORM MARRIAGE AND DIVORCE ACT § 310, comment, *reprinted in* 5 FAM. L.Q. 205, 235 (1971); *Shepherd, Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 178 (1974).

If the rationale for representation rests on constitutional due process protections, anything other than full legal counsel would fall short of the required guarantees. *See* *Bersoff*, *supra* note 34, at 38 n.38 (citing cases); *cf.* *Anders v. California*, 386 U.S. 738, 744, *rehearing denied*, 388 U.S. 924 (1967) (on criminal appeal counsel must act as active advocate, not amicus curiae); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972) (appointment of guardian ad litem cannot satisfy constitutional requirement of representative counsel in civil commitment proceedings).

61. *E.g.*, *Berdon*, *supra* note 5, at 166.

The contrasting theory relies on the inherent powers of the court to protect the child.⁶² The child would receive neither the party status nor the legal representation due a party; instead, the court would appoint an assistant to help discover and protect the child's interests in the pending litigation. Called by some a guardian ad litem⁶³—a term with a large number of meanings, including that of any legal representative for a child for the duration of a suit⁶⁴—the nonadvo-

62. Genden, *supra* note 7, at 584-86; Speca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U. Mo. K.C.L. REV. 1, 25-38 (1969). The California Governor's Commission on the Family concluded that although the state courts probably possess inherent power to appoint guardians ad litem in custody cases, this power should be codified for purposes of clarity and certainty. Childs, *Rights of the Legally Disadvantaged In Adoption and Child Custody Matters*, 53 WOMEN LAW. J. 50, 54 (1967). See also FED. R. CIV. P. 17(c) (court may "appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action").

63. See note 8 *supra* (citing statutes).

Observers have commented that the guardian ad litem has more restricted powers and duties than counsel, which makes the guardian ad litem appear like a factfinder; generally, however, commentators have not precisely distinguished the roles. See Derdeyn, *supra* note 36, at 1374; Note, *supra* note 7, at 924-25, 949. Thus, commentary to the Uniform Marriage and Divorce Act calls for appointment of counsel rather than a guardian ad litem for the child. UNIFORM MARRIAGE AND DIVORCE ACT § 310 & comment, *reprinted in* 5 FAM. L.Q. 205 (1971). Wisconsin Supreme Court Justice Robert Hansen rejected the role of factfinding investigator but continues to call the alternative a guardian ad litem. *Schipper v. Schipper*, 96 Wis. 2d 303, 313, 174 N.W.2d 474, 482 (1970) (Hansen, J., concurring).

64. At common law, court rulings against persons such as infants or mentally retarded individuals were void unless a guardian ad litem had been present to protect their personal interests against adverse judicial rulings. J. WOERNER, A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND § 1 (1897). At least three distinct uses of the term now exist. The first is the historical use. A competent person—not necessarily a lawyer—who provided the "dispositive quality of mind" to guard a child's property or financial interests during a specific litigation, the traditional guardian ad litem was not entrusted with the care or custody of the child, with supervising the child's estate, nor with conducting the suit except under the judge's supervision. Originally, the guardian ad litem only protected an infant defendant while a "*prochein ami*" or "next friend" prosecuted a complaint for an infant plaintiff, but this distinction has eroded over time. 45 IOWA L. REV. 376, 379 (1960).

The second meaning of the term emerged with the advent of independent representation for children in custody suits arising from neglect, abuse, delinquency, and divorce proceedings. Even when a lawyer is appointed in this role, he is not to take an adversarial role but to act as an impartial investigator for the court. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W.L. REV. 16, 28 (1976).

The third meaning of the term is that of the Wisconsin Supreme Court, which has rejected the investigative function but still uses the term "guardian ad litem" to denote the legal advocate for the child. *Schipper v. Schipper*, 96 Wis. 2d 303, 313, 174 N.W.2d 474, 482 (1970) (Hansen, J., concurring); see, e.g., Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1, 7-9 (1966) (discussion by leading judicial force behind Wisconsin practice); Podell, *supra* note 7, at 108.

The term also bears the connotation of guardianship generally, by which one person is entrusted with making decisions for another. In the custody context, this sense of "guardian" would require reallocation of the custody decision from the judge to the child's representative, a result rejected by commentators. Genden, *supra* note 7, at 588-89. *But cf.* BEYOND THE BEST INTERESTS, *supra* note 3, at 66-67 (psychologically determined

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cate representative for the child is more properly denominated a factfinder. His principal role is that of impartial investigator;⁶⁵ his principal task is to "insure that all considerations regarding the best interests of the child will have been brought to the Court's attention."⁶⁶ Rather than advocate a particular placement decision, the factfinder submits a report to the judge; he does not necessarily participate in the trial.⁶⁷

The lines between the role conceptions become sharpest in discussions of the import for the child's legal representative of a child's expressed preference for one parent.⁶⁸ One school holds that the child's preference is but one fact to be found,⁶⁹ while the other maintains that without full advocacy of the preference there would be little reason to have a child's representative at all.⁷⁰ Yet there is a range of intermediate views on how the representative should treat the child's preference,⁷¹ a range that suggests a continuum of roles rather than the extremes of advocate and factfinder. Delineations between the roles also become blurred when an advocate represents a child with a vacillating preference or when a factfinder reports facts that recommend one parent over the other.

Underlying both roles is a limited conception of legal representa-

"least detrimental alternative" should prevail). See also Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, 10 VAL. U.L. REV. 423, 432 (1976) ("hydra-headed" role of guardian ad litem poses problem for attorney, who must advise court but also advance best interests of client). The term "guardian ad litem" will not be used for the remainder of this Note except when employed by a quoted source.

65. KY. REV. STAT. § 403.090 (Supp. 1976) (investigate and report); MASS. ANN. LAWS ch. 215, § 56A (Michie/Law. Co-op Supp. 1977) (same); Genden, *supra* note 7, at 593, 595 (neutral factfinding rather than advocacy may be appropriate function to protect child's interests).

66. Inker & Perretta, *supra* note 7, at 120.

67. Holman & Noland, *supra* note 59, at 543.

68. See Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1, 13 (1977).

69. See, e.g., Genden, *supra* note 7, at 589.

70. Mlyniec, *supra* note 6, at 16.

71. One intermediate view suggests that the child's preference should be influential but not controlling in the representation. Bersoff, *supra* note 34, at 40 (child's preference should be presumptively but rebuttably conclusive in custody determination). This position reflects a broader movement to reverse the presumption of incompetency and allow children to make choices concerning their own lives. Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 508 (1973) (presumption of child's mental incompetency to make choices should be reversed as per Justice Douglas's dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972)); Tribe, *Childhood, Suspect Classifications and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROB. 8, 32 (1975) (child must have opportunity "to rebut any implied or asserted age-based incapacity"). Another view posits that the weight of the child's preference should increase with the child's age. Cf. GA. CODE ANN. §§ 30-127, 74-107 (Supp. 1977) (child 14 years or older should have right to select parent unless selected individual is unfit).

tion.⁷² Both roles focus on the position to be presented to the court. Neither addresses the needs of a child during the period of litigation.⁷³ These deficiencies are readily visible in the experiences of attorneys who latch onto the role conceptions for theoretical definition but abandon them when actually representing children.

B. *The Roles in Practice*

To obtain a picture of the roles adopted by practitioners, a study was initiated in September 1977. The study collected and analyzed the experiences of attorneys appointed under Connecticut law⁷⁴ to represent children in contested custody or related disputes following divorce. The clerks of the New Haven County and Hartford County Superior Courts supplied the names of eighteen attorneys who had received appointments to represent children in divorce suits.⁷⁵ These attorneys included virtually every Hartford and New Haven attorney who had been or was receiving appointments as counsel for the child

72. Functions of a legal representative include counseling, negotiation, conciliation, private legislation, and private adjudication, as well as investigation and advocacy. V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 229-30 (1976); H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURE IN PRIVATE PROFESSIONAL PRACTICE* 119-51 (1963) (study of attorney's role in divorce actions).

73. See p. 1131 *supra*.

74. CONN. GEN. STAT. § 46-43 (1977):

Counsel for minor children. Duties. At any time after the return day of a complaint under section 46-36, if there is a minor child or minor children of the parties, or either of them, the court may, if the court deems it to be in the best interests of the child or children to appoint counsel for such child or children, on its own motion, or at the request of either of the parties or of the legal guardian of any such child or at the request of any such child who is of sufficient age and capable of making an intelligent request, appoint counsel for such child or children. Such counsel may also be appointed on the motion of the court or on the request of any such person in any case before said court when the court finds that the custody, care, education, visitation or support of a minor child or children is in actual controversy, provided the court shall not be precluded from making any order relative to a matter in controversy prior to the appointment of counsel where it finds immediate action necessary in the best interests of any such child. Any such counsel shall be heard upon all matters pertaining to the interests of such child or children, including the custody, care, support, education and visitation of the child or children so long as the court deems such representation to be in the best interests of the child or children.

In Connecticut, the appointment may be initiated with a motion by an attorney for a parent, a recommendation of the Family Relations Division or other concerned observer, or on the judge's own action. The judge who appoints counsel does not necessarily hear the case when it returns to court due to the rotation of judges. See note 48 *supra*.

75. The interviews with Hartford County attorneys indicated no important differences between the experiences of attorneys in the two counties; the only reported difference, determined by comparing the responses of both groups of attorneys to 45 factors, was the greater cooperation between attorneys and the Family Relations Division in Hartford County as compared with New Haven County.

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in divorce-related disputes when the study began.⁷⁶ They represented a broad range of practices and styles.⁷⁷ To the extent that conditions may vary elsewhere,⁷⁸ the experiences of these lawyers may not be generalizable; there seems little to indicate, however, that the study has not addressed most of the problems and issues that would confront an attorney representing a child in a divorce custody suit under a no-fault divorce statute in any state.

The interviews are used in two ways in the Note: to examine the models and criticisms of child representation that have appeared in theoretical discussions on divorce custody, and to provide insights from practice in support of a set of normative principles proposed in this Note.

A "focused"⁷⁹ interviewing technique was employed with each attorney.⁸⁰ After a few direct questions about the attorney's background,

76. The study used the list of 14 attorneys from New Haven County who had expressed to the Clerk their willingness to receive appointments for child representation in divorce suits by the time the study was initiated. Similarly, the names of the four Hartford County attorneys who had received nearly all such appointments at that time were obtained from the Hartford County Clerk. Comprising not a sample but virtually the entire population of attorneys receiving these appointments, the study reviews the general experience with child representation since it began in 1973 in these two counties of Connecticut.

77. The attorneys' practices ranged from public legal assistance to criminal, personal injury, and general practice; their experience as lawyers ranged from 1½ to 30 years, with most having worked for less than 10 years. Some worked as solo practitioners, others as partners and associates in small firms, and others as members of legal assistance organizations.

78. The one unusual aspect of the experience of these attorneys was their exposure to Yale University. The attorneys' responses to psychological experts, described in pp. 1180-83 *infra*, undoubtedly reflect the presence of the Yale Child Study Center in the community.

79. This study employed

the focused interview, which is unstandardized in the sense that the wording of questions is not specified but where there is, nonetheless, a definite focus on a topic germane to the research. The interviewer comes to the respondent with a list of topics derived from a preliminary consideration of the research problem and then directs his questioning in a way which establishes the credibility of the information imparted.

J. HUGHES, *SOCIOLOGICAL ANALYSIS: METHODS OF DISCOVERY* 146 (1976).

80. The interviewing guide used by the authors in interviewing included topics to be covered rather than exact questions to be asked. *See* Appendix A. All of the interviews took place in the office of the interviewee and lasted between one and three hours. With two exceptions, the interviews were tape-recorded and later transcribed verbatim. For the two interviewees who did not allow tape-recording, notes were taken and immediately typed in transcript form. In general, the inhibition potentially caused by the presence of a tape recorder was outweighed by the value for analysis of verbatim accounts.

Transcriptions of conversations introduced some problems. In this Note, punctuation has been added, even though it may be arbitrary. When oral expression is transcribed, it can seem incoherent and ungrammatical. Nevertheless, the authors concluded that it

general practice, and reasons for representing children,⁸¹ the attorney was asked to recount chronologically his involvement in individual cases. This interviewing technique was chosen in order to elicit information on the problems and tasks that each attorney considered important. Although the interviewers asked the attorneys to clarify or to be more specific, each attorney established the terminology and framework for describing his⁸² experiences. After they described the chronological development of each case, attorneys were asked direct questions to elicit information not raised in their recitals.⁸³ In this manner, the interviewers obtained the attorneys' own perceptions or priorities and also specific information for comparison among attorneys.⁸⁴

was more important to enable the reader to draw his own interpretations and conclusions than to "fix" the language for print.

To preserve the promise of confidentiality given the attorneys, they will be referred to only by code initials *A* through *R*, which have been assigned randomly. Attorneys' remarks are cited by code initial and transcript page number, e.g., "Attorney *A* at 20." Although the accuracy of citations has been carefully checked by the Editors of the *Yale Law Journal*, the transcripts themselves are confidential and thus are not available to the public.

81. Most of the attorneys were young and became involved in child representation to build a practice. Some got involved because they enjoyed working with children or as an extension of a specialty in domestic relations practice. Three reported that they had represented children as a favor to a judge who had requested their help in a specific case. Attorney *I* at 2; Attorney *M* at 7; Attorney *R* at 1. Two said that they considered the job to be a pro bono assignment. Attorney *F* at 34; Attorney *H* at 1. For others it became one when they were not paid or were only partially paid. The attorney for the child is permitted to submit a bill for reasonable fees to the court for an order of payment by one or both parties; in Connecticut practice the judicial department may be billed \$100 for the services of a legal representative for any child who has received state aid. CONN. GEN. STAT. § 46-59 (1977). The attorneys unanimously reported that they billed and received less in fees than they would normally charge for the hours put into these cases.

82. To preserve confidentiality, the masculine pronoun is used throughout in reference to interviewed attorneys and their child clients. Few differences between male and female attorneys appeared in the study.

83. The attorneys were asked to contrast their role as child's attorney in divorce custody suits to the role of attorney for a parent in other such cases. In addition, attorneys were asked to compare lawyering for the child in divorce custody litigation to any representation they may have done of children in delinquency, neglect, or abuse proceedings. See Appendix A.

84. There is inevitably some disjuncture between what attorneys said they did and what they actually did. The possibility of exaggeration and of self-serving statements is shown in Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 143-46 (1976), where attorneys and their clients were found to disagree as to number and length of attorney-client conversations. Here, the willingness of attorneys to describe their confusion and their problems with the role of counsel for the child would seem to compensate for this tendency.

To obtain additional perspectives on the role and performance of attorneys for the child, four Superior Court judges (in Connecticut all family relations matters are heard in countywide superior courts, see CONN. GEN. STAT. §§ 51-182a, -182c (1977)), who have a range of views on the appointment of counsel for the child, were interviewed, as were the Assistant Clerk and the Supervisor of the Family Relations Division of the

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Unless an attorney introduced the thought himself, he was never asked to provide a conceptual model or label for his role. More than half the attorneys volunteered a theoretical label for their role,⁸⁵ yet

New Haven Superior Court. The responses of these individuals and of the attorneys are helpful in identifying the troublesome issues in the area, but not in evaluating individual conduct in specific cases.

85. Six attorneys identified themselves as factfinders. Attorney *B* explained that his job was to get information for the judge, not to act as an advocate. Attorney *B* at 27, 56. Attorney *D* said that he was to provide "objective input into the decisionmaking process and to rivet the attention of the parties and the court to the appropriate focal point." Attorney *D* at 26. Attorney *E* distinguished himself from a social worker, but emphasized that his job entailed keeping an open mind and bringing all relevant evidence to the court. Attorney *E* at 8, 27. Describing a similar function, Attorney *Q* likened his role to that of a social worker who investigates for the judge and finds any problems experienced by the children. Attorney *Q* at 38. Attorney *H* said that his job was to get all the facts and that he was not to take sides. Attorney *H* at 3. Attorney *R* explained that he was an arm of the court responsible for obtaining all possible information and for bringing out facts in cross-examination at trial. Attorney *R* at 18, 20, 26. He stressed that he would not decide on a position to advocate until all evidence had been given at trial; he would then file a report with recommendations to the judge. *Id.* at 18, 33, 37.

The self-styled advocates included Attorney *A*, who considered himself ethically obliged to withdraw from a case should he disagree with the child's position. Attorney *A* at 17. Attorney *I* said his responsibility was to conduct the litigation based on his perception of the child's preference. Attorney *I* at 9, 11. Attorney *K* stated that he rarely opposed a child's preference and that where a child was too young to express a preference the lawyer's appointment should be as guardian ad litem rather than attorney for the child. Attorney *K* at 9, 15. Attorney *L* said that he would advocate what the child wanted, except that with very young children he would advocate the recommendation of an expert. To children old enough to understand, he explained his job as telling the court what they wanted. Attorney *L* at 15, 19, 23. Attorney *M* would represent the child as he would any other client. Attorney *M* at 11.

Attorney *C* labeled himself a "child advocate" because he felt his job was to report the child's views to the judge, but his explanation of the role did not include examining witnesses at trial but only conducting an independent pretrial investigation. Attorney *C* at 2-5. Attorney *O* stressed that he was not a social work investigator, but rather the child's "mouthpiece" to the court. Attorney *O* at 18-19, 45, 51. These two attorneys could be interpreted as factfinders with a special obligation to ascertain and report the child's preference.

Three attorneys described hybrid role conceptions. Attorney *F* viewed himself as both advocate and protector: he would find out what the child wanted but would protect the child from consequences the child could not perceive or verbalize. The attorney planned to couch his reports neutrally and take cues from individual judges as to whether active advocacy of the child's viewpoint would be well received. Attorney *F* at 7-8, 25, 27, 34. As a factfinder, Attorney *G* included in his role protection of the child's rights at trial by active cross-examination of witnesses. Attorney *G* at 4, 10. Attorney *J* identified himself as advocate, investigator, protector, and witness. Attorney *J* at 9, 10, 14.

The contribution of personal judgment to resolving the child's problem was emphasized by two attorneys. One suggested that he was a "parent" with legal training who explained the situation to the child and protected him by making judgments as he would for his own child. This attorney also stressed thorough investigation and active advocacy should the case come to trial. Attorney *N* at 3, 11, 14, 17, 18, 26. Another lawyer said that his duty was to provide an opinion to the court and to protect interests not perceived by the child himself. Attorney *P* at 2, 5. Thus 11 attorneys identified themselves as either advocates or factfinders, five described variations on these two role conceptions, and two introduced specific guardianship elements by supplying personal judgment in the role.

every one of these attorneys took on responsibilities inconsistent with his characterization. In each situation the attorneys were able to explain how their choice of action made sense and served some other value in representing the child. The abstract conceptions of the role thus had only partial and sometimes misleading implications for practice.

1. *The Advocates*

A number of attorneys identified their role as advocate for the children. They explained that this meant representing these clients as they would represent any adult client:⁸⁶ the child's desires should direct the attorney's investigation and arguments in the case. Yet each of these attorneys also reported instances in which he felt compelled to serve child-protective functions, even if the result was contrary to the expressed view of the child. More than courtroom advocates, these attorneys also counseled the parents and attended to the child's emotional needs during the litigation.

One attorney identified himself as an advocate for the child's perceptions and desires because "[i]f it's going to be an adversary system, then every party should have his own representation."⁸⁷ Admitting that the Connecticut statute authorizing child representation in divorce custody suits is "very ambiguous" and subject to conflicting interpretations, this attorney argued that the child's counsel should file motions, draft stipulations, and take appeals if necessary to achieve the child's goals.⁸⁸ According to this attorney, handling a case on behalf of the child means "that one ought never to recommend something contrary to the expressed wishes of a client."⁸⁹ He followed this philosophy even with a thirteen-year-old client who failed to provide what he considered "terribly good reasons"⁹⁰ for wishing to avoid visitation with the noncustodial parent.⁹¹ The attorney cross-examined

86. *E.g.*, Attorney I at 11, 23, 26.

87. Attorney K at 45.

88. "I've always acted as if I have that authority and I do do it. I regularly in these cases file motions and take part in the proceedings. . . . I've played an active role in the trial of the case on behalf of the child." *Id.* at 13.

89. *Id.* at 22.

90. *Id.* at 25.

91. Nobody offered any reasons that satisfied me, but I was satisfied after talking at great length with the child . . . [that] that's what he really wanted and he was unambiguous and unambivalent about it. . . . [A]lthough he also was a rather immature 13-year old, he was in a position to express in an intelligent and informed way what he wanted—not so intelligent, but at least cogent. So we—I think very early in the case—took the position that we should support the child's express wishes. *Id.* at 26.

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witnesses at the hearing, arranged for and attended an interview in chambers between the child and the judge, and submitted an argumentative report with a recommendation that supported the child's expressed wish.⁹²

In spite of his philosophy, the attorney described a case in which he advocated a position exactly contrary to the child's expressed wishes. Again, the child client did not want to visit with the noncustodial parent; in fact, the child unequivocally and vehemently communicated to the lawyer that he did not want to be forced to visit. The attorney felt able to recommend visitation because of what he considered exceptional circumstances:

It's probably the first case in which I've represented a child and I took a position contrary to his expressed wishes. I couldn't have done that conscientiously had I not had the input from the social worker [who had been working with the family for some time] that the child really did want to see his father and just didn't want to be responsible for making that decision.⁹³

The attorney also departed from his theoretical role of advocate by meeting intensively with both parents and counseling them in order to reach a workable out-of-court settlement.⁹⁴ Contrasting the "vig-

92. *Id.* at 26-28. The judge adopted verbatim the attorney's recommendation. *Id.* at 29; see p. 1184 *infra* (counsel for child's general effectiveness with judges).

In another case, this lawyer's view of his responsibility to advance the views of two children with different parental preferences led him to override his belief that siblings should not be separated. Attorney *K* at 32. His self-conception of advocate led him to state that

if a child were unable to express a preference, I would ask that I be appointed guardian ad litem to make it clear that I was not the attorney but that I was protecting the child's legal interests serving in a guardianship role. I would not accept appointment as an attorney and then act as a guardian. I think that's a clear role conflict and I think it's probably unethical.

Id. at 51.

93. *Id.* at 6-7.

94. In one case, the younger of two children in the custody dispute did not have a preference for a custodial parent but did want to stay with the older sibling. The attorney settled the suit by an agreement giving custody of both children to one parent and scheduling generous visitation with the other parent in exact terms. Because the parties remained contentious and unwilling to cooperate fully with each other, the attorney continued to monitor the visitation schedule, talk with all parties, and deflect vengeful behavior by either parent. At one point, he investigated and rejected charges of neglect made by the noncustodial party. Over time, the attorney discovered that the younger child developed a strong desire to move to the custody of the noncustodial parent. The attorney discussed the situation with the parties and their attorneys and drafted stipulations to effect the change but still provide for ample visitation with both parents and between siblings. The attorney concluded that this satisfied the desires of the younger child and helped to relax tension between the parties, thus eliminating the need for outside monitoring. *Id.* at 32-36.

orous" advocacy of the parents' attorneys with his own role, the attorney concluded: "[T]he child's attorney plays the most important part because very often the parties are not that far apart when a child's attorney is appointed and what's really necessary is for someone . . . to talk with all of the lawyers and to talk with the parties."⁹⁵

To call this attorney an advocate would not capture the variety of functions he performed. Many of his actions were designed to facilitate understanding and acceptance between the parties and to provide time for a child to form a decision.

Another attorney characterized his role as advocate for the child's viewpoint because he perceived that this would straighten out the "mix-up of loyalties" that might prevent the attorneys for the parents from fully representing their clients.⁹⁶ Therefore, he conceived of the child's attorney as an active advocate, gathering evidence, formulating arguments, seeking relief, and appealing the decision if necessary.⁹⁷ This attorney asserted, with some qualifications, that the child's own perceptions and desires should guide the attorney.⁹⁸

Yet in no case he described did the attorney discuss or discern the child's custodial preference. Two cases involved children who were seven- and six-years old, respectively. In both instances, the attorney chose not to meet with the children at all because he assumed that the sessions would not be very useful to him. He decided to rely on observations of the children offered by the parents and by psychologists who had been hired to form a recommendation in one of the cases.⁹⁹ When the attorney discovered that the five-year old in a third case "didn't know the case was going on," he decided that "I wasn't about to tell him. I didn't see any good in that."¹⁰⁰

Unlike his expressed self-concept as advocate for the child's point of view, this attorney's tactics in particular cases indicate that his chief purpose was to improve the process of decisionmaking by changing the pace of the litigation and by according concern and consideration to all involved.¹⁰¹ He spent a great amount of time with the

95. *Id.* at 23.

96. *Attorney M* at 10.

97. *Id.* at 11, 13, 22.

98. He explained:

If I were representing an eight-year old and I thought the kid was fairly together, but wanted *A* and I thought that *B* was probably better but that *A* wasn't off the wall, I would probably subdue my attraction for *B* and basically treat him like an adult client, within reason, and pitch for *A*.

Id. at 12.

99. *Id.* at 14, 27.

100. *Id.* at 9.

101. One case had been delayed intentionally by one party. The attorney realized that the lack of a report by a psychological expert was the chief obstacle to bringing

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parties to two suits; he explained that he eventually settled both cases by concentrating on a resolution in which the “losing parent” would not feel “terribly embittered, vilified.” He said that he tried to ensure that both sides in each case

had an opportunity to bring out their point of view and have their side fully explored. If the whole thing goes down in a way which inspires their confidence and sense of fairness, and motivated by a wish to do the right thing for the child, I think they can come to peace.¹⁰²

This attorney’s definition of his role as advocate for the child does not capture his flexibility in practice: “I try to find the most constructive role I can play. . . . I try to get the most information, check both the parents and the people they wanted me to check, look at court records, and try to get the full picture”¹⁰³

A third attorney defined himself as an advocate for the child and stressed that he made frequent and early motions in order to make his presence felt by the parents and their attorneys.¹⁰⁴ Yet this attorney also expressed doubt about the reliability of a child’s choice of custodial parent and was concerned that psychological damage might result if the child were forced to choose between parents.¹⁰⁵ The attorney admitted that he would not know whether to advocate even an unequivocal preference of a child if it conflicted with his own “objective” determination that the other parent would be better.¹⁰⁶ While maintaining the importance of advocacy, this attorney rhetorically retreated to the role of impartial investigator:

I guess the presumption is that you gather facts hoping that the more facts the court has the more the court will be able to make an intelligent decision, and if the court makes an intelligent decision then your clients will be benefited somehow, since the children are your clients.¹⁰⁷

the case to court, so he hired an expert and pressured him to meet an immediate deadline and thus permit the case to come to trial quickly. *Id.* at 15.

In another case, the attorney determined that the parent seeking to modify existing visitation arrangements in fact intended to use this tactic as a first step toward modifying custody. The child’s attorney saw no reason to favor a change in custody and communicated to the parties that he would oppose strategic use of the visitation issue because the immediate contest and future consequences could be disadvantageous to the child. After consulting with a psychologist who had evaluated the child, the attorney decided to counter the tactic of the moving party by slowing down the processing of the case. *Id.* at 27-28.

102. *Id.* at 13.

103. *Id.* at 28.

104. *Attorney I* at 19-20.

105. *Id.* at 32, 35, 37.

106. *Id.* at 32, 42.

107. *Id.* at 42.

In specific cases, this attorney explained his efforts to protect the interests of the children during the process of the litigation—interests that the children were not able to express themselves.¹⁰⁸

Attorneys who identified themselves as advocates had clear conceptions of that role. An advocate should work to persuade the court to follow the client's preference by making motions, asserting arguments, drawing stipulations, and taking appeals if necessary. An advocate should help the adversary process by freeing parents' lawyers to give their own clients undiluted loyalty.¹⁰⁹ In practice, however, these attorneys performed in ways not suggested by their own role conceptions. They ignored, evaluated, or rejected the preference of the child; they worked to gather all available facts and sometimes did not advance a position to the court; they mediated between and counseled parents and tried to help them develop realistic perspectives. By responding to the needs of children in the process as well as in the outcome of adjudications, these attorneys may have advanced the interests of their clients more than would an attorney who limits himself to advocacy.

2. *The Factfinders*

Attorneys who identified their principal task as finding facts to help the judge also showed that, in particular situations, they felt it was necessary to take on advocacy, counseling, and mediating responsibilities. One attorney explained that his role was neither to advocate the child's preference nor to write a recommendation, "but to make sure that the court has all the facts available that I can drudge up."¹¹⁰ He regarded as his most important accomplishment his success in one case in compensating for the failure of the parents' attorneys to uncover information that was seriously damaging to one party.¹¹¹ As a factfinder, he investigated allegations of abuse,¹¹² tracked down police records of a mother's boyfriend,¹¹³ and questioned neigh-

108. In one case, this attorney opposed motions by the parents' attorneys to delay the proceedings because he concluded that the children would be better off without prolonging the period of uncertainty. *Id.* at 26.

109. Attorney *M* observed that an attorney for a parent might feel pressure to "trim" his advocacy for his client in order to consider the child's interests; when the child had a lawyer, the parent's attorney could act as a full adversary. Attorney *M* at 9-10, 23. See also p. 1134 & note 35 *supra*.

110. Attorney *H* at 3; see *id.* at 5 ("I don't think that too much information is ever bad. I won't come up with a recommendation.")

111. *Id.* at 6.

112. *Id.* at 2.

113. *Id.* at 5.

bors to check out the stories given by both sides.¹¹⁴ Yet in each case he described, the attorney took steps to work out short-term problems and to avoid bringing issues to court. Once in court, he shaped the facts to persuade the judge to take a particular point of view. He acted in particular situations to minimize conflict, not simply to expose all relevant facts.

He attempted in one case to lessen the disruption in the children's lives and to lay a foundation for further settlement by negotiating an agreement that the children not be moved from the pendente lite custody arrangement until after the end of the school year.¹¹⁵ In another suit, he had decided that the mother would be the better custodial parent before the father told him that the mother was a lesbian. The mother's attorney would not deny this charge, but neither would he present it to the judge. Although the child's attorney acknowledged this to be a fact relevant to the custody decision and considered himself a factfinder for the court, he decided not to present it to the judge.¹¹⁶ He felt that exposing the mother's lesbianism in open court would hurt the children's relationship with her. Moreover, settlement was still possible, for the father had indicated that he would drop his motion for custody if he were satisfied that the mother's sexual preference would not harm the children. Rather than disclosing an important fact to the court, therefore, this "factfinder" obtained a postponement from the judge and arranged to have the mother evaluated by a specialist in sexual disorders. Upon the expert's determination that the mother was mature and could manage the situation without adversely affecting the children, the parties agreed to settle.¹¹⁷

Another attorney identified himself as an investigator in a deliberate rejection of the lawyer's usual role of advocate:

I really don't seem to feel [an attorney-client relationship] when I am with the kids. I see myself as a social worker, just trying to see if there are any problems, and if there are any problems to see that they are expressed and brought to the attention of the court.¹¹⁸

114. *Id.* at 7.

115. *Id.* at 5.

116. *Id.* at 6.

117. *Id.* In other cases, this attorney described tactics typical of an advocate. He planned to move to suppress a Family Relations report in one case because he disagreed with its recommendation and criticized its use of hearsay. *Id.* at 7. Preparing for a hearing in another case, he planned to present a report to the judge that evaluated the children's preferences and took a position against one party because of an unconventional lifestyle. *Id.* at 5.

118. Attorney Q at 38.

In one instance, when the judge asked him to determine whether the *pendente lite* orders had been violated by the parties, he did not restrict himself to ascertaining that fact.¹¹⁹ The attorney also made his own judgments based on his perception of what the children's interests were, what facts he should uncover, and how extensive an investigation he should undertake. In two cases involving motions to modify existing custody arrangements, the attorney posed for himself a threshold question: was there any substance to an allegation against the existing custodian that would warrant moving the children? Barring a legitimate objection to the prevailing living arrangements, he said he would oppose the disruption of a move even if the alternative placement afforded better financial or educational opportunities.¹²⁰ Unlike an impartial factfinder, the attorney made his own judgment, based in part on the children's preferences, and advocated a specific position before the court.

The attorney who restricted his role most completely to investigation out of court expressed the greatest dissatisfaction with his contribution to the child's welfare. Identifying his function as reporting to the judge the child's preference and other information obtained from people who knew the child, this attorney specified that his role did not include discussion with the attorneys for the parents or consultation with the Family Relations Division of the court.¹²¹ He explained that it was not his job to set the court date, nor did he call or cross-examine witnesses at a hearing.¹²²

In the first case he handled, this attorney submitted his report to the judge after spending time with the eight-year-old client and interviewing professionals and relatives who knew the family and the child. He had a schedule conflict with the date set for the trial but did not move for a continuance or postponement. Although the judge's decree was contrary to the recommendation of the attorney for the child and the losing party filed an appeal, the child's attorney was uncertain whether he could or ought to join the appeal. Because the judge advised him that his role was over and he should collect his fees, he did not participate further in the case,¹²³ a decision he later came to regret.¹²⁴

119. *Id.* at 35-36.

120. *Id.* at 10-13, 18-23 (curtailed investigation without meeting wealthier noncustodial parent after determining there was no problem with existing arrangement); *id.* at 43-45 (opposed motion by noncustodial parent who promised greater educational opportunities because no change in circumstances warranted moving children).

121. Attorney C at 2.

122. *Id.*

123. *Id.* at 5-6.

124. *Id.* at 5 ("I'm not pleased with what I did in this case. I'm still bothered with it.")

In another case, this attorney interviewed the parties but “isolated” himself from the other participants.¹²⁵ Although he attended the hearing, he did not call or cross-examine witnesses; when the child was interviewed by the judge in chambers, the attorney did not accompany his client. Again, the court ruled contrary to the attorney’s view of the case; again, in retrospect, he regretted his inaction.¹²⁶ He concluded that “even an experienced lawyer is a novice in this area” and that the law on the child’s status in the litigation should be clarified to communicate the procedural options available to the child’s legal representative.¹²⁷

In sum, attorneys who labeled themselves factfinders frequently described ways in which they evaluated evidence, shaped an argument for the court, decided to curtail an investigation, and negotiated settlements. The one attorney who confined himself to investigation concluded that this failed to protect the interests of the child. For the other attorneys, who went ahead and took on duties other than factfinding, the theoretical role conceptions proved simply irrelevant and were discarded unnoticed as the attorneys responded to their perceptions of the child’s interests.

C. *Reconstructing Theory from Practice*

Departures in practice from the theoretical role conceptions appear reasonable once incorrect views of the legal representation due a child are exposed. The tenets of legal representation for adults cannot be adopted for children without amendment. Yet to restrict lawyers for a child to the role of either factfinder or advocate would preclude some of the very protections sought by the provision of a legal representative for the child in divorce custody disputes.

Unlike most adult clients, the child may not have an opinion on the issue before the court and, even with adult help, may not come to formulate one. Too young, too immature—or too mature—to advance a preference for a custodial parent, the child may not have a viewpoint that lends itself to advocacy before the judge.¹²⁸ An advocate for the child who seeks to make the child’s preference conclusive

125. *Id.* at 2.

126. *Id.* at 3. He explained, “I have no trouble representing children; it’s the procedural stuff that gets me.” *Id.* at 6-7.

127. *Id.* at 7. Although he only represented the child in one custody case, another attorney who had the most years of legal practice concluded that his expertise was not required for handling these cases.

128. See *Adolescence*, *supra* note 11, at 493-94 (in contrast to latency-aged children, adolescents desire—and are able—to detach from both parents and avoid demands for allegiance).

runs into additional problems if he discovers reliable reasons for distrusting the child's expressed view.¹²⁹ One proposed solution for the advocate is to present to the court not the child's preference but instead the position recommended by a psychological professional.¹³⁰ Many psychological experts, however, concede that their skills are sorely inadequate to construct a conclusive test for the custody decision,¹³¹ and this supports judicial reluctance to turn legal decisions over to psychological experts.¹³²

The factfinder, on the other hand, could gather expert recommendations, the preference of the child, and other information for the court while remaining consistent with the definition of his role and recognizing the qualities of a child that may render advocacy inappropriate. The factfinder, however, would not be empowered to counter the parents' arguments or to adjust the pace of the litigation in light of the child's needs—in short, to fulfill the purposes of legal representation for the child that rest on recognition of the child's interests during the suit.¹³³

Another shortcoming of the theoretical conceptions of the role of attorney for the child is their failure to recognize the importance of mediation, negotiation, and settlement,¹³⁴ which persistently appeared in the attorney interviews.¹³⁵ This may be due to perceptions about

129. See, e.g., p. 1147 *supra*.

130. BEYOND THE BEST INTERESTS, *supra* note 3, at 65-67 (child's advocate to bring to court's attention "least detrimental alternative" based on "child's sense of time," limits of courts, and child's relationship with "psychological parent"); cf. Derdeyn, *supra* note 36, at 1374-75 (greater role for psychological experts with greater attention to child's rights); Foster & Freed, *supra* note 36, at 443 (courts lack expertise and might better rely on psychological experts).

131. BEYOND THE BEST INTERESTS, *supra* note 3, at 51-52 ("No one—and psychoanalysis creates no exception—can forecast just what experiences, what events, what changes a child, or for that matter his adult custodian, will actually encounter."); Ellsworth & Levy, *supra* note 1, at 199-200 (distrusting psychological test for custody determination because tests administered at time of discord, and bias of tester tends to identify excessive pathologies); Mnookin, *supra* note 6, at 286-87 ("I do not think that existing psychological theories provide the basis to choose generally between two adults where the child has some relationship and psychological attachment to each.")

132. Cf. *Washington v. United States*, 390 F.2d 444, 455-57 (D.C. Cir. 1967) (Bazelon, C.J.) (expert witnesses should not decide legal questions of insanity but instead should provide information to permit informed decision by those legally responsible to decide).

133. See pp. 1132-34 *supra*.

134. See Mlyniec, *supra* note 6, at 8-9 (catalog of roles appearing in state statutes includes no mention of settlement).

Instead, critics are concerned with the possibility that the child's attorney may make the proceeding more adversarial. See Berdon, *supra* note 5, at 164 & n.52 (noting but rejecting argument); p. 1133 *infra*.

135. Attorney A at 3, 8; Attorney G at 32; Attorney H at 2, 3, 6; Attorney I at 19; Attorney J at 34-37; Attorney K at 10, 23; Attorney L at 8, 14, 31-32; Attorney M at 13, 17; Attorney N at 30; Attorney O at 27; Attorney P at 28; Attorney R at 31.

guardians ad litem¹³⁶ or misguided solicitude for children;¹³⁷ in any event, the commentators have not noticed that the child's representative in the custody suit is ideally placed to facilitate settlement. The practitioners, fortunately, have noticed.¹³⁸

Ultimately, both role conceptions founder on their shared assumption that custody adjudication fits one of the two standard models of litigation.¹³⁹ Either view of the child's representative—as adversarial advocate¹⁴⁰ or inquisitorial factfinder¹⁴¹—provides a misleading perspective on the position. For the child is not a party but rather is the individual whose interests—once determined—must by law prevail. This undermines the adversarial assumptions of the advocate role, because a legal representative for the child's interests may as properly seek to mitigate the adversary nature of the conflict as to participate in it. It also upsets the inquisitorial framework for the factfinding role. Although the factfinder is introduced as an impartial investigator, he is to be impartial only with regard to the parents, and even then, only initially. Entrusted with finding the information pertinent to the child's interests, the factfinder ends up looking very much like the advocate. The representative for a child serves as a preliminary decisionmaker who evaluates the child's interests, since he is necessarily involved in sorting through competing psychological

136. Because the guardian ad litem should protect the child against an adverse party, he was warned by one court against submitting the case to arbitration because the settlement was voidable. *Millsaps v. Estes*, 134 N.C. 486, 46 S.E. 988, 990 (1904).

137. Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177, 187 (1974) (criticizing "informal, paternalistic system," whose benefits "do not in practice exist"); cf. Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1160, 1183-84 (1968) (juvenile clients often regarded by court and lawyers as subordinate nonpersons with dependent status rather than bargaining power). The fear that any settlement of the case will be at the child's expense perpetuates such misguided solicitude. See, e.g., Watson, *supra* note 15, at 59.

138. See note 135 *supra* (citing instances of settlement).

139. On the adversarial and inquisitorial models, see J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 23, 26, 38 (1975); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83, 1286 (1976).

140. See J. THIBAUT & L. WALKER, *supra* note 139, at 38.

141. See *id.* at 23, 26; A. Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 248, 279 (1977).

Recent scholarship suggests that the models are imperfect even where they are intended to apply directly. Chayes, *supra* note 139, at 1282-83, 1286 (traditional adversary model no longer applies in public law litigation); A. Goldstein & Marcus, *supra* at 240, 279 (plea bargaining replaced adversarial model in American criminal systems; judicial supervision less dominant than theorized in "inquisitorial" systems). The models seem even less instructive for the divorce custody suit, which is neither completely adversarial nor nonadversarial. ASS'N OF THE BAR OF THE CITY OF NEW YORK, *PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG* 87-88 (1976) [hereinafter cited as *THE MURKY DIVIDE*].

theories, ongoing tension between the rights of fathers and rights of mothers, and shifting views on morality and lifestyles deemed harmful to children.¹⁴² To represent fully the child's interests, the representative should protect the child from prolonged uncertainty and escalating conflict. Yet the factfinder and advocate conceptions of the role do not respond to these needs.

The attorneys who were appointed to represent children in divorce cases in Connecticut did not neglect these needs of the children. To the contrary, they found ways to respond to the configurations of each case by addressing the needs of the individual child. They investigated, counseled, and mediated between parties, functions common to many areas of legal practice.¹⁴³

Critics have warned that such a broad and flexible conception of the role of a lawyer will lead to abuses in practice, particularly if the client is unschooled or unsuspecting—as is a child.¹⁴⁴ Yet an un-

142. See Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1, 27-33 (1975); Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. MARR. & FAM. COUNSELING 11, 14 (1977) (changing social conditions alter traditional presumptions held by professionals).

143. The *Code of Professional Responsibility* directs an attorney to treat other parties with consideration and avoid inflicting "needless harm." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 [hereinafter cited as CPR]. Although the attorney is instructed to represent the client zealously and to uphold the adversary system, the Code reflects authority that the adversary system should be modified where it is not appropriate. Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 410 (1953), cited in CPR, *supra* at EC 7-1, 39C n.3. Such modifications are frequent in practice. Thus, in business practices, lawyers often become involved on a continuing basis with particular clients and organizations, giving advice and helping to administer ongoing enterprises. V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 229 (1976). See generally Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* (1967).

In divorce practice, attorneys are advised to counsel their clients, not just act as advocates. Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW. 229 (1977); Probert & Brown, *Theories and Practice in the Legal Profession*, 19 U. FLA. L. REV. 447, 464 (1967). A range of functions for the lawyer is particularly common in representing someone not considered to be a full adult under the law. Observers of juvenile courts recommend that the child's lawyer help the child and family understand and respect the court experience. J. POLIER, *A VIEW FROM THE BENCH: THE JUVENILE COURT* 67 (1964); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1420 (1973). The role of child's attorney in divorce custody offers perhaps greater variety in functions and opportunities to help the client—as the individual whose interests are to prevail. The more troubling aspect of the role (and that which allows for expanding responsibilities) is that the attorney represents a client who has limited abilities to perceive or communicate his own interest before a court itself limited in articulating the standard for decision. Fears of abuse, however, seem unfounded. See pp. 1157-72 & notes 145-220 *infra*.

144. See Mlynick, *supra* note 6, at 15-17; pp. 1158-59, 1171-72 *infra*. In describing one representation, Justice Brandeis characterized his role as "counsel for the situation," Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965), a view that met with heavy criticism during the Senate hearings on his nomination to

derstanding of the client's needs and relationships to other parties can provide guidance for a lawyer where traditional or restricted role conceptions cannot. An examination of the attorney's relationship to the child and to other participants in the custody determination can provide the foundation of principles for practice, and the experiences of practitioners can refute apprehensions about abuse of the role of child's representative in divorce custody disputes.

III. Attorney and Client

The problems of the practitioner in representing a child in divorce custody proceedings are discussed here and in Part IV according to four categories. This Part discusses the attorney's relationship with his client. Part IV will examine the attorney's relationship with the child's parents and their attorneys; his use of investigative agencies, psychological professionals, and confidants of the child; and his division of responsibility with the judge.

In each of these categories, fears have been raised about possible inadequacies or abuses of the attorney's role. The experience of Connecticut attorneys is used first to show that the fears in each category are unfounded, greatly exaggerated, or simply problems endemic to lawyering. The Connecticut experience is then used to highlight other problems and to justify principles that for normative or pragmatic reasons should guide attorneys who represent children in divorce custody and visitation disputes. The principles do not tell the practitioner what to do.¹⁴⁵ Instead, they recognize recurring issues and problems, suggest ways of approaching the problems, and identify factors the practitioner should consider in making his own resolution of the quandaries he faces. The discussion in Parts III and IV proceeds on the recognition that principles may clash and may vary considerably in weight and prominence according to the particular case. Potential

the Supreme Court. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 465-508 (1946). More recent criticism appears in Frank, *supra* at 708-09. On the possibilities of being "counsel for the situation" in child custody cases, see pp. 1176-77 & note 246 *infra*.

145. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 25-26 (1977) (principles, as opposed to rules, "do not set out legal consequences that follow automatically when the conditions provided are met"; a principle "states a reason that argues in one direction, but does not necessitate a particular decision"); cf. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 644 (1976) (where norms conflict in nonformal negotiation, "account is taken of both, although the eventual settlement may reflect an adjustment for relative applicability and weight"). But see Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 838 (1972) (arguing that only logical difference between principles and rules is that former prescribe "highly unspecific" acts while latter prescribe "relatively specific" acts).

clashes between principles cannot be settled a priori, but must be resolved through judgment informed by the circumstances.¹⁴⁶

A. *Doubts, Problems, and Empathetic Responses*

The interviewed attorneys recognized that they were operating in an area where two particularly difficult problems are present: representing a child and representing a child who is likely to be in emotional turmoil and to feel threatened by the situation.

Since children are frequently not as capable of informed decision-making as adults, counsel for the child must be ready to take on additional responsibilities for decisions on behalf of his client.¹⁴⁷ Yet the extent of the responsibilities varies according to the competence and articulateness of each particular client,¹⁴⁸ so a simple legal presumption is not appropriate.¹⁴⁹ In representing children whose custody was at issue, the lawyers felt a responsibility to be particularly sensitive so as not to add to the trauma their clients may have been experiencing.¹⁵⁰

Critics have expressed doubts that attorneys possess the degree of skill and sensitivity required. Lawyers may not be competent to talk with children, particularly young ones;¹⁵¹ where a child is not fully

146. The theory expressed is drawn from the moral theory known as "ethical pluralism," which argues that moral decisions must consider a plurality of first principles and that there is no single supreme principle from which the moral rightness or wrongness of every action can be derived. "According to this view . . . the moral reasons for (or against) some actions lie in the consequence of those actions, while the moral reasons governing other actions arise from their being of a kind required (or prohibited) by a rule of duty or obligation." P. TAYLOR, *PRINCIPLES OF ETHICS* 57 (1975). In any given situation one decides by

weigh[ing] the comparative importance of these various reasons to see which reasons outweigh or override any others applicable to the given action. . . . Even among equally competent and sensitive moral thinkers, there will at times be disagreements about the relative importance of the various reasons for action. All that can fairly be demanded of anyone in such circumstances . . . is that the individual in question be thoroughly conscientious and impartial, weighing *all* the considerations morally relevant to *every* alternative course of action open to him.

Id. at 58. For an application of pluralism in political theory, see B. BARRY, *POLITICAL ARGUMENT* 3-8 (1965). *But see* J. RAWLS, *A THEORY OF JUSTICE* 34-40 (1971).

147. *See* CPR, *supra* note 143, at EC 7-12 (additional responsibility cast on lawyer by any mental condition that renders client incapable of making considered judgment on his own); J. Goldstein, *supra* note 56, at 72 (adult, but not child, has legal presumption of general competence that includes capacity to make binding contracts). *But see* *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (parental consent requirement for minor's abortion unconstitutional).

148. *See* CPR, *supra* note 143, at EC 7-11 (responsibilities of lawyer vary according to intelligence, age, and experience of client).

149. *See* note 71 *supra* (citing sources).

150. *See* pp. 1160-62 *infra*.

151. *See* B. Chisholm, *Should Children Have Rights?*, in 1 *The Child as Citizen*, at 9 (undated monograph by Canadian Council on Children and Youth):

Would such use of legal counsel be undertaken regardless of the age of the child?

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able to understand and instruct his attorney,¹⁵² and where the standard under which the lawyer must make his judgments is vague and indeterminate,¹⁵³ critics wonder whether attorneys can or should make decisions on behalf of their clients.¹⁵⁴ Critics question whether the child ought to be asked to choose and whether the child's choice, if already made, should be trusted and followed.¹⁵⁵

Many of these same doubts were expressed by the attorneys. From the interviews four problem areas were identified: (1) how worthwhile it would be to talk to the child—particularly a young and inarticulate one; (2) whether asking questions and conveying information on such a sensitive subject would upset the child; (3) how the lawyer could penetrate literal statements to find out the child's "true" feelings; and (4) how the lawyer should assess the child's preference if expressed, and what he should do if he found himself disagreeing with the wisdom of the child's choice.

Most of the attorneys did not believe that conversing with preschool

What happens with children who are without sufficient language or sufficient experience to understand? . . . What implications would this development have in the education of lawyers, since conversations with children who are troubled require considerable skill and tact. Lawyers who may be very competent in conversations with adult clients may not be so competent in exploring the feelings and wishes of a sad or frightened nine-year-old.

Training is thought to be critical:

It is obvious that simply agreeing that legal representation for children in custody (or other) cases is a good and just thing, in no way guarantees that the quality of such representation will be uniform from the outset. The issue of training is thus introduced. Many voices are urging law schools to assess how well they prepare their students to represent children.

B. Chisholm, Should Judges Interview Children?, in 2 *id.* at 9. See Watson, *supra* note 15, at 78 (lawyers should seek advice from psychological professional in order to talk to children); cf. Inker & Perretta, *supra* note 7, at 120 (mutual reliance necessary between lawyer and psychological experts).

152. See B. Chisholm, Do Children Need Lawyers?, in 3 *The Child as Citizen*, *supra* note 151, at 5 (problems in representing children involve potential inability of child to "instruct" counsel and lack of capacity to understand and give or withhold informed consent to proposed plan); cf. Mlyniec, *supra* note 6, at 16 (only where child has stated preference can traditional attorney-client relationship exist).

153. See p. 1135 *supra*.

154. See Bersoff, *supra* note 34, at 45 (where child has no preference, attorney has no competence to render decision for him); Mlyniec, *supra* note 6, at 13 (child advocate not in better position than judge to determine child's best interests); Dembitz, *supra* note 10, at 1313 ("experience and expertise of the child's counsel is generally far less than the judge's in making the ultimate custody determination").

155. See Mlyniec, *supra* note 6, at 14 (for child, being required to choose between parents increases anxiety, and choice may not represent true feeling); Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 *FAM. L.Q.* 1, 11-15 (1977) (citing cases in which judges disregarded preference of child thought to be based on undesirable or improper influences); cf. 2 J. WIGMORE, *EVIDENCE* § 509 (3d ed. 1940) (possible unreliability of children's testimony due to "childish disposition to weave romances and to treat imagination for verity").

children would be of value,¹⁵⁶ though their assessments varied as to the youngest age at which meaningful communication with children was likely.¹⁵⁷ Most attorneys talked alone with every child who was at least school age.¹⁵⁸ A few lawyers said that even if they could not carry on a meaningful conversation with a young child, they would still like to meet and observe him.¹⁵⁹ With infants and other very young children, however, attorneys generally looked to others for guidance. Information and guidance were sought from older siblings or adults who knew the child well,¹⁶⁰ or from experts in child psychology.¹⁶¹

Most of the lawyers were concerned that attorney-client discussion on sensitive subjects could be a source of discomfort to the child.¹⁶²

156. The attorneys are not alone in their perception that little of value can be gained from interviews with preschool children on matters relating to parental divorce. Trained psychologists and social workers associated with the Children of Divorce Project in Marin County, California, found their intervention strategy generally ineffective with preschool children. Although the children enjoyed their sessions with the counselors, they were generally unable to comprehend explanations; the intervention strategy was therefore concentrated on working with and through the parents to benefit the child. *Brief Interventions*, *supra* note 11, at 30-31.

157. Compare, e.g., Attorney C at 4 ("I've seen little kids five or six who can convey what they want; there shouldn't be any cutoff age for listening or not listening to the child.") with, e.g., Attorney O at 50:

If the child is five or six and tends to be kind of precocious and outgoing, I generally ask the custodial parent, "Well, what is John like? Will he talk to me?" When I was younger and taking [more of these cases] . . . , I had too many kids come into one of our offices and just freeze. And it is a waste of everybody's time. They sit in the chair and yes or no is all you can get out of them, and sometimes not that. Unless the child is extremely outgoing, I don't get involved in talking to them.

158. The only exception was Attorney M, who had not talked with a seven-year-old client, though urged by a parent to do so. Attorney M at 27. But even he suggested that he might talk with the client as the litigation progressed. *Id.*

159. Attorney C at 10; Attorney M at 8; see Attorney F at 23, 26-27 (went to home of clients four- and two-years old; got no verbal information from them but observed that they seemed happy and well taken care of).

160. Attorney D at 8 (siblings aged 3, 5½, and 12; attorney chose to talk only with eldest); Attorney K at 2, 4-6 (client aged seven; attorney relied primarily on social worker who had counseled child extensively). On the use of such confidants, see pp. 1182-83 *infra*.

161. One attorney seemed prepared to turn the entire decision over to experts, though the children were school-aged. Attorney I at 18-19. On the use of experts, see pp. 1180-83 *infra*.

162. For example, one attorney said: "I just feel very uncomfortable talking to kids who are going through that emotional turmoil about what's happening to them. . . . I think it's wrong of me to ask them or expect them to reveal confidences to me." Attorney B at 14. Attorney D described an interview with an adolescent child whom he had taken great care to set at ease: "[I]t was kind of sad; he was kind of like sniffing through the whole thing, and it bothered me, but I felt it was like a necessary operation. But that is what worried me: you normally don't know how deep you want to go down." Attorney D at 17.

Kelly and Wallerstein found that many children in the early latency stage "were unable to discuss the divorce without increasing their suffering, almost unbearably." *Brief Interventions*, *supra* note 11, at 33.

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To mitigate this possibility, attorneys devised ways to set the child at ease. These included meeting the client in a setting comfortable to the child,¹⁶³ tailoring to each child an explanation of the lawyer's role and of the problem,¹⁶⁴ and trying to elicit information gently or indirectly.¹⁶⁵ Indeed, where no such means were employed the attorneys expressed dissatisfaction with the results of the interview with the child.¹⁶⁶

Although some attorneys felt quite confident in their ability to communicate with children and to establish a trusting and friendly relationship relatively quickly,¹⁶⁷ others were uneasy about talking with children in general or about talking with children involved in an emotionally tense situation.¹⁶⁸ In building a rapport with the child, some attorneys emphasized the use of a soothing and intimate style of communication;¹⁶⁹ almost every attorney reported using a fairly

163. Frequently a setting was found outside the lawyer's office to minimize formality. One attorney took his client to MacDonald's, Attorney *O* at 33; another went out for ice cream with his clients, Attorney *I* at 10. The most common alternative to an office meeting was a home visit, described in Attorney *A* at 4; Attorney *B* at 14, 17; Attorney *C* at 4; Attorney *D* at 15; Attorney *H* at 1, 4; Attorney *J* at 24; Attorney *K* at 4, 31; Attorney *L* at 10; Attorney *P* at 6; Attorney *Q* at 10. The main problem with home interviews was obtaining privacy. One attorney solved the problem by asking the parent to take a walk around the block, Attorney *Q* at 10; another found that taking a walk outdoors with the child helped the child to open up his feelings, Attorney *H* at 2; a third talked to his client outdoors "because he had been running around anyway and I felt that outside was more of a kid's domain," Attorney *D* at 16.

164. One attorney representing a very young child simply introduced himself as an aid to the court. Attorney *N* at 7-8.

165. In spite of this care, the response of the child was not always gentle or indirect. See note 181 *infra*.

166. Attorney *C* interviewed a young child in his office and could remember no specific attempt to explain himself to the child; he concluded that "[t]he child never formed any relationship with me and was not really able to." Attorney *C* at 1, 3. Attorneys *B* and *K*, who tried both home and office meetings, found interviews at their offices unsatisfactory because the child was not comfortable enough. Attorney *B* at 17; Attorney *K* at 37.

167. Attorney *F* at 10; Attorney *Q* at 12. Cf. L. TESSMAN, *supra* note 11, at 497 (in interviews with therapists and with proper encouragement, many children can be quite open about their wishes in divorce situations).

168. One attorney's discomfort in talking with children was such that he told his child clients that they must not ask him questions, but only answer his questions, Attorney *O* at 39-40. See note 162 *supra*.

169. One lawyer said he tried "just to talk like a friend and let them know who you are, but in letting them know who you are, don't let them think you are someone apart from them, and someone distant from them, to identify closely with them." Attorney *Q* at 28. Other techniques of easing the situation included sitting next to the child rather than across an imposing desk and asking the child to use the lawyer's first name. Attorney *F* at 9, 37.

Attorneys also attempted to frame the issue in a manner reassuring to the child. One thought it important to emphasize to children "that you are not making a decision as

carefully thought-out "spiel" to introduce himself to the client.¹⁷⁰ A third of the attorneys explicitly discussed confidentiality or gave some expression of the lawyer's exclusive loyalty to the child.¹⁷¹ Most attorneys attempted some explanation of legal representation or the functions of lawyers.¹⁷²

It was generally recognized that trust and rapport must build over time.¹⁷³ Nearly half the attorneys met with the child more than once; each said that he was able to obtain more and better information from the child after the first meeting.¹⁷⁴ Many attorneys made a point of encouraging their clients to initiate further contact.¹⁷⁵

The attorneys found that talking to a child client was a challenge. Some reported considerable uneasiness and were unsure of their ability to handle the situation with the sensitivity required; others found the experience comfortable and even enjoyable. All the attorneys were aware of the special problems of talking to children about the custody or visitation issue and thought carefully about ways to make the experience better for the child.

to who you love more; you are just trying to decide who you want to stay with because you feel a little more comfortable there, more at home." Attorney *F* at 21. Other attorneys thought it important to let the child know that his preference would not be determinative in the court's adjudication. This was thought to relieve the child of a potential burden as well as to give the child an honest appraisal of the process and of the child's impact on it. *See, e.g.,* Attorney *I* at 34 ("[T]his has nothing to do with you. The courts are the only people who are going to decide where you are going to live"); Attorney *K* at 38-39 (child must know that saying he wants something does not mean it will happen). When carried to an extreme, well-intentioned but misplaced protective impulses may contribute to a syndrome of "learned helplessness," *see* note 184 *infra*, and may over-emphasize the part played by guilt in such decisions. The principal investigator of the Children of Divorce Project in Marin County, California, *see* note 11 *supra*, has asserted that "we have probably made too much of the amount of guilt that children feel about the divorce period" and have not been sufficiently aware of their anger and desire to manipulate. Letter from Judith S. Wallerstein to Kim Landsman (Dec. 30, 1977) (on file with *Yale Law Journal*).

170. Except for two attorneys whose clients were too young to talk to or who decided not to talk to their clients, all attorneys mentioned some attempt to explain their role to their clients.

171. Attorney *B* at 15; Attorney *D* at 16-17; Attorney *F* at 10; Attorney *G* at 7; Attorney *H* at 4; Attorney *R* at 6.

172. Attorney *A* at 11; Attorney *B* at 15, 38; Attorney *D* at 16-18; Attorney *F* at 9; Attorney *G* at 7; Attorney *H* at 1; Attorney *I* at 10-11; Attorney *K* at 4; Attorney *N* at 8; Attorney *O* at 32; Attorney *P* at 5.

173. *E.g.,* Attorney *A* at 10 ("[Y]ou spend time with your client . . . in your office and out of your office. . . . And so you get to know somebody for a while they get to trust you"); *see* Attorney *R* at 31 (child appreciated having attorney and confided in him over time as attorney kept promise not to betray confidences).

174. Attorney *A* at 9-10; Attorney *B* at 13; Attorney *G* at 29; Attorney *K* at 4, 12; Attorney *P* at 7-8; Attorney *R* at 30-31; *see* Attorney *C* at 5.

175. *E.g.,* Attorney *D* at 21; Attorney *F* at 9; Attorney *I* at 10.

B. *The Preference Perplexity: Should the Attorney Elicit a Preference, and How Binding Should It Be?*

1. *Eliciting a Preference*

The attorneys' quandaries over whether and how to elicit a stated preference from their client indicate the problems in inviting a child client to participate in the process of deciding his custody. Although almost half the attorneys reported asking the child his wishes directly,¹⁷⁶ occasionally softening the question by indicating that it need not be answered immediately,¹⁷⁷ the rest of the attorneys had qualms about such a procedure. They instead tried to infer a preference from the child's attitudes and from answers to questions such as what he enjoyed—or did not enjoy—doing with each parent,¹⁷⁸ how he was adjusting to a change in living arrangements during the litigation,¹⁷⁹ and to whom he went with a problem.¹⁸⁰

The attorneys may have overestimated the need for subtlety in phrasing issues to the child and caution in inviting the child's participation in the decisionmaking. Not only did children in a range of ages frequently volunteer comments related to the issue,¹⁸¹ but the choice between direct or indirect questioning with older children appeared to make little difference: older children seemed to know that the attorney wanted to ascertain a preference and were generally prepared to give one.¹⁸² Indeed, psychological studies indicate that even young children

176. Six of the 14 attorneys who ascertained the child's preference did so by direct questions. Attorney *F* at 10; Attorney *J* at 5; Attorney *K* at 5, 25, 38; Attorney *P* at 3; Attorney *Q* at 12; Attorney *R* at 6.

177. Attorney *F* at 10; Attorney *K* at 38.

178. Attorney *B* at 23; Attorney *N* at 7; Attorney *R* at 6-7.

179. Attorney *G* at 6.

180. Attorney *D* at 20. A child psychiatrist suggests these questions for clinicians to whom custody cases are referred: "To whom does the child turn when he is hurt or in trouble, or recognizes a problem? In whom does the child confide? Whom does the child trust? For which parent does he behave the better, and why?" Jenkins, *Maxims in Child Custody Cases*, 26 FAM. COORDINATOR 385, 386 (1977).

181. One attorney was startled by the lengthy tirade against a parent that was unleashed by what he considered to be a general, nondirective question. Attorney *H* at 4. In another case a young boy's feelings became apparent before the attorney had a chance to begin questioning the boy. The child

was sitting there with his father and his father had just outlined this list of abuses that the mother had been guilty of, very delicately stated but in front of the child.

And he turned to the child and stated: "Tell him; tell him how she did that."

The child sat there absolutely silent and the father pushed it . . . and pushed it.

The child . . . finally . . . got up and . . . the child ran over to his father. Punched

his father, bit his father, kicked his father [A]nd the father was coming on

like, "Now, now, Johnny; that's not nice. Tell him about your terrible mother."

Attorney *N* at 19-20.

182. Three attorneys reported cases where the child volunteered a preference without being asked. Attorney *C* at 1, 4; Attorney *H* at 1 (by implication); Attorney *K* at 4.

are quite sensitive to the disputes surrounding parental divorce and may feel depressed or angry about being excluded from participation in important decisions concerning their future family life.¹⁸³ The desire to protect children by keeping them uninformed about the course of the litigation and about the attorney's role in it and uninformed in the decisions to be made by the attorney on behalf of the child may therefore be misplaced.¹⁸⁴

Counsel for the child therefore should not neglect the attorney's

183. See McDermott, *supra* note 11, at 1429-30 ("The exquisite sensitivity of these young children to the ways in which parents were feeling toward each other is in contrast to the parents' tendency to consider them as immune, not old enough to participate in the process of working out problems of family disruption").

184. See L. TESSMAN, *supra* note 11, at 281-82 (describing case where children's faith in legal system gave way to precocious cynicism toward legal authorities who were unattentive to their desires); *Later Latency*, *supra* note 11, at 264 (describing hurt and humiliation felt by children at having no leverage in divorce and custody events); *Adolescence*, *supra* note 11, at 482 (describing terrified feeling of children at having no control over their environment); Letter from Judith S. Wallerstein to Kim Landsman, *supra* note 169 (children more likely to feel anger and to want to manipulate than to feel guilt).

Excluding a child from participation may have future psychological costs. A behaviorist (as opposed to a psychoanalytic) theory of depression emphasizes that "it is not the traumatic event per se that produces depression, but the feeling that one has no control over the situation." E. HILGARD, R.C. ATKINSON & R.L. ATKINSON, *INTRODUCTION TO PSYCHOLOGY* 466 (6th ed. 1975). This theory thus focuses on the phenomenon of "learned helplessness":

The "learned helplessness" theory of depression suggests that people most prone to depression are those whose lives have been full of situations in which they were unable to obtain gratification or avoid pain by their own actions. . . . According to this view, a childhood of experience in which one's own actions are instrumental in bringing about gratifications and removing annoyances may be the most effective protection against depression.

Id. at 467. See generally M. SELIGMAN, *HELPLESSNESS* (1975) (full theory and empirical evidence).

Children may be confused and need help in understanding not just the legal situation, but also the basic facts about their parents' divorce. Although an attorney might not be considered the best source of information on such matters, he is already professionally involved with the child and, as a concerned adult, can help. This is especially important where parents have been unable or unwilling to clear up the child's confusion. Wallerstein and Kelly note that although parents thought it important to explain the divorce decision to their preschool children,

[80%] of those in our study had found the task too difficult and—whether out of shame, guilt, misplaced concern for the child, or inability to communicate with their very young child—had offered no explanation. As a consequence, the youngest children were allowed to suffer helplessly with the departure of one parent from the household, without the support that probably would have been forthcoming in a relatively minor crisis.

Divorce Counseling, *supra* note 23, at 12-13. Since attorneys generally do not talk to preschool children, see pp. 1159-60 *supra*, and even trained counselors find it difficult to explain the situation to them, see note 156 *supra*, explanation to preschool children should be handled by confidants of the child. Wallerstein and Kelly found it best to work through the parents to ensure that preschool children were kept informed. See note 156 *supra*; cf. Watson, *supra* note 15, at 78 (children fantasize about events in divorce and lawyers have obligation to explain what is going on).

general duty to help the client understand the legal situation, to encourage the client's involvement in the decisions the attorney must make, and to offer explanations for the attorney's decisions.¹⁸⁵ The extent and sophistication of the explanation that it is possible or desirable for an attorney to give will vary with the child's age and ability to comprehend, as well as with the situation and decision to be explained. Where the child is too young for effective attorney-client communication, explanation may best proceed through parents, confidants, or psychological experts;¹⁸⁶ and where the content of the information may carry risks for the child, the attorney may feel compelled to withhold explanation.¹⁸⁷

Psychology and moral theory both warn the attorney not to force participation on the child. If a client is entitled to participate and to be informed, he is also entitled to do neither.¹⁸⁸ Studies of children of divorce indicate that there may be very good reasons for a child's decision not to become directly involved in the dispute over his custody, particularly where the parents have already framed any choice the child makes in terms of loyalty or treason.¹⁸⁹ In certain situations and at certain stages of development, the child may wish to resolve a loyalty conflict by choosing, and that choice may serve important inner needs,¹⁹⁰ but in other situations and stages the child may risk emotional turmoil and parental retribution by taking sides.¹⁹¹

185. See CPR, *supra* note 143, at EC 7-8 (lawyer should ensure that client's decisions are based on information of relevant considerations and should initiate decisionmaking process if client does not do so).

186. On confidants (including parents), see pp. 1182-83 *infra*.

187. See p. 1151 *supra* (attorney felt it crucial to familial relationship not to inform his clients).

188. Cf. J. Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain*, 84 YALE L.J. 683, 686 (1975) (right of client to determine for himself what he needs to know includes right to decide "that he does not want to know anything").

189. See *Later Latency*, *supra* note 11, at 264 (footnote omitted):

[T]he central ingredient in the loneliness and sense of isolation these children reported was related to their perception of the divorce as a battle between the parents, in which the child is called upon to take sides. By this logic, a step in the direction of the one parent was experienced by the child (and, of course, sometimes by the parent) as a betrayal of the other parent, likely to evoke real anger and further rejection, in addition to the intrapsychic conflicts mobilized.

190. *Id.* at 266.

191. The experiences of younger children can be contrasted with those of the older children:

[W]here parental pressures [to take sides] prevailed, children in early latency seemed unable to comply with the demand that they reject one parent totally and align solely with the other. In this regard they differed from the older children, who seemed capable of avoiding the anguish of conflicting pulls by forming such alignments. These younger children retained their loyalty to both parents, frequently in secret, and often at considerable psychic cost.

Early Latency, *supra* note 11, at 29.

If the child wishes to make such a "strategic withdrawal,"¹⁹² whether from internal or external conflict, he can communicate this desire to his attorney. It is important that the attorney not unilaterally decide that his client should be "protected" from participation and explanation in the decision. The court's appointment of an attorney for the child may enhance the child's self-esteem at a time when it may be sorely depleted; an attorney who does not encourage his client to participate in decisions misses this opportunity to raise the child's self-esteem,¹⁹³ and may even further diminish it. One principle of child representation, therefore, is that the attorney should invite the child to participate in decisionmaking and offer to engage in a continuous explanatory process whereby the client is kept informed of the issues and progress of the litigation, the decisions being made by the attorney, and the reasons for them.

2. *How Binding Is the Preference?*

Virtually every discussion of representing children in divorce custody disputes is permeated by whether the child's preference should bind the attorney's representation.¹⁹⁴ It was a recurrent theme in the

192. On the use of "strategic withdrawal" by children of divorce to maintain psychological development in the face of adversity, see *Divorce Counseling*, *supra* note 23, at 14. See also A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 54 (1968) (for any child, choice to retreat and withdraw can be wise and necessary to growth in certain situations).

193. Many attorneys believed that having a lawyer enhanced the self-esteem of the children they represented. Attorney *F* said that his clients enjoyed the idea of having a lawyer, Attorney *F* at 9, and that it was good for them to have someone to whom they could talk freely and without guilt, *id.* at 19-20, 29. Some of these factors were mentioned by other attorneys. Attorney *B* at 43-44 (child appreciated having someone to give him straight answer); Attorney *G* at 6 (children excited to have own attorney); Attorney *K* at 5 (child bragged to friends about having lawyer); Attorney *L* at 5, 24 (children get kick out of it); Attorney *P* at 26 (kids felt they counted in process); Attorney *R* at 31 (child confided things nobody else had heard). *Accord*, *Brief Interventions*, *supra* note 11, at 36:

We discovered in these [later latency and preadolescent] children an acute sense of reality, orienting them outward, with an equally urgent need to validate their reality-testing by discussing with someone outside of the family the various details of the separation and divorce. Intensified loyalty conflicts often made it difficult to talk with one parent without worrying about betraying the other, and intense anger acted to push them away from both parents. Thus the therapist's clearly stated, empathic advocacy for the child apparently filled a void strongly felt by some of these children.

194. There is a range of views on how binding the child's preference should be. Berdon, *supra* note 5, at 165 (child's wishes should govern if child of sufficient age and maturity to make intelligent choice); Bersoff, *supra* note 34, at 42-43 (lawyer should represent wishes of child aged 12 or older); Genden, *supra* note 7, at 593 (lawyer required to represent child's preference, but child with preference would be better served by neutral factfinder rather than by attorney); Mlyniec, *supra* note 6, at 16 (existence of well-formed preference necessary condition to appoint lawyer for child); J. Goldstein, *Psychoanalysis And Jurisprudence of Child Placement—With Special Emphasis on the Role of Legal Counsel for Children* (Feb. 23, 1978) (Kenneth G. Gray Foundation lecture, Toronto, Ontario) (child's preference does not bind his attorney).

practitioner interviews. Neither the *Code of Professional Responsibility*¹⁹⁵ nor statutory law¹⁹⁶ provides a solution to the problem of whether a child client's wishes bind the attorney. The best interests standard, with its lack of specific content, fails to provide criteria by which to judge the correctness or propriety of the child's preference. Each attorney was therefore left to formulate his own standards.¹⁹⁷

Half the attorneys said that an articulate preference by an older child would carry great weight in determining the child's interests.¹⁹⁸

195. Compare CPR, *supra* note 143, at EC 7-7 (except in "certain areas of legal representation not affecting the merits of the cause," where lawyer can make decisions on his own, "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer") with *id.* at EC 7-11 ("The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . , or the nature of a particular proceeding.") and *id.* at EC 7-12 (additional responsibilities devolve upon lawyer if client has any mental condition "that renders him incapable of making a considered judgment on his own behalf").

196. The only guidance from statutory law is that given to courts in considering the weight to be accorded the child's preference in the final adjudication. The typical instruction is that the court must consider (but is not bound by) the child's preference where the child is of "sufficient mental capacity to make an informed and intelligent choice." Siegel & Hurley, *supra* note 155, at 12.

197. Practitioners expressed considerable ambivalence concerning the general lack of guidance provided for their representation. One lawyer described his frustration and ambivalence:

The responsibility, I guess, is to do what's best for the child. I don't think anyone knows what that means, and because no one really knows for sure what that means it makes it very difficult for someone who has the responsibility of meeting the standard. So it would be somewhat easier, I suppose, if the judges changed their view of what to expect of the attorney of the child. But I don't think that would solve the problem.

Attorney B at 56. Yet lawyers and judges generally doubted the ability of rules to take into account important and variable factors. *E.g.*, Attorney D at 49 (in determining child's best interests "we are all just swirling in there: Family Relations, lawyers, psychologists"); Interview with Hon. Robert Berdon, Judge, Connecticut Superior Court, in New Haven, Connecticut, at 26 (Nov. 14, 1977) (transcript on file with *Yale Law Journal*) [hereinafter cited without cross reference as Judge Berdon]. ("What's the next best [to the child having a happy, intact home]? In every case it's different. I hope we've thrown out the rules."); Interview with Hon. Henry Naruk, Judge, Connecticut Superior Court, in New Haven, Connecticut, at 8 (Oct. 18, 1977) (transcript on file with *Yale Law Journal*) [hereinafter cited without cross reference as Judge Naruk]. (All pieces of custody decision are "part of a sort of kaleidoscope: each case you shake the thing up again and all the pieces change"). One attorney felt that making decisions without specific rules was something a lawyer takes in stride: "Just get a feel for it and if you can at least rationalize the instinctual feeling out of the evidence and meet the legal test, I just think that's basically how it comes out." Attorney R at 18.

198. See Attorney A at 12-13 (must trust child's judgment more than your own because you have not lived with parents and child has); Attorney B at 27 (older child has more right to have his view presented); Attorney D at 31-32 (confused about how to handle disagreement with child's preference, but perhaps child deserves someone to speak for him); Attorney F at 6 (age and maturity of 15-year old meant that his preference must be followed); Attorney J at 22 (where what child wants is reasonable, no excuse for taking different view if child 11 years or older); Attorney K at 16 (rarely ought to go against client's wish); Attorney M at 12 (since child over 14 allowed to

And although some attorneys found that with younger children the problem was not whether to follow the preference, but to determine what the child "really meant" by what he said,¹⁹⁹ one lawyer asserted that age was not the most important factor, since "some young children are quite capable of deciding what's good for them and some older children are quite incapable."²⁰⁰ A few attorneys said that they would distrust most expressions of choice by children because of a child's tendency to repeat what adults tell him or to form judgments on the basis of temporary or superficial conditions; many attorneys described cases in which they thought a child was "brainwashed," "programmed," or "bribed" by a parent.²⁰¹

In contrast to these suspicions about expressed preferences, other lawyers believed there were compelling reasons to support a preference even when they did not understand it. One felt that the attorney-client relationship bound him to represent the child's preference or to ask the court's permission to withdraw.²⁰² Another feared traumatic or damaging consequences if he were to disregard a teenaged client's strongly expressed preference.²⁰³ There was also a recognition, borne out by subsequent events in two reported cases, that a seemingly ill-founded preference could prove to be quite sensible.²⁰⁴

Although the attorneys varied considerably in the clarity and completeness with which they articulated criteria for assessing a child's preference (or for determining the best placement in the absence

have his way in Probate Court, should also have his way in custody decision); Attorney *Q* at 21 (child's input in attorney's decision about 50%); Attorney *R* at 35-36 (cannot make 14-year old go where he does not want to go).

199. See Attorney *K* at 4-6 (therapist who knew child convinced attorney that seven-year-old client did not really want what he said he wanted); Attorney *I* at 35 (seven-year-old client):

[W]hen a kid says to me, "I want to live with my father because he has a big boat," that doesn't mean anything to me. That either means to me, because I am not trained, that he really likes his father and he is rejecting his mother, and he can't bring himself to say that . . . Or he really believes that that is a good reason for going with his father . . . I don't know if I am hearing the right message.

200. Attorney *K* at 16.

201. Attorney *C* at 1; Attorney *H* at 7; Attorney *I* at 11-12; Attorney *O* at 41; Judge Missal at 10 ("[T]here is bidding between the parents, and bribery and everything else to try to get the child to like one parent better than the other."); cf. Judge Berdon at 18 (concern that awarding custody to more indulgent parent not in child's best interests).

202. Attorney *A* at 11.

203. Attorney *O* at 42; accord, Judge Naruk at 8; cf. Judge Berdon at 3 (with older child, "even if the court should ignore the child's wishes, he's going to go do exactly what he wants anyway").

204. See Attorney *J* at 28 (hearing clarified lawyer's view and convinced him that child's preference was correct); Attorney *K* at 26-27 (understood teenager's antipathy for father only after cross-examining father at hearing).

of a stated preference²⁰⁵), almost without exception they were troubled by the prospect of opposing their client's wishes in court.²⁰⁶ Aside from perceived ethical problems, attorneys wondered whether their own conclusions were to be trusted more than those of the child who was more intimately involved with the dispute.²⁰⁷ Attorneys, along with some judges, also wondered whether a decision forcing a child to go with a parent against his wishes would be unenforceable or counter-productive in practice.²⁰⁸ Proposed solutions to the ethical dilemma

205. The most complete and ambitious attempt to express criteria was that of Attorney *R*, who gave the following factors: (1) "with whom does the child most closely identify" ("[W]ho does the child like to be with? Where does he seem to be the happiest?"); (2) "the ability of the parent . . . to properly take care of the child" ("[I]s the child going to be left alone with strangers for long periods of time?"); (3) the economic status of the respective parents; and (4) whether either parent had remarried and so could provide a two-parent home for the child. Attorney *R* at 16-17.

In interviews with other attorneys, best interest standards were not explicitly stated, but were inferred by the authors from the justifications given by attorneys for decisions. Because the parties frequently charged each other with failure to meet minimum standards of parental fitness or moral conduct, many lawyers found themselves trying to investigate and evaluate evidence on this factor. Attorney *F* at 7; Attorney *H* at 2, 6; Attorney *J* at 24-25; Attorney *N* at 6, 18; Attorney *O* at 32. Other factors of importance were continuity in relationships, housing, schooling, and the like, Attorney *A* at 2; Attorney *C* at 2; Attorney *E* at 24; Attorney *H* at 4; Attorney *I* at 21; Attorney *K* at 3; Attorney *L* at 11; Attorney *Q* at 19; *cf.* Attorney *H* at 4 (obtained agreement not to move child until end of school year), perceptions of the child's attachment to and identification with each parent, Attorney *G* at 17; Attorney *R* at 16, each parent's attitude toward visitation with the other parent, Attorney *D* at 14; Attorney *G* at 17; Attorney *O* at 12; *see* *Seymour v. Seymour*, No. 14 86 29, memorandum of decision at 10, (New Haven County Super. Ct. Nov. 25, 1977) (Berdon, J.) ("Visitation is an important factor to be considered when determining custody. Certainly the parent who will freely afford visitation as opposed to one who will present obstacles to visitation should be a factor in considering custody."), the parent's sincerity in seeking custody, Attorney *B* at 53; Attorney *F* at 26; Attorney *K* at 8, 16; Attorney *N* at 22; Attorney *O* at 37, a parent's past involvement in the child's activities and familiarity with his habits, interests, and problems, Attorney *D* at 23; Attorney *G* at 8, 11; Attorney *N* at 10-11, and the feasibility of each parent's custodial plan, Attorney *D* at 24; Attorney *E* at 23-24; Attorney *G* at 7; Attorney *R* at 17.

206. Only Attorney *H* seemed consistently able to disregard or attach little importance to the child's preference, even with older children. Attorney *H* at 5-7.

207. *See* notes 198, 203 & 204 *supra*. Even if the child's preference does not bind the attorney's representation it should carry great weight, for it comes from the one person most aware of how well each parent cares for him. Attorneys would do well to heed a child psychiatrist's advice to his fellow clinicians: "Respect the perceptiveness of the children in recognizing which parent really cares more about them, and which parent is more dependable." Jenkins, *supra* note 180, at 386. *See* Attorney *A* at 12 ("I haven't lived in the house and gone through what he went through in a custody situation . . ."); Judge Naruk at 8 ("[T]eenaged children have lived with both parents long enough; they have become sophisticated enough to be able to judge well. I've had children say to me, 'you know my father's much more strict than my mother, but I really think that I'm better off with him.'")

208. *See* p. 1168 & note 203 *supra*; Attorney *R* at 35 (teenage client):

I would have liked to have recommended in this case some kind of forced visitation, even if it was only an hour a week. I'm not sure that would have done any good because I don't think any judge in the court would have enforced it even for an

of opposing a client's position included requesting the court's permission to withdraw,²⁰⁹ requesting appointment as guardian ad litem rather than as attorney,²¹⁰ or making some sort of full or partial disclosure to the court that would include a statement of the child's wishes.²¹¹ None of these solutions is entirely satisfactory, because each in some way weakens the legal representation available to the child.²¹² In practice attorneys rarely opposed a clearly expressed preference of the client, and most discussion of how to solve the quandary was hypothetical.²¹³

hour. I think most of the judges would say with respect to that kind of a situation, "I'm not going to enforce it. I'm not going to make the kid go where he doesn't want to go."

Cf. Ellsworth & Levy, *supra* note 1, at 200-01 (citing "tentative evidence" that foster care placements more successful when child agrees to them).

209. Attorney A at 11 (speaking hypothetically).

210. Attorney K at 51 (speaking hypothetically).

211. Cf. Berdon, *supra* note 5, at 165 (where attorney disagrees with child's preference he should report preference and take no position). If counsel for an indigent criminal defendant finds an appeal to be frivolous, he must accompany a request to withdraw with a brief referring to anything in the record that might arguably support the appeal. *Anders v. California*, 386 U.S. 738, 744, *rehearing denied*, 388 U.S. 924 (1967). Full disclosure by an attorney—stating the child's preference and the attorney's reasons for opposing it—would run perilously close to a denial of due process if an analogy to criminal law representation by defense counsel holds. See *Suggs v. United States*, 391 F.2d 971, 974 (D.C. Cir. 1968) (defense counsel's brief, whose thrust was to show that appeal without substance, held impermissible "brief against the client").

212. Withdrawal from representation is an extreme step and one that the *Code of Professional Responsibility* permits only in certain restrictive circumstances. See CPR, *supra* note 143, at DR 2-110. It could be argued that a lawyer could withdraw from representation when he disagrees with a child's preference only if he could show that the client's "other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively," *id.* at DR 2-110(C)(1)(d). The lawyer's withdrawal could prejudice the child's interests by delaying the proceedings and by indicating to the judge, by withdrawing, that he thought the client's view was wrong.

A request to be appointed guardian ad litem because of a disagreement with the child's preference sends a signal to the judge similar to a request to withdraw and has added disadvantages for the child. The child is deprived of a full advocate, has an unwanted guardian forced on him, and is not allowed to search for an attorney who will advocate his view.

Partial disclosure—telling the court the child's preference and nothing more—also denies the child a full advocate. In practice, moreover, it may differ little from full disclosure: the lawyer may not tell the judge why he disagrees with the client, but a judge would not miss the implication from the attorney's inaction that attorney and child disagree. Cf. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 37 (1975) (in criminal trial, when defense attorney does not refer to testimony of client he knows to be perjured, he indicates to jury that he knows defendant lied).

Counsel for the child is not necessarily the exclusive advocate for the child, nor is he necessarily the only means by which a judge can be informed of the child's views. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.44 (1977) (where all contenders for custody of children share guardianship responsibility, independent counsel for child not "solely authorized to determine the children's best interest"). As the only lawyer whose primary loyalty is to the child, and as one who can be uniquely persuasive to the judge, *see* p. 1184 *infra*, counsel for the child is potentially the most effective advocate for the child.

213. Compare notes 209 & 210 *supra* with note 206 *supra*.

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It would be a dubious undertaking to criticize an attorney's decision to go against the child's preference. The standards on which to base a criticism are not sufficiently definite, and any decision as to the best course of representation necessarily depends on the particular facts of the situation. No principle for judging a child's preference can be derived other than that an expressed preference should not be dismissed without careful thought. For this reason, however, the principle of explanation and participation assumes added importance. The principle gives the client the opportunity to argue with and influence his lawyer, and thus creates additional pressure on the lawyer to take the child's preference seriously. Although the child may not be entitled to any particular outcome or to have his preference followed,²¹⁴ he is at least entitled to a continuous attorney-client dialogue as part of the process of decisionmaking.

The importance of this dialogue is suggested not only by psychological evidence on children of divorce,²¹⁵ but also by analogy to a moral argument that due process of law has a similar requirement. Due process of law has been interpreted as a moral requirement that a decisionmaker engage in "explanatory procedures" in which the reasons for a decision are explained and the "affected individuals are allowed to examine and contest the proffered reasons."²¹⁶ Explanatory procedures respond to the value of "revelation and participation"—of "being told why."²¹⁷

From a practical standpoint, the requirement that a decisionmaker explain his actions and invite participation serves the affected individual by giving him a chance to change the decisionmaker's mind and to introduce information or a perspective that might otherwise be overlooked.²¹⁸ Regardless of the effect on the actual decision, it may also be intrinsically rewarding and esteem-enhancing to participate in a decision and to understand its rationale.²¹⁹ These are pre-

214. Only two states (Georgia and Texas) require by statute that a child's preference prevail with the court, and then only if the child is at least 14-years old and the parent is not unfit. Siegel & Hurley, *supra* note 68, at 29.

215. See pp. 1163-64 and notes 183 & 184 *supra*.

216. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS* 126, 126 (NOMOS XVIII; J. Pennock & J. Chapman eds. 1977).

217. *Id.* at 127.

218. *Id.*; cf. *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975) (not due process case) (requiring Secretary of Labor to give reasons for not filing complaint as lawyer for union member "promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies").

219. Michelman, *supra* note 216, at 127. Morally, a demand for nonformal explanatory procedures

might issue from a certain kind of ideal conception of social relations and political

cisely the qualities of decisionmaking—whether the decision be that of the lawyer or that of the judge—that may be most valued by a child in a divorce custody dispute.²²⁰

IV. The Child's Representative and Other Actors in the Custody Proceeding

Related to the fear that attorneys are not qualified to talk with children is the warning that the child's attorney will be superfluous. Providing no suitable skill, he will merely duplicate the work of a parent's attorney,²²¹ rubberstamp the report of a psychological expert or the findings of the court's investigative unit,²²² or supplant the judge.²²³ An underlying criticism is that the attorney for the child will impose a burdensome and needless expense on the parties and the judicial system²²⁴ and might make the custody proceedings even more contentious and adversarial than they already are.²²⁵ In practice, however, the attorneys developed unique functions enabling them to focus the custody adjudication on the child's needs. The following sections sharpen this focus by deriving principles to guide the child's attorney in his relations with other participants.

A. *Parents and Their Attorneys*

Instead of duplicating the work of parents' lawyers, attorneys for children found that, because of their position in the case, they often

arrangements, expressing revulsion against the thought of life in a society that accepts it as normal for agents representing the society to make and act upon decisions about other members without full and frank interchange with those other members.

Id. at 128.

220. See pp. 1163-64, 1166 and notes 183, 184 & 193 *supra*.

221. Solender, *supra* note 10, at 639; Judge Callahan at 2-3 ("I have some doubt as to how valuable a function the attorney for the child plays. It seems to me pretty much of a rehash of what you could get from listening to counsel for both sides.")

222. Solender, *supra* note 10, at 639. There is also a fear that an attorney would be less likely to discover information important to the custody decision than would a social worker or psychological professional. Note, *The "Adversary" Process in Child Custody Proceedings*, 18 W. RES. L. REV. 1731, 1744-47 (1967) (lawyers trained to seek overt facts; social workers oriented toward important intangible elements).

223. Dembitz, *supra* note 10, at 1313.

224. Brodsky & Alford, *Sharpening Solomon's Sword: Current Considerations in Child Custody Cases*, 81 DICK. L. REV. 683, 694 (1977); Solender, *supra* note 10, at 642.

225. If the guardian *ad litem* is to serve his function properly he may feel compelled to make the proceeding more contentious (and so more traumatic) than it would have been without him. If there is any area of universal agreement about custody adjudication it is that adversary procedures do more harm than good.

R. Levy, Treatment of Child Custody Problems in the Family Code, at j-4 (Proceedings of the Institute on the Family Code Project: Southern Methodist University School of Law), quoted in Ellsworth & Levy, *supra* note 1, at 225 n.89. Professor Strauss states that presence of counsel for the child "may even encourage litigation." THE MURKY DIVIDE, *supra* note 141, at 73, 83 (Peter Strauss, Prof. of Law, Columbia Univ.).

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could uncover different kinds of information and promote a constructive approach to resolve the dispute. Rather than increasing the scope and intensity of the controversy, many attorneys for children acted to mediate conflict and settle the dispute out of court.

The possibility of talking to all parties directly²²⁶ gives the child's attorney unique advantages in obtaining information about the parents and the child, since this information would rarely, if ever, be available to a parent's attorney.²²⁷ As an investigator and as a representative of the person whose interests are, by law, to prevail, the child's attorney is perceived by the parents as a powerful, occasionally threatening, figure.²²⁸ Minimally, the attorney is recognized as someone having leverage with the judge; some parents²²⁹ and their lawyers²³⁰ attempted to cajole, lobby, or educate the child's attorney as though arguing in court.

The incentives for parents to meet with the child's attorney give

226. None of the attorneys reported that he had been forbidden to talk to a parent outside the presence of the parent's attorney. A typical description of a conversation with a parent's attorney is: "She just said *carte blanche*—speak to my client, go out to the home; I'll instruct my client to assist you in whatever way she can." Attorney Q at 16.

227. Cf. Murch, *The Role of Solicitors in Divorce Proceedings*, 40 *MOB. L. REV.* 625, 637 (1977) (parents' solicitors almost inevitably biased because they meet with only one party). It may be that people hire attorneys to avoid dealing with an adversarial party face-to-face. See Eisenberg, *supra* note 145, at 660. Judge Naruk described the child's attorney as

the filter; he's the conduit through which the other lawyers must go. I would be afraid that the lawyer for either parent, being an adversary for the interest of a parent, would try to jockey the child in that position because he's not thinking of the child. He's thinking of mommy or daddy who's his client.

Judge Naruk at 10.

228. Attorney A at 8; Attorney B at 24; Attorney D at 43; Attorney E at 6; Attorney J at 16; Attorney K at 9; Attorney N at 9-10.

229. One attorney described this meeting with a parent:

When he came in here, he was very forceful, very articulate, very well spoken, very calculated in his behavior. He was overly dramatic and almost staged. He just leaned across my desk and said, "I'm going to tell you something right now, . . . you know what I have on my side?" I said, "What's that?" And he said, "sincerity, love, truth." Just like that. Like it was a press conference.

Attorney Q at 42. Another attorney described the progression in the parents' attitudes toward him during the course of litigation:

The first thing for both sides was exactly what you would expect if you were a judge in night court in Omaha and speeders were being brought in. There's some cajoling, some "I didn't really mean it; I'm really a good guy after all." Some of it is expressed, some of it's not; but it's all the interpersonal mechanisms of winning approval, and it was really difficult. I was put in the position of a very powerful figure by both sides, whose snap of the fingers would send these kids left or right. And I suppose in some senses I was, at that point, as near as they got to such a power. The judge would ultimately be in that position.

Attorney N at 9-10.

230. Lobbying by the parents' attorneys was described in Attorney B at 7; Attorney C at 1, 5; Attorney D at 9; Attorney G at 10-11; Attorney H at 2; Attorney I at 22-23; Attorney J at 12; Attorney L at 4, 12; Attorney N at 13; Attorney O at 12; Attorney Q at 50.

the attorney the power and the opportunity to mediate between them. The child's attorney is both a lobbyist and the target of lobbying. Just as the parents seek influence with the attorney in the hope of acquiring influence with the court, so may the attorney seek to influence the parents to reach an acceptable settlement out of court. Attorneys said that they often reminded parents that the child's interests must govern the custody determination and that, therefore, the parents should cooperate with the investigation,²³¹ assess the child's interests rationally, and drop a tactic—or even an entire claim—contrary to the child's needs.²³² Attorneys felt that they could act as “go-betweens” to settle conflicts during the litigation,²³³ and on occasion they were called on to arbitrate the conflicts that arose before the time set for a hearing.²³⁴ Indeed, counsel for the child is well situated to fulfill the following functions of the mediator: (1) diminish conflict by facilitating reliable communication between parties;²³⁵ (2) reduce the stress and intensity of conflict that lead to defensive and diametrically opposed positions;²³⁶ (3) clarify the real

231. Attorney *I* at 19, 20, 24; Attorney *K* at 23; Attorney *Q* at 16, 17.

232. Attorney *H* at 3; Attorney *M* at 21.

233. Attorney *A* at 2; Attorney *B* at 10; Attorney *J* at 34; Attorney *K* at 33, 36. Two-thirds of the attorneys described efforts to arrange out-of-court settlements. Attorney *A* at 7; Attorney *B* at 41; Attorney *E* at 25-26; Attorney *F* at 15; Attorney *G* at 14; Attorney *H* at 3-4; Attorney *J* at 9; Attorney *K* at 10; Attorney *L* at 6-8; Attorney *M* at 13; Attorney *O* at 29; Attorney *Q* at 23, 43-44.

234. Attorney *A* at 1; Attorney *R* at 23.

235. M. DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973). *Id.* at 353. Impoverished and unreliable communication is especially likely when divorced parents are disputing custody. The attorney for the child can play an important role in introducing a more realistic perspective on the case. Attorney *A* explained that attorneys for the parents are often unwilling to tell their clients that they cannot win: “I just don't think they have enough nerve to tell their clients that . . . [I]f the client wants to go through with it, they don't want their client to think that they are not behind them, and maybe they are afraid of losing the business . . .” Attorney *A* at 2. In contrast, “as lawyer for the children you are in a position to tell parents something that you can't tell the parents as their lawyer.” *Id.*

Attorney *K* described settling one case by improving communications:

I talked with the kids, asked them how much they wanted to visit. I talked with the mother and found out what she could handle and what she wanted. I talked with the father and found out what he wanted and what he could handle, and we worked out a visitation schedule.

Attorney *K* at 33.

236. M. DEUTSCH, *supra* note 235, at 355. Attorney *L* described how intervention by the child's attorney could reduce defensiveness:

The intervention by a neutral third party—because obviously the lawyer for the children starts off neutral—tends to calm things down. The lawyer for the mother and the father are by that time so stubborn, set in their ways, that sometimes if you can give them a way out, you know, “do it for me,” or “come on, I'll suggest it to him.”

Attorney *L* at 31-32.

Attorney *A* emphasized the importance to both the parents and the children of preventing name-calling contests in court:

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issues of conflict by helping the parties identify where they agree and disagree;²³⁷ and (4) alter or compensate for asymmetries in motivation or power between the conflicting parties.²³⁸

The child's attorney is ideally placed to pressure parties toward agreement.²³⁹ Knowledge of the presence or future involvement of third parties produces pressure toward agreement in two directions: "toward deference to norms of fairness, social responsibility, reciprocity, and equity of exchange; and toward the search for alternatives to their preferred positions."²⁴⁰ The parents' lawyers are not in a good

If you can . . . lessen the amount of hatred that has to take place among parents, then you are doing a tremendous service for the children. Because of the fact that in a contested case, whether on a temporary basis or on a final basis, people are going to say things against the other parent that they either may not want to say or may say out of anger, and people never forget that stuff. And then it has a tremendous effect on the children because one parent's feelings for the other parent are going to be obvious to the children And because of the fact that they know about that is going to create all sorts of conflicts in their lives.

Attorney *A* at 8.

237. M. DEUTSCH, *supra* note 235, at 383. Attorney *H* helped the parents clarify their agreement that, regardless which way the court decided the custody question, the children would not be moved from their school until the end of the school year. Attorney *H* at 4.

238. M. DEUTSCH, *supra* note 235, at 382. Attorney *K* described a modification case in which the custodial parent's attorney withdrew shortly before trial. Without representation, the custodial parent would probably have lost custody because of an adverse recommendation by the Family Relations Division. Because Attorney *K* had determined that no change in custody should occur, he provided assistance to the custodial parent and obtained stipulations preserving the existing custodial arrangements. Attorney *K* at 9-10.

239. A number of attorneys commented on the unique vantage point of the child's attorney. Attorney *I* at 28 (able to see perceptions from both sides, like the hypotenuse of a triangle; able to be truthful to court); Attorney *P* at 28 (able to work with whole family, not just one party); Attorney *R* at 20, 37 (able to avoid tunnel vision of lawyer for party; able to risk asking "why" questions of witnesses). Attorney *D* concluded that the role

gives the lawyer an opportunity to be a little bit of a psychologist, a judge, a social worker, and not just be a nuts-and-bolts lawyer. But the key is that after you play all those little roles, you got to pull it together and be a lawyer, to be able to know what is in your own mind, what is relevant, what is material evidence, what is hearsay, what isn't, who is believable.

Attorney *D* at 54.

The judges were also aware of the position of the child's attorney and thought that it was a good reason for appointing counsel for the child where custody was contested. Judge Berdon at 13 ("A lot of cases have settled as a result of appointing an attorney for the child."); Judge Callahan at 5 (possible that he has seen few attorneys for child in court because they have settled cases); Judge Missal at 4 ("[I]f [counsel for the child] does his job properly, he can be a mediator in the situation, especially with the two other lawyers. He can try to make them more objective about the case.") Judge Missal emphasized the importance of the mediator's being another attorney, because the parents' attorneys probably would not respect and listen to the advice of another professional as much. Judge Missal at 4. This confirmation by judges of the attorneys' views of their unique value to the process lessens the likelihood that the views were merely self-serving. See generally note 84 *supra*.

240. J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 56 (1975).

position to exert these pressures, and they were occasionally reported to block potential settlements by holding out to win the case for their clients.²⁴¹ A few attorneys noted that, as the child's attorney became involved, the parents' attorneys backed down from their initial positions and cooperated with the attorney for the child.²⁴²

To clarify and capitalize on the position of the child's attorney in protecting the child's interests, the parents and their attorneys should be told that the child's attorney is independent of both parties, not a threat from the other side or an additional lawyer for their side.²⁴³ The child's attorney should remember that when the dust settles in and out of the courtroom, the child will continue his intimate emotional attachment to one or both parents. The child's attorney not only should treat each side with consideration and should avoid unleashing new resentments between parties or against the child, he also has affirmative obligations to protect and represent those child-parent relationships valued by the child. Representing such relationships requires a standard of care and sensitivity greater than the duty of lawyers in all types of representation to avoid the infliction of needless harm.²⁴⁴ It requires an affirmative duty to reassure the parents, to treat them with respect during the litigation, and to try to bring about an outcome that is acceptable and that recognizes their value as parents.²⁴⁵ To advance the interests of his client, the child's attorney must represent not just one person but "the situation,"²⁴⁶

241. Attorney *H* at 7; Attorney *J* at 24; Attorney *N* at 30; cf. Attorney *I* at 8 (parents' attorneys avoided hearings on child's attorney's motions).

242. Attorney *K* at 11; Attorney *M* at 8; Attorney *N* at 13.

243. See Attorney *P* at 19; Attorney *R* at 4-5 (parent told interview was not confidential). Careful explanation is often necessary because of the circumstances under which the child's attorney enters the case. See p. 1178 *infra*.

244. CPR, *supra* note 143, at EC 7-10.

245. To the extent that a child-parent relationship is valued by the child, one or both parents are what Professor Hazard terms "quasi-clients," defined as persons to whom a lawyer owes a duty greater than that due strangers but secondary to that due the client, G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 45 (1978).

Several attorneys mentioned specific aspects of their representation that exemplified this concept. Attorney *G* at 30 (persuaded mother, to whom he recommended custody be given, to accept visitation by father in interest of child's attachment to father); Attorney *K* at 23 ("[p]rimarily it's in the child's interest to try to have the parents feel as positively as they can"); Attorney *M* at 13 ("losing parent" in custody dispute should not feel "vilified"); Attorney *P* at 7-8 (persuaded teenage client who had run away from home to return to parent).

246. In his confirmation hearing, Justice Brandeis argued that because a client's interests are often intertwined with those of other parties, attorneys should consider being "counsel for the situation." See note 144 *supra*. A recent interpretation of this role, based on the accounts of practitioners, describes the lawyer for the situation as an analyst of the relationship between the clients, in that he undertakes to discern the needs, fears, and expectations of each and to discover the concordances among them. He is an interpreter, translating inarticulate or exaggerated claims and

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and must try to achieve a fair, amicable, and workable settlement for both parents as well as for the child.²⁴⁷

B. *Investigative Agencies and Psychological Professionals*

Because the question before the court concerns the welfare and well-being of a child, many observers are convinced that the child's interests require an independent investigation by a social service agency or psychological professional, not by a lawyer.²⁴⁸ In practice, the attorneys for the child found that, in contrast to psychological professionals and social agency personnel, they provided a different perspective and set of skills to protect the child's interests.

1. *State Investigative Agencies*

A contested custody or visitation suit may be referred by the court for an investigation by a social service agency.²⁴⁹ Nearly all the cases

forewarnings into temperate and mutually intelligible terms of communication. He can contribute historical perspective, objectivity, and foresight into the parties' assessment of the situation. He can discourage escalation of the conflict and recruitment of outside allies. He can articulate general principles and common custom as standards by which the parties can examine their respective claims. He is advocate, mediator, entrepreneur, and judge, all in one.

G. HAZARD, *supra* note 245, at 64-65. *But see* Frank, *supra* note 144, at 708 (one who lawyers for situation is likely to regret it).

247. *See* M. GOLDING, *PHILOSOPHY OF LAW* 113-16 (1975) (adversarial proceedings damage family); Golding, *Preliminaries to the Study of Procedural Justice*, in *LAW, REASON, AND NATURE* 77, 91 (G. Hughes ed. 1974).

Where a case comes to a contested hearing, counsel for the child may still be able to settle or eliminate some contentious issues. In a case in which the authors of this Note were counsel for the child, the lawyers for the parents levied accusations of parental unfitness in a chambers conference and asserted that testimony to this effect would be given in open court. Counsel for the child summarized his investigation to the judge and stated that no reason had been found to suspect that either parent was unfit. The judge announced that he would rely on the report of counsel for the child and proceed on the assumption that neither parent was unfit. He also suggested that parents' counsel direct the hearing away from accusations against either parent. The Assistant Clerk of the New Haven County Superior Court described the way an attorney for the child handled the cross-examination of an unstable parent:

He had a TNT guy up there [who] could have exploded any time. . . . [The attorney] handled the questions so as not to get in conflict, and lose any of the purpose of what he was trying to elicit. And he kept him pretty calm. . . . I know other attorneys who would get up and cross-examine him until we [would] have to put him in Connecticut Valley Hospital because you could really send a guy like that off the edge, . . . whether it be [from] losing his child or not being able to have visitation. . . . An attorney shouldn't tear away at a parent. You have to try to assume that the parent[s] . . . have sympathy for the child. You are not out to destroy; you are out for what is good for the child.

Sappern Interview, *supra* note 21, at 11.

248. *See* note 222 *supra*.

249. Two state agencies may become involved in some way with custody litigation in Connecticut. The primary agency is the Family Relations Division of the Superior

handled by the interviewed attorneys included an investigation by an officer of the Family Relations Division of the court.²⁵⁰ Trained in interviewing techniques and custody law, the officer conducts an investigation to obtain information on the history of the parties and the dispute.²⁵¹ The officer's findings and recommendations are compiled in a written report that the judge may read at his discretion;²⁵² parties may object on hearsay grounds to the inclusion of the report, and in Connecticut practice the judge may rule either way on the objection.²⁵³ In the majority of cases handled by the interviewed attorneys, the investigation and written report were completed before the child's attorney entered the case.²⁵⁴ This reflects a common pattern in divorce custody cases: a Family Relations recommendation in favor of one party leads to a motion by the other party—seeking “another bite at the apple”²⁵⁵—to appoint an attorney for the child.²⁵⁶ In this light, the Family Relations report could be viewed as an initial trial decision, the child's attorney an appeal, and the court itself the ultimate recourse.²⁵⁷

Did the child's attorney duplicate the work of the Family Relations investigator? Attorneys reported that they often found the personal data assembled in the report useful.²⁵⁸ Yet they concluded that the reports frequently failed to provide accurate and full information on the child and the child's point of view.²⁵⁹ In contrast with the under-

Court, which does custody investigations. See CONN. GEN. STAT. § 51-182a (1977). In some cases attorneys may also consult the state's Department of Children and Youth Services, which investigates charges of child abuse or neglect. See *id.* § 17-38(e).

250. Of the 35 cases discussed by attorneys, the Family Relations Division was involved in 30.

251. Interview with Bernard Christianson, Supervisor of the Family Relations Division of the New Haven County Superior Court (Dec. 15, 1977).

252. Judge Berdon at 5; Judge Missal at 7.

253. See, e.g., *Schaff v. Schaff*, No. 146124 (New Haven County Super. Ct. Nov. 2, 1977) (Missal, J.); *Piatt v. Piatt*, No. 139451 (New Haven County Super. Ct. Sept. 30, 1975) (Daley, J.) (both decisions granting motions to strike Family Relations report from court file). Judge Missal said that he refrains from reading the Family Relations report if either party objects to it as hearsay. Judge Missal at 7. Judge Berdon said that on the request of both parties in one case he read the report but not the recommendation of the Family Relations officer. Judge Berdon at 5.

254. In at least 17 of the 30 reported cases in which the Family Relations Division was involved, the report was already completed when the child's attorney was appointed.

255. Sappern Interview, *supra* note 21, at 18, 20. Another reported strategy was to move for a pendente lite order to allow a lawyer to test his client's chances for permanent custody without inordinate risk. See note 27 *supra*.

256. E.g., Attorney B at 7, 24-25; Attorney G at 8-9, 33 (parents viewed him as second bite at apple after Family Relations recommendation submitted); Attorney J at 40.

257. Sappern Interview, *supra* note 21, at 4, 5, 20; Attorney M at 11.

258. E.g., Attorney F at 4; Attorney I at 15.

259. E.g., Attorney D at 20; Attorney I at 14; Attorney K at 19; cf. Judge Missal at 7 (Family Relations reports generally “much better on the adults . . . than on the children”).

standing obtained by the attorneys' own investigations, Family Relations information on the child was found to be misleading and superficial.²⁶⁰ As a result, attorneys reported that they disagreed with the recommendation of the Family Relations report more often than not.²⁶¹

The differences in the recommendations of the child's attorneys and the Family Relations Division were attributable not only to different information, but also to divergent perspectives and loyalties. That contrast is most evident in a case in which the entire investigation was conducted jointly but opposite conclusions were reached.²⁶² A parent had moved to modify custody based on charges of neglect of the children and drug use by the custodial parent. After interviewing the parents, the children, their teachers, and neighbors, the child's attorney and the Family Relations officer agreed that the child had not been neglected in any way. They also concluded that the past use of drugs posed no threat to the child, since the custodial parent had participated voluntarily and regularly in a drug abuse program. Moreover, the oldest child, aged eight, indicated articulately and definitely that he preferred to remain where he was.²⁶³

Although they shared all evidence and discussed the case throughout the investigation, the Family Relations officer recommended a switch in custody while the attorney recommended against modification. The attorney explained that he saw no reason to move the children, who seemed happy and well cared for, while the Family Relations officer emphasized the noncustodial parent's material advantages and more conventional lifestyle.²⁶⁴ Thus certain functions can be per-

260. Attorney *G* at 5 (attorney observed child over time, while Family Relations report only portrayed snapshot of child's feelings); Attorney *K* at 19 ("It wasn't until after we got to know the children that we realized that the Family Relations report was misleading with respect to what the children really wanted, especially the older child."); Judge Missal at 7 ("I am more apt to follow the suggestion of the child's attorney than the Family Relations if there is a conflict.").

261. Two attorneys reported supporting the Family Relations report and recommendation. Attorney *D* at 22; Attorney *N* at 23. Four attorneys reported disagreeing with the recommendation. Attorney *G* at 13, 27; Attorney *I* at 41; Attorney *K* at 9, 10; Attorney *Q* at 14. Eleven attorneys reported disagreement with the assessment of one or more members of the family by the Family Relations report. Attorney *A* at 16; Attorney *C* at 5; Attorney *D* at 20; Attorney *G* at 22-23; Attorney *H* at 4, 7; Attorney *I* at 14, 15; Attorney *K* at 10; Attorney *M* at 7, 14; Attorney *O* at 22, 24; Attorney *P* at 21; Attorney *Q* at 14, 18-19, 60.

262. Attorney *Q* at 14.

263. *Id.* at 12-13, 17-18.

264. *Id.* at 18-19. This may indicate an important difference between an investigator for the state and one whose loyalties are to the child. Judge Berdon at 5-6:

[Counsel for the child is] a different role from a Family Relations officer. The Family Relations office is a fact-gathering agency for the court that's supposed to get the background on the child and get as much information as it possibly can and make it available to the court, but that's the extent of it. He's not an advocate for the child, he's not an advocate for anybody.

formed cooperatively,²⁶⁵ but the child's attorney brings a perspective on the custody question different from that of the Family Relations officer and can in addition protect the child in court.²⁶⁶ The attorney's independent judgment is therefore an important contribution.

2. *Psychological Evaluations*

With increasing recognition of the significant needs of the child in the custody determination, observers have noted an expanding role for psychiatric or psychological evaluations.²⁶⁷ What role remains for the child's attorney in assessing and advancing the child's interests? The attorneys said that they relied heavily on psychiatric evaluations of very young or inarticulate children.²⁶⁸ Such professional studies helped to detect evidence of abuse, neglect, or emotional damage and also helped penetrate the child's literal statements to discover identification with or preference for one parent.²⁶⁹

Yet most attorneys were troubled by the way in which psychiatrists and psychologists behaved in custody cases.²⁷⁰ The most common criticism of experts was that once hired by one party, their objectivity could quickly be compromised.²⁷¹ Because parties occasionally "shop around" for experts to support their claims,²⁷² the attorneys felt that

265. See, e.g., Attorney A at 16 (occasionally disagreed with Family Relations report, but important to have input into it). *But see* Attorney C at 2 (to avoid prejudice did not talk to Family Relations officer until both attorney and officer had finished reports); Attorney I at 15 (did not want to know anything about Family Relations report). Hartford attorneys reported that they had been appointed on the recommendation of the Family Relations Division and at times conducted joint interviews.

266. Judge Berdon at 19 (child needs lawyer because "ultimately it's got to be decided in the courtroom").

267. Derdeyn, *supra* note 36, at 1374-75; Kubie, *supra* note 49, at 1198-99; Watson, *supra* note 15, at 75.

268. Attorney A at 15; Attorney B at 51, 59-60; Attorney M at 16-17; Attorney O at 29.

269. [T]he use I put a therapist to is to try to get beyond the face value of what the kids are saying. In other words, say, tell me whether this is just some propaganda that they're forced to give me because of the influence of the parent who has them, or in some deeper way it's part of the child's own self. Attorney J at 11; *accord*, Attorney I at 15; Attorney K at 5-8.

270. E.g., Attorney D at 49 (should not be too deferential to psychiatrists or psychologists: "we are just all swirling in there"); Attorney J at 11, 45 (concerned that referral to psychiatrist is just passing buck; his judgment may be no better than lawyer's); Attorney K at 27 (criticizing psychiatrist who testified about child without having seen him); Attorney R at 11 (psychiatrist spoke in "gobbledygook," "[a]ll of which I found fascinating, none of which I believed").

271. See Attorney O at 49 ("My experience has been that certain attorneys that do a lot of divorce work can influence a psychiatrist to a point where I have extreme credibility problems with their testimony."); Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 YALE L.J. 1680, 1690-91 (1977) (bias of experts can be caused by selection process and by tendency to identify with litigant or attorney they assist).

272. Attorney D at 38, 46; Attorney K at 27-28. The authors also noted this phenomenon in a number of their own cases.

experts' reports and testimony were less credible than expected. A related problem was the tendency of experts to testify abstractly rather than to focus on the particular child whose custody was at issue.²⁷³ Most disturbing to the lawyers was the sense that some clinicians adhered to an ideological point of view rather than providing descriptive insights on the child and family.²⁷⁴ Aware of the general problem of turning legal questions over to expert witnesses,²⁷⁵ the attorneys still expressed hope that the sensitivity and training of psychological professionals could contribute to informed custody determinations.²⁷⁶ Yet even the attorney who was most enamored of psychiatrists and most troubled by his own lack of training to communicate with children concluded that it would be unwise for the child's attorney simply to follow the instructions of an expert.²⁷⁷

Some lawyers responded to this problem by consulting with experts while maintaining a critical stance. These lawyers felt that they could assist their client and the court by applying their own common sense and other information about the case to detect superficial or unsubstantiated judgments by experts.²⁷⁸ On this basis, attorneys found the most credible and helpful consultants were not experts brought in to evaluate the child or parents at the time of the custody determination. Instead, psychological professionals who were involved in continuing therapeutic relationships with the child or family were valued for their familiarity with the situation over time and for their expertise not only in analyzing, but also in helping the child and family.²⁷⁹

273. Attorney *D* at 46; Attorney *E* at 18-19; Attorney *K* at 27; Attorney *R* at 11-12; see Attorney *M* at 26.

274. Attorney *A* at 3; Attorney *D* at 46; Attorney *M* at 16-17, 26; Attorney *R* at 11-12.

275. Attorney *B* at 59-60; Attorney *D* at 40, 46; Attorney *J* at 45; Attorney *M* at 16-17; Attorney *R* at 13-14.

276. Attorney *B* observed a session between a psychiatrist and a child and concluded: The child psychiatrist knew how to talk to that kid—to get information in a very innocent kind of way. It was a very telling interview. I don't know how to do that. . . . I'm not sure that I'm getting the right information, not sure that I'm interpreting the information that I get correctly. I'm not sure that someone else couldn't get better information and I'm not sure that I'm not getting the information at perhaps a price that the child is paying in terms of being forced to disclose to a virtual stranger intimacies.

Attorney *B* at 58-59. Another attorney consulted with a psychiatrist before he met with his clients to find out what kinds of questions were appropriate and what could be harmful, Attorney *R* at 7-8. *But see* Attorney *A* at 3 (undecided as to validity of psychiatrists' assessments); Attorney *R* at 13-14 (absent claim that parent's psychological condition poses physical threat to child, not convinced that psychiatrists add much to adjudication).

277. Attorney *B* at 60.

278. Attorney *A* at 3; Attorney *B* at 59-60; Attorney *E* at 21; Attorney *M* at 16-17; Attorney *Q* at 61; Attorney *R* at 11.

279. Attorney *E* at 9-11; Attorney *G* at 29; Attorney *K* at 6; Attorney *R* at 22, 25.

In cases lacking ongoing therapeutic consultation, attorneys discovered that nonprofessionals who knew the child and family well could be as or more useful than experts.²⁸⁰ Teachers, friends, neighbors, grandparents, and other relatives, along with therapists, might be called "confidants": persons close enough or trusted enough by the child to know what the child wants and needs.²⁸¹ Attorneys found these persons valuable in identifying the child's problems and in investigating allegations of parental unfitness.²⁸² Older siblings often acted as spokesmen for younger, less articulate children.²⁸³ The attorneys for the child found that confidants of the child were sometimes more willing to talk, and to talk candidly, with the child's representative than with other persons active in the case.²⁸⁴

Although the appropriate place for psychological experts in the custody determination remained problematic for the attorneys, the representatives for the child performed distinct functions in weighing the credibility and usefulness of psychological reports. Seeking an independent view of the situation, the lawyers often received discerning perceptions from other people who had the confidence of the child and family. The attorney for the child can and should, by working in cooperation with people who know the family well, place expert evaluations in the context of other information and perspectives on the child and family. The child's attorneys opposed the introduction of an expert to evaluate the child when an attorney already felt

280. Attorney C at 4; Attorney G at 16, 31; Attorney N at 12; Attorney Q at 39.

281. Attorney G at 29 (information obtained from school psychologist helped attorney assess child's reaction to pendente lite situation); Attorney J at 8-10 (children's therapist could explain both what children felt and what they needed in situation, providing court with "not just the professional opinion, but the children's opinion").

282. Attorney G found by talking with the mother-in-law of one parent that a continuing religious disagreement had motivated the father-in-law's serious charges of unfitness against the parent. Attorney G at 2. A therapist who had been involved with both mother and child advised Attorney K that although the mother had emotional problems, she was not unfit. Attorney K at 4-5; *accord*, Attorney B at 10, 32; Attorney G at 24; Attorney Q at 21.

283. Attorney C at 4; Attorney D at 16; Attorney J at 7-8; Attorney Q at 39-40 (older children provided information about younger child's general feelings and unspoken preferences and about family situation).

284. Attorney A at 9 ("Some people might be willing to talk to you as attorney for the children who might not be willing to talk as much or as openly to the attorney for the parent."); Attorney G at 31 (close friend of both parents came forward to speak with child's attorney in confidence). Similarly, at the hearing the child's attorney may be willing to call confidants who would not have been brought to the stand by parents. In one case, a social worker had been involved in extensive counseling with both parents before and during the break-up of the marriage. Neither parent called the social worker to testify; each parent probably feared damaging testimony. The child's attorney, however, felt that the insights of this confidant of both parties were enlightening and important for assessing the child's interests, and he called the social worker as a witness for the child. Attorney E at 9-11.

certain as to the proper outcome of the litigation,²⁸⁵ when he thought that one of the parties was not seriously pursuing custody,²⁸⁶ and when he perceived no problem of the child or the parents for which a psychiatrist or psychologist would be of crucial assistance.²⁸⁷ If an expert evaluation is necessary, the child's attorney should emphasize that information rather than conclusions should be conveyed to the court.²⁸⁸

By using friends, relatives, and professionals who have continuing contact with the family, the child's attorney encourages the provision of help and counseling to the divorcing family rather than merely adding to the number of evaluative reports. Families in custody litigation may have too many professionals judging them and too little empathy and assistance.²⁸⁹

C. *The Judge*

Some observers maintain that except in unusual instances, the child's attorney is less qualified than the judge to make the custody decision.²⁹⁰ Others are uneasy about intrusion by the attorney for the child on the judge's responsibility to protect the interests of children before the court.²⁹¹

285. Attorney G at 20.

286. Attorney A at 5.

287. Attorney L at 12; Attorney O at 49. Attorney E opposed a psychiatric evaluation because a social worker was already providing continuous therapy for the family. Attorney E at 14, 16.

288. A child psychiatrist has advised his colleagues that their best position is to be selected and consulted by the child's counsel. Jenkins, *supra* note 180, at 385. Information and description would be more useful to the attorney and to the court than clinical conclusions. Cf. *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967) (Bazelon, C.J.) (expert witness for insanity defense should receive careful instructions from court that emphasize need for descriptive information rather than conclusions).

289. *E.g.*, Attorney R at 31:

Here's a child who had been interviewed by [a psychiatrist] . . . ; he had been interviewed by this Ph.D. . . . He had been tested by this one and tested by that one, I think I was just one more person in a chain. I'm not sure he really knew what any of those people were doing either.

Accord, Attorney K at 56 (has opposed psychiatric evaluations as unnecessary and burdensome); Attorney P at 17 (opposed additional study by psychiatrist following two previous evaluations because he feared that child might begin to believe he was sick). But attorneys also recognized that psychological counseling rather than evaluation could be very helpful to a child or family in need. *E.g.*, Attorney H at 8. Attorney O represented a child who was "all pent up inside, dying to express his . . . interests." Supported by the Family Relations officer, he arranged with the parents for counseling for the child. Attorney O at 48. See Letter from Judith S. Wallerstein to Kim Landsman, *supra* note 169 ("[I]t would be very helpful to have somebody represent the interests of the child in order to 'reduce repetitive investigation by psychological professionals and make such professional interventions of better quality for the child.'")

290. *E.g.*, Dembitz, *supra* note 10, at 1313.

291. See pp. 1134-35 & notes 36-39 *supra*.

In practice, attorneys for the child perceived that they could wield a powerful influence in court, but admitted that they did not control the custody determination. The lawyers almost uniformly expressed the view that in cases resulting in a contested hearing the judge relied heavily on their investigations and recommendations.²⁹² The extent of the judge's dependence on them was a source of pride to some attorneys;²⁹³ others were annoyed and troubled by the sense that some judges shifted the responsibility for the ultimate decision to the child's lawyer.²⁹⁴ Yet some attorneys recalled instances when their views had been rejected or even ignored by judges.²⁹⁵ Others reported that the judge helped to shape the role taken by the child's attorney by asking him to gather facts on a specific issue,²⁹⁶ directing him to examine witnesses during the trial,²⁹⁷ and requesting that he mediate between parties out of court.²⁹⁸ A number of attorneys said that the judge would determine whether the child's lawyer should submit a recommendation to supplement his factual report.²⁹⁹ Attorneys noted that they might facilitate an interview in chambers between the child and the judge.³⁰⁰ Generally, the attorneys explained that they had to com-

292. Attorney *A* at 7; Attorney *B* at 25; Attorney *D* at 27; Attorney *H* at 6; Attorney *J* at 30; Attorney *K* at 13; Attorney *M* at 11; Attorney *N* at 14; Attorney *O* at 12; Attorney *Q* at 27-28; Attorney *R* at 28.

Attorney *I* remarked, "I don't wait for the court to rely on me. I just say, 'look, this is ridiculous, and this is what I think we should do.' And I just sound like the voice of rationality in this otherwise crazy situation, because [the parents' attorneys'] positions are so extreme." Attorney *I* at 28.

293. *E.g.*, Attorney *K* at 27-28; Attorney *Q* at 27, 38.

294. Attorney *H* at 8 ("Some judges cop out and rely on the attorney for the child to come up with the answer, especially if that attorney is known to be good. But it's especially dangerous if he's just known to be good but isn't really."); Attorney *B* at 25 ("The judge was looking to me, I think, more than he should have to do his job. . . . [Many judges] view the child's attorney as the judge. I'm not the judge and I feel fully incompetent and unqualified to make determinations of what's in the best interest of the child.")

295. Attorney *B* at 26, 34, 42; Attorney *D* at 32; Attorney *E* at 28, 30; Attorney *F* at 15, 16; Attorney *J* at 2-3, 17, 20; Attorney *Q* at 26. *See* Attorney *B* at 25 ("Some judges . . . view the child's attorney almost as a child himself That's especially true of the referees [who are] retired judges."); Attorney *H* at 8 ("A lot of attorneys don't like to be 'kiddie counsel,' because they're treated that way by the judge. . . . But it doesn't have to be that way.")

296. Attorney *I* at 41; Attorney *Q* at 22.

297. Attorney *R* at 19; *cf.* Attorney *O* at 7 (judge directed child's attorney to play active role in court in order to foreclose appeals).

298. Attorney *E* at 25.

299. Attorney *F* at 34; Attorney *I* at 42; Attorney *J* at 19; Attorney *K* at 29.

300. Judges Berdon and Missal expressed reservations about their abilities to communicate effectively with a child brought into their chambers for an interview. When a child's attorney who knew the children well was present, the judges found the awkwardness of the situation and the anxieties of the child sufficiently reduced to make the sessions fruitful. Judge Berdon at 9-10; Judge Missal at 6-7.

pete for the judge's attention as would any other attorney.³⁰¹

The lawyers described two problems they encountered with the court. Because the judge often waited until one party submitted a supporting motion before appointing an attorney for the child, the child's attorney often was introduced too late to work out *pendente lite* disputes or to prevent escalation of the conflict.³⁰² Most frustrating to practitioners was their inability at times to control the scheduling of proceedings because of the workload of the court.³⁰³

By their reported conduct, the attorneys did not impair but instead assisted judicial protection of children. The attorneys increased the judge's knowledge about the child and his parents, enhanced communication between judge and child when an interview in chambers was requested, and attempted to control the temper and speed of the process. Judicial appointment of the attorney for the child as soon as the parties indicated their intentions to fight over custody enhanced the attorney's effectiveness;³⁰⁴ supported by consultation with the judge, the attorney could help restrict the areas of contention and work for a settlement out of court.

Conclusion

Demands for reform of divorce custody and visitation disputes arose with the recognition that the needs of children were being neglected. Since the problem is legal to the extent that it must ultimately be heard by the court, the child needs a lawyer to manage the process of litigation.

In practice, the interviewed attorneys for the child did much more to serve their clients. They acted as prehearing factfinders, courtroom advocates, mediators, arbitrators, protectors, and legal—and sometimes emotional—counselors. Fears that lawyers are incompetent or unqualified to serve this range of demands proved unfounded in practice.

301. *E.g.*, Attorney *F* at 21 (“[Y]ou have to try to get [the judge’s] ear and pump some information into it, and make yourself important but not overbearing.”); Attorney *I* at 28 (“I don’t wait for the court to rely on me. I just say, ‘look this is ridiculous, and this is what I think we should do’”)

302. *See* p. 1178 *supra*.

303. Attorney *E* at 5, 6; Attorney *G* at 10; Attorney *H* at 8; Attorney *J* at 20, 24; Attorney *M* at 28; Attorney *O* at 18, 20.

304. *See de Montigny v. de Montigny*, 70 Wis. 2d 131, 137-38, 233 N.W.2d 463, 467 (1975) (where petition to modify custody not “on its face frivolous,” it is abuse of trial court’s discretion “to fail sua sponte to appoint a guardian *ad litem* for the minor children”); *Pfeifer v. Pfeifer*, 62 Wis. 2d 417, 431, 215 N.W.2d 419, 426 (1974) (Hansen, J.) (appointment of guardian *ad litem* at midtrial, when special concern for children’s welfare became apparent, “hardly serves the full purpose of providing legal representation to protect the rights and welfare of the minor children in divorce litigation”).

Lawyers in our society have performed these functions in representing adults in divorce and in other legal matters. If there is anything unique about the role of attorney for the child, it is that the lawyer may be called on, in one litigation and with one client, to perform any or all of these functions.

Because the child's counsel is a new type of legal representative, some commentators have expressed uncertainty and fear about what the lawyer for the child would do; some lawyers expressed confusion in describing what they did. For the most part, the interviewed attorneys responded creatively and flexibly to the demands of the situation, though they felt burdened by sharing some of the judge's agonizing over the custody decision.³⁰⁵ Some attorneys expressed the need for more guidance, but virtually all emphasized the complex and shifting nature of each divorce custody dispute. Moreover, no set of rules adequately describes what attorneys did, nor would any be helpful to the practitioner. Instead, principles to guide attorneys can be derived from a composite picture of practitioner's experiences, from psychological studies, and from legal ethics:

1) The attorney should invite the child to participate and should provide explanation to the extent of the child's desire and capacity. He should also respect a child's desire not to participate. Although meeting with a preschool child is rarely worthwhile, the perceptiveness and ability to comprehend of even young school-aged children should not be underestimated.

2) The attorney should be wary of opposing the child's preference; there may be good reasons for the preference that are not readily observable.

3) The attorney should act to enhance existing parent-child rela-

305. Attorneys were bothered by the responsibility of making such an important decision for the child. Attorney *A* at 12; Attorney *B* at 2, 9, 26; Attorney *C* at 2, 6; Attorney *D* at 15; Attorney *G* at 33; Attorney *J* at 27; Attorney *K* at 9; Attorney *M* at 11, 19; Attorney *N* at 14-15; Attorney *P* at 27. Yet they also found it a positive and satisfying experience. See Attorney *A* at 1 (enjoyable, interesting); Attorney *D* at 2, 52, 54 (interesting, educational, gratifying, opportunity for variety); Attorney *F* at 1, 31 (opportunity to wear "white hat"); Attorney *G* at 20 (challenging); Attorney *H* at 1, 9 (fun, interesting, satisfying); Attorney *I* at 39, 40 (fun, educational); Attorney *K* at 59 (enjoyable representing kids); Attorney *L* at 33 (more enjoyable and interesting than representing parents); Attorney *N* at 29 (chance to wear "shining armor"); Attorney *P* at 27 (opportunity to help entire family); Attorney *R* at 33 (extremely interesting). Many attorneys may have enjoyed representing children in divorce custody cases because it is not a lucrative specialty to which any lawyer could devote full time. Therapists who devoted their full time to divorce counseling felt "burned out" and "drained." Detachment might avoid this problem, but would preclude the empathetic response thought crucial to effective assistance. *Divorce Counseling, supra* note 23, at 19.

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tionships; this requires a duty to the parents greater than avoiding the infliction of needless harm.

4) The attorney should take advantage of his unique opportunity to act as mediator and arbitrator in a manner consistent with the child's interests.

5) The attorney should exercise his own independent judgment and not simply rely on investigative agencies or experts.

6) Except with a preschool or disturbed child, professional evaluation of the child should not be sought where the child and his confidants can guide the attorney. This avoids needless introduction of strangers.

7) Where a psychological evaluation is necessary, the attorney should choose the expert and carefully instruct him to provide information, not just conclusions. Professionals, moreover, should be used to help the child and his family, not merely to evaluate them.

8) If the attorney cannot settle the case and if delay will not serve his own trial strategy, he should press to have the case heard quickly and should play an active role in court.

The earlier the attorney is appointed in a contested custody case, the more effectively he can put these principles into practice. If the attorney is to expedite and orchestrate the litigation, his appointment should be made as soon as a real dispute is apparent. In that way he can do more for the child than agonize.

APPENDIX A: INFORMATION ASCERTAINED FROM ATTORNEYS

Appendix A: Information to be Ascertained from Attorneys

A. *Background on the Attorney*

1. Picture of his general practice.
2. Why did he get involved in this type of representation?

B. *Background on Each Client and Case*

1. Age and description of client(s) and parents.
2. What was the specific issue to be adjudicated?
3. At what stage in the process was the attorney for the child appointed?
 - a. How long had litigation on the matter proceeded?
 - b. Was the Family Relations Division already involved and, if so, what had they done?

- c. What other professionals had already been involved or consulted on the matter?
- d. How had the attorney for the child been appointed?

C. *Out-of-Court Activities*

1. Ordering of contacts and gathering of information (*e.g.*, Family Relations Division, parents, other attorneys, client).
2. How was contact with the client arranged?
3. How many times did the attorney talk to his client?
4. Was client contact by phone, in the office, the client's home, and/or elsewhere?
5. How much total time was spent with the client?
6. Did the client have a preference as to outcome? If so, how was it ascertained (*e.g.*, volunteered by client, by direct or indirect questions, intuited)?
7. How well did the client seem to understand the situation and his lawyer's role in it? Did the attorney attempt to explain this?
8. Did the attorney and client disagree about the correctness of the child's preference and assessment of his interests? If so, how was the disagreement resolved?
9. What was the attorney's recommendation to the court and how was it communicated?
10. What sort of contact or involvement was there with the parents and with other professionals involved in the case?
11. Were efforts made to settle out of court?

D. *In-Court Representation*

1. Did the attorney file any motions on behalf of the child or himself?
2. Did a judge or a referee hear the case and how was it scheduled for a hearing?
3. How was the attorney's recommendation communicated?
4. Did the attorney call any witnesses or cross-examine those of the parents?
5. Did the judge talk to the child? If so, under what circumstances (*i.e.*, who requested the interview, where did it occur, who else was present, was a record made)?
6. What was the final disposition?

E. *Post-Disposition Tasks*

1. Who was billed for the attorney's services and how much was billed?
2. Was there any contact with the client or the parents after the adjudication?
3. How did the client learn of the final adjudication?

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F. *General Perceptions and Impressions*

1. How did the parties view the attorney for the child?
2. What impact on the parents did the attorney think he had?
3. What impact on the other attorneys did the attorney think he had?
4. How would the attorney evaluate the behavior and competence of other professionals involved in the case, including the judge?
5. How much importance does the attorney think he had in the final disposition in comparison with the impact of other attorneys, various expert witnesses, the Family Relations Division, and the judge's own predispositions?
6. How would the attorney have handled the case differently with the benefit of hindsight?
7. What impact does the attorney think he had on the client?
8. Will the attorney handle this sort of case and representation in the future?
9. How does this type of representation differ from representing parents in custody disputes and from representing children in other types of legal problems?

APPENDIX B: QUESTIONS ASKED OF JUDGES

1. What are your criteria for deciding whether or not to appoint an attorney for the child?
2. In what percentage of cases involving contested custody or visitation issues in disputes arising from divorce have you appointed an attorney for the child?
3. Of what benefit do you hope this attorney will be (a) to you in your adjudication, (b) to the child, and (c) to the parents?
4. How well have attorneys you have appointed or observed lived up to your expectations?
5. Have you or would you accept an attorney for the child retained by one or both of the parents?
6. Would you accept an attorney retained by the child on his own initiative?
7. Under what circumstances have you or would you remove an attorney for the child who had been appointed by the court?
8. Assess the influence on your decisions of the recommendations of children's attorneys compared with other information you receive.
9. Have you or would you allow the child's attorney to make motions on the child's behalf?

10. Does the presence of an attorney for the child change the process or your method of proceeding in any way?
11. How active in the courtroom and in chambers have attorneys for children been?
12. How important is what goes on in court compared with what goes on in chambers?
13. How often and under what circumstances do you interview the child? Who else is present at these interviews and is any record made?
14. How would you assess your ability to communicate with children in such interviews, and how valuable to you have the interviews been?