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REFOCUSING THE LENS OF CHILD ADVOCACY REFORM ON THE CHILD

INTRODUCTION

When placed within family court jurisdiction, children need lawyers. Dependency¹ cases in the family court—in which parents are accused of abusing or neglecting their children—are fraught with constitutional tensions regarding the state’s and parents’ rights to regulate the well-being of children,² along with systemic pressures such as federal statutes and state funding³ that substantially affect family relationships. Children sit at

1. This Note addresses only dependency proceedings, otherwise known as child protective proceedings. This Note does not address delinquency or custody proceedings.

2. The United States Supreme Court has generated several landmark opinions that set the boundaries between the respective, and often conflicting, constitutional rights of parents and the state over children’s well-being. Parents’ right to raise their children has long been established. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . In recognition of this . . . [our] decisions have respected the private realm of family life which the state cannot enter.”) (citation omitted); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right under the Fourteenth Amendment to “establish a home and bring up children”).

However, when the well-being of the child is substantially at stake, the state has powers to enter the otherwise private family setting. *See Prince*, 321 U.S. at 167 (“[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; . . . this includes, to some extent, matters of conscience and religious conviction.”); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972) (“[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”); *Prince*, 321 U.S. at 168 (“The state’s authority over children’s activities is broader than over like actions of adults.”).

3. The federal Adoption and Safe Families Act (ASFA) makes children’s safety the primary concern in matters involving children’s placement, while significantly placing pressure on state funding concerns. *See Adoption and Safe Families Act of 1997*, Pub. L. No. 105-89 (1997) (codified in scattered sections of 42 U.S.C.). *See also* LESLIE J. HARRIS & LEE E. TEITELBAUM, *CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS* 647 (2d ed. 2006).

[T]he state cannot receive federal foster care funds for the child if a judge finds that removal was not necessary to protect the child’s welfare or that reasonable efforts to enable the child to remain at home were not made. Judges are, therefore, in something of a dilemma if they conclude that an agency has not made reasonable efforts. On the one hand, just making the finding has the effect of depriving the agency and thus the children of needed funds. On the other hand, failure to make the finding when the facts warrant it undermines the purposes of the law.

Id. The legislative history of ASFA specifies that the act was “designed to produce [an] increase in adoptions.” H.R. REP. NO. 105-77, at 7 (1997). “Rather than abandoning the Federal policy of helping troubled families, what is needed is a measured response to allow States to adjust their statutes and

the heart of these proceedings; indeed they are the very reason for them. Facing abrupt state intervention into their family life and the oft-accompanying physical removal⁴ from their homes, these children travel a tumultuous and uncertain road from the time the alleged abuse or neglect occurs until the allegations are resolved. Threatened also with termination of parental rights,⁵ they—for better or worse—face the potential permanent loss of their natural family life. The recognition that children are not mere property to be tossed between their parents and the state has prompted states to require representation of children as independent parties. Children possess unique rights and interests—to be free from harm and to access relevant social services, among others—that need separate advocacy, particularly in light of the frequent conflicts between the respective interests of parents and children.⁶ Though a relatively common practice, child representation in dependency proceedings remains both inconsistent and disputed across the country.

Children's lawyers in dependency proceedings practice in a highly specialized and unsettled area of the law. Legislators and experts have not agreed on how best to represent children, despite years of discourse regarding what role children's lawyers⁷ should play. The two most prominent schools of thought—those who support lawyers representing children's best interests (best interests lawyers), and those who support lawyers treating children as adult clients and advocating the clients' wishes (client-directed lawyers)—highlight the great philosophical divergence regarding child advocacy.⁸ The focus of each camp is remarkably different, despite the shared goal of achieving effective child representation. Best interests models are configured around the lawyer's

practices so that in some circumstances ["aggravated circumstances"] States . . . [can] move more efficiently toward terminating parental rights and placing children for adoption." *Id.*

4. Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL'Y* 141, 144–49 (2006) (discussing the disruption children face when removed, even temporarily, from their homes after an allegation of abuse or neglect).

5. See HARRIS & TEITELBAUM, *supra* note 3, at 661.

6. Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 *PACE L. REV.* 869, 899–904 (2007) (discussing how parents' interests and actions in court can clash with children's interests, particularly in high-conflict cases where parents feel more pressure). Though Elrod writes to argue for a client-directed model of child advocacy, her description of children's separate interests reflects the general reasons children were ever deemed to need representatives in court.

7. For simplicity, unless otherwise specified, all references in this Note to attorneys or child representation refer only to child advocacy in dependency proceedings.

8. For detailed discussion regarding the debate between best interests and client-directed models, see *infra* Part II.A.

decision making, whereas the alternative client-directed models focus on how to advance the child's decision making.

Years of efforts to clarify the role of child advocates reveal an inherently problematic focus: they center on lawyers, not children. Recent reform efforts have manifested in several model standards,⁹ which are in significant conflict with one another. However, the common thread among these standards as well as among state laws is that they are generally designed to clarify the lawyers' role in an attempt to better represent children. By primarily focusing on how to clear lawyers' confusion regarding how to represent their clients, rather than focusing on how to increase, or at least optimize, children's participation in the proceeding, the standards have diminished children's voices. Such diminishment not only devalues the child as a party, despite the child's access to separate representation, but it also deprives the court of potentially critical information from the child. This Note refocuses the lens of current reform efforts on the significance of children's voices, stemming from both theory and practical necessity. It urges that reform efforts keep children, rather than lawyers, first in mind. Regardless of whether such a refocusing results in a client-directed or a best interests model as a resolution, it provides the appropriate analytical framework for reform efforts. However, through these considerations, along with a critique of the informal nature of actual dependency proceedings, this Note proposes that a client-directed attorney emerges as the option best suited to refocus reform efforts to consider children first.¹⁰

Part I discusses child representation reform efforts over the last twelve years. It recounts the entrenched best interests status quo reflected across state statutes, the growing movement toward increasing client direction as manifested via prominent national conferences, and the mixed efforts of various model standards to shape lawyers' roles. Part II discusses the discord between client-directed and best interests advocacy, as well as between the specific framework of existing standards and the growing movement toward client direction. It explains that the mismatch between this trend and the standards exists because the trend is child-focused whereas the standards are lawyer-focused. Part II next examines how current lawyer-focused standards curtail children's participation and direction, why this curtailment is harmful, and what assumptions and biases underlie these standards. Part III identifies the informal nature of

9. *See infra* Part I.B.

10. This Note recognizes that some children are indisputably incapable of expressing wishes. Hence, this proposal does not encompass infants and other preverbal or nonverbal children.

family court as a principal source of the general laxity in maintaining client direction in child advocacy, by way of its heavy deference to professional decision making in dependency cases. Specifically, Part III explains how the protective sentiment that pervades family court has helped sustain lawyer-focused models and the predominance of best interests advocacy. Part IV proposes that, in light of these circumstances and the need to refocus on children, children's lawyers should assume roles as client-directed attorneys. Part IV also provides justifications as to how such a proposal would maximize client-directed advocacy without sacrificing the rehabilitative nature of family court.

I. STANDARDS AND CONFERENCES: RECENT EFFORTS TO CLARIFY THE ROLE OF THE ATTORNEY

The last several decades have witnessed a surge in discourse regarding the contentious issue of child representation. As no federal law articulates what the precise role of a child's attorney should be, each state has adopted its own laws to guide its lawyers.¹¹ Despite the overarching status quo in maintaining best interests advocacy as a preferred option, this state-by-state development has generated considerable inconsistency among the state statutes,¹² and has thereby triggered a desire for reform.

A. National Conferences Establish a Growing Consensus

Two national conferences, one at Fordham University¹³ (Fordham or Fordham Conference) and the other at the University of Nevada, Las Vegas¹⁴ (UNLV or UNLV Conference), culminated much of the scholarly debate surrounding child representation. Together, these conferences book-ended a decade of movement toward a client-directed model of child

11. See YALE LAW SCHOOL, REPRESENTING CHILDREN WORLDWIDE: HOW CHILDREN'S VOICES ARE HEARD IN CHILD PROTECTIVE PROCEEDINGS (2005), <http://www.law.yale.edu/rcw/rcw/summary.htm> [hereinafter REPRESENTING CHILDREN WORLDWIDE] (summarizing current child representation legislation across the world, including each state in the United States).

12. See Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 754-56 (2006) (describing the variety of state statutes governing child representation in dependency proceedings). See also REPRESENTING CHILDREN WORLDWIDE, *supra* note 11.

13. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Conference*].

14. *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006) [hereinafter *UNLV Conference*].

advocacy.¹⁵ Although state statutes collectively indicate a national preference for best interests advocacy, Fordham and UNLV represent a gradual movement away from this preference. The conferences have produced not only academic discourse, but also practice guides addressing how to effect the desired changes.¹⁶

The consensus at Fordham is captured in the first line of its recommendations: “A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child’s lawyer.”¹⁷ With regard to the existing variety of legal and non-legal child advocacy, Fordham first states that “[l]aws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child’s guardian *ad litem* should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding.”¹⁸ Addressing the diversity within the role of children’s lawyers, Fordham’s second recommendation states that “[l]aws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.”¹⁹ With this objective as a unifying theme, Fordham then provides guidance for lawyers representing children of varying capacities.²⁰ Fordham’s guidance regarding interviewing, counseling, and confidentiality speaks collectively to children of all capacities.²¹

Ten years later, “[a]ffirming and building upon”²² the Fordham recommendations, the UNLV Conference produced a practice guide “to assist attorneys to maximize the child’s participation in proceedings involving the child’s interests through deeply grounded representation.”²³ The UNLV recommendations specifically state that “[c]hildren’s attorneys should take their direction from the client and should not substitute for the

15. Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 *HAMLIN J. PUB. L. & POL’Y* 177, 179 (2006) (“The profession has moved towards giving the child greater autonomy in directing legal representation to allow the child’s own position and perspective to be given real advocacy. . . .”).

16. Annette R. Appell, *Children’s Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 *NEV. L.J.* 692, 714–19 (2006) (outlining guidelines to discerning children’s voices); ANN M. HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993); JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (2007) (a practice guide seeking to enhance child representation).

17. *Fordham Conference*, *supra* note 13, at 1301.

18. *Id.*

19. *Id.* at 1302.

20. *Id.* at 1308–14.

21. *Id.* at 1302–09.

22. *UNLV Conference*, *supra* note 14, at 592.

23. *Id.* at 593.

child's wishes the attorney's own judgment of what is best for children or for that child."²⁴ These recommendations urge lawyers to gain a holistic sense of their clients' lives, families, and communities,²⁵ as well as multidisciplinary training and assistance in cases.²⁶ They further provide guidance on how to maximize children's participation in the representation.²⁷ Specifically, the recommendations outline limited circumstances²⁸ in which lawyers should substitute judgment for their clients, namely when the child "lacks the capacity to make adequately considered decisions[.]" when "the child's expressed preferences would be seriously injurious[.]" or when the attorney is practicing "in a jurisdiction that requires the attorney to exercise substituted judgment or act as a guardian *ad litem*."²⁹ In reaffirming Fordham's recommendations for legal reform, the UNLV recommendations propose that the "[m]eans of achieving this goal include curbing judicial or legislative discretion to dictate . . . the child's attorney's role and interpreting or modifying the [federal] Child Abuse Prevention and Treatment Act ("CAPTA") mandate for appointment of best interests representatives for children to include the appointment of a client-directed attorney."³⁰

Though Fordham and UNLV represent only one school of thought in the child advocacy debate,³¹ they are products of experts across the country,³² and therefore they symbolize a significant consensus favoring client-directed child representation in dependency proceedings.

24. *Id.* at 609.

25. *Id.* at 593–95.

26. *Id.* at 598–605.

27. *Id.* at 595–96.

28. As Jane Spinak explained, under the UNLV recommendations, "[e]ven the lawyer representing a client unable to direct representation at all or in part, substitutes judgment on behalf of the child only after taking significant steps to determine what position the client would want the attorney to take." Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385, 1387 (2006).

29. *UNLV Conference*, *supra* note 14, at 609. The UNLV recommendations admonish lawyers, however, of the limits of relying on capacity as a reason to substitute judgment.

When assessing the child's capacity to make a decision, the following apply: (A) Capacity to communicate does not include failure to communicate; (B) Generally, the only children who cannot communicate are those who are pre-verbal or otherwise unable to communicate their objectives; (C) When the child's preferences would be "seriously injurious" does not mean merely contrary to the lawyer's opinion of what would be in [the] child's interests.

Id.

30. *Id.* at 611 (footnote omitted).

31. Other scholars, who are in favor of best-interests representation, disagree with Fordham's stance. For examples of arguments supporting the best interests approach, see *infra* note 68.

32. Seventy of the nation's child advocacy scholars attended the Fordham Conference. Fordham Law, Louis Stein Center for Law & Ethics, Program Details, Ethical Issues in the Legal

B. Conflicts Among Various State and National Standards

Outside of this reform effort, state laws and national model standards for child representation remain inconsistent. Only a handful of state statutes have default positions which allow children to direct their lawyer's advocacy.³³ The remaining states allow for either client-directed attorneys or the alternative best interests attorneys depending on factors such as the judge's or representative's discretion or the child's age and capacity.³⁴ Such discretionary lines have resulted in inconsistent placement of similar children into both types of representation,³⁵ as well as unclear roles for children's lawyers. In an attempt to promote consistency and clarity, several national organizations have drafted model standards.

The American Bar Association published its Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA Standards or ABA Abuse and Neglect Standards) in 1996.³⁶ The ABA Standards treat child clients the same as they would adult clients. These Standards acknowledge that children develop in increments and may be able to voice opinions on some issues, even if not all issues, at any given age.³⁷ Hence, they require children's lawyers to be zealous advocates of their clients' wishes instead of best interests advocates or presenters of

Representation of Children, <http://law.fordham.edu/ihtml/st-2e1lr.ihtml?id=685> (last visited Sept. 22, 2008). The *Fordham Law Review* published a special edition dedicated to the Conference, consisting of collaborative recommendations and working group reports, along with twenty-four articles written by twenty-six of the Conference's participants. For a list of articles and authors in the table of contents, see Contents, 64 FORDHAM L. REV. at ix, ix (1996).

For a list of the ninety-five participants at the UNLV Conference, see Participants in the Conference on Representing Children in Families: Children's Advocacy & Justice Ten Years After Fordham, <http://rcif.law.unlv.edu/participants> (follow "Representing Children in Families Participants.pdf" hyperlink) (last visited Sept. 28, 2008).

33. See REPRESENTING CHILDREN WORLDWIDE, *supra* note 11. Louisiana, Massachusetts, New Jersey, Oklahoma, and West Virginia reasonably reflect policies parallel to those expressed at Fordham and UNLV, as they provide children with client-directed lawyers at the outset of the proceeding. *Id.*

34. See *id.* Lawyers in states such as Arizona, Connecticut, Iowa, New Jersey, New York, Tennessee, and West Virginia, fulfill a hybrid role of advocating the child's best interests along with the child's wishes. *Id.* Still other states, such as Minnesota, New Mexico, and Wisconsin provide client-directed lawyers, but only for children who reach a certain age. *Id.* The balance of the states present varied schemes, often relying on the court's discretion, the appointed representative's discretion, or the development of a conflict between the client's wishes and the representative's assessment of the child's best interests. *Id.*

35. The UNLV Conference responded to this problem by suggesting that legislatures and judges should be limited in how they can define lawyers' roles. See *supra* text accompanying note 30.

36. AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), available at http://www.abanet.org/family/reports/standards_abuseneglect.pdf.

37. *Id.* § B-4(1).

neutral evidence. Additionally, they directly incorporate the Model Rules of Professional Conduct³⁸ to determine whether a child client is “under a disability.”³⁹ Proponents of client-directed child advocacy appreciate the ABA Standards because they “instruct[] lawyers to err on the side of empowering children.”⁴⁰ However, the Standards have also been criticized by those who suspect that lawyers may try to exert power over a child client who may frequently qualify as having severely diminished capacity.⁴¹ Furthermore, some critics argue that the Model Rules, which broadly offer guidance for representing a “[c]lient with diminished capacity,”⁴² are inadequate to address the unique issues that affect child clients.⁴³

Five years after the introduction of the ABA Standards, the National Association of Counsel for Children (NACC) established a modified version of the ABA Standards called the NACC Recommendations for Representation of Children in Abuse and Neglect Cases (NACC Standards).⁴⁴ The NACC clearly recommends that all children receive

38. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

39. *Id.*

40. Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 321 (1998). Guggenheim comments on how the ABA Standards embrace Fordham's view that client wishes should control whenever possible. “It is important to underscore that this uniformity is achieved by instructing lawyers to err on the side of empowering children. The ABA Standards explicitly direct lawyers to advocate the position articulated by the client ‘[i]n all but the exceptional cases, such as with a preverbal child[.]’” *Id.*

41. As an initial matter, the ABA Standards, “which present the closest thing to a uniform model of representation for lawyers representing children, are simply recommendations and have no binding effect.” Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551, 574 (2007). “Compounding the problem is the issue of lack of resolve: if a young person is unsatisfied with the representation, he or she is unlikely to seek redress.” *Id.* at 578.

Additionally, some concern has been expressed because the ABA Standards only recommend, but do not require, lawyers to serve solely as lawyers. The ABA's stance in this respect has raised both questions and concerns. “When the *Abuse & Neglect Standards* left open the door for attorneys to continue to function in the dual role of counsel for the child and guardian *ad litem*, they disregarded the inherent conflicts created by the attorney's obligation to comply with the state ethics code.” David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103, 124 (2000).

42. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

43. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1401 (1996) (“The Model Rules of Professional Conduct unhelpfully instruct lawyers representing young children ‘as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client.’ . . . [However,] the Rules are unhelpful in clarifying where and how the relationships are to differ.”) (footnote omitted).

But see Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16. Each of these three practice guides supplements the Model Rules by specifically addressing children and instructing lawyers how to foster an appropriate relationship with child clients.

44. NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT

legal representatives instead of non-lawyers, who are otherwise available as guardians ad litem.⁴⁵ However, “[r]ather than urging jurisdictions to choose a particular model, [the NACC Standards] set[] out a checklist of children’s needs that should be met by whatever representation scheme is chosen.”⁴⁶ In setting up its standards in this fashion, the NACC hoped to “avoid becoming mired in the debate over best interests and expressed wishes.”⁴⁷ The NACC endorsed most of what the ABA Standards set forth but revised them to lean more heavily towards a best interests approach, focusing on lawyers counseling their child clients but ultimately substituting their judgment for that of the client.⁴⁸

Most recently, in February 2007, the ABA endorsed⁴⁹ the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (NCCUSL Act or Act).⁵⁰ The NCCUSL Act was drafted in 2006 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL Act explicitly integrates the ABA Abuse and Neglect Standards,⁵¹ as well as another set of ABA Standards for custody proceedings.⁵² The Prefatory Note to the Act also addresses the other major prior standards and conferences.⁵³ Assuming the NCCUSL drafters considered all of the history discussed in the Act’s Prefatory Note, and in

CASES (Nat’l Ass’n of Counsel for Children 2001), available at http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf.

45. *Id.* at 5.

46. *Id.* at 4.

47. *Id.*

48. *See id.* at 14–15.

49. *See* AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REPORT TO THE HOUSE OF DELEGATES, www.abanet.org/leadership/2007/midyear/docs/journal/hundredfivef.doc [hereinafter ABA ENDORSEMENT OF NCCUSL ACT] (“RESOLVED, That the American Bar Association approves the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2006 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.”).

50. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2006), available at http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2006_finalact.pdf [hereinafter NCCUSL ACT].

51. *See supra* text accompanying notes 36–37.

52. The ABA promulgated a separate set of child representation standards for the context of custody proceedings. *See American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (2003). The Prefatory Note to the NCCUSL Act summarizes these ABA standards: “The ABA Custody Standards identify two distinct roles for attorneys who represent children: the ‘child’s attorney,’ who is in a traditional attorney-client relationship, and the ‘best interests attorney,’ who advocates a position that the attorney determines to be in the child’s best interests.” NCCUSL ACT, *supra* note 50, at 3–4. “The ABA Custody Standards explicitly reject the hybrid attorney/guardian ad litem model because of the confusion and ethical tensions inherent in the blended professional roles.” *Id.* at 4.

53. NCCUSL ACT, *supra* note 50, at 4–5.

light of the ABA's recent endorsement⁵⁴ of the Act, the NCCUSL Act embodies many of the current thoughts regarding how to legislate for child representation in dependency proceedings.

The Prefatory Note to the NCCUSL Act specifies that “[t]he Act seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children’s representatives and by providing guidelines to courts in appointing representatives.”⁵⁵ The Act sets up two categories of lawyers: child’s attorneys⁵⁶ and best interests attorneys.⁵⁷ The child’s attorney is to treat the child as an adult client and hence to allow the child to direct his or her representation.⁵⁸ In contrast, the best interests attorney is not bound by the client’s wishes.⁵⁹ The best interests attorney advocates for what the attorney believes is in the child’s best interest, after reviewing objective evidence.⁶⁰ The NCCUSL Act requires the judge to determine at the outset of the proceeding whether to appoint a child’s attorney or a best interests attorney.⁶¹ This decision rests on factors such as the child’s age, developmental level, and expressed desires for an attorney or a specific outcome.⁶² The judge also has the option of appointing a third type of representative, the court-appointed advisor, who acts simply as an aid to the court in making a best interests determination.⁶³

54. See ABA ENDORSEMENT OF NCCUSL ACT, *supra* note 49.

55. NCCUSL ACT, *supra* note 50, at 5.

56. “The child’s attorney is in a traditional attorney-client relationship with the child and is therefore bound by ordinary ethical obligations governing that relationship.” *Id.* at 6. The Act specifies that the child’s attorney should be a client-directed representative rather than a best interests representative. *Id.* The Act does allow for “a limited exercise of substituted judgment . . . when the child is incapable of directing or refuses to direct representation as to a particular issue. . . .” *Id.* at 6–7. In such a situation, the lawyer is authorized to make a decision for the child, so long as that decision does not conflict with the wishes the child did express. *Id.* at 7.

57. *Id.* at 7 (“The best interests attorney . . . is a legal representative of the child but is not bound by the child’s expressed wishes in determining what to advocate. Instead, the best interests attorney has the substantive responsibility of advocating for the child’s best interests based on an objective assessment of the available evidence and according to applicable legal principles.”).

58. *Id.* at 6.

59. *Id.* at 7.

60. *Id.*

61. *Id.* at 16 (“In an abuse or neglect proceeding, the court shall appoint either a child’s attorney or a best interests attorney. The appointment must be made as soon as practicable to ensure adequate representation of the child and, in any event, before the first court hearing that may substantially affect the interests of the child.”).

62. *Id.* (“In determining whether to appoint a child’s attorney or a best interests attorney, the court may consider such factors as the child’s age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child’s best interests.”).

63. *Id.* at 8 (“The role of the court-appointed advisor is to assist the court in determining the child’s best interests. The court-appointed advisor’s responsibilities include investigation of the case

The NCCUSL Act is useful for analyzing the current state of child representation legislation, as it consolidates many of the mainstream ideas into one model. Along with integrating other accepted approaches to child representation, the Act incidentally sweeps in their accompanying drawbacks. It already has received criticism for its separation of roles and its methods of appointment.⁶⁴ Generally, the Act implicitly endorses both the separation of attorney roles and best interests representation. Also implicit in this endorsement are the assumptions and implications of such rationales.

II. THE MISMATCH BETWEEN THE CLIENT-DIRECTED TREND AND EXISTING STANDARDS

Given its atypical client characteristics, sensitive subject matter, and multidisciplinary dimensions, child advocacy often appears amorphous. The efforts to clarify the goals of child advocacy in dependency proceedings have indeed been arduous. Decades of discourse, both consistent and at odds with the Fordham and UNLV recommendations,⁶⁵ indicate a consensus that the presence of *some kind* of child advocate is vital to the dependency proceeding. Underlying this agreement are the beliefs that some kind of child participation is valuable⁶⁶ and that justice requires children to have some sort of advocate.⁶⁷ This broad accord and its underlying premises might suggest a rather straightforward conclusion that reform efforts ought to enhance and expand child representation.

and, where appropriate, making a recommendation to the court. . . . [T]he court-appointed advisor may not perform acts that would be restricted to a licensed attorney, even if the person functioning as a court-appointed advisor holds a license to practice law.”)

64. See generally Spinak, *supra* note 28. Professor Spinak criticizes the NCCUSL Act directly, from three principal perspectives. First, Spinak explains how the Act actually makes the attorney role more complicated, as it deviates from the steady national trend toward having lawyers act as lawyers in a single role, regardless of the client’s age. *Id.* at 1389. She argues that the division of roles set up by the NCCUSL Act is out of line with existing consensus, and that it pushes lawyers to act more for the state than for their own clients. *Id.* Next, Spinak explains how the power of the courts to appoint a “type” of attorney at the outset of the proceedings “undermines the independence of a lawyer.” *Id.* at 1390.

65. See generally *Fordham Conference*, *supra* note 13; *UNLV Conference*, *supra* note 14. The Child Abuse Prevention and Treatment Act also demonstrates how federal law embraces the idea that children should have some sort of representation in court, albeit guardian ad litem representation. See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000).

66. See Ann M. Haralambie, *Recognizing the Expertise of Children and Families*, 6 NEV. L.J. 1277 (2006) (describing the expert knowledge children and families have about their own lives).

67. As explained in an early New York case, “[w]ithout [legal] representation [for children], the natural parent vigorously focuses on parental rights and claims. The approach centers on whether ‘this child belongs to me,’ without an equal inquiry, on behalf of the unrepresented infant on whether ‘this parent belongs to me.’” *In re Tyese J.*, 373 N.Y.S.2d 447, 450 (N.Y. Sur. 1975).

However, despite the general agreement on this basic conclusion, the implications associated with effectuating it generate the divergence between general rhetoric and practical application of child representation standards.

A. The Persisting Debate: Best Interests Versus Client-Directed Lawyers

Most prevalent, particularly in modern scholarship and reform efforts, is the discord regarding *how* the child should participate in the proceeding. The two mainstream avenues of thought regarding this conflict over the nature of the lawyer-client relationship are commonly labeled “best interests” and “client-directed.” Each avenue has received praise,⁶⁸ and each has received criticism.⁶⁹ A notable distinction between the two is the

68. For arguments supporting the best interests approach, see Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J. 1284, 1289–92 (2006); see also Frances Gall Hill, *Clinical Education and the “Best Interest” Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering Pedagogy*, 73 IND. L.J. 605, 623–24 (1998). Though Hill addresses custody proceedings, the analysis of best interests representation is the same in either context.

Best-interest representation is consistent with society’s notion that children have not attained the full measure of cognitive skills, maturity, and judgment necessary for autonomous decisionmaking. . . . [Guardian *ad litem*] representation allows the child to fully express his needs, concerns, and desires, but screens the child’s position for accuracy and investigates the child’s situation from the broader perspective of the family system and the long-range interests of the child.

Id. at 623 (footnote omitted). These supporters also consider as beneficial and appropriate best interests attorneys’ ability to incorporate societal values into their investigation and advocacy. *Id.* at 623–24. Such normative considerations are seen to generate the best options for all children. *Id.* For arguments supporting the client-directed approach, see generally Elrod, *supra* note 6.

69. For criticism of the best interests standard, see Sobie, *supra* note 12, at 807–08.

First, the “best interests” of the child is largely irrelevant unless and until parental malfeasance has been proven Similarly, concluding in a termination of parental rights case that the child should be adopted is meaningless, unless and until the court finds by clear and convincing evidence that sufficient facts exist to permit termination.

Id. at 807 (footnote omitted). The best interests role for attorneys is also criticized because the court’s overall disposition must accord with the child’s best interests; hence, best interests advocacy for lawyers is arguably repetitive. *Id.* at 808; see also Shari Shink, *Justice for Our Children: Justice for a Change*, 82 DENV. U. L. REV. 629, 646–47 (2005) (explaining the type of racial and class-based discretion that biases best interests determinations, as well as the general ambiguity surrounding these determinations).

For criticism of client-directed models, see Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441, 444, 448–49 (2000).

[T]hese so-called client-directed models actually contain within themselves serious opportunities for lawyers to exercise unfettered and unreviewed discretion in representing children. This discretion is even more serious than that complained about under the pure best interests approach because the latitude permitted in the client-directed models is more private and less reviewable by a court and other litigants than is the best interests discretion.

way in which each standard seeks to incorporate the child in the proceeding. Models adopting a best interests approach endorse the arrangement by which a third party steps into the child's position, collects information from the child and the child's surroundings, and then arrives at the third party's own conclusions as to what is best for the child.⁷⁰ In contrast, models adopting a client-directed approach perceive actual child direction in the proceeding as the requisite standard for child participation.⁷¹ Proponents of best interests advocacy focus primarily on children's general lack of capacity to make reasoned decisions as adults can. Hence, they rest their stance on children's apparent inability to adequately direct their lawyers.⁷² Proponents of client-directed advocacy present a different view of capacity,⁷³ strive to empower children,⁷⁴ and

Id. at 444. Critics of the client-directed approach also highlight how children in dependency proceedings are frequently traumatized and under pressure from both parents to make certain decisions. *Id.* at 448. Another common criticism concerns how the client-directed model does not accommodate for preverbal or pre-capacity children. *Id.* at 448. *But see supra* note 10.

70. NCCUSL ACT, *supra* note 50, at 7.

71. *Id.* at 6–7.

72. *See Harris, supra* note 68, at 1285.

73. *See Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 905 (1999). “[W]hen the issue is not who should have the authority to determine the ultimate outcome, but who should have an opportunity to attempt to influence the ultimate decision maker (here, the court), reasoning ability should matter much less.” *Id.* Another related argument compares the relationship between lawyer and child in dependency proceedings to that in delinquency proceedings. *See Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 90–92 (1984). This argument reasons that the relative ages at which children in delinquency proceedings and children in dependency proceedings are allowed to direct their lawyers should correspond. *Id.* at 90. First, this argument is premised on the common goals of both delinquency and dependency proceedings: to help children. *Id.* at 91. Moreover, both types of proceedings can lead to similar results, in that children in both proceedings may be removed from their parents' homes. *Id.* “[T]he child's power to direct his counsel and thereby make his own views and preferences known to the judge and jury should not turn on fortuities such as whether the state has decided to proceed by way of a delinquency proceeding rather than . . . a protective proceeding.” *Id.* at 92.

74. *See Katherine Hunt Federle, Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995) (“Under present accounts, capacity is a prerequisite to having and exercising rights. . . . [M]oving our rights talk beyond notions of the capacity of the rights holder . . . [and] thinking about the powerlessness of children helps us to construct new images of childhood that are not tied to disabling accounts of children's helplessness and vulnerability”). *Id.* at 1585–86 (footnote omitted). For more on Federle's empowerment theory, see Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996).

Buss offers another empowerment-oriented approach. *See Buss, supra* note 73, at 961. Buss rests much of her analysis on how children's diminished capacity limits empowerment goals. *Id.* at 927–47. However, although admittedly casting doubt on the client-directed attorney model, Buss ultimately rejects the guardian ad litem model, arguing that “modifying [the client-directed attorney] model to address its inadequacies would serve children better than abandoning the approach in favor of the guardian ad litem, or best interest, approach.” *Id.* at 950.

view children as experts⁷⁵ on their own family lives.

The incongruity in what is considered appropriate in either of these two camps is a key contributor to the frequent discrepancy between any expressed goals of child advocacy and their selected means. The patent contrast between the standards adopting either of these views may seem remarkable, especially considering the common goal of enhancing child representation. However, each group of thought believes its method achieves the goal, chiefly because each group believes it accommodates for the maximum feasible child participation. For instance, those who focus on children's limited capacity consider the child's contribution to the lawyer's best interests determination as sufficient in relation to the child's decision-making capabilities.⁷⁶ Notably, these two views differ not only in how they incorporate the child, but also in how they are configured. Best interests models, by assigning to lawyers full decision-making authority, are framed around the lawyer's role itself. In contrast, client-directed models keep the child at the center of their framework, and have the lawyer react to that position.

Even aside from the intricacies of these two views, the simple existence of such a dichotomy evokes an overlooked set of principles underlying the recent dialogue surrounding child representation reforms. While this dichotomy is generally considered the baseline for child advocacy models and reforms, peering beneath its surface reveals important assumptions. These assumptions suggest that perhaps a broader debate is the source of the mismatch between the consensus favoring child direction and the efforts to legislate.

B. The Overlooked Yet Underlying Discrepancy: Lawyer-Centered Versus Child-Centered Models

Examining the broader implications of what various reformers seek to achieve elucidates an even more fundamental discrepancy in the child representation debate. While recent discourse in academics, practice guides, and reform efforts tends to concentrate on how to promote client

75. See generally Haralambie, *supra* note 66. Though this article does not argue for either best interests or client-directed advocacy per se, it explores the value of the type of information that children are able to provide. "Children . . . alone know what relationships matter to them. . . . They can often provide valuable information on family interactions and other family resources. If we really listen to them, we may be surprised at the insights they have about what does and does not work in their families." *Id.* at 1282.

76. See Harris, *supra* note 72, at 1285.

participation, the immediate goal of state laws⁷⁷ and many national standards has been to clarify the role of the child's attorney as a means of better representing children. While seemingly subtle, the discrepancy between the focus of the discourse and the focus of the laws and standards highlights how different theories of improving child representation can have profoundly different practical effects as a result of their incongruous goals.

Reform efforts should balance child advocates' need for clarity with the unique concerns arising in the child advocacy field at large. A lawyer's clarity of purpose is undoubtedly essential to competent representation, but it should be addressed in its appropriate context. Indeed, unless lawyers have a clear idea of what actions are required, prohibited, and discretionary, they will be unable to represent their clients with sufficient zeal, for they may be unaware of the limits or appropriateness of their actions. Beyond these basic principles, however, the context of child advocacy in dependency proceedings—which is still relatively new in legal practice⁷⁸—requires additional considerations. These considerations encompass the reasons for having child representation at all,⁷⁹ the goals accompanying those reasons,⁸⁰ and the recognition that children's rights are still developing.⁸¹ Moreover, as modern studies continue to indicate that children have not only strong opinions but also a critical understanding of their family lives,⁸² the need to hone in on children's thoughts and desires is critical to truly effective representation. Though mainstream thoughts still diverge on how best to accomplish this honing,⁸³ the logic of focusing heavily on children's needs applies regardless.

77. See REPRESENTING CHILDREN WORLDWIDE, *supra* note 11; see also *supra* notes 33–34.

78. New York became the first state to provide lawyers for children in 1962. Sobie, *supra* note 12, at 752.

79. See *In re Tyease J.*, 373 N.Y.S.2d 447, 450 (N.Y. Sur. 1975); see also Elrod, *supra* note 6, at 899–904.

80. Regardless of the type of model, the goals of child advocacy reform are to enhance child representation. Hence, in any event, the logical stance is to begin by considering the child and then to draft a representational scheme from that point.

81. See David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117 (2003) (discussing how, in the context of family relations, while parents' rights have been well established, children's rights remain murky). See also Elrod, *supra* note 6, at 877 (“Why is it so difficult to recognize the individual personhood of children? Today, 192 of 194 nations recognize the individual personhood of children by incorporating the rights stated in the UN Convention on the Rights of the Child. . . . What is flawed is that more states and the United States do not have similar documents Instead, children rely on piecemeal federal and state legislation granting benefits in areas such as welfare and education. . . .”).

82. See generally Haralambie, *supra* note 66.

83. See *supra* Part II.A.

This backdrop strongly suggests that the focus of reform efforts surrounding child representation should first be on the child's role as an independent party and secondarily on clarifying the lawyer's function to accommodate for that role. As children have been recognized as requiring separate representation, their status as an official third party to the proceeding must be honored; hence, how each child may fully partake in the proceeding deserves primary attention. However, the existing emphasis on first delineating the role of the lawyer by separating it into mutually exclusive categories—best interests and client-directed—has resulted in a collectively lawyer-focused reform effort. This structure has sustained the separation of best interests and client-directed representation; in turn, this separation has come at the expense of silencing many children's voices. Even in states where all child advocates are best interests representatives,⁸⁴ though the statutes do not require selecting between categories of lawyer roles, they embrace a default position that provides disproportionately more deference to the lawyer than to the child.⁸⁵ Ironically, then, a movement to promote child representation has shifted its lens from focusing on the child to focusing on the lawyer.

A major consequence of such a shift is manifested in the criticism of the 1995 American Academy of Matrimonial Lawyers Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (AAML Standards).⁸⁶ These standards, addressing child representation in custody and visitation proceedings, categorize children as either "impaired" or "unimpaired."⁸⁷ The former group receives lawyers who serve primarily as information-gatherers, whereas the latter group receives client-directed lawyers to advocate for the clients' wishes.⁸⁸ The principle criticism of such an "all-or-nothing"⁸⁹ scheme is that "th[is] categorization

84. For example, states such as Alabama, Arkansas, Colorado, Idaho, Illinois, Indiana, Minnesota, Nebraska, North Dakota, New Hampshire, Ohio, Oregon, Rhode Island, South Dakota, Washington, and Wyoming require only best interests representatives, with no provision requiring the representative to express the child's view to the court. See REPRESENTING CHILDREN WORLDWIDE, *supra* note 11; see also *supra* notes 33–34.

85. See *supra* Part II.A.

86. Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (With Commentary)*, 13 J. AM. ACAD. MATRIMONIAL LAW. 1 (1995).

87. *Id.* at 8–27.

88. *Id.*

89. Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIMONIAL LAW. 57, 67 (1995).

What does the attorney do if the child comprehends some of the issues in the case but not others? What if the child speaks thoughtfully about some aspects of the case but not others?

of children is impractical in application and . . . the diminished role of attorneys for ‘impaired’ children, precluding such attorneys from advocating a position, deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child’s attorney.”⁹⁰ Such criticism rests on the premise that because impairment itself is not amenable to discrete categorization, children should not be categorized according to it.⁹¹ While such categorization arguably accomplishes the goal of delineating roles to guide lawyers,⁹² it operates prophylactically to withhold the power of some supposedly “impaired” children to direct their relationship with their attorneys, when they might actually have been able to direct their attorneys to a certain extent. If the goal is instead to enhance and optimize child participation, then standards should operate prophylactically in the other direction. Even setting aside the debate between best interests and client-directed advocacy, the primary focus on lawyers as opposed to individual children is misguided.

C. Shortcomings, Biases, and Faulty Assumptions of the Lawyer-Centered Approach

The lawyer-centered framework of mainstream models is largely responsible for the models’ shortcomings. Fulfilling client-centered goals, such as those expressed in Fordham and UNLV, requires the presumption that a child can direct his or her lawyer, until a reason exists to believe the contrary.⁹³ Even without embracing the client direction philosophy, client-

. . . The [AAML] Standards require an all-or-nothing determination of impairment, but impairment itself is not an all-or-nothing condition. This is a fundamental empirical flaw in the Standards’ distinction between “impaired” and “unimpaired” children.

Id.

90. *Id.* at 57. This article argues that the distinction between impaired and unimpaired is unworkable. It discusses child development, explains the value of even the supposedly irrational information children provide, notes the “perversion” of the attorney’s role when acting as mere fact-finder, and criticizes the inflexibility of the all-or-nothing categorization between impaired and unimpaired. *Id.* at 66–70.

91. *Id.*

92. Simply categorizing children such that one group will direct its lawyer while another will receive best interests advocacy does not guarantee clarity for lawyers. Best interests lawyers still face a foggy set of responsibilities, often hinging on pure discretion. See Guggenheim, *supra* note 40, at 307. Furthermore, this exercise of discretion may result in a tenuous decision. “[I]n spite of a [best interests] decision-maker’s best efforts, there remains a wide variety of circumstances that cannot be accounted for both in the present and in the future, which may distort the validity of the decision as being in the child’s best interests.” CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 17 (2002).

93. See *Fordham Conference*, *supra* note 13, at 1312 (“As with adults, lawyers have an ethical

centered goals place heavier weight on extracting maximum information from each child for each issue.⁹⁴ However, most modern statutes and standards, such as the NCCUSL Act, provide that some threshold determination, generally based on age or capacity, will determine what type of advocacy—client-directed, best interests, or some combination of the two—the lawyer will provide.⁹⁵ Lawyers are then prescribed a singular role to fulfill. Inherent in such a setup is the presupposition that certain children cannot—and therefore should not be allowed to—direct their lawyers at all. Those children for whom a best interests attorney is appointed gain no statutory right to have any of their opinions advocated to the court, as best-interests attorneys may make their recommendations irrespective of a child’s wishes.⁹⁶ Hence, in models such as the NCCUSL Act, the judge’s threshold determination as to which “type” of lawyer a child will receive⁹⁷ accomplishes the same effect as the AAML Standards,⁹⁸ and thereby places disproportionate weight on categories of lawyering rather than on how to optimize child participation.

This framework falls short by failing to account for the value of children’s direct input in dependency proceedings; furthermore, standards that are bifurcated into client-directed and best interests options allow for the potentially inappropriate assignment of a best interests lawyer and its ensuing dangers. The introduction to the UNLV recommendations highlights both the value of children’s input and the dangers of best interests advocacy.⁹⁹ It notes that children have come to be valued as individuals with personal opinions, and that lawyers often fail to account for children’s cultural and community needs when they try to independently substitute their own judgment for that of the client.¹⁰⁰

obligation to advocate the position of a child unless there is independent evidence that the child is unable to express a reasoned choice. Where such evidence exists, a lawyer must engage in additional fact finding to determine whether the child has or may develop the capacity to direct the lawyer’s action.”).

94. See Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16.

95. See REPRESENTING CHILDREN WORLDWIDE, *supra* note 11; see also *supra* notes 33–34.

96. See *supra* note 84. Other states require best interests attorneys to report the child’s wishes to the court at all stages, and still others require such reporting when the lawyer’s opinion departs from the child’s. See REPRESENTING CHILDREN WORLDWIDE, *supra* note 11. Among those states are Arkansas, California, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nevada, New Mexico, North Carolina, Pennsylvania, South Carolina, Utah, Vermont, Virginia, and Wisconsin. *Id.* In any event, even lawyers in these latter two categories may still make their own independent recommendations to the court regarding the child’s best interests. *Id.*; see also *supra* notes 33–34.

97. NCCUSL ACT, *supra* note 50, at 16.

98. See *supra* Part II.B.

99. See UNLV Conference, *supra* note 14, at 592.

100. *Id.*

Because children are experts on their personal lives,¹⁰¹ their opinions ought to be given sufficient weight. Lawyer-centered models, however, provide for a double-layer filter for best interests analysis; rather than relying on the judge's required best interests determination at the conclusion of the proceeding, models embracing the best interests advocacy option often filter the child's voice through the lawyer's best interests analysis and then again through the judge's. Hence, these models leave considerable room for distortion, even if it is inadvertent.

Moreover, the initial categorization of lawyers into the bifurcated scheme is fraught with personal perceptions and biases,¹⁰² no matter how well intentioned it might be.¹⁰³ Emotions, subjective beliefs, and instincts often color the decision.¹⁰⁴ Though each type of appointed attorney may be statutorily confined to fulfilling only certain duties in order to reduce the attorney's inclination to advocate solely from his own ideals, such confinement may not be sufficient to overcome biases.¹⁰⁵ Discretion still pervades through the decision regarding a child's capacity and the application of the statutes.¹⁰⁶ Judges or lawyers (depending on the

101. See Haralambie, *supra* note 66, at 1282.

102. See Amy Sinden, "Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 380 (1999). Sinden explains how the emotional nature of dependency proceedings often leads to distorted decisions based on instincts rather than proper deliberation. *Id.* Given these circumstances, Sinden argues that "[b]ecause of these pressures, the evidentiary constraints and protections against bias and prejudice afforded by formality are particularly important in the child welfare context." *Id.* at 381.

103. UNLV Conference, *supra* note 14, at 592.

[C]hildren's attorneys can find themselves, and the legal and related social systems that serve or govern children, inattentive to the complexity and individuality of the children and families that come before them. The result is that these often well-meaning professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need.

Id.

104. See Sinden, *supra* note 102, at 380; see also UNLV Conference, *supra* note 14, at 592 ("In these instances, professionals and systems fail to appreciate the strengths and expertise of children and families regarding what they want, what they need, and how they define the problem. Moreover, these failures fall disproportionately and most punitively on African American and Latino children and families.")

105. See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 45-48 (2000). Mandelbaum argues that even if lawyers who are assigned to represent very young children (and who hence must serve as best-interests attorneys) are restricted to working toward only statutorily delineated goals for the child, the proceeding will still have been based on biased perceptions because of the child's initial assignment of one type of lawyer or another. *Id.* at 45. Mandelbaum asserts that the initial determination of which children are impaired and unimpaired could have dramatic effects on the child's representation throughout the proceeding, regardless of the lawyer's attempts to maintain neutrality. *Id.* at 46-48.

106. "[M]uch discretion remains in the determination of when a child is impaired and the meaning

particular statute) also retain substantial discretion in determining the category in which each child belongs; consequently, this decision may depend entirely on the specific perceptions of a particular decision maker.¹⁰⁷ Furthermore, such decisions often rest on adults' perceptions of children as a group, rather than the individual child at issue. Some scholars have cautioned against such a collective view of children by emphasizing children's unique qualities and situations.¹⁰⁸

Finally, although many models are premised on the idea that classifying lawyers into best interests and client-directed groups will establish sufficient clarity regarding lawyers' roles,¹⁰⁹ and thus will enhance their ability to represent children, such a presupposition may not hold true.¹¹⁰ Because of the discretionary nature of best interests advocacy¹¹¹ and the complexities of representing non- or semi-verbal children even in client-directed advocacy,¹¹² lawyers in both groups may

and implementation of statutory fidelities or statutory mandates." *Id.* at 45.

107. *See id.* at 45–46. Mandelbaum directly addresses the issues surrounding lawyers who must determine how they shall represent their own child clients. However, this analysis naturally encompasses anyone who would be designated as the initial decision maker, including the judge in the NCCUSL Act. "[W]hat is important to highlight is that in making the determination of when a child is sufficiently mature, an extraordinary amount of discretion still remains with the legal representative. . . . [One] lawyer might find the [child] to be unimpaired, while an equally well-meaning attorney might reach the opposite conclusion." *Id.* at 46.

108. Annette Appell has discussed how universal standards of child representation are difficult to achieve because of the vast diversity among children. Appell, *supra* note 16, at 712. However, Appell has also admonished that "[t]he answer is not . . . to throw our hands up at these challenges and substitute our own platonic professional opinions regarding justice for children." *Id.* at 713. Furthermore, Appell cautions against the tendency to view children as "automaton[s]" rather than to directly account for children's unique and diverse needs and experiences. *Id.* at 714. Many models emphasize the importance of gathering specific information about each child and his or her circumstances, even when the child is too young to verbally offer the information to his or her attorneys. *See also* Mandelbaum, *supra* note 105, at 67–69.

109. For justifications for a dual model, see generally Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) (explaining that both the client-directed model and best-interests model are inadequate to accommodate for *all* children and that each model is appropriate for a distinct set of children); Duquette, *supra* note 69, at 441 ("[I]t is a mistake to try to develop a single lawyer role for children in protection cases which tries to accommodate their developing capacities from infants to articulate teens. . . . [W]e should resolve the ambivalence *not* by adopting a *client-directed* or a *best interests* approach, but by having two sets of standards—one for the client-directed attorney role and one for a best interests guardian ad litem. . . .").

110. For a discussion of the lack of clarity associated with classifying lawyers as best interests advocates, see *supra* note 92; *see also* Guggenheim, *supra* note 40, at 307. Regarding the NCCUSL Act's separation of roles, Professor Spinak has commented that "[d]espite the drafters' assertions, creating another role perpetuates the confusion about how to represent children and stymies the extraordinary efforts to refine the role of the child's lawyer through the multi-disciplinary research and practice that has flourished in the last decade." Spinak, *supra* note 28, at 1389.

111. *See* Mandelbaum, *supra* note 105, at 45–48.

112. Professor Guggenheim has argued that difficulties in representing children under a client-directed scheme stem from the practical differences between children and adults. Guggenheim, *supra*

still be unclear as to how to represent their clients.¹¹³ Inconsistency also persists among best interests lawyers as to how each lawyer determines what is in the child's best interest.¹¹⁴ Hence, this underlying assumption that bifurcation of attorney roles will achieve clarity is subject to shortcomings that may undermine the classification's purposes.

III. PINPOINTING A SOURCE OF THE PROBLEM: INFORMALITY OF THE FAMILY COURT

A. *The Roots of Informality and the Ensuing Emphasis on Best Interests Advocacy*

In addition to considering preferences for best interests and client-directed models and the practical implications of representing children, scholars have examined the history of child representation as a source of understanding the reasons for the current, unsettled state of child advocacy. A major source of confusion often discussed is the counterintuitive development of child representation at its early stages. The child representation movement first witnessed significant expansion of the designated contexts and proceedings requiring child representation, and it thereafter shifted to defining the role of the lawyer.¹¹⁵ This historical perspective sheds light on why children's attorneys have struggled to achieve uniformity in representation. However, it does not capture why the focus has been permitted to rest so heavily on the role of the lawyer instead of on the participation of the child. Instead, considering the

note 43, at 1399–1401. Guggenheim's argument focuses on the lack of specific guidance from rules governing lawyers' professional conduct on how to truly treat children as regular clients. He explains that, unlike typical inquiries into lawyers' roles, the inquiry into children's lawyers' roles cannot rest on the Model Rules of Professional Conduct. *Id.* This is because the Model Rules are tailored for "unimpaired" adults, who are starkly different from children due to differences in capacity and communications. *Id.* Hence, Guggenheim highlights how the Model Rules are deficient in instructing lawyers to treat impaired clients, such as children, as similarly to adults as possible. *Id.* Practically speaking, children are too different from adults to fit the same standard. *Id.*

To overcome the lack of guidance highlighted in this passage, several child advocacy experts have published practice guides to assist lawyers in catering to the needs of child clients. *See Appell, supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16.

113. While client-directed advocacy faces some of the same challenges as best-interests advocacy regarding the need for lawyer discretion, the key difference is that it errs on the side of allowing children to direct their representation. Therefore, in assessing the tradeoffs of both alternatives, though neither is flawless, client-directed advocacy at least avoids sweeping in the additional problem of wrongfully withholding from children the right to direct their representation.

114. *See Guggenheim, supra* note 40, at 307; Mandelbaum, *supra* note 105, at 49–53.

115. *See Guggenheim, supra* note 40, at 303. Such a development is counterintuitive in that the number of situations calling for children's lawyers expanded much more rapidly than the definitions associated with these lawyers' role. *Id.*

representation in the context in which it takes place—inside the walls of family court—provides a reasonable explanation for the bifurcation of lawyer roles, the dominance of the best interests attorney, and the ensuing attenuation of client-directed child advocacy.

Family court is designed to achieve rehabilitative and therapeutic effects.¹¹⁶ These goals, in turn, have pushed the court to function more informally.¹¹⁷ This informal nature is both deeply rooted¹¹⁸ and criticized.¹¹⁹ The nature of family court is accompanied by the notion that children should be protected not only from the alleged abuse or neglect at issue but also from any negative effects of the adversarial process.¹²⁰ Because this protective sentiment seeps into all facets of the dependency proceeding—from removal of the child from the home through the potential termination of parental rights—the very inclusion of the child in the proceeding has been cast as harmful.¹²¹

The perceived need for this protective stance in advocating for children has helped sustain the predominance of best interests advocacy by encouraging it via bifurcated standards. The court's informality is one of its chief characteristics, especially in its dependency proceedings.¹²² This

116. See *infra* note 123.

117. Social work norms are seen to dominate dependency proceedings. Sinden, *supra* note 102, at 353–54. Much of this social work dynamic stems from how Family Court proceedings are generally cast as therapeutic, despite their legal ramifications. *Id.* “[T]he predominance of social work norms and discourse creates significant pressure on parents to resolve these cases through non-adversarial, informal means. . . . While lawyers’ training steeps them in the discourse of individual rights and . . . formal, procedure-bound environments, social workers are . . . trained to value informality over formality.” *Id.* at 353–54.

118. See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, FUTURE OF CHILD., Spring 1998, at 23, 24–29 (describing the roots of family court).

119. “[T]he dynamics [of family court] . . . do more than simply push participants to resolve cases through negotiated settlement rather than trial. Instead, they serve to devalue and suppress rights talk, treating any effort to frame problems in an adversarial context as unmotherly and harmful to the child.” Sinden, *supra* note 102, at 355. Because of the stigma attached to adversarialism in the purportedly therapeutic family court proceedings, informality often trumps formality as the ideal methodology. *Id.*

120. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123–29 (1998) (detailing the potential harmful effects of adversarial proceedings on children involved in the proceedings).

121. See Alicia M. Hehr, Note, *A Child Shall Lead Them: Developing and Utilizing Child Protection Mediation to Better Serve the Interests of the Child*, 22 OHIO ST. J. ON DISP. RESOL. 443, 451–52 (2007) (describing how legalizing human problems through litigation is harmful); Weinstein, *supra* note 120, at 123–29; but see Jacob Ethan Smiles, Note, *A Child’s Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485, 492 n.49 (2003) (contrasting the effects of assigning lawyers for children in commitment proceedings from dependency proceedings).

122. In other contexts, such as delinquency, the lawyer operates solely as a client-directed attorney and hence does not face the same confusion as in dependency proceedings. Furthermore, the delinquency context does not face the same informality issues as dependency proceedings, as the

informality, as it coexists with the establishment and development of children's legal rights, is a significant reason why child representation has developed with so much uncertainty. The goals underlying this informal system¹²³ have justified our subversion of children's statutory rights to speak and have allowed the prominence of best interests attorneys in child representation schemes.¹²⁴ Indeed, most state statutes appoint best interests lawyers as proxies for the child,¹²⁵ consistent with the goal of maintaining a collaborative effort among the parties to correct family problems rather than litigating them. In addition to compensating for children's lack of capacity, best interests lawyers also remove the child from an adversarial position and align with the ostensibly therapeutic goal¹²⁶ of achieving a common resolution in the child's best interest.

B. Implications of Informality's Support of Best Interests Advocacy

Criticism of this existing child advocacy system need not derive from ideological disagreement with best interests advocacy; rather, it also rests

Supreme Court has recognized procedural protections for minors. *See In re Gault*, 387 U.S. 1, 31–57 (1967) (recognizing juveniles' rights in delinquency cases to notice, counsel, cross-examination, and privilege against self-incrimination). The progeny from this case further serves to relieve any remaining inconsistencies. *See, e.g., Breed v. Jones*, 421 U.S. 519, 537–38 (1975) (recognizing applicability of the bar against double jeopardy in juvenile delinquency proceedings); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that delinquency proceedings must function under the “beyond a reasonable doubt” standard of proof).

123. “The history of the nation's response to child abuse and neglect has been marked by a tension between two missions: an emphasis on rescuing children from abusive or neglectful families on the one hand, and efforts to support and preserve their families on the other.” Schene, *supra* note 118, at 24–29 (delineating the development of the Family Court, beginning with the English Poor Law and continuing through child-saving goals and then progressive family therapy goals). The mid-twentieth century generated transformation in child protection efforts, moving from a focus in law enforcement to a focus in social services. HARRIS & TEITELBAUM, *supra* note 3, at 631. The therapeutic goals altered the system from focusing primarily on saving children to focusing on rehabilitating families as a means of bettering children's lives. *Id.* For a criticism of how such “cooperation” between the state and families occurs, see Sinden, *supra* note 102, at 354.

124. For a detailed discussion in support of appointing attorneys to act as guardians ad litem, see Harris, *supra* note 68.

125. *See REPRESENTING CHILDREN WORLDWIDE*, *supra* note 11.

126. *But see* Sinden, *supra* note 102, at 354 (criticizing the predominance of social work norms over adversarial norms in dependency cases).

A key word in the prevailing social work discourse is thus “cooperation.” . . . This language of “cooperation” cloaks the substantial power differential that exists between the child welfare agency and the accused mother. . . . In the child welfare context . . . “cooperation” is frequently just a code word for the parent doing whatever the social worker tells her to do. . . .

The fallacy, of course, is that this claim treats the “best interests of the child” as some objectively determinable absolute, when in fact it is an extremely malleable and subjective standard.

Id.

on the overall importance of adopting child-centered reforms. Of course, best interests attorneys ought not to be dismissed lightly or criticized too harshly, as they undertake difficult work with a noble reason in mind. Moreover, they are often necessary in particular situations, such as where the child clients are nonverbal or infants.¹²⁷ However, the underpinnings of child advocacy¹²⁸ and the articulated reasons¹²⁹ for the current trend toward client direction serve as a reminder of the need to adopt a child-centered approach in setting up the system's default framework. Of course, even those who disagree with the Fordham and UNLV recommendations can appreciate a new child-centered approach, as it does not necessitate endorsement of total client direction. Instead, it provides a significantly different methodology, by which children are at the forefront of reform efforts.

In most, if not all, states that adopt a best interests attorney model,¹³⁰ a lawyer may consider the child's wishes, either because mandated to do so or because the lawyer chooses to do so.¹³¹ But, in either case, the lawyer is not bound to advocate for the attainment of the child's desires. Even children whose best interests lawyers are statutorily mandated to communicate the child's wishes to the court¹³² do not receive the full benefit of client direction. Those statutes generally require only that the child's wishes be communicated, not that they be advocated.¹³³ Furthermore, children who may actually be capable of articulating their wishes and contributing significantly to their representation may be assigned best interests lawyers because of reasons such as age or judges' perceptions of the children's capacity.¹³⁴ Hence, modern state statutes and standards perpetuate the diminishment of children's voices and the amplification of their representatives' voices. Despite the potentially dramatic effects of the proceeding on the child's life, the child often plays only a nominal role in his or her representation and understands very little,

127. *But see supra* note 10.

128. *See supra* Part II.B.

129. *See UNLV Conference, supra* note 14, at 592–93; Haralambie & Glaser, *supra* note 89, at 67.

130. *See REPRESENTING CHILDREN WORLDWIDE, supra* note 11; *see also* note 33.

131. *See Harris, supra* note 68, at 1290–91 (offering support for best interests models by explaining how the child's wishes may still be incorporated into lawyers' best interests advocacy). Harris demonstrates the conditional nature of how and when children's wishes will affect best interests advocacy. *Id.*

132. *See supra* note 96.

133. *See supra* note 96.

134. NCCUSL ACT, *supra* note 50, at 16.

if anything, regarding the significance of the proceeding.¹³⁵ A significant question to ask, then, is whether it is worth forsaking the child's full right to representation for the sake of clarifying the attorney's role and maintaining informality.¹³⁶ Though current standards may suggest "yes," a truly child-focused movement would say "no."

IV. THE CLIENT-DIRECTED ATTORNEY ROLE BRINGS CHILDREN TO THE FOREFRONT

Following from the foregoing explanation of the underlying causes of our fractured system of child representation in dependency proceedings, one solution that emerges to mend those fractures is to make all lawyers client-directed. Such a reform would help bridge the underlying but persistent rift between child-centered goals and the existing efforts to legislate. Certainly, establishing a client-directed attorney role is not in itself a particularly novel idea. However, this Note seeks to offer another justification for it—namely, the need to refocus child advocacy on the child and away from the lawyer. This Note further seeks to demonstrate how such a role would account for children's special needs as clients, benefit the proceeding as a whole, and strike an appropriate balance between formality and informality.

As an initial matter, reformers cannot supplant the whole family court system, and perhaps they should not want to. Some of the informal procedures indeed are valuable and relatively untroubling.¹³⁷ But to fully

135. Those concerned with the best interests lawyer's role often focus on how the role of the child in such representation is minimized.

At worst, it has led to situations where representatives do not even deem it necessary to meet with their child clients. More frequently, it has led to a greatly reduced role for the child, such that the child's wishes are not made known to the court and the child has very little, if any, understanding of the court process, his role in it, and what it means to his life.

Mandelbaum, *supra* note 105, at 36–37 (footnote omitted).

136. For a discussion of the tradeoffs between best interests and client-directed advocacy, see *infra* note 151.

137. Family court has developed many informal procedures designed to benefit children. For example, in delinquency proceedings, many state statutes offer diversion as an alternative to judicial proceedings. See HARRIS & TEITELBAUM, *supra* note 3, at 456–60. Examples of diversion procedures include informal probation and peer courts. *Id.* at 457. The availability of diversion alternatives "expresses a conviction that many referrals to court are unnecessary and that the harm done to children in many cases outweighs the benefits of judicial action." *Id.*

Similarly, even when a judicial proceeding occurs in family court, the disposition stage of the proceeding is designed to be flexible to accommodate for individual needs. The judge is allowed broad discretion to determine what is in the child's best interest. *Id.* at 632. The disposition may be tailored to provide particular therapy, services, placement, and other multifaceted planning for the child and the child's family needs. *Id.*

maintain such a system at the expense of a child's right to be heard—particularly when children have so much at stake and often so much to say—effectively devalues the child as a party in the proceeding. For better or worse, family court functions to keep children as far away as possible from the stress of the courtroom. By limiting children's ability to utilize the one mouthpiece they have, family court treats them as only subjects of the proceeding, rather than as real parties to it. The universal implementation of client-directed child advocates could maintain the other relatively informal and rehabilitative features of family court, while simultaneously refocusing child advocacy on the child.

A. Eliminating the Over- and Under-Inclusiveness of Categorizing Children, While Accommodating for Those Lacking Capacity

A reform calling for only client-directed attorneys would carefully respond to the concern that too many capable children are being excluded from the client-directed category of representation under the current bifurcated system.¹³⁸ It would shift standards away from centering on lawyers' clarity and instead toward focusing primarily on how to enhance child participation. This in turn would value children as real parties to the legal proceeding, rather than only as the subjects of the underlying allegations at issue. Children would direct all issues in their representation except only those issues determined by their lawyers to be beyond their capacity. Such a discrete framework would replace the all-or-nothing approach¹³⁹ of labeling best interests and client-directed attorneys. Moreover, while the potential for attorneys' misjudgment or bias would still exist, it would apply to smaller, isolated decisions that could be addressed and analyzed along the way, in contrast to the drastic and practically unchangeable determinations otherwise made at the outset of the proceeding. Such a stance is part and parcel with Fordham and UNLV's recommendations for child-centered representation. After all, the proceeding itself will always center on the child, but to meaningfully consider the child as a party, the child's representation must focus on the child's wishes.¹⁴⁰ Such a reform would transform the current prophylactic approach,¹⁴¹ which errs on the side of limiting the number of client-

138. See *supra* notes 89–91 and accompanying text.

139. This reference to an all-or-nothing approach addresses the type of approach taken by the AAML Standards. See *supra* text accompanying notes 86–88.

140. See *Fordham Conference*, *supra* note 13, pt. II.A; *UNLV Conference*, *supra* note 14, pt. I.C.

141. See *supra* Part II.B.

directed attorneys, into a new prophylactic approach that errs on the side of empowering children.

This new approach would not require a blind eye toward children's diminished capacity, which is often a subject of great concern among advocates of the best interests model. In circumstances where an attorney determined that the child had diminished capacity¹⁴² and thereby could not direct a particular piece of the representation, the attorney could counsel the child¹⁴³ or substitute judgment, within the limits of ethical conduct.¹⁴⁴ Because child representation is such a specialty, specific practice guidelines also exist to compensate for situations where adult-focused ethical rules appear deficient.¹⁴⁵ For instance, both the Fordham¹⁴⁶ and

142. See MODEL RULES OF PROF'L CONDUCT, R. 1.14 cmts. 1–4 (2002).

143. See MODEL RULES OF PROF'L CONDUCT, R. 2.1 (2002). Other practice guides designed specifically for children's lawyers provide a framework for counseling children as well. See Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16. These specialty sources generally encourage lawyers to, among other things, become involved in the children's community and family lives and learn how to listen to children before inserting personal opinions or values.

144. See MODEL RULES OF PROF'L CONDUCT, R. 1.14 (2002). *But see* Katner, *supra* note 41, at 111–15 (describing the limitations of Model Rule 1.14 of the Model Rules of Professional Conduct, which governs clients with diminished capacity, as applied to children). Fordham's recommendations also caution how Rule 1.14 may be inadequate: "Further study should be given to . . . whether Rule 1.14 of the ABA Model Rules of Professional Conduct . . . adequately addresses the representation of children. . . . [C]onsideration might be given to amending [it] to delete the term 'minority,' and to adopting a separate Model Rule to address the representation of children." *Fordham Conference*, *supra* note 13, at 1314.

Though criticism of Rule 1.14 is well grounded, it should not be interpreted as to completely undermine lawyers' ability to apply ethical rules to client-directed child advocacy. Katner argues that the ABA Standards provide guidance to supplement Rule 1.14. Katner, *supra* note 41, at 104–05. Other scholars have produced other practice guides specifically for child advocates. See Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16. These manuals, though not always explicitly concerning ethical professional behavior, provide significant guidelines to steer lawyers' conduct during representation.

Moreover, the profession's perception of how ethics applies to child representation is also shaped by the profession's notions of what appropriate child representation entails. This is clearly articulated in the first sentence of the UNLV recommendations' introduction: "During the nearly half century that legal norms have mandated appointment of counsel or other representation for children in legal proceedings, the children's attorneys' community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation." *UNLV Conference*, *supra* note 14, at 592.

145. See Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16.

146. *Fordham Conference*, *supra* note 13, at 1301 ("The lawyer should not serve as the child's guardian *ad litem* or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child. The role of the child's lawyer will vary, however, depending on whether the child has capacity to direct the representation. The lawyer for a child who is not impaired . . . must allow the child to set the goals of the representation as would an adult client."). For Fordham's guidelines regarding children who have capacity to direct their representation, see *id.* at 1302–05, 1308.

Part IV of the Fordham Recommendations, which addresses nonverbal and preverbal children, first explains that "[a]lthough other issues remain unresolved, the profession has reached a consensus

UNLV¹⁴⁷ recommendations provide guidance for lawyers dealing with children, and several scholars and experts in the child advocacy field have written books, articles, and practice guides¹⁴⁸ to address this very difficulty. These guidelines address how lawyers can determine when children lack the requisite capacity to make certain decisions.¹⁴⁹

Withholding decision-making power from children in such situations is far different from withholding it outright; it reverses the prophylactic effect of the existing scheme. In this situation, the goal is to maximize child participation whenever possible, even piecemeal, throughout the proceeding. This is distinct from existing standards that simplify a lawyer's role from the outset and thereby risk unnecessary exclusion of the child's input at later stages. Furthermore, it involves essentially the same determination as is presently accepted to categorize a child,¹⁵⁰ only it would be made more discretely with regard to specific instances rather than sweepingly for all issues.¹⁵¹ Though requiring an arguably more complex set of tasks for lawyers, the increased attention to children as individuals would reinforce their presence at the center of the representation. Thus, a reform calling for a client-directed attorney reaches

that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations." *Id.* at 1309. For Fordham's guidelines for lawyers representing clients with diminished capacity to direct representation, see *id.* at 1308–11.

147. See *UNLV Conference*, *supra* note 14, at 593–600.

148. See Appell, *supra* note 16; HARALAMBIE, *supra* note 16; PETERS, *supra* note 16.

149. See *Fordham Conference*, *supra* note 13, pt. V; *UNLV Conference*, *supra* note 14, pt. IV.A.2.a.

150. NCCUSL ACT, *supra* note 50, at 16.

151. Some scholars are wary of lawyers potentially exerting too much influence over children in a client-directed relationship because of children's inherent diminished capacity. See Duquette, *supra* note 69, at 455–56. Others voice that having lawyers receive direction until they determine that they must substitute judgment creates an unworkable hybrid attorney role. See Katner, *supra* note 41, at 103–04, 109–10. Scholars who express such concerns are essentially concerned with unethical conduct. Remarkably, however, the profession expressed at the UNLV Conference that "the children's attorneys' community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation." *UNLV Conference*, *supra* note 14, at 592. Because of children's inherently limited capacity, a natural condition to allowing for the profession's consensus is to allow the lawyers some means of supplementing the client's direction. All of these considerations must be viewed against the backdrop of the child representation debate. Weighing the benefits and dangers of best interests representation against the benefits and dangers of client-directed representation may generally lead to a variety of arguments and conclusions. But in the context of determining how states should structure lawyers' roles, states must specifically consider what exactly they should strive to achieve, in addition to considering general ethical issues. Fordham, UNLV, practice guidelines, and scholarship articulate a view that has been reinforced for more than a decade: increase child direction and participation in legal representation. Hence, weighing both of these options in this light underscores how only the client-directed option is accompanied by augmented child participation to justify its accompanying negative effects.

the heart of the underlying disparity in child-centered and lawyer-centered models.

B. Advancement of Well-Reasoned Results

In addition to necessitating an open lawyer-client relationship, the goal of maximizing child participation entails incorporation of the child's views into the judge's deliberation. This would provide the child a meaningful opportunity to participate in the conversation about his or her life, just as the parents and state participate. As a result, the judge would receive a greater wealth of information upon which to decide the case—information unavailable from any other source but the child.¹⁵² Moreover, the child's lawyer would merely provide a third perspective to the case, which would not necessarily influence the judge any more than the state's or parents' lawyers might.¹⁵³ The judge would still be expected to arrive at his or her own best interests decision¹⁵⁴ consistent with the rehabilitative and protective goals of family court.

Along with promoting judges' consideration of children's perspectives, a client-directed attorney role would also increase the quality of information lawyers would gather from their clients and hence enhance the attorney-child relationship. Lawyers would be obligated to gather information to accurately represent the child instead of deciding best interests based on subjective perceptions.¹⁵⁵ Commenting on current practice, Professor Guggenheim has explained that, because child clients are neglected and abused, lawyers often view them automatically as children who need to be rescued or protected. For instance,

[w]hen children are accused of wrongdoing, lawyers tend to see their principal function to defend them. However, when the state labels the children as "victims," their lawyers no longer see a need to protect their clients from the state. Instead, they see a need to

152. Haralambie, *supra* note 66, at 1282.

153. Regarding the "fear that the judge will simply defer to the child's attorney's position," Haralambie and Glaser argue "the proper remedy . . . is to educate judges about . . . their mandatory obligation to exercise independent discretion, not to remove the advocacy for the most affected and least powerful person in the case: the child." Haralambie & Glaser, *supra* note 89, at 92–93 (footnotes omitted).

154. The standard for judges' decisions in dependency cases is to determine what is "in the best interests of the child." See HARRIS & TEITELBAUM, *supra* note 3, at 632.

155. See Guggenheim, *supra* note 40, at 307.

protect them from the people whom the state has identified as harmful to their clients.¹⁵⁶

In such situations, lawyers tend to step out of their prescribed roles as attorneys and merge into the role of protectors, thereby effectively siding with the state in terms of what they advocate. Of course, not all lawyers are prone to such behavior, and indeed some lawyers may even lean more heavily towards reunification with families whenever possible. However, the existence of this alternative stance does not overcome the problems with allowing lawyers to shift their advocacy based on subjective perceptions of abuse and neglect cases.

C. Accounting for Both the Benefits and Drawbacks of the Adversarial System

The client-directed role for lawyers would also provide the benefits of the adversarial system without damaging family court's protective procedural view of children. American courts operate on a formal adversarial basis for a number of reasons, including accuracy, protection against bias, and credibility.¹⁵⁷ Furthermore, "the adversarial process grants the parties control over the process and the decision-maker, whether a judge or a jury, controls over the decision."¹⁵⁸ These underlying policies support all types of court proceedings, regardless of the issue. Particularly in family court, where biases, stereotypes, and assumptions¹⁵⁹ infamously and easily drift into deciding sensitive, family issues, the rights of the parties deserve, at minimum, a guard against slanted analysis. Such slanted analysis would arise not only among the parties to the case but also quite foreseeably between the child and the child's representative.

The concerns regarding protecting children from the stress and potential harm from the adversarial process, which are subsumed within the philosophical bases of family court, must be considered relative to the appropriate context. Children who experience abuse or neglect, or children who have been subject to state intervention even when no findings of

156. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 809–10 (2006).

157. Sinden, *supra* note 102, at 379 ("The formal adversarial process is designed to produce accurate decisions by bringing out all relevant facts and limiting bias and prejudice. . . . [E]ach side is motivated to ferret out all the evidence that supports its position. . . . [P]arties' adoption of a conciliatory stance . . . raises the danger that they will accept statements uncritically.").

158. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 64–65 (2005).

159. See Sinden, *supra* note 102, at 380.

abuse transpire in court, are subject to emotional trauma. They are brought into the system by third parties,¹⁶⁰ who are then in a position to shape the children's entire family lives.¹⁶¹ Given the existing disruption to the children's lives, the lingering question is whether the adversarial process contributes an undue level of additional trauma, enough to override the value of child-directed representation. Of course, the potential effects of litigation on a child ought not to be understated. However, these effects must be weighed against the benefits of the adversarial process, namely the added protection against improper representation. Additionally, allowing children to participate in the adversarial process may lessen the helplessness associated with trauma, and even the distrust of the system, if they know they at least have a voice in determining the outcome. Weighing the costs and benefits associated with the existing system and the client-directed attorney model, the latter alternative emerges as one whose benefits justify its costs.

D. Freeing the Attorney of External Influences

Requiring the client-directed approach would also effectively free lawyers from the pressures from the state or the court that often arise in family court proceedings. While most standards seek to clarify the ambiguities in child representation by separating the roles of client-directed attorneys and best interests attorneys, they do not account for the conflicts inherent in the best interests role itself.¹⁶² Once the lawyer becomes a best interests advocate, the lawyer often faces added pressures to advocate in a certain manner, regardless of what the client desires or what the attorney may personally think.¹⁶³ For instance, the attorney might

160. Abuse and neglect cases arise after the state agency receives a report of alleged abuse or neglect, inquires into the situation, takes actions it finds necessary to correct the problem, and finally determines that such actions were insufficient and therefore require court intervention. HARRIS & TETTELBAUM, *supra* note 3, at 632.

161. The dispositional options, at the hands of judges and other individuals outside of the family, range from family reunification to termination of parental rights. *Id.* at 655, 661.

162. See Guggenheim, *supra* note 73, at 81. Guggenheim has suggested that allowing a child's attorney to make a best interests determination for the child would practically result in that lawyer usurping the judge's role.

Additionally, Guggenheim has highlighted how "[t]he irony in the theoretical arguments over whether children's lawyers should advocate for what their client wants or for what is in their best interests is that were children's lawyers ever to truly become powerful voices for what their clients want, they would become deeply opposed to state intervention." Guggenheim, *supra* note 156, at 833.

163. See Guggenheim, *supra* note 156; see also *id.* at 824 (detailing a case, *In re Jennifer G.*, 481 N.Y.S.2d 141 (1984), *appealed after remand* 487 N.Y.S.2d 864 (1985), in which a lawyer was chastised and removed because he advocated for his child clients to go home after acknowledging that

risk his or her reputation or face discipline by the court for advocating a client's wishes which pose a potential threat to the client.¹⁶⁴ Such an affiliation is dangerous in terms of its procedural effect on the proceeding, because lawyers may develop a tendency to over-filter what they advocate and hence may leave out significant information from the client.¹⁶⁵ A similar mode of analysis has been applied to the role of the prosecutor in delinquency cases.¹⁶⁶ Prosecutors in delinquency cases struggle to balance their *parens patriae* obligation to protect the child with their role as state prosecutors trying to establish a substantive delinquency case against the child.¹⁶⁷ Practically then, if not formally, such a situation in the context of a dependency proceeding may result in not only children losing a zealous advocate but also the state gaining an extra player on its side.¹⁶⁸ Relatedly,

such a return would present some risk to the children). Neither the case nor Guggenheim's commentary specify the age of the children or the precise type of advocacy the lawyer had undertaken.

Jennifer G.'s lawyer's simple advocacy for the return of children to their mother's custody (advocacy grounded enough to persuade the trial judge) greatly damaged his reputation. . . . He also was a powerful reminder to all of the other children's advocates in New York City. The clear warning issued from the . . . appellate court . . . was simply too strong not to be noticed: . . .

You place yourselves and your reputations at risk if you do anything which appellate courts will construe as placing children at risk. Moreover, if you carefully read the decisions we routinely announce, we do not perceive any serious risk to children being removed from their parents, but we are quick to find substantial risk when children are permitted to remain at home.

Guggenheim, *supra* note 156, at 824.

164. See Guggenheim, *supra* note 156, at 819–22, 824.

165. *Id.*

166. See Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN. ST. L. REV. 233 (2005).

167. *Id.* at 234–35.

[W]e must consider closely any state legislative scheme that, on one hand, promotes the protective role of the state over juveniles under the doctrine of *parens patriae*, but on the other hand, constructs a system whereby the very same state officer (the prosecutor) who performs this role also decides, by his own sagacity, that the juvenile should be tried as an adult. . . . Therein lies an inherent conflict that violates basic principles of due process that are afforded any criminal defendant, much less juvenile defendants.

Id. (footnotes omitted). While dependency proceedings have not realized the same due process rights as delinquency or criminal cases, best interests lawyers face similar internal conflicts as delinquency prosecutors.

168. Guggenheim explained the practical effects of such a bias on the relationship between an attorney and child-client:

In my experience, many adults connected with child protective cases treat children's expressed preferences quite differently, depending on what the child says. When children say they want to go home, that wish is often received by adults the same way editors treat a story about a dog biting a man—they aren't going to run with it. On the other hand . . . [w]hen, but only when, [children] do not want to go home, adults pay serious attention to their preferences.

if lawyers are to independently determine the best interests of their clients, then they may begin to usurp bits of the judge's role.¹⁶⁹ In determining what to advocate as the best interests of the child, lawyers have to interpret the law and engage in fact-finding as judges would. Freeing the attorney from these unwritten yet persisting obligations would increase commitment to zealous representation while discarding the gray areas in which lawyers would otherwise have to decide what they "should" advocate. Such liberation would allow lawyers to focus fully on their child clients.

CONCLUSION

Dependency proceedings are turbulent and often life-changing. While some proceedings end in relatively non-controversial resolution, some may result in harm to the child or termination of the parents' rights. Children possess emotions and opinions the same as any adult party to the proceeding, and they can be invaluable sources of information. The manner in which the system addresses and handles the views of the child is critical to legitimizing child representation.

Despite the developing nature of children's rights and the increasingly broad trend toward supporting client-directed advocacy, legislative efforts have centered on clarifying lawyers' roles instead of seeking methods by which to optimize children's participation. Hence, children have been cast in the shadows of reforms that purport to enhance their representation. Though some children may be entirely incapable of expressing their wishes on a particular issue, not all children need to be grouped into a presumption of total incapacity. Family court norms of informality and general concerns regarding children's capacity dominate the current system. These norms promote the existing prevalence of lawyer-focused models and thereby insufficient focus on children. In light of this context, requiring a client-directed role for lawyers in the midst of other informal structures would help correct the lawyer-focused distortion that has so widely affected reform efforts. A movement to enhance child

Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488, 1503 (1999).

169. Guggenheim, *supra* note 73, at 81; *see also* Spinak, *supra* note 28, at 1390 ("[Best interests] lawyers will persist in usurping the role of the judge in determining best interests and undermine the full presentation and consideration of relevant information, including the child's counseled wishes and legal interests.").

representation requires a focus on the child, consideration of the child, and respect for the child.

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