



University of Baltimore Law Review

Volume 26
Issue 2 Spring 1997

Article 3

1996

The Use of Appointed Counsel for Children in Maryland: A Need for Standards and Guidance

William T. Kerr

University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubl>

 Part of the [Law Commons](#)

Recommended Citation

Kerr, William T. (1996) "The Use of Appointed Counsel for Children in Maryland: A Need for Standards and Guidance," *University of Baltimore Law Review*: Vol. 26: Iss. 2, Article 3.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol26/iss2/3>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

**THE USE OF APPOINTED COUNSEL FOR CHILDREN IN
MARYLAND: A NEED FOR STANDARDS AND GUIDANCE**

William T. Kerr†

I. INTRODUCTION.....	518
II. MARYLAND LAW CONCERNING APPOINTED COUNSEL FOR CHILDREN.....	519
A. <i>The Power to Appoint</i>	519
B. <i>The Role of Appointed Counsel</i>	522
C. <i>The Practical Dilemma</i>	524
III. SURVEY OF MARYLAND CIRCUIT COURT JUDGES.....	525
IV. DEFINING THE ROLE.....	525
A. <i>Task Related Definitions</i>	526
1. Waiver.....	526
2. Fact Investigation.....	527
B. <i>Advocate</i>	528
V. ADVOCACY—DEFINING THE CHILD’S BEST IN- TERESTS.....	531
A. <i>Theoretical Guidelines</i>	531
1. The Goldstein, Freud, and Solnit View ...	532
a. <i>Summary</i>	532
b. <i>Controversies</i>	533
2. Recent Research Findings.....	534
3. Benedek and Benedek Theory.....	535
B. <i>The Client’s Preferences</i>	537
VI. PRACTICAL STRATEGIES FOR DECISION-MAKING	542
A. <i>The Search for the Least Destructive Choice</i>	542
B. <i>Some Guiding Principles</i>	545
1. The Appointed Counsel Should Actively Participate with Attorneys for the Parents	545
2. The Appointed Counsel Should Take Ad- vantage of his or her Unique Position to Affect the Way Custody Litigation is Con- ducted.....	545

†University of Michigan Law School, J.D. Partner, Bregel, Kerr, Wallace & Dantes.

VII. CIRCUMSTANCES INDICATING APPOINTED COUNSEL IS APPROPRIATE.....	546
VIII. RECOMMENDATIONS.....	547
A. <i>Early Warning System</i>	548
B. <i>Implementation of Standards of Appointed Counsel</i>	548
C. <i>Certification for Counsel</i>	548
D. <i>Adequate Compensation for Counsel</i>	549
APPENDIX A. SURVEY OF MARYLAND CIRCUIT COURT JUDGES.....	551
APPENDIX B. ABRIDGED SURVEY RESPONSES AND TABLES.....	557

I. INTRODUCTION

As experienced practitioners of the art of custody litigation are aware, the appointment of counsel for children in contested custody cases has an inconsistent and unsteady history. At best, the appointed counsel helped guide courts through the Scylla and Charybdis of parental advocacy with less pain for the innocent victims of that difficult trip—the children. At worst, appointment of counsel for children has complicated the problem it was intended to solve.

Attitudes towards appointment of counsel and the role the appointed counsel plays in custody cases are varied. Misunderstandings abound, and lawyers and judges define the role in widely varying ways. A 1993 report by the Counsel for Kids Subcommittee of the Maryland State Bar Association Family Law Section noted that courts and attorneys alike face a “lack of clarity of the purpose for the appointment and the role of the attorney,” when representing a child-client.¹ Further illustrating this lack of clarity are the results of a recent survey conducted by the Author of this Article, in which Maryland state circuit court judges offered a wide range of opinions as to what they believed to be the proper role of appointed counsel.²

1. See Counsel for Kids Subcommittee of the Maryland State Bar Association Family Law Section, *Court Appointed Lawyers for Children: Distinguishing the Roles and Responsibilities* (1993) [hereinafter *Maryland Bar Report*] (a report for the bench and bar on file at the Maryland State Bar Association).

2. As background for this analysis, the results of a survey of Maryland state circuit court judges on the use, effectiveness, and future of the role of appointed counsel for children are included. This empirical study is used to ascertain current attitudes regarding the use of appointed counsel and as a backdrop for comments about the potential role of appointed counsel in Maryland cus-

Few lawyers have the skills necessary to fulfill the role of appointed counsel to children without outside assistance. This is because neither legal education nor continuing legal education programs currently equip lawyers with the skills or insight essential to make informed decisions in custody cases.

Confusion over the role of appointed counsel must be eliminated if the legitimacy of that role is ever to be tested. The relative success of the role of court-appointed counsel can only be measured by the ability to achieve its intended purpose. Until the purpose of appointed counsel for children³ is commonly understood, a discussion of appointed counsel's "success" or "failure" is unproductive, if not misleading. For this reason, this Article advocates for the establishment of a clear definition of the role of appointed counsel for children.

This Article sets forth a theoretical framework within which appointed counsel can make the difficult tactical decisions which must be confronted in each custody case. An analysis of this topic is important because appointed counsel is ideally situated to force the system to be sensitive to the long-term mental health of the child, both during and after a custody proceeding.

II. MARYLAND LAW CONCERNING APPOINTED COUNSEL FOR CHILDREN

A. *The Power to Appoint*

In *Nagle v. Hooks*,⁴ decided in 1983, the Court of Appeals of Maryland made the appointment of counsel for a child mandatory if there was a disputed custody issue and a question was raised as to whether a child's statutory psychiatrist-patient privilege should be waived.⁵ As defined in *Nagle*, the role of appointed counsel was confined to making this single decision on behalf of a child: whether

tody cases. Maryland state circuit court judges offered the following definitions of appointed counsel: (1) a neutral fact finder; (2) an investigator who will submit a report to the court either with or without counsel's opinion; (3) a representative of the court; and (4) an advocate for the child. For a detailed analysis of the results of this survey, see *infra* Appendices A and B.

3. Consistent with the legislature's intent that disabled adult children be placed on an equal footing with minor children, allowances for appointed counsel for minors are also applicable to disabled adult children. See *Stern v. Stern*, 58 Md. App. 280, 298, 473 A.2d 56, 65 (1984). For the purposes of this Article, however, "child" will be used to mean "minor."

4. 296 Md. 123, 460 A.2d 49 (1983).

5. See *id.* at 129, 460 A.2d at 51-52.

the confidentiality of the child's communications with a treating psychiatrist should be waived so as to permit testimony by the mental health professional.⁶ The court held that when a minor is too young to personally exercise a privilege of non-disclosure, the court is obligated to appoint a guardian to act in the best interests of the child.⁷

Moreover, the court held that the parents may not, jointly or severally, waive or refuse to waive the privilege on behalf of the child.⁸ Basing its ruling on "the polestar rule of 'the best interests of the child,'" ⁹ the court stated that a "neutral" third party was necessary to eliminate the "very real possibility" that one or both parents might use the waiver power for self-serving ends.¹⁰ Subsequent courts have refused to extend the holding of this case and, thus, the purpose of a "*Nagle v. Hooks* appointment" remains limited to the decision to waive the child's psychiatrist-patient privilege.¹¹

Except when judicially mandated by a need to address a child's testimonial privilege of confidentiality, the power to appoint counsel to represent children in contested custody proceedings is provided by section 1-202 of the Family Law Article of the Annotated Code of Maryland. Section 1-202 states in pertinent part: "In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court *may*: (1) appoint to represent the minor child counsel who may not represent any party to the action; and (2) impose against either or both parents counsel fees."¹² Subti-

6. See *id.*; MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995) (creating a statutory psychiatrist-patient privilege). Waiver of the privilege may not be necessary in cases in which a court-ordered investigation by the court's medical service leads to a written report subsequently admitted into evidence. See *Newkirk v. Newkirk*, 73 Md. App. 588, 596, 535 A.2d 947, 951 (1988).

7. See *Nagle*, 296 Md. at 128, 460 A.2d at 51 ("[T]he court must appoint a guardian to act, guided by what is in the best interests of the child."). For a discussion of the difficulties in determining the child's best interests, see *infra* Part V.

8. See *Nagle*, 296 Md. at 128, 460 A.2d at 52. The court based its holding primarily on section 9-109(c) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, which states that "if a patient is incompetent to assert or waive this privilege, a guardian shall be appointed and shall act for the patient." *Id.* at 127, 460 A.2d at 51 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-109(c) (1995)). The court found this statement to mean that appointment in such cases is mandatory. See *id.* at 127-28, 460 A.2d at 51.

9. See *id.* at 128, 460 A.2d at 51.

10. See *id.*

11. See, e.g., *Leary v. Leary*, 97 Md. App. 26, 46, 627 A.2d 30, 39-40 (1993).

12. MD. CODE ANN., FAM. LAW § 1-202 (1991) (emphasis added). Section 1-202 does

tle 8 (Juvenile Causes) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland provides additional guidance:

[I]n addition to any requirements relating to the appointment of counsel for children, at any time during the pendency of any action where it appears to the court that the protection of the rights of a child requires independent representation, the court *may*, upon its own motion, or the motion of any party to the action, appoint an attorney to represent the interest of the child in that particular action. Such actions include but are not limited to those involving a child in need of assistance, child in need of supervision, delinquent child, or mentally handicapped child.¹³

As the language of both statutes makes clear, the appointment of counsel in a custody or custody-related proceeding is discretionary. It may occur either upon the court's own volition or by request of a party.¹⁴

Only one Maryland case has addressed the circumstances under which a failure to appoint counsel for a child might constitute reversible error. In *Levitt v. Levitt*,¹⁵ the Court of Special Appeals of Maryland remanded a custody modification proceeding with a direction that counsel be appointed for the minor child pursuant to section 1-202 of the Family Law Article of the Annotated Code of Maryland.¹⁶ The court reasoned that if counsel had been appointed,

not explicitly afford the trial court, in the absence of contested issues, the power to appoint permanent counsel for a child unless the parties consent. *See Van Schaik v. Van Schaik*, 90 Md. App. 725, 734, 603 A.2d 908, 912 (1992). Furthermore, this section does not authorize trial courts during divorce proceedings to appoint counsel to represent the interests of children with respect to other issues such as replevin, conversion, or the return of property. *See id.*

13. MD. CODE ANN., CTS. & JUD. PROC. § 3-834(a)(1) (Supp. 1996) (emphasis added).

14. Only section 3-834 specifically allows counsel to be appointed upon motion by a party to the action. *See id.*

15. 79 Md. App. 394, 556 A.2d 1162 (1989).

16. *See id.* at 404, 556 A.2d at 1166. A master of the Circuit Court of Maryland for Montgomery County recommended that the custody be changed from joint custody to sole custody with the father. *See id.* at 396, 556 A.2d at 1163. The chancellor disagreed and continued the joint custody. *See id.* at 397, 556 A.2d at 1163. The Court of Special Appeals of Maryland vacated the judgment and remanded for further proceedings. *See id.* at 405, 556 A.2d at 1167. For further discussion of the role of master and chancellor, see *Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991).

several deficiencies in the proceedings would have been cured.¹⁷ The deficiencies the court perceived were: (1) neither the Master, nor the Chancellor, spoke to the five-year-old boy; (2) no professional evaluation of the child had been done; (3) no one sought to admit testimony of a family counselor who had seen both the parents and the minor child; and (4) no one suggested that a home or school visit be conducted by an unbiased professional.¹⁸ In *Levitt*, a contentious custody battle provided "a new arena for the parents to continue their on-going controversies."¹⁹ The court emphasized that in evaluating the child's best interests, the court should be "most concerned" with: (1) the effect on the child of the protracted, antagonistic custody hearings; (2) the lack of input from the child or an objective witness during the proceedings; and (3) the lack of any advocacy on behalf of the child.²⁰ The *Levitt* court remanded the case directing the trial court to appoint an attorney for the child in order to give the child a voice in the proceeding and to consider a professional evaluation of the child.²¹

As precedent, *Levitt* may have no value beyond its unique facts. However, the court of special appeals implied that the trial court's failure to appoint counsel can taint the results of the court's decision under certain circumstances.

B. *The Role of Appointed Counsel*

Counsel appointed to represent a child faces an immediate dilemma: the appointed counsel must decide what role to assume in the pending custody proceeding. Absent specific direction from the court making the appointment, the appointed counsel's only source for guidance is section 1-202 of the Family Law Article of the Annotated Code of Maryland.²² This section calls upon appointed counsel simply to represent a child-client.²³ In the few cases reaching the appellate level, Maryland's courts have not attempted to define the

17. See *Levitt*, 79 Md. App. at 403, 556 A.2d at 1166.

18. See *id.*

19. *Id.* at 396, 556 A.2d at 1163.

20. See *id.* at 404-05, 556 A.2d at 1167. "Neither the Master nor the Chancellor spoke to Chad. While not essential in every case, perceptive conversation with him should have shed some light on how Chad felt about his parents and grandparents." *Id.* at 403, 556 A.2d at 1166.

21. See *id.* at 405, 556 A.2d at 1167.

22. See MD. CODE ANN., FAM. LAW § 1-202 (1991).

23. See *id.* § 1-202(1).

role of court-appointed counsel.²⁴ The courts instead have evaluated the appropriateness of the appointed counsel's decision on which role to assume in situations where the trial court provided no specific guidance or parameters.²⁵

In *John O. v. Jane O.*,²⁶ the Court of Special Appeals of Maryland considered whether appointed counsel properly represented a child-client where the trial court did not define the appointed counsel's role at the time of appointment.²⁷ At trial, the appointed counsel took a position contrary to the stated preference of the child based upon counsel's own independent assessment of the evidence.²⁸ The appointed counsel sought to resolve the conflict by informing the trial court of the child's own preferences.²⁹ On appeal, the court of special appeals chose not to define what the appointed counsel should have done.³⁰ Instead, the court held that, under the facts of this case, counsel's chosen form of representation was not inappropriate.³¹

The Court of Special Appeals of Maryland later sanctioned an even narrower concept of "representation" in *Leary v. Leary*.³² In *Leary*, appointed counsel presented the children's desires without expressing counsel's own opinion on what was in the children's best interests.³³ The appointed counsel did not comment on whether the children's statements of preference were sincerely motivated or mature.³⁴ The appellate court characterized counsel's choice of role as "not . . . strictly . . . an advocate of their position, but . . . a conveyor of their preferences."³⁵ The *Leary* court explained that "the circumstances forced [appointed counsel] to take the middle ground between advocacy and fact finding."³⁶

24. See, e.g., *Levitt*, 79 Md. App. at 404, 556 A.2d at 1166 (stating only that the "attorney should proceed expeditiously in the manner counsel deems to be in [the child's] best interest").

25. See *infra* notes 26-39 and accompanying text.

26. 90 Md. App. 406, 601 A.2d 149 (1992).

27. See *id.* at 435, 601 A.2d at 163.

28. See *id.* at 435-36, 601 A.2d at 163-64.

29. See *id.*

30. See *id.*

31. See *id.*

32. 97 Md. App. 26, 627 A.2d 30 (1993).

33. See *id.* at 48-49, 627 A.2d at 40-41.

34. See *id.* at 46-49, 627 A.2d at 39-41.

35. *Id.* at 49, 627 A.2d at 41.

36. *Id.*

In both *John O.* and *Leary*, appointed counsel decided that to represent the child meant interviewing the child to ascertain the child's point of view, and independently deciding whether the child's stated preferences were consistent with the child's best interests.³⁷ The appointed counsel in *Leary* presented her client's preferences to the court without altering them to include a contrary point of view.³⁸ The appointed counsel in *John O.*, on the other hand, did not trust the child's motives and, given his perception of his role, decided to present the court with his personal point of view that was contrary to the child's stated preferences.³⁹ The court of special appeals found neither approach to be inappropriate.⁴⁰

C. *The Practical Dilemma*

Unless there is a strong showing that the role selected by the appointed counsel was detrimental to the child's best interests, it appears that the appellate courts in Maryland will not inquire further. As intimated in cases such as *Levitt* and *John O.*,⁴¹ the Maryland courts have commented quite favorably on the roles played by appointed counsel in Maryland custody cases.

At present, a lawyer appointed to represent a child in a custody proceeding is forced to define his or her own role. The absence of standards, guidance, or direction leaves the appointed counsel in an extremely sensitive and vulnerable position. The passions of competing litigants leave little margin or tolerance for error. As long as the participants in the process are free to define the legitimacy or appropriateness of the appointed counsel's role, counsel's actions on behalf of children in custody disputes are vulnerable to criticism and attack by disgruntled or dissatisfied parents or children, in concert with lawyers who are happy to extend custody litigation into the post-trial arena. Motions to discharge or substitute appointed counsel, appeals, and even claims of malpractice, will be the ever-increasing by-products of a system which leaves appointed counsel to make decisions without relying upon any authoritative guidance. These threats are likely to deter the appointed counsel's enthusiasm as well as the effectiveness of his or her advocacy. Such threats also add another layer of contentiousness to custody proceedings, al-

37. See *id.*; *John O.*, 90 Md. App. at 436, 601 A.2d at 163-64; see also *supra* notes 26-36 and accompanying text.

38. See *Leary*, 97 Md. App. at 49, 627 A.2d at 41.

39. See *John O.*, 90 Md. App. at 435-36, 601 A.2d at 163-64.

40. See *supra* notes 26-36 and accompanying text.

41. See *supra* notes 15-31 and accompanying text.

ready overburdened with the conflicts triggered by the contesting parents. In this context, a discussion of the appointed counsel's "role" is not merely an academic exercise. It has practical implications which affect the potential contributions the appointed counsel can make to the system.

III. SURVEY OF MARYLAND CIRCUIT COURT JUDGES

Appointed counsels are currently deployed in a variety of roles in Maryland custody cases. In an effort to gauge judicial perceptions regarding the role of appointed counsel in custody cases,⁴² a survey was conducted of Maryland circuit court judges.⁴³

Although most judges indicated that appointed counsel should act as a "representative" of the child, a significant number of judges consider the roles of "a neutral fact-finder" and "a representative of the court" also to be appropriate. Further, many judges stated that they define the role of appointed counsel differently from case to case. The type of "representation" which judges believe appointed counsel should offer likewise varies. Moreover, judges' expectations regarding the independence of appointed counsel from the court, or from the parents, varies according to the nature of the case.

Despite differences of opinions as to which role the appointed counsel should assume, almost all judges surveyed believe that the appointed counsel should routinely seek outside expert evaluations of the child. Many judges also responded that counsel should continue to have contact with the child for a period of time after the final settlement. This indicates that many judges see the role of appointed counsel for children as fundamentally different in nature from that of other legal representatives. Indeed, judges consistently acknowledged that children have different needs and capacities than adult clients. Appointed counsel must recognize these differences and adapt to them in every case.

IV. DEFINING THE ROLE

The court's authority to appoint a representative of the child's interest stems from the court's inherent power to serve as *parens patriae*⁴⁴ to minor children in custody proceedings. If the appointing court is not explicit about the nature and extent of the responsibili-

42. See *supra* note 2 and accompanying text.

43. For an abridged account of this survey see *infra* Appendices A and B.

44. Traditionally, *parens patriae* refers "to [the] role of [the] state as sovereign and guardian of persons under legal disability, such as juveniles." See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

ties it intends a child's advocate to undertake, the statutory authorizations for the appointment of counsel may restrict, rather than broaden, the court's inherent powers.

The Counsel for Kids Subcommittee of the Family Law Section of the Maryland State Bar Association (Counsel for Kids Subcommittee) has identified the roles "most widely required" in custody cases as: (1) *Nagle v. Hooks* waiver; (2) investigator; and (3) guardian *ad litem*.⁴⁵ The single task contemplated for an appointee under a *Nagle v. Hooks* appointment is defined by case law.⁴⁶ The role of an investigator is created by the court's exercise of its inherent power.⁴⁷ Therefore, the extent of the investigator's role needs to be defined by the appointing court.⁴⁸ Counsel appointed to "represent" a child under section 1-202 of the Family Law Article of the Annotated Code of Maryland⁴⁹ must undertake the tasks which the term represent connotes, unless a more task-specific directive is set out in the order of appointment.⁵⁰ On its face, the directive to represent a child implies an involvement which is more extensive than the other roles. If a court deems it appropriate for appointed counsel to undertake a narrower role than the term represent connotes, the appellate cases indicate that it is incumbent upon the appointing court to so indicate in its initial order of appointment.⁵¹ An examination of each of these roles follows.

A. Task Related Definitions

1. Waiver

A counsel appointed to determine whether a child's psychiatrist-patient privilege should be waived is, by definition, confined to that narrow responsibility. This form of appointment requires only that counsel inform the court of a single decision.⁵² It does not, on its face, require the appointed counsel to otherwise participate in the custody proceeding. Thus, the appointed counsel's opportunity or ability to influence the outcome of the legal process is limited to the impact of this singular decision.

45. See *Maryland Bar Report*, *supra* note 1.

46. See *supra* Part III.

47. See *Maryland Bar Report*, *supra* note 1, at 3.

48. *Cf. id.*

49. MD. CODE ANN., FAM. LAW § 1-202 (1991).

50. See *Maryland Bar Report*, *supra* note 1, at 2.

51. See, e.g., *Nagle v. Hooks*, 296 Md. 123, 460 A.2d 49 (1983).

52. See *supra* Part II.A.

On closer inspection, however, the *Nagle v. Hooks* role is more complex than it first appears. Whether it is appropriate to waive the privilege and permit a child's therapist to testify in the proceedings depends upon what goals the appointed counsel is trying to accomplish. It is often difficult to determine the child's best interests. For example, if the child has been in therapy, and the disclosure of the therapist's thoughts and opinions in a court proceeding will jeopardize the future therapeutic relationship, should counsel refuse to waive the child's psychotherapist-patient privilege? Counsel must balance the negative impact of possible loss of the future therapeutic relationship against the possible negative impact of excluding information which may be relevant, or perhaps even crucial to the custody proceedings. If the appointed counsel in the *Nagle v. Hooks* role must take the child's best interests into account, the appointed counsel must determine where those interests lie. That is, counsel must undertake a complete factual inquiry to make an intelligent and informed decision.

The *Nagle v. Hooks* role, however, does not presently contemplate any disclosure of the appointed counsel's thought processes to the court. There appears to be no judicial expectation that the appointed counsel will provide the court with a factual justification for a waiver decision rooted in the child's best interests. The only expectation is that a decision will be made and revealed to the court and to all of the participants in the custody dispute.⁵³

2. Fact Investigation

Courts sometimes appoint counsel as an independent investigator.⁵⁴ Typically, courts anticipate that counsel will conduct a factual investigation, including an inquiry into the child's preference. Such investigation occurs if the child's age is appropriate and the topic is relevant. Counsel must then submit a report to the court.⁵⁵ The court has the power to appoint someone to fulfill this limited role,

53. In fact, the *Nagle* court may have done significant harm to the role of appointed counsel by defining appointed counsel as "neutral." See *Nagle*, 296 Md. at 128, 460 A.2d at 51. A more apt definition would have been "not aligned with either named party," or "representative of the child's interests." The *Nagle* court intended for counsel to: (1) independently determine the child's best interests in the waiver of privilege issue; and (2) use these best interests as the basis for decision of the waiver issue. See *id.* at 127-28, 460 A.2d at 51-52.

54. See *Maryland Bar Report*, *supra* note 1, at 3.

55. See *id.*

and the role is often assumed by non-lawyers.⁵⁶

Significantly, the obligation to report facts to the court enhances the opportunity to influence the outcome of the legal process. Counsel appointed for this purpose does not represent the child.⁵⁷ The appointed counsel's principal allegiance is to the court, whose need for neutral information generated and defined the appointment in the first place.⁵⁸ Counsel appointed for this purpose is neutral, in contrast to the other self-interested parties in the custody litigation. The gathering and reporting of facts, however, is not a neutral process. The observations of the neutral fact-finder are filtered through his or her personal life history, experiences, biases, prejudices, and judgments. For this reason, the findings of a neutral fact-finder ought to be a subject of cross-examination by the other litigants, and an exploration into personal history and background should be as legitimate and permissible as with any other fact witness.

B. Advocate

Absent a narrower directive from the appointing court, counsel appointed under section 1-202 of the Family Law Article of the Annotated Code of Maryland is called upon to represent a child.⁵⁹ Neither case law, nor the rules of professional conduct, offer more specific guidance to assist appointed counsel in deciding how to undertake the tasks of representation.

An advocate for a child can represent a child's interests more effectively than one whose role is limited by the court. An advocate has the advantage of choice, for there are a variety of courses of action from which counsel may select.⁶⁰ The skill of counsel's fulfillment of this role depends upon: (1) his or her being aware of all available choices; and (2) having a clearly-defined sense of purpose.⁶¹

The most effective course of action may involve negotiating with all the parties involved, assuming a mediating role, counseling a misguided child, bringing outside influence or assistance to bear,

56. *See id.*

57. *See id.*

58. *See id.*

59. *See* MD. CODE ANN., FAM. LAW § 1-202 (1991); *see also* *Maryland Bar Report*, *supra* note 1, at 2.

60. *See generally* *Maryland Bar Report*, *supra* note 1, at 2-3.

61. This is a standard by which he or she can predict, and later evaluate, whether a course of action will lead to the desired outcome.

or utilizing the full range of trial skills to advocate on behalf of a child in the courtroom.⁶² However, unless the role of the representative of the child is broad enough to include all of these responsibilities, the representative's opportunity to be effective is significantly limited.

If the appointed counsel's role in representing a child is limited to fact-finding, whether by court directive or by the appointed counsel's own choice of role, counsel's ability to resolve the custody problem on behalf of a client is severely constrained. This narrow definition of "role" strips the appointed counsel of many tools that might otherwise positively affect the outcome of the litigation. For example, the appointed counsel cannot negotiate, attempt to bifurcate the custody proceeding and sever it from a contentious and time-consuming financial dispute, nor use his or her role as the child's attorney to influence a settlement. In short, this definition or concept of an attorney's role affords him or her access to only a very narrow and constricted scale of opportunity.

The role of an advocate subsumes the narrower definitions of role outlined by the Counsel for Kids Subcommittee.⁶³ An appointed counsel who effectively represents a child must not be confined to the privilege issue, nor should the opportunity for advocacy be limited to fact investigation and neutral reporting to the court. The role of advocate must incorporate all of these and more.

The Counsel for Kids Subcommittee uses the term "guardian *ad litem*"⁶⁴ to describe a child's appointed representative under section 1-202 of the Family Law Article of the Annotated Code of Maryland.⁶⁵ The term guardian *ad litem*, has historical roots which imply a loyalty to the court *greater than*, or *different than*, the loyalty to the client.⁶⁶ This is inconsistent with a lawyer's duty when he or she is called upon to represent a child's interests. The primary duty of loyalty of a representative of a child should be to the child, not to

62. Cf. *Maryland Bar Report*, *supra* note 1, at 2.

63. See *supra* note 1 and accompanying text.

64. See *Maryland Bar Report*, *supra* note 1. A "guardian *ad litem*" is a "special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation." BLACK'S LAW DICTIONARY 706 (6th ed. 1990). The use of that terminology is unfortunate and is rejected by this Author.

65. See *Maryland Bar Report*, *supra* note 1, at 2-3 (citing MD. CODE ANN., FAM. LAW § 1-202 (1991)).

66. See Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619 (1976).

the court. Thus, the term guardian *ad litem* creates confusion in an arena where the avoidance of confusion is the immediate objective.

On the other hand, the use of the term "represent" is distinct and unambiguous. "Represent" typically describes the full range of actions which lawyers perform on behalf of their clients. Appointed counsel is not a passive overseer in the case, nor a representative of the court, regardless of the court's perception. When representing a child, counsel should maintain his or her status as an independent advocate. Although the lawyer may choose to posture himself or herself as a "neutral fact-finder" in any given case, that choice should be made only as a deliberate strategy designed to accomplish the purpose of his or her representation of the client. Appointed counsel must remember that fact-finding is but one phase of the appointed counsel's role as an advocate representing their client's interests. Further, appointed counsel should not report to the court, nor should appointed counsel become a witness who can later be subjected to cross-examination.

Viewed from a broader plane, the purpose of the appointed counsel's representation of children is to bring about a solution to a custody problem which is consistent with the best interests of the child. This purpose is most likely to be achieved if appointed counsel acts as an advocate, because only then can counsel's impact be felt at all stages of the custody proceeding. At each stage of the proceeding, the lawyer's task is to make the legal system respond creatively and promptly to serve the best interests of the child.

Appointed counsel's tasks are multi-faceted, and they require a knowledge beyond that which is typically developed in a traditional "legal" education. When assuming the role of appointed counsel, one must either grapple alone with unfamiliar mental health concepts or collaborate with mental health professionals. Even such collaboration will not always provide all the answers. The theoretical constructs of the mental health professional provide the appointed counsel with some guidance, but there is no consistent theoretical framework to guide either the lawyer or the mental health professional through the murky area of child custody.⁶⁷ Rather, appointed counsel must gather all of the information available, and then make informed, intelligent decisions.

When handled properly, the role of appointed counsel can prove invaluable in a court proceeding. Certainly, the interests of

67. See generally Diane Trombetta, *Shared Parenting: Is it Working?*, 27 FAM. & CONCILIATION CTS. REV., Dec. 1989, at 17-20.

the child are integral to any divorce proceeding; they are, however, often ignored.⁶⁸ Appointed counsel for children can help to fill this gap and offer children the protection that they deserve.

V. ADVOCACY—DEFINING THE CHILD'S BEST INTERESTS

To be effective, the appointed counsel for a child must undertake the extremely difficult task of defining the "best interests" of the child, and take appropriate action to achieve this goal in a manner which is the least detrimental to that interest.

A. *Theoretical Guidelines*

Divorce proceedings can have profound, lasting effects on children.⁶⁹ Therefore, every attempt ought to be devoted to minimizing these negative effects on children in custody proceedings. Two dis-

68. See *Levitt v. Levitt*, 79 Md. App. 394, 556 A.2d 1162 (1989) (holding that appointment of an attorney for the child of the parties was necessary because the child's interests were being ignored because the parents advocated only for their own interests).

69. See Christopher F. Clulow, *Divorce as Bereavement: Similarities and Differences*, 28 FAM. & CONCILIATION CTS. REV., June 1990, at 19-22. The Author argues that both divorce and death are major changes that introduce discontinuities in people's lives. See *id.* at 19. They both involve coming to terms with loss and the search for new meanings. See *id.* The long-term effects of divorce depend on how the breakdown of the marriage has been handled by the partners, by the children, if any, and by the community in discharging its legal and social responsibilities. See *id.* The bonds that hold people in marriage (e.g., economic, legal, or emotional ties) tend to be easier to deal with when death occurs than in the case of a divorce. See *id.* at 21. Likewise, the consequences for children of divorce are often more serious than when one parent dies. The two chief components of grief, sorrow and anger, are expressed differently according to whether a marriage ends in death or divorce. See *id.* Moreover, social and religious rituals are supportive of the bereaved, whereas no such social and psychological provision is made for those whose marriages end in divorce. See *id.*; see also Richard Wolfman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L., Fall 1991, at 399-417. Wolfman and Taylor report on a subset of data from an ongoing longitudinal study of 95 children and their parents from 43 divorcing families, 27 of whom were involved in child custody disputes, and 16 of whom had settled the issue out of court. See *id.* at 399. Contested children exhibited significantly greater internality of control orientation than the normative sample. See *id.* Contested children's test scores also suggested significantly less separation anxiety and significantly more positive family concept than the uncontested group at post-test. See *id.* It is suggested that these unanticipated findings may indicate that certain aspects of custody litigation, its destructive potential notwithstanding, may actually contribute to children's development of adaptive coping strategies. See *id.*

tinct views have dominated the debate on what constitutes the "best interests" of the child in a divorce proceeding.⁷⁰ Three noted child psychologists, Joseph Goldstein, Anna Freud, and Albert J. Solnit, advanced the view that children are better off in the long run if one parent has complete control after the custody dispute.⁷¹ The dominance of this theory was eroded, however, when mental health professionals and courts began to question the efficacy of this solution.⁷² Numerous mental health professionals began to advocate the prevailing need for a strong, continuing relationship between the child and each parent.⁷³ To date, neither side in this debate has gained universal acceptance,⁷⁴ and indeed, individual circumstances may necessitate one approach over the other in any given case. Most importantly, a court appointed attorney must be familiar with each possibility to make an informed decision regarding a particular child-client's best interests.

1. The Goldstein, Freud, and Solnit View

a. Summary

Goldstein, Freud, and Solnit proposed that custody decisions should: (1) safeguard the child's need for continuity of relationships; (2) reflect the child's, not the parents', sense of time; and (3) take into account the law's limited capacities to supervise interpersonal relationships or to make long range predictions.⁷⁵ They recognized, however, the difficulty that parents have in maintaining a constructive relationship with one another following a divorce.⁷⁶ Therefore, Goldstein, Freud, and Solnit posited that custody should be awarded to the parent who, based on the above factors, repre-

70. See Deborah A. Luepnitz, *A Comparison of Maternal, Paternal, and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, 9 J. OF DIVORCE, Spring 1986, at 1-12.

71. See JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

72. See Joan B. Kelly, *Longer-term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL., Dec. 1988, at 119-40. *But see* Sheila J. Kuehl, *Against Joint Custody: A Dissent to the General Bullmoose Theory*, 27 FAM. & CONCILIATION CTS. REV., Dec. 1989, at 37-45; Leonard S. Jacobson & Alice G. Dvoskin, *Is Joint Custody in the Child's Best Interest?*, 25 MD. BAR J., Nov./Dec. 1992, at 11.

73. See Michael Benjamin & Howard H. Irving, *Shared Parenting: Critical Review of the Research Literature*, 27 FAM. & CONCILIATION CTS. REV., Dec. 1989, at 21-22.

74. *See id.*

75. *See* GOLDSTEIN ET AL., *supra* note 71, at 31-52.

76. *See id.*

sents the least detrimental alternative.⁷⁷ Moreover, the preferred pattern of custody and visitation should maximize the child's opportunity to maintain a continuing relationship with a primary "psychological" parent.⁷⁸ Principal responsibility for nurturing the child's best interests should reside in the "psychological" parent.⁷⁹ In addition, there should be minimal legal intervention once the initial custody determination has been made.⁸⁰

b. Controversies

The approach of Goldstein, Freud, and Solnit sparked several controversies. The first controversy centered on whether it is in the child's best interests to make custody decisions final, that is, not subject to continuous review or court involvement.⁸¹ Goldstein, Freud, and Solnit argued that making custody determinations final would safeguard the child's need for continuity and provide the child with the same rights to parental authority as are given to children in two-parent families.⁸²

The second controversy involved whether decisions regarding visitation should be under the exclusive control of the custodial parents.⁸³ Goldstein, Freud, and Solnit contended that the courts' limited capacity to supervise interpersonal relationships, combined with the need to establish a stable source of authority, justified the conclusion that the custodial parent ought to exercise this function.⁸⁴

77. *See id.*

78. *See id.* at 19. Goldstein, Freud, and Solnit define the psychological parent as "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." *Id.* at 98.

79. *See id.*

80. *See id.* at 98-99. The California Supreme Court has followed Goldstein, Freud, and Solnit in defining de facto parents: the court has held that although de facto parents may appear in proceedings involving child placement, they are not "parents" under applicable statutes; thus, they may not be awarded custody unless awarding custody to a parent would be detrimental to the child. *See In re B.G.*, 523 P.2d 244, 254 (Cal. 1974) (en banc).

81. See John Batt, *Child Custody Disputes & the Beyond the Best Interest Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621, 632 (1992); see also HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 598-601 (1968). See generally Joseph Goldstein, *Anna Freud*, 92 YALE L. J. 219 (1982).

82. *See* Goldstein, *supra* note 71, at 38.

83. *See* Batt, *supra* note 81, at 627-28.

84. *See* Goldstein, *supra* note 71, at 38.

The remaining controversy pertained to the proper role of the child's legal representative. Goldstein, Freud, and Solnit expressed concern about positioning legal counsel between parents and children.⁸⁵ They argued that once the court makes a determination, the role of the appointed counsel ends.⁸⁶

In designating a custodial parent, the court expresses the state's confidence that this particular adult has the greatest capacity among those available to fulfill the child's needs, including his need to be protected from and represented before the law. To do otherwise—to impose continuing legal counsel for the child as a condition of a disposition—is to undermine that confidence and threaten, rather than promote, family integrity.⁸⁷

As Goldstein, Freud, and Solnit subsequently clarified, giving the custodial parent a primary role in determining visitation should be perceived not as a position opposed to visitation, but as the best way to maximize the benefits of the continuity of care, autonomy, and authority of the custodial parent in the child's long-term best interests.⁸⁸

2. Recent Research Findings

There is significant disagreement on whether a child's conceptualization of a primary psychological parent, as implied in this approach, is determinative of the child's best interests.⁸⁹ Indeed, subsequent research on children of divorce has demonstrated that the child's interests may be best served when: (1) contact is maintained with the non-custodial parent; (2) both parents cooperate in the parenting function; (3) parents have a continuing positive relationship with one another; and (4) the child does not suffer from a feeling of abandonment at the decreasing interest and involvement of the non-custodial parent.⁹⁰

85. *See id.*

86. *See id.*

87. *See id.* at 30-52.

88. *See id.* at 31-52.

89. *See, e.g.,* Loyola Association of Women Law Students, *Symposium on Joint Custody: Seeking Solomon's Wisdom*, 5-6 (1984) (arguing that, notwithstanding the theory of Goldstein, Freud and Solnit, many child welfare professionals believe the child will adjust to post-divorce life more smoothly through significant contact with both parents).

90. *See* Kelly, *supra* note 72, at 119; *see also* Trombetta, *supra* note 67, at 18.

This research, coupled with an increasing emphasis on sexual equality, has led to a preference for various forms of shared parental responsibility.⁹¹ These alternatives to sole custody differ from one another in the degree of shared legal responsibility they vest in parents, but they generally attempt to assure continuity of contact with both parents by decreasing the parent's perceptions that the custody dispute is a contest with a winner and a loser.⁹²

While this approach has merit in its sensitivity to a child's perception of abandonment by a non-custodial parent, there are also negative factors to consider. For example, joint custody arrangements are difficult to sustain because they demand a great deal of mutual respect on the part of the parents.⁹³ However, shared parental decision-making creates an additional forum for their continued hostile entanglement.⁹⁴

3. Benedek and Benedek Theory

Two prominent commentators, Elisa P. Benedek and Richard S. Benedek, have argued that no single custody solution is applicable to all situations, but rather, different circumstances call for different custody arrangements.⁹⁵ Accordingly, they have proposed a set of factors to help determine whether joint custody is appropriate in a particular case: (1) the level of the parents' desire for joint custody; (2) the maturity of the parents; (3) the parents' commitment to the child's positive development; (4) the parents' predisposition to honor their agreement; (5) the proximity of the parents' residences; and (6) the child's desire for continuing contact with both parents.⁹⁶ These criteria address the motivations, attitudes, and intentions of the parents.⁹⁷

91. See, e.g., Trombetta, *supra* note 67, at 18-19; see also Benjamin and Irving, *supra* note 73, at 21-33.

92. See Richard B. Pesikoff & Bette S. Pesikoff, *Child Custody in the 80's: The Effects of Divorce on Childhood and Teenagers and the Concept of Joint Custody*, 23 *FAM. & CONCILIATION CTS. REV.*, June 1985, at 53-55.

93. See Kuehl, *supra* note 72, at 37-45.

94. See *id.*

95. See Elisa P. Benedek & Richard S. Benedek, *Joint Custody: Solution or Illusion?*, 136 *AM. J. PSYCHIATRY* 1540, 1543 (1979).

96. See *id.*

97. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Custody Decisionmaking*, 101 *HARV. L. REV.* 727 (1988) (noting that anecdotal evidence indicates that many women consider joint custody a "loss" of the custody battle, while many men view it as a victory; as a result, women often bargain away property and support benefits in order to avoid the risk of losing

The Benedeks assume that the parents, regardless of the nature of the custody settlement, can determine whether or not continued contact with both of them will be a constructive reality.⁹⁸ Where these factors imply that a joint custody arrangement is not feasible, continuing contact with both parents is not likely to be beneficial and may even be harmful to the child.⁹⁹

An alternative is to impose court ordered visitation when the non-custodial parent fails to remain involved.¹⁰⁰ Court orders, however, are not a realistic solution because they rarely succeed in compelling parents to have time for their child, or to continue to recognize and honor their responsibilities.¹⁰¹

The standard of the child's best interests is defined differently under the alternative, and sometimes conflicting, approaches of joint and sole custody. Furthermore, within each theoretical approach, numerous smaller distinctions present themselves. The child advocate's position, in each case, is likely to be consistent with some theoretical approaches and inconsistent with others. For instance, a theoretician who attaches a greater value to the relationship between two siblings might conclude that it is sufficiently important to both children that they should not be separated.¹⁰² Given one child's age and the intensity of one child's stated preference, it might be equally legitimate to conclude that the children should be separated. There is no magic formula or authoritative theoretical guidance upon which counsel can invariably rely.

Because of the ambiguity inherent in determining a child's best interests, many issues are left unresolved. Namely, who should de-

their children).

98. See Benedek & Benedek, *supra* note 95, at 1543.

99. See generally Trombetta, *supra* note 67, at 17-19. As Ms. Trombetta points out, research provides no clear answer as to how the effectiveness of shared parenting by divorced couples relates to sole physical custody of children. See *id.* at 18. What can be deduced from the research is that certain factors seem to enhance children's adjustment to divorce: (1) low levels of parental conflict; (2) the quality of the relationship with the noncustodial parent; (3) environmental (especially economic) stability; and (4) the psychological well-being of the children's primary caretakers. See *id.* By looking at the full range of political, social, and economic implications of the recent trend in divorce laws toward shared parenting, it becomes clear that evaluating the success of joint parenting is extremely difficult. See *id.* at 18-19.

100. See *id.*

101. See Goldstein, *supra* note 71.

102. See Stuart Fine, *Children in Divorce, Custody and Access Situations: An Update*, 28 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES, May 1987, at 361-64.

cide what is the most appropriate custody arrangement, and under what circumstances, if any, a child's advocate is entitled to disagree with a mental health professional's assessment of the child's best interests. One circumstance in which it may be legitimate to do so is when the advocate possesses more facts than those relied upon by the mental health professional.¹⁰³ Such a situation is not uncommon, partly because of the institutional constraints placed upon mental health professionals in their fact-gathering process, and partly because mental health professionals' approaches to "fact-finding" and "reality" are different than that of a legally trained advocate.

The incorporation of mental health theories by appointed counsel does not simplify the appointed counsel's task. Indeed, it often intensifies counsel's dilemma. It is beyond the scope of this Article to attempt to decide these complex issues for this discussion is intended only to introduce the reader to the conflicting theories on "best interests," and to emphasize the need for further education, thought, and sensitivity.

B. The Client's Preferences

A lawyer called upon to represent a child has a client who is either: (1) unable to express a preference about his or her future; (2) unwilling to express a preference about his or her future; (3) expressing an ill-advised or immature preference about his or her future; or (4) expressing a mature and intelligent preference about his or her future. Accordingly, the appointed counsel must tailor his or her role based on the child's ability and capacity to make a choice about custody. Accomplishing this task is not easy. This, however, is a practical problem which must be addressed in every case if counsel intends to proceed with a clear sense of purpose.

At present, there are no standards which give concrete guidance. The comment to Rule 1.14 of the Maryland Rules of Profes-

103. See, e.g., Theresa Abrams, *The Influence of Family Disruption on Clinician Bias in the Assessment of Children*, 11 J. DIVORCE, Spring-Summer 1988, at 189-205. Abrams studied the correlation between the clinicians' life experiences such as clinician's biases, and whether they came from intact marriages, high-conflict marriages, or recently divorced marriages. See *id.* at 189. She concluded that the largest correlation was among clinicians who had themselves undergone marital disruption. These clinicians were more likely to find normal psychological adjustment in the child, and were less likely to recommend further treatment for the child. See *id.*

sional Conduct addresses the problem, but does not present any real solution:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.¹⁰⁴

The American Bar Association Model Code of Professional Conduct offers equally convoluted guidance. Ethical Consideration 7-11 states that: "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client."¹⁰⁵ Ethical Consideration 7-12 provides that:

[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of his client.¹⁰⁶

Similarly, the Juvenile Justice Standards provide that counsel in a juvenile case should act as counsel would in any other case.¹⁰⁷ None of these pronouncements give the lawyer any relief from the need to struggle for a decision-making framework. In the line of fire, however, counsel must take a position, for neutrality has no place in advocacy.

104. See MD. RULES OF PROFESSIONAL CONDUCT 1.14 cmt.

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

106. *Id.* at EC 7-12 (1982).

107. See ABA JUVENILE JUSTICE STANDARDS, *Counsel for Private Parties* (1990).

The American Academy of Matrimonial Lawyers (American Academy) has published *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*.¹⁰⁸ It addresses the dilemma of client preference and offers a solution worthy of serious consideration by any careful practitioner. These standards can be summarized into the following main points. First, if a minor is "unimpaired," then the advocate's role is identical to the role of an advocate representing an unimpaired adult.¹⁰⁹ If there is a rational and reasonable basis for the client's choice, it is the responsibility of the attorney to follow the client's instructions whether or not he or she believes it to be in the client's best interests.¹¹⁰ Second, if a client is "impaired," the role changes. Third, the decision of whether a client is "impaired" or "unimpaired" is to be made by the lawyer, not by the court.¹¹¹ Fourth, when a client, by virtue of his or her impairment, is unable to set the goals of representation, the lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation.¹¹² Finally, there is a rebuttable presumption that minors age twelve or older are unimpaired.¹¹³

In contrast, the Counsel for Kids Subcommittee has taken a more flexible approach:

At trial, a guardian may advocate a position that differs from the wishes of the child. Where the child is able to express a preference, it is essential that the guardian make the preference known or sees that the child has the opportunity to convey his or her thoughts directly to the Court. The guardian should be present at any time the child is either testifying or in chambers with the Judge.¹¹⁴

If a child-client is not sufficiently mature to understand and articulate his or her own desires, a question arises as to whether it is appropriate for appointed counsel to advocate any position on be-

108. See *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAWS. 1 (Summer 1995) [hereinafter *Standards*].

109. See *id.* at 2.3.

110. See *id.* at 2.4.

111. See *id.* at 2.1.

112. See *id.* at 2.7. The lawyer should not submit a trial memo or argue the case, although the lawyer should otherwise participate in the litigation.

113. See *Standards*, *supra* note 108, at 2.2.

114. See *Maryland Bar Report*, *supra* note 1, at 2-3.

half of the child. Under these circumstances, the American Academy would restrict counsel's role to fact investigation, counseling the client, negotiation, and generally monitoring, and influencing the course of conduct of the custody litigation.¹¹⁵

While it is true that lawyers are not trained by education or experience to make decisions about a child's best interests, lawyers are trained to gather facts, evaluate information, exercise judgment, and make decisions based on the information. With adequate training, the use of outside resources, and the acquisition of specialized knowledge, the appointed counsel can effectively advocate for the child's best interests. The American Academy's suggestion that the appointed counsel's role be restricted to something less than, or short of, courtroom advocacy is an unfortunate attempt at solving the problem. If a lawyer for a child is stripped of the power to advocate a position on behalf of his or her client, the lawyer's derivative power to exercise any authoritative control over the course or outcome of the custody litigation would be significantly limited. The appointed counsel's ability to obtain information, to negotiate solutions of interim issues such as visitation and selection of schools, or to coerce contentious litigants into agreeing to a custody evaluation, are by-products of the appointed counsel's power to advocate a position which may influence the outcome of the custody litigation.

The appointed counsel's role in this situation, however, is that of an advocate, not of a witness. As an advocate, the appointed counsel's position is only as effective or as persuasive as the evidence the appointed counsel can produce in support of his or her position. The appointed counsel does not, and should not, testify. Furthermore, it is improper and immaterial for the appointed counsel to interject his or her personal opinion into the decision-making process. Courts are well-equipped to maintain the distinction between personal opinion and fact in the application of the traditional rules which regulate the introduction of evidence and the permissible scope of oral argument.

One of the most troubling dilemmas for legally trained advocates of children occurs when the advocate's personal beliefs about the child's best interests contradict the child's own preference. Unfortunately, this is a common problem in litigated custody disputes. Children develop and verbalize preferences for many reasons—both sound and unsound. At one end of the spectrum is the child who is mature enough to know his or her own needs and to express an in-

115. See, e.g., *Standards*, *supra* note 108.

telligent preference; at the other end of the spectrum is the child whose preference is the product of parental control. Parental control and influence in custody disputes may range in quality from gentle persuasion to insidious and destructive coercion. Such attempts to influence children generally cause them to become unknowing surrogates for one side. This phenomenon is not confined to any particular age. The difficulty, therefore, arises when the child has expressed a preference, and the appointed counsel disagrees with the child. Is counsel then duty-bound to present the child's preference to the court and support the child's choice throughout the proceedings?

Some would consider it an attorney's duty to advocate a client's preference in all situations. This "rule" certainly resolves the appointed counsel's ethical, and perhaps personal, dilemma. It is neat, clean, and unambiguous. If a child is to have a voice in charting his or her future, it should be his or her own voice. This appealing sentiment, however, is more beguiling than it is helpful. A child's stated preference is still the statement of a child. A child should be allowed to participate in the process and have his or her views considered. However, in light of the system's purpose in custody disputes, including its concern about the family unit after a divorce, it seems unwise to unleash, within the dispute resolution mechanism, another force bent upon harm. To hamstring a child's advocate by requiring the active pursuit of an ill-motivated, misguided, or misunderstood preference accomplishes little and carries within it a great potential for harm, not only to the child, but also to the parents as well.

Thus, if the role of appointed counsel is to achieve its full potential, it is a mistake to impose rigid definitions or parameters upon that role. Rather, it is preferable to rely upon the appointed counsel's exercise of good judgment, subject to the scrutiny and controls inherent in the legal system and the rules of evidence. Appointed counsel must be given latitude in deciding how much weight is to be given a child's preference in any given case. It should not be the court's decision, nor should it result from a narrow definition of the appointed counsel's role. In that respect, the flexible approach of the Counsel for Kids Subcommittee is a wise solution.

It should be permissible, although not mandatory, for the appointed counsel to advocate his or her view of the client's "best interests" in cases where the client is too young, too immature, or is unwilling to express his or her view. Moreover, if a client has a pref-

erence or point of view, the appointed counsel should never be bound by that point of view regardless of the age of the child. However, if the appointed counsel determines that the child's preference is consistent with the child's best interests, the appointed counsel should act as an advocate to achieve that end. Finally, if the appointed counsel determines that the child's preference is inconsistent with the child's best interests, the appointed counsel must decide either to: (1) advocate for a result consistent with the client's preference; (2) withdraw from the case; or (3) advocate for a result contrary to the client's preference. If the appointed counsel chooses to advocate a position contrary to the client's preferences, the appointed counsel must notify the client and the attorneys for both parents. If either parent objects, he or she may move for the removal of appointed counsel.

Counsel's personal opinion about his client's best interests is not evidence, nor is it proper to interject it as evidence. In addition, counsel must make the client's position known to the court and, if the court will permit it, afford the client an opportunity to be heard throughout the course of the proceeding.

VI. PRACTICAL STRATEGIES FOR DECISION-MAKING

A. *The Search for the Least Destructive Choice*

Once the appointed counsel understands the parameters of his or her role and the goals to be attained, dilemmas emerge. As both practitioners and the public are aware, "advocacy" can encompass behavior ranging from the compassionate to the cruel. If the appointed counsel is to be effective, his or her decisions and conduct must be strategically guided by the goal he or she seeks to accomplish for the child-client. Given the passions and prejudices which accompany custody litigation, the appointed counsel is in a unique position to affect not only the decision of the judge, but also the future attitudes of the parents and children toward each other and the legal system.

The purpose of this discussion is to suggest a practical framework to help guide the appointed counsel through the decision-making process. This framework is premised upon the notion that there are seldom any correct answers to give the appointed counsel the steadfast and guilt-free reassurance he or she strongly desires. Instead, the appointed counsel is forced to first ask the right questions. Having done so, the appointed counsel must then examine the consequences of his or her responses. Through this repetitive

process, the appointed counsel can hopefully acquire the wisdom to select the least detrimental alternative available to achieve his or her purpose.

Every decision appointed counsel makes, from whether to first interview a child or the child's parents, to which questions to ask, has consequences. If, in advocating a child's interests, the appointed counsel's purpose is to achieve the desired outcome in a way which is least detrimental to those interests, then the appointed counsel must evaluate the choices not only in terms of their consequences upon the outcome of the case, but also in terms of their impact upon relationships in the family after the case is resolved. A concept of representation or advocacy which takes into consideration the impact of strategic decisions, both in terms of the legal outcome and their impact on future family relations, forces an advocate to consider alternative strategies which may achieve the desired results at a lower cost to future family relationships.

A litigator's sense of tactics and legal procedure, although essential, is an incomplete tool for this difficult task. For example, if the interests of the child would be best served by the custodial care of the mother, and counsel has become aware that the father is involved in a homosexual liaison, should the appointed counsel disclose this fact to the court or to the other parent in order to attain the desired objective? If disclosure is likely to adversely affect the relationship between the parents in the future, should the appointed counsel look for a less destructive way of advocating custody for the mother, such as encouraging settlement negotiations in the relative privacy of a chamber's conference, or threatening disclosure in negotiating with the father or the father's attorney?

Of course, the ultimate inquiry is whether disclosure of the liaison is needed to persuade a judge to grant custody to the mother. If the answer to this question is yes and settlement is not possible, then the appointed counsel is left with no alternative except to make the disclosure. In such a case disclosure may be the least detrimental alternative available to accomplish the appointed counsel's goal for the child, and cross examination of the father on this sensitive issue may be necessary despite its potentially adverse effect on future familial relationships.

Adversarial zeal should, at times, be curtailed because of a stronger necessity to safeguard and promote the child's long-term relationships with both parents. Thus, the notion of advocacy should include safeguards that prioritize the preservation of parental access unless, and until, a contrary course of action becomes

necessary. The notion of advocacy must be broad enough to respond not only to the issue of legal custody, but also to the child's total life situation. Although the earlier discussion in this Article addressed the weight to be given to the child's stated preference,¹¹⁶ apparently most children prefer to be raised by both parents and their selection of one parent over the other may be more an artifice of the divorce context than a statement of greater psychological attachment.¹¹⁷ Therefore, the child's advocate should take precautions to ensure that the child's preference is not used in a way which may jeopardize the continued relationship with the parent who is not awarded custody.

Appointed counsel in this hypothetical has several strategies available to deal with this "ethical" dilemma: (1) negotiate with both parents for a compromise solution; (2) try to persuade the client to change his or her mind; (3) inform the court of the client's preference and advocate against it, as did counsel in *John O.*;¹¹⁸ (4) advocate for the client's stated preference; (5) try to persuade a parent to drop the custody dispute; or (6) withdraw as counsel. To add to the complexity of this situation, assume that the appointed counsel is the only person who knows of the client's preference.

No single answer fits all situations. Nevertheless, the most important lesson to be learned from the foregoing discussion is that it is in the client's best interests to use the information obtained in a fashion that is least detrimental to continuing relationships in his or her family, and strategically appropriate to accomplish the purposes the appointed counsel has defined for his client in the custody determination.

If the appointed counsel's purpose is, for example, to have the daughter reside with her father while maintaining her relationship with her mother and receive counseling, the appointed counsel may decide to say nothing to either parent about the daughter's preference. The appointed counsel should attempt to allow her to speak to the judge without a court reporter present, and ask the judge to render an opinion which does not disclose the child's preference to either parent.¹¹⁹

116. See *supra* Part V.B.

117. See Benedek & Benedek, *supra* note 95, at 1540-43.

118. See *supra* notes 26-31 and accompanying text.

119. This approach requires a waiver from all parties because a judge's interview of a child must be recorded by a court reporter and the record must be made available to all parties, unless waived. See *Shapiro v. Shapiro*, 54 Md. App. 474, 480, 458 A.2d 1257 (1983).

B. Some Guiding Principles

1. The Appointed Counsel Should Actively Participate with Attorneys for the Parents

The appointed counsel should actively participate in the decision-making process to minimize the adverse effects of destructive strategies employed by the parents or their lawyers. Counsel should develop a working relationship with both parents, the lawyers, his or her client, and anyone else having a significant role in the case. All participants should understand that their objections to anyone's conduct should be brought to the attention of the child's attorney. Parents should understand, for example, that psychological exams should not be conducted without the appointed counsel's knowledge. The purpose of imposing this edict is to prevent lawyers or parents from expert-shopping, which often over-involves the child, forces an unwanted "co-conspirator" role on a child who has natural loyalties to both parents, prolongs the litigation, and escalates parental hostilities toward one another and the legal system. If the appointed counsel becomes aware that either parents or their lawyers are using dilatory strategies, the appointed counsel should actively intervene to advise against such strategies.

2. The Appointed Counsel Should Take Advantage of his or her Unique Position to Affect the Way Custody Litigation is Conducted

The appointed counsel for the child is in a uniquely powerful position to affect not only the outcome of custody litigation, but the manner in which the confrontation is waged. The manner in which the legal system decides a custody case can be as important as the ultimate decision it makes.¹²⁰ Parental attitudes toward the process will affect their willingness to accept and abide by any decision made. Their willingness to accept the court's decisions can be critical to the child's future well-being within the divorced family.

For instance, if a custody assessment is needed, and the parents' lawyers, by design or incompetence, have done nothing to initiate the process, the appointed counsel should actively intervene and insist that custody be done by consent or, if unable to force this mutual concession, file a motion on the child's behalf requesting this relief.¹²¹

120. See generally Wolfman & Taylor, *supra* note 69, at 399-415.

121. If the request for a custody assessment is refused by any party, a motion can

If parents in a custody case become enmeshed in their own power struggle, the child's attorney should place himself or herself directly between the parents and his client. If the parents cannot agree on the style of haircut, the choice of pediatrician, or the correct extracurricular activities in which their child should participate, then the appointed counsel must actively intervene. Otherwise, the child's frequent haircuts, visits to different doctors' offices and multiple lessons, games, camps, and church meetings could create an overly enmeshed, overly indulgent, petulant monster who is a victim of the lack of insight of the parents and appointed counsel. If it requires the filing of a motion, efforts to work with the parents' lawyers, or the appointment of a monitor mental health professional, the appointed counsel should intervene to make it happen.

This active involvement is required at all stages. If a parent wants the last opportunity to persuade the child by being the parent who delivers the child to chambers for an interview, then the appointed counsel should prevent this from happening. The appointed counsel should deliver the child or ensure that a neutral party discharges this task.

At trial, the appointed counsel's role is to present witnesses, control the agenda, examine, and cross-examine to advocate for the client. It is an instrumental role.¹²²

VII. CIRCUMSTANCES INDICATING APPOINTED COUNSEL IS APPROPRIATE

This Article advocates an appointed counsel role that requires a court to consider more than the substantive issues in a custody case when deciding whether to appoint counsel for the child. The court should consider the manner in which the custody dispute is likely to be resolved if counsel is not appointed. For instance, a parent or lawyer may be using child custody as a weapon in an acrimonious divorce. Appointed counsel may be in a unique position to inform the court and control such activity, which may not be apparent when the custody issue is uncomplicated. In such circumstances, the appointed counsel may protect the child from the destructive actions of parents or their lawyers, even if the appointed counsel does not add a shred of advocacy or information to the case. Under such circumstances, the appointed counsel's efforts to control the process

be filed to proceed with the assessment. *See* MD. RULE 2-423.

122. This Author has, on occasion, assumed the lead and presented the child's case first.

may be more of a long-term benefit to the child than the court's ultimate custody decision.

The courts' view of the appointed counsel as an active intervenor in the custody decision process would make such appointment suitable to many child-custody divorce cases. For example, appointed counsel may be appropriate in a case where a high level of conflict or power struggle between parents exists. Such a case may be indicated by: (1) a high number of pleadings; (2) the presence of lawyers reputed to attract conflict-seeking parents; (3) the presence of sexual issues, including but not limited to abuse; and (4) the fact that one or both parents are pro se or have discharged numerous attorneys.

Another situation where appointed counsel may be appropriate is where a case indicates a high level of conflict or power struggles between lawyers. Some indicia of such conflict are: (1) the reputation of the lawyers; (2) the number and content of contested motions and hearings; and (3) the number of requests for delays and postponements.

The court's potential receipt of inadequate or incomplete information about a child is also pertinent to appointed-counsel's decision. Such potential may be evidenced by: (1) the apparent incompetence of lawyers; (2) the parents' refusal to disclose medical histories; and (3) a child age ten or older expressing a desire to reside with one parent where the other parent opposes such a custody arrangement.

These are just a few of the many circumstances that may make the appointment of counsel appropriate under the model advocated by this Article. The examples illustrate how the legal system's view of appointed counsel's validity and utility can change when the appointed counsel's role is more clearly defined.

VIII. RECOMMENDATIONS

This Author can attest from experience to both the enormous complexity and vast potential of appointed counsel's role in divorce and custody litigation. If the appointed counsel actively intervenes to prevent the destructive use of the legal system or the child during custody litigation, the resulting benefit would often justify the cost, even if the appointed counsel never appears at the trial table or advocates a position. Such benefit, of course, assumes the appointed counsel's ability to recognize or predict parental behaviors which negatively affect the legal and family systems.

The role of appointed counsel defined in this Article is a powerful one. The appointed counsel is in a unique position to gather evidence, influence the course of litigation, and affect its end result. In the right hands, this power can be a potent adjunct to the efficient resolution of custody disputes. In the wrong hands, such power has the potential for harm. The following recommendations help ensure that families derive the important benefits of appointed counsel and do not become unwilling or unwitting recipients of its potential negative consequences.

A. Early Warning System

Custody litigation must be evaluated by the legal system early in the case. If the dispute meets criteria such as those listed in the previous section, then the system itself must initiate the involvement of competent appointed counsel. If counsel intervenes early in the process, the chances are better, though not guaranteed, that the potentially destructive aspects of the litigation can be minimized.

B. Implementation of Standards of Appointed Counsel

Courts should require that counsel appointed to represent children meet prescribed levels of competence based on training in the field, years of experience, exposure to family law issues, and reputation in the community. Inexperienced lawyers will not provide the level of competence needed to perform this role adequately. A mere interest in custody litigation is helpful, but insufficient to qualify the attorney. The role demands a range and level of knowledge and skill, including trial advocacy, which is highly valued even in experienced practitioners.

Whether established by local or state bar associations, or judicial rulemaking, criteria must be established to insure that the role of appointed counsel be vested in capable hands. Such criteria should include: (1) participation in a court or bar association approved training program addressing effective performance in the appointed counsel role; (2) specified number of years of practice; (3) specified experience in family law and custody matters, including litigation, negotiation, and mediation; (4) general reputation for competence in the legal community; and (5) expressed interest and aptitude.

C. Certification for Counsel

Appointed counsel should not be certified to represent children in custody cases prior to completion of an interdisciplinary le-

gal and mental health training program. The curriculum should include the following broad topics: (1) defining the role—what it means to represent a child; (2) the best interests of a child—an in-depth theoretical overview of expert opinion and its empirical base; and (3) investigation and evaluation of a custody case—the dissimilar approaches of legal and mental health professionals.

The certification should also address practical dilemmas, including: (1) how to interview children; (2) how to relate to the parents in a custody and divorce situation; (3) how to evaluate the child's expressed preference; and (4) how to prepare for an in-chambers interview. The program should offer alternatives to protracted litigation, including mediation, arbitration, and post-divorce monitoring. Finally, the curriculum should include instruction on potential ethical dilemmas, including disagreements with the child-client, disagreements with the expert, and problems in appointed counsel's relationship with the court.

D. Adequate Compensation for Counsel

If counsel is not compensated adequately,¹²³ the level of competence will be adversely affected. The corresponding lack of consistency, dedication, and skill in the role will preclude the court and children from receiving many important benefits that appointed counsel can provide.

To overcome this problem, courts should require parents to pay retainers and to pay for appointed counsel services on a regular basis. In the alternative, courts should insist that payment be guaranteed from the sale or other disposition of marital assets.¹²⁴

Contrary to popular belief, if the appointed counsel undertakes the task of representation with the viewpoint advocated in this Article, such participation will often reduce the cost of custody litigation. For example, the appointed counsel may perform functions otherwise handled by parents' attorneys, such as interviewing witnesses and selecting experts. Appointed counsel may also help resolve recurring and expensive visitation issues before they result in prolonged and expensive contested court proceedings. Very often,

123. Currently, courts have not set any standards for the compensation of appointed counsel. The Court of Special Appeals of Maryland, however, has held that appointed counsel for a child is entitled to compensation from the parents. *See* *Lapides v. Lapides*, 50 Md. App. 248, 254, 437 A.2d 251, 254-55 (1981).

124. Alternatively, the state could create a fund for appointed counsel as New York has established. *See* N.Y. JUD. LAW §§ 35, 243, 245, 249 (McKinney Supp. 1997).

participation by appointed counsel will bring litigation to a negotiated conclusion far more rapidly than if the process is left to the contending parties, namely the mother, father, and their lawyers.

The survey of Maryland circuit court judges indicates that the judiciary is well aware of appointed counsel's current shortcomings, but nonetheless remain strongly in favor of its increased use. If the recommendations in this Article are followed, appointed counsel for children in custody proceedings can begin to achieve his or her potential. Children, at last, will be afforded the voice they have been so long due.

APPENDIX A

SURVEY OF MARYLAND CIRCUIT COURT JUDGES

In an effort to gauge judicial perceptions regarding the role of appointed counsel in custody cases, a survey was conducted of circuit court judges throughout the state of Maryland.

I. RESULTS OF INDIVIDUAL QUESTIONS

The present role of appointed counsel in court varies widely, even within the same judge's courtroom. The role of appointed counsel was defined as follows: representative of child (43/45, 96%); neutral fact-finder (26/45, 58%); representative of the court (18/45, 40%); and other (3/45, 7%). Most judges accept variations of the role of counsel (32/45, 71%), while a relatively few see only a single acceptable role (13/45, 29%). Only 11 out of 45 judges indicate they use appointed counsel strictly as an advocate for the child.

The judges surveyed also stated that appointed counsel should advocate on behalf of their client as follows: by making a child's wishes clear, but advocating for the child's best interests (39/45, 87%); or by advocating the child's best interests, even if they conflict with child's stated wishes (23/45, 51%); or some combination of these two approaches.

Few judges believe that appointed counsel should be an advocate for the child's wishes, regardless of the attorney's views on the child's best interests (9/45, 20%). Indeed, several judges view this option as entirely inappropriate (5/45, 11%).

Most judges believe that advocacy must be contoured to the needs of each case, and that to cast a definition of the appointed counsel's role in stone, is inappropriate and unworkable.

Most judges believe that appointed counsel should rely somewhat on psychiatric or other independent evaluations (38/45, 84%). A minority of judges would have appointed counsel place great reliance upon independent evaluations by mental health professionals (8/45, 18%). Two judges expressed a belief that counsel should rely on such evaluations "very little" (2/45, 4%), and one judge believed that counsel should ignore these evaluations altogether (1/45, 2%). Relatively few judges believe that reliance on mental health professionals should vary from case to case (6/45, 13%).

Many judges believe that the amount of contact appointed counsel should have with the parents' attorneys should vary according to the needs of the case (22/46, 48%). The judges did not overwhelmingly subscribe to any single response on this issue.

Virtually all judges believed that *ex parte* communications between the court and appointed counsel are improper (43/46, 93%), although many will allow such communications under exceptional circumstances (21/46, 46%). Several judges, however, do allow *ex parte* communications between appointed counsel and the court (3/46, 7%).

II. EVALUATION OF APPOINTED COUNSEL

A. Summary

The responding judges overwhelmingly concluded that an appointed counsel has a beneficial effect in divorce and custody proceedings. Moreover, most of the judges considered an appointed counsel's work to be either excellent or good. This is not surprising, given the selectiveness judges appear to employ in appointing counsel.

Nonetheless, judges found several faults with the current use of appointed counsel. Most judges cited lack of definition of the role, as well as a lack of experience and lack of relevant outside knowledge, as the primary weaknesses facing counsel appointed to represent children.

Finally, the judges made many suggestions concerning the improvement of the role, which are addressed in the text of this Article.

B. Results of Individual Questions

Most of the judges believed that the termination of the appointed counsel's role in the case, and the termination of the appointed counsel's relationship with a client, should vary in each case (33/44, 75%). No judges indicated specifically that appointed counsel should terminate his or her relationship *before* settlement. Several judges indicated that counsel should terminate the relationship *after* settlement occurs.

Most judges found the quality of representation presently afforded by appointed counsel either excellent (23/46, 50%) or good (20/46, 43%). Of these, most found the work either uniformly excellent (20/46, 43%) or uniformly good (17/46, 37%). A few had mixed experiences and gave mixed reviews. A minority of judges find the work adequate (5/46, 11%), and almost none found the quality of the work poor (1/46, 2%).

The majority of judges found that appointed counsel affect proceedings "beneficially" (39/46, 85%). None found the effect of ap-

pointed counsel to be detrimental. Once again, some of the judges found the effect to vary (8/46, 17%).

A majority (23/43, 56%) of the judges surveyed believed that one of the "greatest weaknesses" of appointed counsel for children today was the lack of definition of the appointed counsel's role.

Other often-cited weaknesses included: inexperience as appointed counsel for children (13/43, 30%) and lack of outside knowledge that would be beneficial to counsel (e.g., psychiatric knowledge) (10/43, 23%). One judge responded that inexperience in the practice of law was one of the "greatest weaknesses." None of the judges found a lack of legal skills a great weakness.

Finally, some judges listed no weaknesses in the counsel they had appointed (5/44, 11%). Four of these five judges also responded that they only appoint counsel with whom they are personally familiar.

C. Summary of Judges' Recommendations

The recommendations made by the judges can be summarized as follows: (1) clarify the role of appointed counsel; (2) distinguish them from other experts; (3) encourage the appointed counsel to communicate freely with counsel for the other parties; (4) teach the appointed counsel to represent a child's best interests; (5) a court order should spell out appointed counsel's role explicitly; (6) create a training program for appointed counsel; (7) family law section of the state/local bar should establish minimum requirements (and perhaps court certification) that require appointed attorneys to have practiced family law for five years and to have participated in a minimum of 20 domestic relations cases; (8) create a list of counsel available for appointment, including information on specific attributes such as experience, interests, and talents; (9) set guidelines for the compensation of appointed counsel; (10) create a fee schedule using factors such as the complexity of case and parents' ability to pay; (11) make other support resources available to appointed counsel, such as psychologists and psychiatrists; (12) train judges on the use of appointed counsel; (13) counsel parents on the effect of divorce and custody litigation on children to encourage amicable settlement; (14) recognize the need for appointed counsel early; and (15) inform appointed counsel of the case's real issues early on.

III. SURVEY METHODOLOGY

A. *Sample Size and Composition*

One hundred and twenty Maryland circuit court judges received our survey. The author received the following responses: 46 completed questionnaires, 1 textual response, and 3 "not sufficient experience to answer." The data reported below represents a total of 50 respondents,¹²⁵ or 42% of 120 Maryland circuit court judges.

While most judges returned the survey anonymously, we received enough signed surveys, or surveys attributed to a certain county, to know that the sample is representative of the entire state and is not geographically biased.

B. *Presentation of Data*

The tables in Appendix B indicate the individual responses of every responding judge. Judges often selected more than one response to a question. Thus, the total aggregate number of responses often exceeds the number of responding judges.

The two primary methods of reading the data are (1) measuring trends in the overall responses to determine how judges generally respond to a given question; and (2) examining trends in individual responses to determine specifically how judges will answer a given question.

IV. SURVEY RESULTS

For an abridged version of the survey results, see Appendix B.¹²⁶ The following is a summary of the results therein.

A. *The Process of Appointing Independent Counsel for Children*

1. Summary

The overwhelming majority of judges surveyed employ appointed counsel for children at some time, although not in every case. In deciding whether to appoint counsel, judges consider a range of factors, both substantive and procedural.

Judges use care in selecting the counsel they appoint, often attempting to match certain characteristics of counsel with the unique aspects of the case. Most judges are "very familiar" with the counsel

125. Three judges have returned questionnaires too recently to be included in this Article. Thus, the total number of completed surveys is currently 49.

126. The survey responses are on file with the Author.

they appoint. This may indicate that most judges have certain attorneys who have earned their confidence, and that the judges appoint only these attorneys. This conclusion is borne out by the answers to question 5A. Judges prefer to appoint counsel with whom they are familiar, and few will appoint counsel with whom they are not at all familiar.

2. Results of Individual Questions

Almost all judges appoint counsel for children at some point. When judges decide to appoint counsel, they do so most often after original motions and before final disposition. Within this range, the precise stage at which appointments are made varies: after original motions (24/46, 52%); during or after discovery (20/46, 43%); at some later stage in the trial proceeding (22/46, 48%). Most judges have appointed counsel at varying stages of the proceedings (26/46, 57%), although a significant number (19/46, 41%) seem to appoint at a certain set stage of the proceedings.

The following factors most strongly indicate the need for independent counsel for children: (1) the possibility of receiving inadequate information without independent counsel (42/47, 89%); (2) a high level of conflict between parents (41/47, 87%); (3) the potential for long-term damage to the child (35/47, 74%); (4) age of the child (27/47 57%); and (5) a high level of conflict between attorneys (23/47 49%).

The following factor less strongly indicates the need for independent counsel for children: the amount of money at issue (6/47, 13%). Six judges felt strongly enough to write in the following factor: allegations of substance abuse or sexual abuse (6/47, 13%). Other factors considered include the maturity of the child and a high level of conflict between parent and child.

All judges indicated that they considered a number of factors in reaching this decision; thus, no one factor is dispositive. The most common combinations of responses were: (1) risk of inadequate information and age of child (18/47, 38%); (2) parental conflict, attorney conflict, and the potential for harm to the child (14/47 30%); and (3) parental conflict and potential for harm to the child (13/47 28%).

The qualities most often sought in an attorney for appointed counsel are: (1) experience (35/44, 80%); (2) legal knowledge/competence (34/44, 77%); and (3) the personal characteristics of counsel (27/44, 61%). Almost all judges consider a number of fac-

tors in reaching this decision, usually including some combination of the above three factors.

Most judges appoint counsel with whom they are "very familiar" (40/45, 89%). None will appoint counsel with whom they are "not at all familiar." Few judges will appoint counsel with whom they are "somewhat familiar" (19/45, 42%). Every judge prefers to appoint counsel with whom they are familiar.

APPENDIX B
ABRIDGED SURVEY RESPONSES AND TABLES

Question One:

At what point in divorce or custody proceedings do you appoint counsel for children? (Check one or more)

Table 1

Response	Number of Respondents	Percentage of Respondents
Never	1	2%
After original motions	24	52%
During or after discovery	20	43%
At some later stage in the trial proceeding	22	48%
After a final decision	2	4%
Other	7	15%
No response	1	NA

Question Two-A (Substantive):

What factors indicate the need for independent counsel for children? (Check one or more)

Table 2A

Response	Number of Respondents	Percentage of Respondents
Possibility of receiving inadequate information without independent counsel	42	89%
Age of child	27	57%
Amount of money at issue	6	13%
Other	13	28%
No response	0	NA

Question Two-B (Procedural):

What factors indicate the need for independent counsel for children? (Check one or more)

Table 2B

Response	Number of Respondents	Percentage of Respondents
High level of conflict between the parents	41	87%
High level of conflict between attorneys	23	49%
Potential for long-term damage to child from divorce proceeding	35	74%
Other	6	13%
No response	0	NA

Question Three:

What qualities do you look for in an attorney for appointed counsel? (Check one or more)

Table 3

Response	Number of Respondents	Percentage of Respondents
Experience	35	80%
Legal knowledge/competence	34	77%
Other knowledge/competence (e.g., psychological)	18	41%
Personal characteristics (specify)	27	61%
Other	4	9%
No response	3	NA

Question Four:

How familiar are you with the attorneys you appoint? (Check one, or more if this varies)

Table 4

Response	Number of Respondents	Percentage of Respondents
Very familiar	40	89%
Somewhat familiar	19	42%
Not at all familiar	0	0%
No response	2	NA

Question Five-A:

Do you prefer to appoint counsel with whom you are familiar?

Table 5A

Response	Number of Respondents	Percentage of Respondents
Yes	45	100%
No	0	0%
No response	2	NA

Question Five-B:

Will you appoint counsel with whom you are not at all familiar?

Table 5B

Response	Number of Respondents	Percentage of Respondents
Yes	15	33%
No	30	67%
No response	2	NA

Question Six:

What is the present role of appointed counsel in your court?
(Check one or more)

Table 6

Response	Number of Respondents	Percentage of Respondents
Neutral fact-finder	26	58%
Representative of the court	18	40%
Representative of the child	43	96%
Other (specify)	3	7%
No response	2	NA

Question Seven:

How should appointed counsel advocate for her client, the child?
 (Check one or more; also note whether any of these are entirely inappropriate)

Table 7

Response	Number of Respondents	Percentage of Respondents
Advocate child's best interests, even if they conflict with child's stated wishes	23 (appropriate)	51%
	0 (inappropriate)	0%
Advocate child's wishes, regardless of attorney's views on child's best interests	9 (appropriate)	20%
	5 (inappropriate)	11%
Make child's wishes clear, but advocate for the child's best interests	39 (appropriate)	87%
	0 (inappropriate)	0%
Advocacy varies	9 (appropriate)	20%
	0 (inappropriate)	0%
No response	2	NA

Question Eight:

How heavily should appointed counsel rely on psychiatric or other independent evaluations? (Check one or more; if other than psychiatric, please specify)

Table 8

Response	Number of Respondents	Percentage of Respondents
Not at all	1	2%
Very little	2	4%
Somewhat	30	67%
A great deal	8	18%
This varies	6	13%
No response	2	NA

Question Nine:

How much contact should appointed counsel have with the parents' attorneys?

(Check one or more)

Table 9

Response	Number of Respondents	Percentage of Respondents
No contact	0	0%
Minimal contact	14	30%
Some additional outside contact	9	20%
Close contact throughout the entire proceeding	13	28%
Amount of contact varies	22	48%
No response	1	NA

Question Ten:

Are *ex parte* communications between the court and appointed counsel permissible?

Table 10

Response	Number of Respondents	Percentage of Respondents
Yes	3	7%
No	43	93%
Allowed under exceptional circumstances	21	46%
No response	1	NA

Question Eleven:

When should appointed counsel terminate his relationship with his client, the child? (Check one or more)

Table 11

Response	Number of Respondents	Percentage of Respondents
Before settlement	0	0%
Immediately after settlement	7	16%
Sometime after settlement	7	16%
This varies	33	75%
No response	3	NA

Question Twelve:

How do you view the quality of representation presently afforded by appointed counsel? (Check one or more)

Table 12

Response	Number of Respondents	Percentage of Respondents
Excellent	23	50%
Good	20	43%
Adequate	5	11%
Poor	1	2%
Variable	1	2%
No response	1	NA

Question Thirteen:

How have appointed counsel for children affected proceedings you have been involved in? (Check one or more)

Table 13

Response	Number of Respondents	Percentage of Respondents
Beneficially	39	85%
Detrimentially	0	0%
Varyingly	8	17%
No response	2	NA