



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 22 | Number 3

Article 5

June 2014

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Recommended Citation

Sobie, Merrill (2014) "The Child Client: Representing Children in Child Protective Proceedings," *Touro Law Review*. Vol. 22: No. 3, Article 5.

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THE CHILD CLIENT: REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

*Merril Sobie**

INTRODUCTION

The representation of children in child protective proceedings, defined generally, as cases in which a parent or other person responsible for the care and custody of a child is charged with committing acts of child neglect or abuse, originated in the late 20th century.¹ A few pioneering states enacted legislation in the 1960's, and the movement to provide legal counsel gained momentum through the enactment of the 1974 Federal Child Abuse and Treatment Act, and the subsequent implementation of the Act's mandate that children be afforded "representation" through the appointment of an attorney or lay "guardian ad litem." Today, the

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¹ A "child protective proceeding" is the generic name for a range of actions filed by the government (usually a local or county department of social services) against a parent (or another person who has assumed a parenting role). The initial suit is an abuse or neglect action (called dependency in some states). 43 C.J.S. *Infants* § 12 (2006). A second type of child protective proceeding is an action, also brought by a governmental entity to terminate parental rights, which may be pursued simultaneously with a child neglect or abuse suit, but is usually brought months or years after the child has been found to be abused or neglected, and after the parent has been afforded a rehabilitative opportunity. *Id.* § 20. Lastly, when a child has been placed outside her home (e.g., in foster care) as a result of a protective action, but prior to family reunification or adoption of the child, the court is required to conduct periodic reviews, commonly known as "permanency hearings." See MODEL JUVENILE COURT ACT § 2, 9A U.L.A. 2 (1968).

substantial majority of American children are represented by legal counsel, and the clear trend is toward universal attorney representation.

The development of children's representation, however, has been tempered by an unresolved controversy concerning the role and responsibilities of the child's counsel. Usually couched in terms of whether the lawyer should advocate the "child's wishes," or alternatively, the child's "best interests," both approaches unfortunately oversimplify the complex nature of representing children, who range in age from the newborn to the near adult. The competing models, frequently prescribed by state statute or appellate decisions and analyzed through multiple articles and commentaries, fail to meet most children's needs, and fail to appropriately guide the attorney through the complex adversarial course of child protective litigation.

The thesis of this Article is that the system should evolve beyond a "best interests" or a "child's wishes" paradigm and assume a traditional attorney-client model. That is not a new concept—the American Bar Association Standards on Representing Children in Child Protective Proceedings Act, several articles, and at least a few states have tentatively moved in that direction. To continue the progression, I believe we need a greater understanding of the child's right to representation, including the child's constitutional right to counsel, the child's role and interest in the proceedings (counsel is cast adrift in the absence of his client's defined rights), and the child's right to be involved as a participant in the litigation. I also

believe we should cut a new path through the “thicket” of “child’s wishes” versus “best interests”. The new path should reinforce the child’s legal role, including his status as a full party to the proceedings; recognize the child’s interests in protection, family integrity, and autonomy; and his right to legal representation akin to that of any other party to the litigation.

Part I outlines the historical context and address the child’s right to legal representation. Part II discusses the child’s legal status by defining the specific legal interests, her procedural rights as a party to the litigation, the right to choose counsel, and the child’s right to be involved as a participant. The penultimate Part analyzes the role of the child’s counsel, including an outline of the relevant statutes, the diametrically opposed positions of state legislatures and the organized bar, and the hopelessly conflicting contemporary case law. The final Part addresses the fundamental deficiencies of the “best interests” and “child’s wishes” dichotomy, and suggests a hopefully better approach, one designed to respect and implement children’s legal interests.

I. THE CHILD’S RIGHT TO REPRESENTATION

A. Background

To the contemporary family lawyer, it is difficult to visualize a world where a child protection system is unknown, or one in which the now ubiquitous “best interests of the child” phrase has yet to be coined. However, child protective laws did not exist until the late 19th century, and then evolved slowly through several generations.

Prior to the development of protective laws, children's rights or interests were irrelevant, precluding the development of social or legal mechanisms designed to protect or even articulate children's interests.²

Dependency and child neglect laws originated when rapid industrialization, coupled with massive immigration, precipitated the so-called "child savers" movement of the post civil war era. Child savers zealously pursued the legal protection of impoverished or neglected children, often viewing the two as synonymous, and equally sought measures to ensure the "Americanization" of immigrant youths.³ The result was the demise of the ancient poor and apprenticeship laws, which were replaced by fledgling child protective systems.

In 1877 New York enacted a comprehensive "Act for Protecting Children," granting the courts jurisdiction over any child under the age of fourteen who, *inter alia*, was found to be begging or receiving alms, was destitute or vagrant, whose parent was "vicious," or who lacked "proper guardianship."⁴ Illinois enacted similar legislation in 1879.⁵ By 1900 most states had legislated child

² See WILLIAM BLACKSTONE, 1 COMMENTARIES *449 (discussing that under common law, parental rights reigned supreme); see also DAVID M. SCHNEIDER & ALBERT DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE: 1867-1940 75-77 (1938) (describing the poorhouses or county almshouses, first established by the English Elizabethan Poor Law of 1601, and subsequently replicated throughout the United States—institutions where young children received basic sustenance until they reached the age at which they could be boarded out as apprentices); CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, VOLUME I, 1600-1865 639 (Robert H. Bremner ed., 1970) (detailing the rapid expansion of poorhouses during the early nineteenth century that contributed to the need for a formal child protective system).

³ See ANTHONY M. PLATT, THE CHILD SAVERS 108-09 (1969).

⁴ AN ACT FOR THE PROTECTION OF CHILDREN, ch. 428, 1877 N.Y. Laws 486.

⁵ PLATT, *supra* note 3, at 111 (discussing the 1879 Industrial School for Girls Act).

protection acts.

Under the early child protective measures, the courts, specifically the lower trial courts, were granted summary commitment power which would summarily place or “commit” a child to a public or private child care agency for an indefinite period or until the child reached the age of twenty-one.⁶ Basic due process standards, such as notice, were disregarded or statutorily abrogated. Appellate review was unavailable.⁷ When challenged, the vague definitions were upheld by invoking the state’s authority to protect children as “*parens patriae*.”⁸ Subsequently, the child protective statutes were enforced by the specialized juvenile courts established in the early 20th century.⁹

Indeed, early “child saver” acts continued, with only minor revisions, through most of the 20th century.¹⁰ One has only to read the landmark 1967 *In re Gault* (“*Gault*”) decision¹¹ to view the largely unchanged 19th century landscape. Although, *Gault* involved juvenile delinquency, similar if not identical procedures were applied nationally to child protective proceedings. Hidden behind strict

⁶ ACT OF MAY 31, 1884, ch. 438, 1884 N.Y. Laws 511.

⁷ See *People ex rel. Van Riper v. New York Catholic Protectory*, 13 N.E. 435 (N.Y. 1887) (discussing the plenary powers exercised by the courts, limited only by extraordinary habeas corpus jurisdiction). A young girl had been committed pursuant to New York’s vague statute for allegedly being in the company of a prostitute who she had asked for directions; denied the right of appeal, her father filed a habeas corpus writ. *Id.*

⁸ See *In re Ferrier*, 103 Ill. 367, 371-72 (1882); See also *People v. Ewer*, 36 N.E. 4, 134, 135 (N.Y. 1894).

⁹ PLATT, *supra* note 3, at 134 (describing the first juvenile court established in Illinois in 1899).

¹⁰ See, e.g., CHILDREN’S COURT ACT, ch. 547, 1922 N.Y. Laws 1259 (amended 1923).

¹¹ See *In re Gault*, 387 U.S. 1, 17 (1967) (holding that juveniles accused of committing a criminal act have a right to notice and representation in juvenile court proceedings consistent with the due process requirements of the Fourteenth Amendment) [hereinafter “*Gault*”].

privacy and confidentiality rules, the mid-20th century child protective judicial proceeding was virtually identical to the “child savers” era of informal summary adjudication.

During the child protective system’s first century, roughly from 1870-1970, the child was assumed to have absolutely no legal standing or role. After an informal inquiry, perhaps augmented by the verbal report of a probation officer, the court would determine parental guilt or innocence. Upon finding parental guilt, the judge would assume the role of “*parens patriae*.” The parents could be placed under supervision or the child could be removed from the home and placed with a private or public agency. In effect, the child would be entrusted to an executive agency, one which retained parenting responsibility until the youth reached majority. The court would never see the case again.¹²

In the “*parens patriae*” milieu, the need for legal representation was never perceived. However, rarely a parent, who was always deemed to be a party to the proceedings, could appear with privately retained counsel. But the child was not considered a party and any form of private or public representation was precluded. In truth, there was little that counsel for the parent or the child could have achieved. Writing shortly before the Supreme Court’s *Gault* decision, Professor Alfred J. Kahn observed that “[m]ost children’s courts cases are heard without counsel, and many with experience in children’s court agree that lawyers, as currently prepared, ordinarily

¹² Motions such as continuing jurisdiction, modification, or periodic reviews were unknown. *But see In re Knowack*, 53 N.E. 676, 678 (N.Y. 1899) (holding that a parent who had self-rehabilitated could petition the court to reclaim custody).

contribute very little to such proceedings, particularly where no question exists about the truth of the allegations.”¹³

It is only in the post-*Gault* era that representation became potentially meaningful. Hence, only in the past forty years has the delivery of legal services for children become worthy of asserting, litigating, and legislating.¹⁴ It is only in the contemporary post-*Gault* era that children’s rights and independent interests have been pursued. In recent decades, the judicial authority in dealing with child protection has also been significantly strengthened, effectively raising the stakes for parents and for children. Specific dispositional provisions have become the norm, as opposed to summary placement or general supervisory orders, with periodic review and continuing jurisdiction to modify or vacate judicial orders. So too, concepts of family preservation, the least detrimental alternative doctrine, and kinship foster care placement are products of the most recent generation. The possibilities, and consequently, the need for social services and legal guidance, have become far more pronounced.¹⁵

In light of this history, it is not surprising that the responsibilities and role of the child’s attorney has been slow to develop, and that a consensus has been difficult to achieve. Moreover, the status of the child as an integral part of the

¹³ ALFRED J. KAHN, A COURT FOR CHILDREN 100 (1953).

¹⁴ Although the first child representative statute preceded *Gault* by five years (see Part I.B. for a discussion on this), the attorney’s role was extremely tentative and uncertain, at least until the Supreme Court’s 1967 decision. See N.Y. FAM. CT. ACT § 241 (McKinney 2006) (codified 1962); see generally *Gault*, 387 U.S. 1.

¹⁵ Judicial modification of existing child protective orders has been possible for a long time, but was rarely used before the late twentieth century. See *Knowack*, 53 N.E. 676, as an example of an early case of judicial modification of existing child protective orders.

proceedings has only evolved during the past two generations. It is these issues which will be discussed in succeeding sections.

B. The Advent of Children's Representation

In 1962, the New York State Legislature “finding that counsel [for children] is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition,”¹⁶ authorized the New York Family Court to appoint attorneys to represent children.¹⁷ Given the title of “law guardian,” but defined as “an attorney admitted to practice law in the state of New York and designated under this part to represent minors,” child representation was mandated.¹⁸ The Act applied to child protective proceedings, as well as several other actions involving children, such as juvenile delinquency. New York thereby became the first state to provide counsel for children. The representation of children had formed a bridgehead, though expansion beyond New York was slow—and the role and responsibilities of the child's attorney was far from clear.

Not long thereafter, the principal that the child should have a voice in proceedings which, after all, are brought to protect her, achieved national application with the enactment of the 1974 Federal Child Abuse and Treatment Protection Act (“CAPTA”).¹⁹ CAPTA requires every state to “ensure the appointment of a guardian ad litem

¹⁶ FAMILY COURT ACT, ch. 686, 1962 N.Y. Laws (codified as N.Y. FAM. CT. ACT § 241).

¹⁷ N.Y. FAM. CT. ACT § 249(a).

¹⁸ *Id.* § 242.

¹⁹ See 45 C.F.R. § 1340.14 (2006).

or other individual whom the state recognizes as fulfilling the same function as a guardian ad litem, to represent and protect the rights and best interests of the child.”²⁰ However, a guardian ad litem is a far different creature than an attorney.²¹ And, as will be discussed, CAPTA’s prescriptive language incorporates several ambiguities and inconsistencies. But at least CAPTA mandated that every child be “represented” in some manner, however primitive and ambiguous. On the down side, however, CAPTA was enacted during the nascent period of child representation and has contributed greatly to the dilemmas and conflicts that continue to plague the field of children’s representation.

Implementation of CAPTA was initially accomplished largely through the establishment of the Court Appointed Special Advocate program (“CASA”), involving the appointment of “citizen” or lay volunteers to represent the interests of children. Originating in Seattle, Washington, the CASA program quickly expanded nationally, resulting in the widespread representation of children by, at best, marginally trained part-time non-lawyers acting as guardians ad litem.²² CASA subsequently gained federal recognition when Congress authorized funding through state grants to provide training

²⁰ *Id.* § 1340.14(g).

²¹ A guardian ad litem is assigned to make legal decisions for a legally incompetent client, including a client who is a minor. See BLACK’S LAW DICTIONARY 725 (8th ed. 2004). In fact, the guardian ad litem usually retains an attorney and then, acting as a client, instructs the attorney and authorizes or consents to appropriate legal measures. See *In re M.M.*, 431 N.W.2d 611, 612 (Neb. 1988) (stating that a guardian ad litem is “an individual who steps into the position of the minor”). For example, when a child is injured in an automobile accident, the court appoints a guardian ad litem, who retains an attorney and assumes the role of client.

²² See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 35-36 (1997).

and administrative oversight.²³ In reality, CASA was devised as an inexpensive “quick fix” method to comply with the CAPTA mandate, one which guaranteed compliance without the commitment of significant financial resources. Children gained a guardian ad litem representative who might advocate for their interests, but that representative lacked the authority, the training, and the tools to appropriately present a case before a court of law.²⁴ Further, the most important traditional purpose of a guardian ad litem, the guidance of counsel, was abrogated when legislators failed to authorize or finance legal representation (frequently, the very purpose of appointing a volunteer guardian ad litem was to avoid the necessity of legal representation).

Once implemented, the inherent inadequacies of CASA programs contributed to the post-CAPTA growth of attorney representation. Granted at least nominal non-lawyer representation in the form of a lay volunteer, who might well raise significant legal issues which he could not address, the judiciary, legislators, and the organized bar began to focus on the desirability of affording legal counsel. Over the course of the thirty year period since the initial legislation, the majority of states have enacted statutes requiring the

²³ See VICTIMS OF CHILD ABUSE ACT OF 1990, 42 U.S.C. § 13013 (2000).

²⁴ Unlike attorneys, CASA volunteers cannot subpoena records, call witnesses, conduct cross-examination, file motions, or appeal. CASA programs do not necessarily operate in isolation, or without legal service backup. Several programs employ attorneys, to advise the CASA volunteers, or appear in court to afford actual legal representation in some cases. See Hollis R. Peterson, Comment, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1099 (2006). The common practice, however, is to employ CASA in lieu of legal representation. See, e.g., PETERS, *supra* note 22, at 35-36 (2nd ed. 2001); Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 90 (1995).

legal representation of children that mandate the assignment of an attorney to represent the child or have permitted the court to assign an attorney on a discretionary basis. The result is the current mixture of legal and lay representation, with children's attorneys acting as guardians ad litem or as counsel to the youngster (with or without the assistance of a CASA volunteer) or blending the two seemingly inconsistent roles.²⁵

Nationally, as of 2004, over half of the states provide for the assignment of an attorney. In some, appointment is mandatory and the court must appoint counsel.²⁶ In other states, assignment of counsel is discretionary,²⁷ while in a few, an attorney must be appointed if an older child requests an attorney²⁸ or if the guardian ad litem's recommendations conflict with the child's wishes.²⁹

However, the close to equal division masks the fact that most of the larger states require legal representation; those include the following states: California,³⁰ the District of Columbia,³¹ Illinois,³²

²⁵ The current CAPTA provision, as amended in 2000, stipulates that "[i]n every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings." 42 U.S.C. § 5106(a)(b)(2)(A)(ix) (2006).

²⁶ *See, e.g.*, N.C. GEN. STAT. § 7B-600 (2004); D.C. CODE § 16-2304(b)(3) (2004); KAN. STAT. ANN. § 38-1505(a) (2004); 23 PA. CONS. STAT. ANN. § 6382 (West 2006).

²⁷ *See, e.g.*, NEV. REV. STAT. § 432B.420(1) (2004); S.C. CODE ANN. § 20-7-1510(B), *repealed by* 1994 S.C. ACTS 497.

²⁸ WASH. REV. CODE ANN. § 13.34.100(6) (West 2006).

²⁹ N.H. REV. STAT. ANN. § 169-C:10(II) (2006); WIS. STAT. ANN. § 48.235 (West 2006).

³⁰ *See* CAL. WELF. & INST. CODE § 317 (West 2006). The California state requirement is recent; interestingly, in 1995 the Los Angeles County Superior Court adopted a rule mandating the appointment of counsel for the child, a move that was unsuccessfully contested by the county, which objected to the mandatory cost. *See* Los Angeles County Dept. of Children and Family Servs. v. Super. Ct., 59 Cal. Rptr. 2d 613 (Cal. Ct. App. 1996).

³¹ D.C. CODE § 16-2304(b)(3) (2006).

³² 705 ILL. COMP. STAT. § 405/2-17 (2006).

Massachusetts,³³ and New York.³⁴ In Texas, although assignment in every neglect or abuse case is not required, appointment is mandatory in the relatively large number of cases in which termination of parental rights is at issue.³⁵

The prevalence of mandatory appointment in the more populous states, with correspondingly large numbers of child protective cases, coupled with the discretionary appointment provisions enacted by several additional jurisdictions, assures that the significant majority of children are provided legal representation. Although precise national statistics are unavailable and would be exceedingly difficult to compute in light of the approximately fifteen “discretionary” states, where appointment is determined by individual judges on a case by case basis, probably at least two-thirds of the children who find themselves enmeshed in child protective actions are represented by an attorney. That, in itself, constitutes an important achievement. As has been noted, the number of children represented in any manner or form was zero in 1960. Forty-five years later, a clear majority of states require representation by an attorney, and the remaining states afford representation by a non-lawyer guardian ad litem.

C. The Child’s Constitutional Right to Counsel

One intriguing albeit largely unanswered question is whether

³³ MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2006).

³⁴ N.Y. FAM. CT. ACT § 249.

³⁵ TEX. FAM. CODE ANN. § 107.012 (Vernon 2006) (using the unusual term “attorney ad litem”).

the child is constitutionally entitled to counsel. The issue could be raised in terms of the right to counsel under the United States Constitution or could be asserted pursuant to the right of counsel, due process or equal protection provisions found in most state constitutions. Although litigated sporadically, the claim has gone largely unnoticed and unasserted. When raised, however, the argument has succeeded. The conundrum is why, almost fifty years after the *Gault* decision and thirty years after the enactment of CAPTA, the issue remains elusive.

As a starting point concerning the right to counsel, the Sixth Amendment to the United States Constitution provides that “[i]n all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” Although originally interpreted as the right to be represented by retained counsel, in 1963 the United States Supreme Court held that every person accused of committing a felony must be afforded representation, regardless of his financial ability.³⁶ Four years later, in *Gault* the Court extended the right to juvenile delinquency cases, which are proceedings where a child is accused of committing a crime.³⁷

Ergo, the right to counsel in criminal and juvenile justice cases is secure. However, the extension beyond the criminal law, specifically to child protective proceedings, has been largely unpursued. The United States Supreme Court has never determined whether children in protective proceedings are constitutionally

³⁶ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

³⁷ *Gault*, 387 U.S. at 41-42 (holding that a juvenile has a right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to assert the privilege

entitled to representation. True, the Court has held that indigent parents are not automatically entitled to assigned counsel, at least in termination of parental rights actions,³⁸ but that does not preclude the constitutional right of a child, a fact recognized in the handful of cases where the child has in fact asserted the right.³⁹

In 1976, only two years after Congress enacted CAPTA, a three judge federal district court panel, in the case of *Roe v. L.T. Conn*, held that the child who is involved in a neglect proceeding is constitutionally entitled to representation:

the plaintiffs maintain that Alabama child custody procedure violates the due process clauses of the Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding, and none was appointed here. We agree, if the parents are indigent, free counsel should be afforded to the child.⁴⁰

The case, which involved several unrelated issues, subsequently settled without an appeal.

Seventeen years later a New York appellate court held that in a neglect or abuse case the child possesses a constitutional right to counsel. Applying a *Mathews v. Eldridge*⁴¹ analysis, the court in *In*

against self-incrimination).

³⁸ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981) (holding that failure to appoint counsel for indigent parents in proceeding for termination of parental status did not deprive parents of due process rights).

³⁹ A few state courts have nevertheless found a constitutional right to counsel for the parent when she is accused of child neglect or is in jeopardy of losing parental rights. *See, e.g., In re K.L.P.*, 735 N.E.2d 1071 (Ill. 2000); *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972).

⁴⁰ *Roe v. L. T. Conn*, 417 F. Supp. 769, 780 (D.C. Ala. 1976).

⁴¹ 424 U.S. 319, 334-35 (1976) (requiring a balancing test, including the interest involved at the risk of an erroneous determination when applying procedural due process).

re Jamie TT. concluded that the child “has a constitutional as well as statutory right to legal representation of her interest in the proceedings on the abuse petition.”⁴² Interestingly, New York statutorily provides for the assignment of counsel in every case. The court ruled that the child had received ineffective representation, based on the fact counsel is constitutionally required.

In the same year as *Jamie TT.*, the issue of whether the child is constitutionally entitled to counsel in a termination of parental rights case was raised before the Oklahoma Supreme Court. Since an Oklahoma statute provided for the appointment of counsel on a discretionary basis, the court, implying that the child did enjoy a constitutional right, ordered that the relevant trial court appoint counsel for the child in every case, thereby converting the discretionary statutory power into a mandatory one without addressing the constitutional question directly.⁴³

To complete the current case law, last year a federal district court in Georgia held, in *Kenny A. v. Perdue*, that the child involved in a protective case is constitutionally entitled to counsel.⁴⁴

⁴² *In re Jamie TT.*, 599 N.Y.S.2d 892 (App. Div. 1993). In *Jamie TT.*, the constitutional argument was asserted for the purpose of arguing that as a constitutional matter the child is entitled to effective representation. *Id.* New York statutorily provides for representation. See N.Y. FAM. CT. ACT §249.

⁴³ *In re S.A.W.*, 856 P.2d 286, 289 n.9 (Okla. 1993). The statute stipulated that “when it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel[;]” the interpretation that counsel was mandated in each and every case would indeed be weak in the absence of a constitutional overlay. *Id.* An interesting albeit non-definitive case is *In re D.B.*, 385 So. 2d 83 (Fla. 1980), which involved the constitutional right to counsel for indigent parents where the court stated, as brief dicta, that they found no constitutional right of counsel for the child. *Id.* at 91.

⁴⁴ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005). The decision applies to “deprivation” proceedings, the Georgia equivalent of neglect or dependency, and to termination of parental rights proceedings.

Interestingly, the court found that Georgia, like New York in *Jamie TT.*, statutorily provides for legal representation.⁴⁵ The court's conclusion regarding mandated counsel, based on a confusingly worded statute, softened the constitutional ramifications. The plaintiff-children in *Kenny A.* alleged that astronomically high caseloads of the attorneys who represent children preclude effective representation. Georgia responded by asserting that since the State was not constitutionally required to provide counsel, the constitutional doctrine of effective representation is inapplicable. The court disagreed:

Even if there were not a statutory right to counsel for children in deprivation [neglect] cases and TPR [termination of parental rights] proceedings, the Court concludes that such a right is guaranteed under the Due Process clause of the Georgia Constitution, Art. I, §1, P. 1. It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake . . .

The Court finds that children have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. . . . [T]he Court concludes that plaintiff foster children have a right to counsel in deprivation and TPR proceedings under the Due Process Clause of the

⁴⁵ See GA. CODE ANN. § 15-11-6(b) (2004).

Georgia Constitution.⁴⁶

Over the course of thirty years, commencing with *Roe*, there have been four powerful cases in which the child's constitutional right to counsel has been upheld.⁴⁷ Oddly, at this time, none of the succeeding cases have cited *Roe* or mentioned any other precedent. It is as though each case was decided in a complete vacuum. An even greater oddity is that the issue has been litigated in only four states. Have children's lawyers throughout the country not thought of the issue? Have they not read the case law? The virtual absence of litigation which would improve the lives of children may be a sad commentary on the ability or the effectiveness of children's rights organizations. There exists no case in which a state appellate court or a federal court has rejected the claim that the child is constitutionally entitled to representation. Given the precedent of the four successful cases and no case in which the claim failed, surely the issue should be asserted in every jurisdiction which does not require the assignment of counsel. And in those jurisdictions which statutorily provide representation, the constitutional standard of effective representation should obviously be implemented—in fact, *Jamie TT.* and *Kenny A.* were determined in states where every child is at least nominally represented. In short, the issue should be pursued from the Atlantic to the Pacific.

⁴⁶ *Kenny A.*, 356 F. Supp. 2d at 1359-60.

⁴⁷ Another interesting pro child's right to counsel case is *In re Adoption/Guardianship Number T97036305*, 746 A.2d 379 (Md. 2000). Since Maryland provides representation, the court did not reach the constitutional issue, but emphasized the importance of counsel. *Id.* at 387-89.

If the trend continues (hopefully faster than the slow motion pattern seen thus far), the ramifications will be extremely significant. First, universal representation will become the norm, whether the case involves child neglect, abuse, permanency planning, or termination of parental rights. Second, the child will be entitled to constitutionally effective representation, i.e., counsel will be held to a relatively high standard of quality.⁴⁸ Finally, the thorny issue of the attorney for the child's responsibilities and role will be largely defused. When one is constitutionally entitled to representation, one is presumptively entitled to a lawyer who acts as a lawyer, not a guardian ad litem, or some vague hybrid attempting to fuse the role of counsel and guardian.⁴⁹

II. THE CHILD'S LEGAL STATUS IN A PROTECTIVE PROCEEDING

A. Introduction

To a large extent, a person's rights and obligations flow from that individual's legal status. For example, one must have standing to bring a lawsuit as a prerequisite to considering whether a perceived wrong may be legally rectified. A citizen may have specific legal rights which can be addressed by the court, while a non-citizen lacks the status to assert the same right. Or a person must be legally "aggrieved" to appeal a judicial decision—mere dissatisfaction does

⁴⁸ *Jamie TT*, 599 N.Y.S.2d at 892. While the child had an attorney, the case was reversed on the ground that he failed to provide effective representation. *Id.*

⁴⁹ However, the issue could not be completely resolved, particularly in cases involving very young children. *See infra* Part IV.C.

not qualify. As a corollary, an attorney's authority and actions reflect the individual client's legal status. One obvious example, the lawyer's authority is very limited indeed when the client lacks standing to seek legal redress. Similarly, the attorney who represents the second mortgagee in a foreclosure action is in a weaker position than the attorney who represents the first mortgagee. Or a lawyer representing a party to the proceedings has far greater empowerment than one who represents a witness—such as the right to cross-examine every person who testifies.

The above rather primitive description seems obvious. In fact, almost everyone understands those fundamentals—that is, until one speaks of a child who is involved in a child protective or custody proceeding. What are the child's legal expectations? What are her legal rights? Which mechanisms are available to assert those rights and expectations in the context of the particular proceeding? Does the child enjoy any individual rights which he may legally demand? Unfortunately, many of these critical questions lack definitive answers.

The absence of a national consensus concerning the child's legal status, rights, and expectations in a child protective proceeding has, in large measure, precipitated the current uncertainties, dilemmas, and conflicts concerning the legal representation of children. Unless the attorney knows the child client's rights, she can hardly be expected to form a decisive legal goal or strategy. In an automobile personal injury action, the plaintiff child has standing to bring the action (perhaps acting through a guardian ad litem), is a

party to the proceeding, and has the legal right to receive compensatory damages for his injuries. His lawyer is entrusted with the job of commencing a suit and employing every ethical pursuit to maximize the sought after economic recovery. In a juvenile delinquency case, to bring the matter closer to the subject at hand, the child's status is that of legal respondent, i.e., one accused of committing a crime. Hence, specific due process rights apply and the child's goal is to achieve a dismissal or, in the absence of dismissal, the least restrictive disposition. The attorney's role parallels that of the client. Thus, the attorney zealously protects the child's due process rights, seeks dismissal and if that fails, the attorney negotiates or litigates for the least restrictive disposition. But what about a child protection case?

This Part will discuss the basic attributes of what we shall broadly call, for lack of a better phrase, the "status" of the child. The initial discussion will be whether the child is a "party" to the proceedings. I shall then discuss the right of the child to choose or retain a specific lawyer, the right to be present and participate in the proceedings, and the specific substantive legal interests which the child may assert. Hopefully, a discussion of these basic taken-for-granted "adult" rights will lead to a better understanding of the child's status and role—and, accordingly, counsel's status and role.

B. The Child as a Party

In a civil child protective proceeding any individual whose cognizable interest may be adversely affected is granted "party" status, or at least has the option to join or intervene as a party. In

New York, for example, the applicable statutes stipulate that “persons who ought to be parties if complete relief is to be accorded between the person’s who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.”⁵⁰ Further, the statutes provide that a person must be permitted to intervene in the action “[w]hen the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.”⁵¹ Thus, if “A” brings suit against “B” and the outcome may affect the legal interest of “C,” “C” must be joined as a necessary party, or possesses the right to intervene as a party. The clear intent is to bring every relevant person before the court, guaranteeing interested parties the ability to participate and to be heard, and ensuring that the ultimate decision or judgment will be binding on everyone who has a stake in the litigation.

An essential feature of party status is the automatic applicability of a large “bundle” of procedural and substantive rights. A party has the right to be represented by counsel (though not necessarily the right to assigned representation), discovery rights, standing to participate in motion practice, the literal right to a chair at a table at the front of the courtroom, the right to present evidence, to cross-examine witnesses, to argue, the ability to consent or to withhold consent to a proposed resolution, and the right to appeal any adverse decision.⁵²

⁵⁰ N.Y. C.P.L.R. § 1001(a) (McKinney 2006).

⁵¹ *Id.* § 1012(a)(2).

⁵² *See Gideon*, 372 U.S. at 343-44. In some circumstances, a non-party may enjoy one or

Every child protective proceeding involves two obviously necessary parties—the parent or legal guardian and the state (either directly or through a statutory delegation, as when a child care agency is the petitioner). But what about the child? After all, the child has an obvious cognizable interest in the outcome – it is her life and her interests that are at issue. The child surely meets the definition of a “party,” in New York or any other state; it is inarguable that she “might be equitably affected,” is “bound by the judgment,” and her interests may be inadequately represented by the other parties, such as the parent and the state.

Despite meeting the traditional criteria, until recently the child has not been recognized as a party. Historically, the proceedings were viewed as a straight parent-state contest. The right or ability to participate, either directly or through the appointment of a guardian ad litem, was simply off the radar screen.⁵³

The child’s status began to evolve with the assignment of counsel or a guardian ad litem. Whichever 1974 CAPTA alternative a jurisdiction chose, someone responsible for the child’s specific rights and interests had been injected into the proceedings. That person would likely advocate a position, whether based on the child’s wishes, the perceived best interest of the child or an amalgam of both. Further, the child’s spokesperson might want to introduce evidence or at least assure that evidence was introduced to support her position.

more rights; the point is that party status confers these rights automatically. *Id.*; see also *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967) (describing the right to confront and cross-examine witnesses as “fundamental” and “essential to a fair trial”).

⁵³ See *supra* note 12 and accompanying text.

And, if the decision was viewed as adverse to the child's interest, she might want the case to be determined by a higher court. If the individual assigned to meet the CAPTA requirement is an attorney, the attorney would naturally want to call and cross-examine witnesses, argue legal points, and file written material. Lawyers are trained to represent real parties, and to make extensive use of the tools of their trade in the course of implementing such representation.

In the thirty post-CAPTA years, the child's status in the proceedings has indeed mutated, but on an ad hoc basis with no discernable national rule. In several states, such as Indiana and Ohio, the child has been statutorily granted party status,⁵⁴ while in other states, such as Maine, he has gained party status through case law.⁵⁵ Perhaps the most definitive statement of party status can be found in *In re Adoption/Guardianship No. T97036005*,⁵⁶ where the Maryland Court of Appeals held that the Maryland Code confers party status on the child, and proceeded to reverse a termination of parental rights determination, agreed to by the parents and the state, on the ground that the child had failed to consent to the disposition:

The primary issue we must decide in each case is whether the trial court violated the constitutional and/or statutory rights of the children by granting the

⁵⁴ See IND. CODE § 3103409-7 (2004) (*repealed by* IND. P.L. 1-1997, § 157) which stipulates that “[t]he (1) child; (2) child’s parents, guardian or custodian; (3) county office of family and children; and (4) guardian ad litem or court appointed special advocate; are parties to the proceeding.” Interestingly, the child and guardian ad litem are deemed separate parties. See also MD. CODE ANN., CTS. & JUD. PROC. § 3-801(u)(ii) (West 2006) and MINN. STAT. ANN. § 21.01(a) (West 2006) (deeming the guardian ad litem a party); *In re Williams*, 805 N.E.2d 1110, 1113 (Sup. Ct. Ohio 2004) (holding a child has a right to assigned counsel “based on the juvenile’s status as a party to the proceeding”).

⁵⁵ See *In re Nikolas E.*, 720 A.2d 562, 564 (Me. 1998).

⁵⁶ 746 A.2d 379 (Md. 2000).

petition . . . to terminate parental rights when both parents either affirmatively consented or were statutorily deemed to have consented, without first providing the children with a meaningful opportunity to be heard on the merits of the petition. We shall hold that these children had this right, and accordingly, shall reverse. . . .

We conclude that because the child is a party to the guardianship petition, the child has a right to assistance of counsel and the right to notice of the petition and opportunity to object thereto. These rights in turn entitle the child, when the child objects to the petition [seeking termination of parental rights], to a hearing on the merits of the petition.⁵⁷

Nationally, the more prevalent reaction has been to skirt the issue by statutorily providing specific party rights to the child, while refraining from explicitly conferring party status itself. Thus, in Illinois the child has the right to be present, to be heard, to present evidence, examine records, and cross-examine witnesses.⁵⁸ In New York, a state providing for the legal representations of children well before the 1974 CAPTA mandate, the child, acting through counsel, has the statutory right to file certain motions,⁵⁹ and the right to move for the modification or rescission of any relevant court order.⁶⁰ Additionally, the child, through her attorney, may file a petition (subject to court approval)⁶¹ or the child may appeal an adverse

⁵⁷ *Id.* at 380, 389.

⁵⁸ See 705 ILL. COMP. STAT. 405/1-5 (West 2006).

⁵⁹ See N.Y. FAM. CT. ACT § 1039.

⁶⁰ *Id.* § 1061.

⁶¹ See *In re Weber*, 456 N.E.2d 1186, 1187 (N.Y. 1983) (noting that anyone other than child protective agencies may file a petition only if given permission to do so by a court).

order.⁶² Delaware has held that the child is, in effect, a de facto party, concluding, paradoxically, that although he “may not be a party in the formal sense” he is nevertheless “an integral party” entitled to be heard.⁶³ In still other states the child is statutorily referred to as a “party” for at least some purposes, a fact which, as in Georgia, convinced at least one court that the state has granted the minor full party status for every purpose.⁶⁴ It may be that in Delaware and Georgia the child is indeed a party, even in the absence of an explicit statute, and in Illinois and New York she comes close. But in other states the child unfortunately possesses less than the full array of “party” rights, or the issue has not been addressed.

The upshot is that in most, but not all, American jurisdictions (unlike Indiana, Maryland, Ohio, Maine and Georgia) the child is a “virtual” or de facto party with many, if not all, the rights of an “actual” party; and the specific rights vary from state to state. The magic word “party” has been largely avoided, permitting courts and legislatures to stop short of granting the child full party rights, while simultaneously conferring many party rights on a piecemeal basis. The present scheme is rather inefficient; it would be easier to enact the one word, “party,” than to prescribe each and every right separately.

As noted earlier, recognition of the child as a formal party in

⁶² See *In re Fernando V.*, 712 N.Y.S.2d 537, 538 (App. Div. 2000) (granting the child’s appeal of an earlier dismissal of a petition to terminate the father’s parental rights).

⁶³ *In re Frazer*, 721 A.2d 920, 923 (Del. 1998).

⁶⁴ See *Kenny A.*, 356 F. Supp. 2d at 1358-59 (noting that the statute provides that all parties are entitled to counsel and since a child is a party in a deprivation hearing, he is entitled to counsel).

child protective cases would resolve many of the problems and dilemmas which continue to plague the field, and it would further the development of the mature child client-attorney relationship which this article advocates.⁶⁵ The ordinary attributes of a party would presumably apply, including the right to notice, participation, presentment of evidence, the need to agree to settlements or dispositions, and the right to appeal. The right to representation by assigned counsel would also logically flow from party status, or at least a strong argument for representation could be made. After all, a party possesses the implicit right to present witnesses, cross-examine, argue and file appropriate motions. Although adults have the right to proceed *pro se*, even when entitled to assigned counsel, one would hardly expect a child to pursue these endeavors or to attend every appearance or hearing, a routine which *pro se* representation entails.⁶⁶ The clear trend has been toward party status—and the recognition of the rights which explicitly or implicitly flow from achieving that position should, hopefully, gain strength in the near future.

C. The Right of the Child to Choose Counsel

Appellate courts in several states have held that the child, or at least the older child, has the right to be represented by counsel of her choosing. The decisions often reflect a statutory provision. In California, where the relevant statute states that a minor “has the right

⁶⁵ See *supra* Part II.B. It should be noted that the child would not be a petitioner or a respondent, but would be a necessary third party.

⁶⁶ The recent Georgia holding that the child is constitutionally entitled to counsel was in part predicated on the fact that the child is indeed a party. *Kenny A.*, 356 F. Supp. 2d at 1359.

to be represented . . . by counsel of his or her own choice,” the Court of Appeal held that the trial court is obligated to honor the child’s choice, assuming the particular youth is competent to decide, i.e., possesses the minimally requisite capacity or maturity.⁶⁷ New York law provides that the minors “should be represented by counsel of their own choosing or by law guardians,”⁶⁸ prompting the appellate courts to hold that the child must be permitted to substitute an attorney she wanted for court appointed counsel where “the child has indicated her lack of trust in her appointed representative, her fear that this representative will not effectively communicate her wishes to the court and her belief that the law guardian has been influenced by her adoptive mother”⁶⁹ In a similar vein, Illinois and Alaska courts have recognized the right of the “competent” child to choose or substitute counsel.⁷⁰ To be sure, the right to select counsel is dependent on the child’s competence, and the absence of parental or other manipulation. As noted by the Illinois court,

[w]e recognize that a minor’s right to select substitute counsel is not absolute. However, in the present case the judge conducted an extensive hearing, with both sides presenting evidence to address the issue of whether A.W. [the child] was coerced or manipulated into the decision to substitute private counsel for the

⁶⁷ *Akkiko M. v. Super. Ct. of San Francisco*, 163 Cal. App. 3d 525, 528, 531 (Ct. App. 1985).

⁶⁸ N.Y. FAM. CT. ACT § 241.

⁶⁹ *In re Elianne M.*, 601 N.Y.S.2d 481, 482 (App. Div. 1993); *See also In re Albanese*, 707 N.Y.S.2d 171, 172 (App. Div. 2000) (citing child’s “displeasure with the representation” provided by an agency as a reason for removing the agency as the child’s representative); *Redder v. Redder*, 792 N.Y.S.2d 201, 204 (App. Div. 2005) (citing N.Y. FAM. CT. ACT § 241).

⁷⁰ *See In re A.W.*, 618 N.E.2d 729, 733 (Ill. App. Ct. 1993); *Wagstaff v. Super. Ct., Fam. Ct. Div.*, 535 P.2d 1220, 1227 (Alaska 1975).

Public Guardian.⁷¹

The right to choose counsel, a fundamental principle of American law, has significant repercussions for children. If children are considered parties to protective proceedings, participants who enjoy equal or substantially similar rights to adult parties, at least when they are competent to exercise those rights, the ability to retain counsel is implicit. To a great extent, the existing case law confirms those rights without explicitly holding that the child is a party. Equally, counsel whom the child selects will advocate what the child wishes or what counsel and the child jointly formulate. Surely none of the children involved in these cases wanted an attorney who would advocate what he perceived as the child's "best interests." In fact, in each case the child sought, successfully, to dismiss a lawyer who refused to trust the child as a competent party, i.e., enter into the normal attorney-client relationship.⁷²

Several other states, which follow the prevalent guardian ad litem model, provide either that the child may request the appointment of independent counsel or that the court may assign counsel when the child and guardian ad litem disagree. In Maine, the

⁷¹ *In re A.W.*, 618 N.E.2d at 733.

⁷² Retaining independent counsel is not easy for a child. In some cases a relative initiates the process and may compensate counsel, while in others the child seeks assistance from a legal clinic or other publicly funded group. An attorney may accept the case on a pro bono basis; or, the child or attorney may request that the court substitute appointed counsel. But one substantial impediment is the lack of knowledge concerning the right to choose counsel. It is safe to say that even in California, Illinois, and New York, i.e., states that permit the practice, few children are advised that they possess the right – and, obviously, even fewer youths exercise the right.

child may request the appointment of “legal counsel,”⁷³ while in Washington, the court “may appoint an attorney to represent the child’s position. . . . if the child requests legal counsel and is age twelve or older.”⁷⁴ Although stopping short of an absolute right to counsel, these statutes recognize the need for the child’s position to be independently represented and for the competent child’s right to be represented through the normal attorney-client relationship. The child who requests representation always intends that counsel will advocate his position, or at least that the attorney will develop a position with the close collaboration of the child.

Lastly, several statutes provide for the appointment of counsel when the child’s position conflicts with that of the guardian ad litem. For example, in New Hampshire “where the child’s expressed interests conflict with the recommendation for dispositional orders of the guardian ad litem, the court may appoint an attorney to represent the interests of the child.”⁷⁵ In Ohio, an attorney guardian ad litem serves as both guardian and counsel, but if a conflict exists the court may substitute the guardian ad litem, leaving the original assigned attorney as counsel.⁷⁶

Although couched in discretionary terms, e.g., the court “may” appoint counsel, this set of statutes takes cognizance of the child’s right to seek independent counsel to represent his position. Put simply, a child would not ordinarily ask the court for a lawyer to

⁷³ See ME. REV. STAT. ANN. tit. 22, § 4005(1)(F) (West 2006).

⁷⁴ See WASH. REV. CODE § 13.34.100 (2006).

⁷⁵ See N.H. REV. STAT. ANN. § 169-C: 10(II)(a).

⁷⁶ OHIO REV. CODE ANN. § 2151.281(17) (LexisNexis 2006); see also MISS. CODE ANN. § 43-21-121(4) (2006); MINN. STAT. § 26.01 (2006), and R.I. GEN. LAWS § 40-11-14 (2006).

parrot the guardian ad litem, nor would there be a need for the court to appoint separate counsel in the event of conflict if the child's views were irrelevant.

The right of the child to choose counsel is also reflected in professional standards adopted by the organized bar. The relevant American Bar Association standards provide that:

The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer. A person with a legitimate interest in the child's welfare may retain private counsel for the child and/or pay for such representation⁷⁷

Similarly, the "Fordham" recommendations, promulgated at the 1992 Fordham Conference on the Representation of Children, provide that "the court should permit the child to be represented by a retained private lawyer if the court determines that this lawyer is the child's independent choice." The "Fordham" standards continue by recommending that "the court should allow, at the child's request, the substitution of one state-compensated lawyer for another, for good cause"⁷⁸

In sum, several states, including three of the most populous states in the union, California, New York and Illinois, have enacted

⁷⁷ A.B.A. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Standard H-5 (1999). The standard continues by stipulating that court approval is necessary, and that such approval should not be granted if the child opposes the lawyer's representation. *Id.*

⁷⁸ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Child*, 64 FORDHAM L. REV. 1301, 1321 (1996).

statutes granting the child the right to choose his counsel. Several additional states provide for the appointment of counsel when the child so requests or when there is a conflict between the child's position and that of the guardian ad litem. In addition, standards adopted by the American Bar Association and other groups underscore the basic right of the child to be represented by an attorney who the child wants, a lawyer who will develop and advocate a position consistent with her position. The existence of these provisions constitutes a strong statement in favor of the child's need and right to be considered as an equal party to the proceedings capable, in many cases, of entering into a normal attorney-client relationship.

D. The Child's Right of Presence and Participation

Children who are involved in protective proceedings may be present in the courthouse and appear before the court, participate in the proceedings, and attend out-of-court conferences. Although the notion of presence and involvement may surprise even the most seasoned children's attorney, there is simply no prohibition—or at least I have never seen a statute, rule or case limiting participation generally.⁷⁹ To the contrary, several state statutes specifically prescribe the child's right to be present in court and participate.⁸⁰

⁷⁹ Limiting the child's presence for a specific purpose or event is, of course, a different matter. See *In re Ty L.*, 581 N.W.2d 595 (Wis. Ct. App. 1998). In an unpublished opinion, the Court held that the emotionally troubled institutionalized child's presence in court could be precluded by the trial judge, and telephone presence substituted; the Court also held that the guardian ad litem could not waive the child's presence. *Id.*

⁸⁰ See, e.g., 705 ILL. COMP. STAT. 405/5; MINN. STAT. § 22.01 (stipulating that a child over the age of 12 may participate).

And in those states which afford full party status to the child, the juvenile may surely appear and otherwise participate in the proceedings—that is the essence of party status.⁸¹ Yet, in most states the child's appearance before the court is a rare event and most children, including older juveniles, are absent from the courtroom itself and are hardly ever seen at case meetings or conferences.⁸²

The major exception is California. The California Code provides that “[a] minor who is the subject of a juvenile court hearing . . . is entitled to be present at the hearing,” and continues by stipulating that: “[i]f the minor is 10 years of age or older and he or she is not present at the hearing, the court shall determine whether the minor was properly notified of his or her right to attend the hearing.”⁸³ Consequently, many California juvenile courthouses are designed to be child friendly, and are equipped with children's areas and furniture. The children are to be seen and heard.⁸⁴ The California protocol does not mean that children attend every court hearing, but a significant majority of children above the age of eight or ten are present in the courthouse, where they can discuss the case

⁸¹ See *supra* notes 54-55 and accompanying text.

⁸² One study found that only 10-18 percent of represented children appeared in court at all. U.S. NAT'L CTR. ON CHILD ABUSE & NEGLECT, FINAL REPORT OF THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM § 6.2.2.3 at 6-14 (1998).

⁸³ See CAL. WELF. & INST. CODE § 349 (referring to the statutory modification that essentially reinforced the California practice of child presence and involvement). In addition to California, there have been tentative measures in a few jurisdictions. For example, the New York City Family Court administration encourages the attendance of older children at post-disposition permanency hearings.

⁸⁴ For example, the Los Angeles County courthouse devoted to child protective proceedings has large open children areas equipped with children sized furnishings. I have visited the courthouse twice in the past few years, and admired the child friendly architecture and furnishings, as well as the presence of large numbers of children.

with their attorney, participate at meetings and, when appropriate, appear in the courtroom—seated next to their lawyer, as is any other party. It is a refreshing albeit unique experience to walk through a juvenile court and actually see children.

The American Bar Association standards agree with California, stating, simply, that “[i]n most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify,”⁸⁵ adding, as a commentary, that “[a] child has the right to meaningful participation in the case, which generally includes the child’s presence at significant court hearings.”⁸⁶

A recent development which may encourage child participation is the employment of mediation programs to resolve cases prior to formal adjudication. Since 2002 the District of Columbia courts have referred every child protective case to mediation panels,⁸⁷ and last year New York enacted legislation authorizing mediation.⁸⁸ Not surprisingly, California, which utilizes mediation techniques, permits the child’s involvement, stipulating that “[t]he child has a right to participate in the dependency

⁸⁵ See *supra* note 77, Standard D-5. The need for greater child participation has also been addressed in the New York State Bar Association Standards: “The law guardian should determine whether the child should be present in court, and, when appropriate, should determine whether the child should make a statement to the court.” LAW GUARDIAN REPRESENTATION STANDARDS, N.Y.S. BAR ASSOCIATION COMMITTEE ON CHILDREN & THE LAW 138 (1996).

⁸⁶ See *supra* note 77, Standard D-5. Given the prevailing practice of child exclusion, the American Bar Association commentary notes that “[i]t may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child’s attendance at the hearing.” *Id.* The possible need to file a writ of habeas corpus for the child to be present at her own protective hearing underscores just how far we have to progress before securing a meaningful role for the child in the proceedings. *Id.*

⁸⁷ DISTRICT OF COLUMBIA COURTS ANNUAL REPORT, 81 (2004).

⁸⁸ N.Y. FAM. CT. ACT § 1018.

mediation process accompanied by his or her attorney.”⁸⁹

To a child, mediation is usually a much less awesome or frightening procedure than a formal court appearance. The informality, with sessions conducted at a conference table where the participants engage in conversation rather than formal testimony, is more child friendly than the courtroom setting. The growing use of mediation may also have a spill-over effect on the courtroom phase. If mediation (at which the child is active) is successful, and early reports indicate a very high resolution rate, the child should clearly be present at the subsequent court appearance needed to formalize the agreement and craft a relevant court order.⁹⁰ Even where mediation is unsuccessful, the child’s involvement (when the child participates) should facilitate a similar involvement when the same issues are litigated before the court.

Presence is essential to a realization of the child’s right to participate to the extent the youngster may be able. There is no policy reason to generally exclude the child, with the exception of the very young, and subject to the court’s authority to exclude for a specific justifiable reason, such as when forensic experts are testifying or discussing the parent’s psychological condition. Adding to the need for the child to be present, at least in the courthouse, is the common practice of negotiating and settling cases (or specific issues) in the courthouse at the pre-trial conference or mediation session, or

⁸⁹ CAL. CIV. CODE § 1405.5(d)(2)(B) (West 2006).

⁹⁰ In Santa Clara, California, for example, 75 percent of the cases referred for mediation resulted in a partial resolution. Hon. Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CENTER FOR FAM., CHILD. & CTS. 60, 63 (2004). Similarly, the District of Columbia, which refers every case to mediation panels, reported a 74 percent mediation

on the day the hearing is scheduled.⁹¹ The great majority of child protective cases, like most causes of action, never reach trial. Consequently, in most cases the child who is in attendance will never hear testimony or be present at an evidentiary hearing. Precluding presence and participation at the conference table is a great disservice to children, as California has found. Nor should the older child usually be excluded from the courtroom when a settlement is placed on the record. Even if courtroom participation is not appropriate in a specific matter, that should not bar the child's presence in the courthouse—as per California, the ABA standard, and in a few other jurisdictions. The child's attorney could privately discuss proposals and alternatives with the child (that is what the attorney-client relationship is all about), solicit the child's views on the spot, and incorporate the young client's concerns and suggestions.

Short of live presence in the courtroom, at least limited participation may be afforded through the use of in-camera testimony, which is when a child testifies or is interviewed confidentially in judicial chambers. In-camera procedures are routinely employed in child custody cases,⁹² granting the court insight into the child's position and, of at least equal significance, granting the child a forum to express her views as a participant. On

settlement rate in 2004. *See supra* note 87.

⁹¹ Jean Koh Peters, observing that the great majority of children's lawyers attend critical conferences without their clients, concludes that the child's attorney shall "never act or make any statements outside the presence of your client that you would not make in front of your client." PETERS, *supra* note 22, at 60. That is good advice, but it in no way constitutes a substitute for client presence and participation.

⁹² Several statutes explicitly permit the practice. *See, e.g.*, IND. CODE ANN. § 31-17-2-9 (West 2006); MO. REV. STAT. § 452.385 (2006). The practice has also been long recognized by case law. *See, e.g.*, *Lincoln v. Lincoln*, 247 N.E.2d 660 (N.Y. 1969).

the other hand, while not unknown, the use of in-camera testimony in child protection proceedings is a very rare event.⁹³

Adding to the dichotomy, in a custody case at least the older child's wishes must be considered by the court when determining the case. Hence, the court possesses a procedural mechanism, in-camera, to determine a substantive rule, consideration of the child's point of view.⁹⁴ In a child protective case, however, the child's wishes may not be relevant, and the child is almost never heard. The anomalous consequence may be illustrated by the following hypothetical. Suppose Jane's mother has neglected her. Jane's grandmother may, in that event, pursue a private child custody action; Jane would probably enjoy the right to be heard through an in-camera interview, and her expressed wishes must be considered by the court. But suppose, instead, that the government files a child neglect case against Mom which results in the placement of Jane in kinship foster care with grandma. In that event, Jane will not be heard—an in-camera would be highly unlikely, and her desires are probably deemed to be irrelevant. The two cases involve the same child, same contestants, same facts, same disposition, but significantly different levels of participation.

I believe that children should participate at far greater levels than at present, whether the case ostensibly involves child custody or child protection (and elements of both are often woven into a given

⁹³ Two reported cases in which the procedure was used are: *Cruz v. Pennsylvania*, 472 A.2d 725 (Pa. Commw. Ct. 1984); *In re Bernelle P.*, 398 N.Y.S.2d 714 (App. Div. 1977). The practice is also authorized by court rule in West Virginia. W. VA. CODE ANN. § 8 (West 2006).

⁹⁴ Forty-six states plus the District of Columbia require consideration of the child's wishes

case). That said, bringing the “child protective” youngster to the level of the “child custody” youngster would constitute a significant improvement.⁹⁵

Last, assuming the child enjoys the right to choose an attorney or to request the substitution of attorneys, as provided in many states, that right cannot be intelligently employed unless the child client sees the lawyer in action. To return to the theme which commenced this section, many jurisdictions explicitly permit presence and participation, while no jurisdiction prohibits child participation. In the final analysis, the development of a meaningful attorney-client relationship, as advocated in this article, is severely compromised, if not unachievable, when the child is barred from the forum where his vital interests are determined.⁹⁶

E. What are the Child’s Legal Interests?

It hardly needs to be said that the child maintains a legally cognizable interest in a child protective proceeding.⁹⁷ That is the presumptive reason the youngster is afforded representation, whether

in custody matters. *See* Linda Rio, *Charts*, 38 FAM. L.Q. 809, 810 (2005).

⁹⁵ One reason for the dichotomy between protective and private custody cases may be the involvement of the government in child protective cases; the old “*parens patriae*” or, perhaps, the government knows best for children attitude, unfortunately persists.

⁹⁶ Professor Freeman offers the following cogent observation:

[S]hould lawyers adopt the roles of other professionals? And should their roles be conceived differently when they are representing children as opposed to adults? There seems to be an assumption that they should, but this, I would suggest, is yet another instance of the way we project our reluctance to see children as participants in processes which affect them.

MICHAEL FREEMAN, *THE MORAL STATUS OF CHILDREN* 80 (1997).

⁹⁷ Once upon a time that was not considered to be so. *See supra* Part I.A. But the clear twenty-first century consensus is that the child has an independent legal interest in the action. *See* Edwards, *supra* note 24, at 67.

by counsel, a guardian ad litem, or both. That is also the rationale for granting the child party status, or at least the attributes of party status, whether de jure or de facto.⁹⁸ In other words, the minor who is allegedly abused or neglected is viewed as possessing a separate independent interest in the litigation. Hence, she can present evidence, argue via an attorney or guardian, seek interim or permanent relief, and when necessary, appeal to a higher tribunal.

But what precisely are those interests? The answer may not always be clear. Of perhaps greater significance, little has been written and, in fact, the question itself has been largely subsumed in the debate over whether counsel should represent the “child’s wishes” or the child’s “best interests.”⁹⁹ Yet, the child’s legal interests must be identified before counsel can frame a position or develop a strategy to attain a goal.¹⁰⁰ This section will summarize those specific legal interests which the child may assert within the child protective proceeding framework.

The first interest, one which is readily apparent, is protection. After all, that is the reason we call the action a “child protective” proceeding. Assuming the existence of abuse, neglect, or dependency, the child has a cognizable legal right to be protected.

⁹⁸ See *supra* Part I.A.

⁹⁹ See *infra* Part III.

¹⁰⁰ In most legal actions the legal interests of a specific party is so evident that we do not think of the issue. For example, the legal interest of a plaintiff in a tort action is to be made whole by recouping monetary damages (of course the defendant’s interest is opposite). In a divorce action the legal interest for the plaintiff is to obtain a divorce, while subsidiary legal issues flow from the divorce, such as the right to marital property, maintenance, etc. However, in a child protective case the interests of the child are less clear or, perhaps more accurately, have not been given clear legal expression. See Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955, 1968-69 (1996).

Further, virtually every child who has been abused or severely neglected wants protection – no one wishes to endure continued abuse or to be consistently deprived of basic needs such as nourishment or medical services.¹⁰¹ The extent and form of protection which the child desires may vary. Child “A” may want to be placed outside her home, perhaps with a relative, while in the same situation Child “B” may want to remain home with the parent supervised or with home based services. And the applicable statutes authorize a wide range of protective measures which the child may assert. In California, for example:

[i]n all cases in which a minor is adjudged a dependent child . . . the court may limit the control to be exercised over the dependent child by any parent or guardian and shall by its order clearly and specifically set forth all those limitations The limitations may not exceed those necessary to protect the child.¹⁰²

The Uniform Juvenile Court Act authorizes a range of “orders of disposition best suited to the protection and physical, mental, and moral welfare of the child.”¹⁰³ Every state provides, as one possible remedy, that the child remain at home with the parents placed under supervision,¹⁰⁴ and many specifically provide for the issuance of orders of protection enjoining the parent or other person responsible

¹⁰¹ If a person, adult or child, actually desires to be abused or be deprived of basic needs, the person’s competency is seriously questioned. That said, the relatively benign forms of neglect, such as inadequate supervision or the lack of an acceptably maintained home, may of course not rise to the level where the child would necessarily want remediation (and a few children may, irrationally, resist protection from serious abuse).

¹⁰² CAL. WELF. & INST. CODE § 361(a).

¹⁰³ UNIFORM JUVENILE COURT ACT § 30 (1968).

¹⁰⁴ See, e.g., N.Y. FAM. CT. ACT § 1054.

from committing detrimental acts against the child.¹⁰⁵ Needless to say, every state also permits placement outside the home when necessary to protect the child. The child's legal interest in protection may take many forms, and the minor, through counsel, may advocate and argue from a large array of protective measures.

Even assuming that the specific child may be adequately protected only through placement outside the home, the statutory parameters are extremely broad. The child may be placed with a relative in an arrangement deemed "kinship" care.¹⁰⁶ For that matter, in many states the child may be placed "in the custody of a relative or other suitable person,"¹⁰⁷ an extraordinary open ended prescription which could encompass a distant relative, family friend, or neighbor. The Court may even specify the geographic location; for example, in California the placement should "be as near the child's home as possible, unless it is not in the interest of the child."¹⁰⁸ These provisions provide additional scope for the child and her counsel (for example, the child may wish to be placed with Aunt Mary rather than with a grandparent or a stranger). In addition, the duration of the initial placement may vary. From the child's perspective, a four month initial placement while Mom attempts to get her act together may be preferable to a one year placement.¹⁰⁹

Second, the child has a legal interest in preserving her

¹⁰⁵ *Id.* § 1056.

¹⁰⁶ *See, e.g.,* CAL. WELF. & INST. CODE § 361.2.

¹⁰⁷ N.Y. FAM. CT. ACT § 1055(a).

¹⁰⁸ CAL. WELF. & INST. CODE § 362.2.

¹⁰⁹ *See id.* § 364(d), which requires that the court order's duration be set at "not more than six months from the time of the hearing."

family's integrity and continuing her relationship with her family, including parents, siblings, grandparents and possibly other relatives.¹¹⁰ And that interest is not inconsistent with the right to safety and protection. Both may be achieved in a given case by designing a non-placement disposition. But even if the child is placed outside his home, he maintains the legal right to visitation with his parents and siblings.¹¹¹ Visitation can be maximized (even when supervision is needed), siblings can often be placed in the same foster home, and a parent can be involved in her child's life, including education and medical services, when custody is transferred, at least temporarily, to a child care agency. Most placed children want to maintain a close relationship with their parents, and the attorney working with the child maintains the ability to ensure the implementation of those rights.

Whether placed or not, and regardless of any other court directives, the child is also legally entitled to a wide range of appropriate medical, psychological, social and educational services.¹¹² A partial list includes medical examinations and treatment, counseling, psychological diagnosis, homemaker services, and special educational services. The specifics vary from state to state, but the principle is, today, embedded in child protective laws.

¹¹⁰ See, e.g., *Kenny A.*, 356 F. Supp. 2d at 1360 (concluding that the child possesses "an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents").

¹¹¹ See, e.g., *In re Clifton B.*, 96 Cal. Rptr. 2d 778 (Cal. Ct. App. 2000); *In re C.R.*, 835 A.2d 340 (N.J. Super. Ct. App. Div. 2003); *In re Termination of Parental Rights to Diana P.*, 694 N.W.2d 344 (Wis. 2005).

¹¹² See, e.g., *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); COLO. REV. STAT. ANN. § 26-5-102(b) (West 2005).

Similarly, the parent is usually legally entitled to rehabilitation services. It may well be in the child's interests to advocate court ordered services for his parent, thereby improving the home environment when the child is not removed or enhancing the possibility of reunification when the child has been placed. The introduction of a court ordered homemaker into the household, for example, often redounds to the immediate benefit of the minor.¹¹³

An additional albeit easily overlooked interest is autonomy. Every person has the right to be left alone and is entitled to individual privacy. Children who are enmeshed in child protective cases are too often subject to multiple invasive measures, ranging from serial interviews involving their innermost thoughts conducted by caseworkers, psychologists, and social workers, to physical examinations, to disclosure of the child's mental and psychological records. A major and non-controversial responsibility of counsel is to articulate and protect the child's autonomy rights by, for example, requesting court protective orders barring sequential interviews or by seeking to quash a subpoena for the child's confidential or privileged therapy records.¹¹⁴

In summary, the child possesses an impressive array of independent legal interests or rights which may be developed, advocated, and argued by the child's attorney. Those rights exist

¹¹³ For purposes of this section, the discussion and citations pertain to abuse, neglect or dependency cases. A similar analysis could be outlined for termination of parental rights proceedings, though the dispositional options are usually more limited.

¹¹⁴ See, e.g., *In re Kathleen Quigley Berg and Eugene Berg*, 886 A.2d 980 (N.H. 2005) (holding that the child's therapy records could not be disclosed in a custody case based on the fact that the relationship between child and therapist was privileged and the child did not waive the privilege); *In re Richard S.S.*, 29 A.D.3d 1118 (App. Div. 2006) (holding that the

regardless of the specific representation model. One does not have to engage in a wooden “best interests” vs. “child’s wishes” analysis to determine whether the attorney should press for needed services (as well as seek supporting forensic reports and testimony)—or to conclude that whenever possible the child should be consulted or, better, serve as an active participant. Nor is there likely to develop an attorney-client conflict concerning social services, education, protection of the child’s autonomy or visitation. The key, it seems to me, is an understanding of the myriad and sometimes complex legal rights of the child, coupled with a holistic approach with the child in securing and enforcing those rights.¹¹⁵

III. THE ROLE OF CHILD’S COUNSEL

For more than forty years, the role and responsibilities of the attorney who represents a child in a protective proceeding have been hotly debated.¹¹⁶ The contestants have been the “best interests of the child” school, arguing that counsel should independently determine and advocate the child’s best interests regardless of the child’s wishes (assuming the child has a specific view), and the “child’s wishes” school, which bases its argument on the premise that counsel is obligated to advocate the child’s wishes unless the child is very young or otherwise impaired. Attempting to bridge the divide, a

child’s mental health records could not be subpoenaed in a child neglect proceeding).

¹¹⁵ I am indebted to Jean Koh Peters, who has pioneered in developing a holistic approach to child representation.

¹¹⁶ See, e.g., Bruce A. Green & Bernadine Dohrn, *Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281 (1996); Susan D. Hawkins, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075 (1996) (explaining similar controversies which have shaped the representation of

legislature or a court has on occasion prescribed the contradictory formula of advocating both “best interest” and “child’s wishes.”¹¹⁷

This Part will outline the current state of the “controversy,” without attempting an exhaustive players-list or history. The discussion commences by surveying legislation, continues by explaining the position of the organized bar and academics, and concludes with a synopsis of 21st century case law. In general, legislators have persistently mandated that the attorney adhere to a “best interests” standard, while the organized bar and academics have pushed the other way, toward either a “child’s wishes” lawyering model or, more recently, a conventional or “adult” attorney-client model. The judiciary appears to be hopelessly conflicted concerning the role of child’s counsel.

In a subsequent Part,¹¹⁸ I shall discuss why I believe the “best interests” vs. “child’s wishes” equation is misleading, if not false, and argue for a more sophisticated albeit complicated relationship between the child client and the attorney. For now, my intent is to illustrate the inconsistencies and deficiencies of the present approaches.

A. The Legislatures Speak

The grandfather statute, New York’s 1962 Act, provided for counsel “to help protect their [the children’s] interests and to help

children in child custody cases).

¹¹⁷ See, e.g., ARK. CODE ANN. § 9-27-316(5)(B) (2005); UTAH CODE ANN. § 78-3A-912(8)(a) (2005).

¹¹⁸ See *infra* Part IV.A.

them express their wishes to the court.”¹¹⁹ After forty years, that prescription remains in effect. On the face of it, there is nothing extraordinary about the language. Clients, whether age eight or age eighty, look to lawyers to help protect their interests, and, surely, to articulate their position. Perhaps tellingly, the statute does not even include the phrase “best interests,” much less mandate that counsel advocate “best interests.” “Interests,” the governing word in the New York statute is not synonymous with “best interests.” For instance, a landowner may pursue a legally recognized interest to evict a viable tenant even when market conditions preclude obtaining a new tenant, i.e., the landlord’s “best interests” would be to forgo the right of eviction. In fact, litigants of every age frequently pursue their legal interests, even when counterproductive to their “best interests.” Further, the statute also stipulates that children “should be represented by counsel of their own choosing or by law guardians.”¹²⁰ For reasons that have been noted, a child is unlikely to choose counsel who may compromise her position.¹²¹ The grandfather statute is best described as ambivalent, and, as will be outlined in Section C, the New York courts have continuously reflected the legislative ambivalence during the statute’s forty-year lifespan.

Enacting CAPTA in 1974, the United States Congress opted for a guardian ad litem model, stipulating that the states must appoint a guardian ad litem or an individual who fulfills the guardian ad litem role, language which strongly promoted the “best interests” aspect of

¹¹⁹ N.Y. FAM. CT. ACT § 241.

¹²⁰ *Id.*

¹²¹ *See supra* Part II.C.

child representation.¹²² As states gradually replaced or supplemented lay guardian ad litem, such as CASA volunteers, with attorneys (a progression not yet complete) the “best interests” paradigm was codified. And state legislators have continued to embrace the concept that counsel for the child should advocate “best interests,” regardless of the child’s age or maturity.

Perhaps surprisingly, the legislative “best interests” approach has been strengthened in recent years. For example, in 1995 Montana amended its appointment statute by changing the phrase “the court may appoint an attorney” to “the court may appoint a guardian ad litem,”¹²³ adding that the guardian ad litem may be an attorney. The Montana Supreme Court subsequently held that:

. . . the [amended] statute contemplates a guardian ad litem has a unique role to protect the interests of the child. This role is different from the traditional role played by attorneys. We hold that when a court appoints a guardian ad litem, the guardian is not to act as an attorney.¹²⁴

And in 1999 California amended its relevant provision by adding the caveat “[c]ounsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child.”¹²⁵ The phrase could be construed as an artful compromise between “best interests” and straight advocacy, but it retains the subjective “best interest”

¹²² 45 C.F.R. § 1340.14(g).

¹²³ MONT. CODE ANN. § 40-4-205(1) (2006).

¹²⁴ *Jacobsen v. Thomas*, 100 P.3d 106, 111 (Mont. Sup. Ct. 2004).

¹²⁵ CAL. WELF. & INST. CODE § 317.

baggage. Further, the return of the child frequently raises protection issues—as does the placement of the child. It's often a difficult choice involving a balance of rights and interests. And just how is the lawyer supposed to balance the child's physical safety with the child's emotional protection (removal of the child carries an emotional and psychological price)?

Overall, most states provide for the appointment of a guardian ad litem.¹²⁶ Of perhaps greater significance, thirty-five states explicitly stipulate that the child's representative, attorney or lay, shall advocate the child's "best interests."¹²⁷ To date, there is no indication that the states will do anything but continue to legislate that position. At the legislative level the battle has seemingly been won by the "best interests" school.

However, the statutes are not always consistent. A few states, such as Wisconsin, are in one sense statutorily pristine, stipulating that the attorney shall not consider or be bound by the child's wishes.¹²⁸ Other statutes provide that counsel may consider the child's wishes when determining "best interests,"¹²⁹ or require the attorney to apprise the court of the "child's wishes,"¹³⁰ fostering a "hybrid" model of inherent inconsistencies. Still other states are silent regarding the "child's wishes."

"Best interests" is of course a subjective standard, one

¹²⁶ Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 425 (2000) (indicating that 41 of the 50 states provide for the appointment of a guardian ad litem, including those which stipulate that the guardian ad litem must be an attorney).

¹²⁷ See COLO. REV. STAT. ANN. § 19-3-602(3).

¹²⁸ See WIS. STAT. ANN. § 48.235.

¹²⁹ See ME. REV. STAT. ANN. tit. 22, § 4005(1)(e); S.C. CODE ANN. § 20-7-122(5) (2006).

¹³⁰ CAL. WELF. & INST. CODE § 317(e).

dependent on the particular attorney's background and views. It is also a balancing standard in which different criteria must be weighed. For example, the child's right to and need for protection may support a "best interests" placement, while the same child's emotional and psychological need for family integrity may support the "best interests" goal of non-removal. The Solomonic determination of "best interests" frequently bedevils the judges who must ultimately determine the issue, with or without the independent determination of counsel for the child.

Several jurisdictions have enacted yet additional conflicts. In those states which statutorily stipulate that the child may choose counsel, yet adhere to a "best interests" model, the attorney may be placed in an untenable position—the child ordinarily wants a lawyer who advocates his position, not one who disregards his position in favor of counsel's subjective "best interests" analysis.¹³¹ If the child is entitled to counsel as a constitutional matter, as several courts have held, the mandate of effective representation surely implies a relationship different than that of guardian ad litem, and in fact requires a strong attorney-client relationship.¹³² Further, if the child is a party to the proceedings, a principal that has earned wide recognition,¹³³ the guardian ad litem model, as legislated at the federal and state levels, becomes extremely strained, if not untenable.

Nevertheless, state legislators have remained steadfast (as has CAPTA) in prescribing the "best interests" standard for counsel. The

¹³¹ See *supra* Part II.C.

¹³² See *supra* Part I.C.

¹³³ See *supra* Part II.B.

organized bar and academy are another matter.

B. The Organized Bar and the Academy

Viewed as a whole, the thinking of scholars, as reflected in law reviews, has evolved significantly since the inception of legal counsel for children. Writing shortly after New York enacted the first state statute in 1962, Jacob Isaacs, one of the Act's architects, stressed a decidedly "best interests" role:

It is in the neglect proceeding that his [the attorney's] role as a guardian rather than as an advocate becomes predominant. He is not called upon to defend but rather to ascertain where the best interests of his ward lie and to exert his efforts to secure the disposition which in his view would best serve those interests. The ultimate decisions he will be called upon to make will be basically non-legal in character.¹³⁴

As has been noted, the New York Act does not even mention "best interests."¹³⁵ Isaacs engrafted that standard upon the statutory language, perhaps unsure of the ramifications of providing the then novel and unprecedented gift of counsel to children.

The "best interests" theme was reinforced one decade later by Brian Fraser, one of the contributors to CAPTA. Shortly after CAPTA's enactment, Fraser published an article that strongly endorsed the guardian ad litem model of representation—the attorney

¹³⁴ Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 519 (1963). Isaacs nevertheless advocated a more adversarial or lawyer-client approach in juvenile delinquency cases. *Id.*

¹³⁵ N.Y. FAM. CT. ACT § 241.

role envisioned by Congress.¹³⁶

The tide began to turn in 1983 when Professor Sarah Ramsey advocated a largely “child’s wishes” approach; one year later Professor Martin Guggenheim published an article advocating a strong attorney-client role, one dictated by the Rules of Professional Responsibility that guides every lawyer representing a client, old or young, competent or impaired.¹³⁷ Guggenheim’s approach became widely accepted in the academy and ultimately influenced the organized bar.

The attorney-client theme has been reinforced in several subsequent articles.¹³⁸ Viewing the academic position in the late 1990’s, Jean Koh Peters concluded that:

Very few authors currently suggest that a teenage child, for instance, should be represented in the mode espoused by the early writers or the guardian ad litem. Thus from Guggenheim on, the vast majority of the literature has resoundingly embraced the traditional lawyering role for children above a certain age.¹³⁹

As will be discussed later, the traditional role is not synonymous with

¹³⁶ Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W. L. REV. 16, 35-44 (1977) (concluding that the guardian ad litem is the most effective form of independent representation).

¹³⁷ Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation of Children*, 59 N.Y.U. L. REV. 76, 96 (1984); Sarah Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 288 (1983).

¹³⁸ See, e.g., ROBERT H. MNOOKIN, IN THE INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY (1985) (criticizing heavily the “best interests” model of representation).

¹³⁹ PETERS, *supra* note 22, at 48. The “traditional role” view is of course not universally held. See e.g., Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441 (2000).

simply espousing the child's wishes.¹⁴⁰ It is a lot more complicated. There are also obvious difficulties in adhering to a strict attorney-client role when representing the very young child (as Peters recognized) or the psychologically impaired child. Nevertheless, the academy today is strongly against the "best interests" paradigm and in favor of the more traditional or an "adult" representation model, with the child's wishes as the major or predominant factor.

The boldest assertion of a traditional attorney-client relationship is found in the American Bar Association Standards for Child Protective Cases. The standards commence by defining the terms "child-attorney" and "guardian ad litem." "The term 'child-attorney' means a lawyer who provides legal services for a child and who serves the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client,"¹⁴¹ while "[a] lawyer appointed as 'guardian ad litem' for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences."¹⁴² However, the attorney guardian ad litem's standing is subsequently severely truncated, if not superseded, by the following A.B.A. standard: "If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem."¹⁴³ Any doubt that the

¹⁴⁰ See Duquette, *supra* note 139, at 447 (finding the traditional model "too broad, too indeterminate, to meet the needs of all children").

¹⁴¹ See A.B.A. STANDARDS OF PRACTICE, *supra* note 77, Standard A-1.

¹⁴² *Id.* Standard A-2.

¹⁴³ *Id.* Standard B-2.

“child’s attorney” role and empowerment differs from a lawyer representing an adult is quickly dispelled by the definitional section’s commentary, “[t]o ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position.”¹⁴⁴ For good measure, the commentary to the guardian ad litem definition cautions that the standards express a clear preference for the appointment as the “child’s attorney.”

When representing any child other than the very young there is always a potential conflict between the role of child’s attorney and guardian ad litem, and a good possibility that the potential conflict will ripen into an actual one. The older child’s position and preferences may or may not be similar to the independent position of the guardian ad litem, but is unlikely to be identical.¹⁴⁵ For example, the child may not want to remain in the parental home, but may want placement with a person the attorney believes to be less suitable than an alternative placement. Further, as guardian ad litem the attorney cannot protect the child’s confidential statements. Although the ABA standards permit a guardian ad litem role for attorneys representing the very young, they effectively preclude the guardian ad litem representation of most other children. Completing the progression, the standards stipulate that “the child’s attorney should represent the child’s expressed preferences and follow the child’s direction

¹⁴⁴ *Id.* Commentary to Standard A-1. The commentary also states that “[i]n all but the exceptional case, such as with a preverbal child, the child’s attorney will maintain this traditional relationship with the child/client.” *Id.*

¹⁴⁵ One study found that approximately 31 percent of all children represented in protective proceedings are over the age of 13. U.S. NAT’L CTR. ON CHILD ABUSE & NEGLECT, *supra* note 82, Table 4.4-1. Therefore, the majority of children are capable of assisting their attorney.

throughout the course of litigation.”¹⁴⁶ So much for “best interests.”¹⁴⁷ The American Bar Association standards were subsequently adopted, with minor revisions, by the National Association of Counsel for Children.¹⁴⁸

The Fordham Conference recommendations, reflecting a consensus by representatives of the Bar and Academia, similarly take a strong lawyer qua lawyer position and, taking the ABA position to its logical conclusion, prohibit the attorney from ever acting as a guardian ad litem.

The lawyer should assume the obligations of a lawyer, regardless of how the lawyer’s role is labeled [sic], be it as guardian ad litem, attorney ad litem, law guardian or other. The lawyer should not serve as the child’s guardian ad litem or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.¹⁴⁹

In addition, the Fordham Conference came down heavily against the principle that the attorney determine and advocate the child’s “best interests,” “[a]lthough other issues remain unresolved, the profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf

¹⁴⁶ See A.B.A. STANDARDS OF PRACTICE *supra* note 77, Standard B-4.

¹⁴⁷ Wisely, the A.B.A. Standards never mention the “child’s wishes,” and instead refer to the child’s “preferences” or “position.”

¹⁴⁸ In 1999, the following was adopted, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1999).

¹⁴⁹ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1301 (1996).

of their clients including ‘best interests’ determinations.”¹⁵⁰

The philosophy of the legal profession or, more accurately, of the organized bar and academy, is accordingly diametrically opposite that of legislators, both state and federal. The situation resembles a lengthy tug of war in which neither side prevails. The courts have been caught in the middle, as evidenced by the breadth of case law.

C. The Contemporary Case Law

The judiciary has been wrestling with the role of the child’s counsel since the first series of cases dating from the early circa 1960’s statutes and the 1974 CAPTA. Since then, the extensive case law has largely reflected the relevant statutory language, that is to say has applied a “best interests” model with the attorney acting as a guardian ad litem (assuming the state requires the appointment of legal counsel). But, perhaps surprisingly, the case law is far from uniform. Several courts have resisted the legislative prescription, while others have tried to posit their decisions in both camps, precipitating inconsistent and sometimes conflicting opinions. This section will, by way of illustration, present a sample of mostly 21st century cases.

1. *Cases Applying a “Best Interests” or Guardian Ad Litem Model*

The prevalent theme has been “best interests.” The West Virginia Supreme Court, for example, has opined that,

¹⁵⁰ *Id.* at 1309.

. . . in the case of a child, justice is clearly best served by requiring that counsel and the court exercise their respective best judgment in all aspects of the case, and that the court have the benefit of counsel's candid and independent assistance in ascertaining the best interests of that child.¹⁵¹

The Mississippi Supreme Court has held that counsel, acting as guardian ad litem, should "make an independent evaluation as to what constitutes the best interests of the children" and submit a written report to the court.¹⁵² The Supreme Judicial Court of Maine has opined that an attorney for the child should function ". . . as an arm of the court, investigating the facts bearing on parental rights and responsibilities and reporting her findings and recommendations to the court."¹⁵³ The Colorado Court of Appeals has concluded that an attorney "represents the best interests of the child" and "cannot represent a child's views without question."¹⁵⁴

In several cases the courts, while applying the statutory "best interests" formula, have at least recognized the conflict. In Ohio, the court opined that:

Because a guardian ad litem has a duty to recommend what is in the best interests of the child, and an attorney has a duty to zealously represent his client, it is easy to see that a conflict could arise any time a

¹⁵¹ *State ex rel. Jeanne U. v. G. Canady Jr.*, 554 S.E.3d 121, 130 n.8 (W. Va. 2001) (citing *In re Lindsey C.*, 473 S.E.2d 110, 124 (W. Va. 1995)).

¹⁵² *D.J.L. v. Bolivar County Dep't of Human Servs.*, 824 So. 2d 617, 623 (Miss. 2002). *See also* *Jacobsen v. Thomas*, 100 P.3d 106, 108-09 (2004) (finding that in addition to attendance at all proceedings, the guardian ad litem, shall meet with parties, their counsel and conduct an investigation as would help determine the best interest of the child(ren)).

¹⁵³ *Kennedy v. Maine*, 730 A.2d 1252, 1256 (Me. 1999).

¹⁵⁴ *In re Custody of C.J.S.*, 37 P.3d 479, 482 (Colo. Ct. App. 2001).

child's desire is not what he deemed in his 'best interests,' but went on to find no conflict in the particular case.¹⁵⁵

In another Ohio case, the same attorney represented the child in a dependency case and in an unrelated juvenile delinquency case. Viewing his role as a guardian ad litem, the attorney, without investigation or much discussion with his client, had the child plead guilty to rape, prompting the court to reverse, "counsel's failure to investigate or raise these issues further illustrates how his role in determining Jon's best interest, i.e. to obtain necessary counseling, and his duty to zealously represent his client were in conflict."¹⁵⁶ The case illustrates the danger of the "best interests" model infecting other areas of children's representation, such as delinquency, where it is totally untenable, as well as the dilemmas in treating the same child differently when he is involved in multiple proceedings (the same child received a "real" lawyer for the delinquency charge, but a "best interests" lawyer for the child protective charge).

2. *Cases Which Held That the Attorney Must Advocate the Child's Position*

A significant number of courts have held that counsel for the child is bound by the traditional attorney-client rules, and must act accordingly by assuming the role of advocate for the child's interests and position rather than the attorney's "best interests" beliefs. A

¹⁵⁵ *In re Griffin*, No. 18432, 2001 WL 43106, at *5 (Ohio Ct. App. Jan. 19, 2001).

¹⁵⁶ *In re Slusher*, Nos. 15-01-14, 15-01-15, 15-01-16, 15-01-17, 2002 WL 971765, at *7 (Ohio Ct. App. Apr. 23, 2002).

Connecticut appellate court has held that:

The purpose of appointing counsel for a minor child . . . is to ensure independent representation of the child's interests . . . [w]e conclude that such representation is . . . the type of representation enjoyed by unimpaired adults . . . the attorney for the child is just that, an *attorney*, arguing on behalf of his or her client, based on the evidence in the case and the applicable law.¹⁵⁷

A New Jersey appellate court has held that the role of counsel in an abuse, neglect or termination of parental rights case is one of advocate for the child, and concluded their opinion with the following observation:

During oral argument, one of the law guardians remarked that the wishes of children are dreams. True. But the judge entrusted with these difficult and often heart-rendering decisions must be advised of a child's wishes if justice is to be done. Law guardians are obliged to make the wishes of their clients known, to make recommendations as to how a child client's desires may be best accomplished, to express any concerns regarding the child's safety or well-being and in a proper case to suggest the appointment of a guardian ad litem.¹⁵⁸

In a similar vein, a Maryland Appeals Court concluded that:

. . . due process requires that Justus be given the opportunity to be heard in a meaningful way, that is,

¹⁵⁷ Sheiman v. Sheiman, 804 A.2d 983, 989 (Conn. App. Ct. 2002) (quoting Ireland v. Ireland, 717 A.2d 676 (Conn. 1998) (quotation and citation omitted)); *see also In re Georgette*, 785 N.E.2d 356 (Mass. 2003) (holding counsel is obligated to follow the normal attorney-client relationship unless the child is incapable of verbalizing a preference or her preference places the child at risk of substantial harm).

¹⁵⁸ Div. of Youth & Family Servs. v. Robert M., 788 A.2d 888, 905-06 (N.J. Super. Ct. App. Div. 2002).

by presentation of evidence on the question of whether the termination of his parent-child relationship with George W. is in his best interest. At age twelve, Justus is old enough to understand the nature of the guardianship proceeding and its effect on him, to have formed considered views about it, and to express those views . . . he constitutionally was entitled to an opportunity to be heard on the question of whether the guardianship would be in his best interest, even though he was not entitled to consent to it. The Court [below] erred in denying Justus the process to which he was due.¹⁵⁹

Last, for purposes of this brief outline, a recent California case addressed an attorney conflict situation in a permanency planning case involving multiple siblings. Three of the seven siblings did not wish to be adopted, while four siblings either desired adoption or were too young to form firm opinions. The Court of Appeals, holding that the differing children's opinions required the appointment of different attorneys to advocate their positions, reversed the trial court determination that one attorney could represent the entire brood.¹⁶⁰

3. *The "Conflict" Cases*

Reflecting the not unusual "duality" statute, whereby counsel is supposed to represent the child's "best interests" while simultaneously advocating or at least expressing the child's wishes,¹⁶¹

¹⁵⁹ *In re Adoption/Guardianship No. 6Z970003*, 731 A.2d 467, 480-81 (Md. Ct. Spec. App. 1999), *rev'd on other grounds*, 746 A.2d 379 (Md. 2000).

¹⁶⁰ *Carroll v. Superior Court*, 124 Cal. Rptr. 2d 891, 898 (Cal. Ct. App. 2002).

¹⁶¹ *See* ME. REV. STAT. ANN. tit. 22, § 4005(1)(b),(e).

several courts have determined that the attorney must indeed perform conflicting roles. One recent illustration is *In re Esperanza M.*,¹⁶² where the New Mexico court commented that the applicable statute “signifies a guardian ad litem’s dual role of representing the child’s best interests, while also presenting the child’s position to the court.”¹⁶³ The court added: “[w]e commend the appellate guardian ad litem for representing in the answer brief what she perceived to be the position that was in the best interests of E.M., while still advancing the child’s contrary position.”¹⁶⁴ Speaking out of both sides of one’s mouth is not, to say the least, the customary practice of an attorney. Taking two contrary positions belittles, if not totally negates, both.¹⁶⁵

Appellate courts within the same state are not necessarily consistent in their approach to the question of counsel’s role. Two New York cases decided in the same year, 2000, are a good example of that phenomenon. In one, the court affirmed a determination where counsel advocated what he perceived as the eleven year old child’s “best interests” to the exclusion of the child’s wishes, concluding that “we find that the law guardian did not act improperly by advocating a position that he believed to be in his client’s best interest.”¹⁶⁶ But in another case, a different appellate court reversed a case where the attorney assumed a straight guardian ad litem role and

¹⁶² 955 P.2d 204 (N.M. Ct. App. 1998).

¹⁶³ *Id.* at 212.

¹⁶⁴ *Id.* at 213.

¹⁶⁵ *Fox v. Wills*, 822 A.2d 1289 (Md. Ct. Spec. App. 2003), *rev’d by Fox v. Wills*, 890 A.2d 726 (Md. 2006) (holding in a custody case, that the court should clearly order the child’s attorney to fulfill a specific role, be that as guardian ad litem or attorney for the child).

¹⁶⁶ *In re Carballeira*, 710 N.Y.S.2d 149, 153 (App. Div. 2000).

failed to advocate the child's wishes.¹⁶⁷ Adding to the confusion, a third appellate panel held, but one year later, that an attorney for the child is the same as an attorney for any other party, and hence should properly advocate the position and wishes of the child.¹⁶⁸

Last, in terms of the inherent inconsistency of the "best interests" model, is the intriguing Illinois case of *In re Rose Lee Ann L.*¹⁶⁹ An attorney represented two children (in separate cases) who had been placed several years earlier, as a result of child protective proceedings. Counsel had continuously represented the youngsters throughout the placement period, a usual event given the continuing jurisdiction of the court and the need for periodic reviews and extensions. Subsequently, the children, while still in placement, entered into a romantic relationship with each other which produced a baby. The state quickly commenced a child protective proceeding against the children/parents. The trial court assigned the lawyer who had previously represented the youngsters to the new case, an event which created a dilemma for counsel. Illinois follows a strict "best interests" model of child representation, with the attorney designated as guardian ad litem. Hence, as attorney for the children now turned parents, counsel was obligated to advocate what he perceived as their "best interests." As perceived by counsel, "best interests" was the removal and placement of the infant. To be precise, counsel concluded that it was in the parents' "best interest" to relinquish custody of the child (it may sound confusing, but the child client had

¹⁶⁷ *Albanese*, 707 N.Y.S.2d at 172.

¹⁶⁸ *In re Rueckert*, 723 N.Y.S.2d 232, 233 (App. Div. 2001).

¹⁶⁹ 718 N.E.2d 623 (Ill. 1999).

turned into the parent/client). On the other hand, a parent is entitled to a “real” attorney (rather than a guardian ad litem), one who advocates his position and attempts to achieve his goal which, in this case, was to raise the child. Both parents shared that goal, with the intent of raising the child together.

Faced with the obvious dilemma, counsel posed a series of questions to the trial court. In reply, the court directed the attorney to treat the children/parents as parents, and assume the traditional attorney-client relationship in lieu of the guardian ad litem relationship. At that point, counsel moved to withdraw from the case and have substitute counsel assigned. The trial court denied the motion, a decision which was reversed on appeal. To the appellate court, the children/parents were entitled to traditional representation, which the original attorney could not provide.

I suppose one lesson of *Rose Lee Ann L.* is that if the child wants or needs a lawyer-advocate rather than a “best interests” lawyer, he or she should become a parent. By becoming pregnant or fathering a child, the person magically obtains the maturity and competence to dispense with a guardian lawyer.¹⁷⁰ At its core, the case illustrates the absurdities of treating the child, or at least the child who is of sufficient age to conceive, as a person who cannot enter into an attorney-client relationship, or one who does not merit recognition as a real party to the proceedings.¹⁷¹

¹⁷⁰ See, e.g., *State v. Joanna V.*, 94 P.3d 783, 786-88 (N.M. 2004) (discussing the inherent conflicts when the same attorney represents the same child, in this case 14 years of age, in child protective cases where the attorney is under a “best interests” mandate, and in a juvenile delinquency case, where the attorney must be a zealous advocate).

¹⁷¹ Approximately one-third of all children represented in child protective proceedings are

Every case discussed in this Part has been decided in the past six years. A similar pattern of inconsistencies and ambiguities would emerge if the writer researched any half decade since the enactment of CAPTA. There is surely a better way to meet the legal needs and interests of children.

IV. TOWARD A NEW PARADIGM

A. The Problems with “Best Interests” and “Child’s Wishes”

This Part will attempt to construct a different approach for representing children in protective proceedings. The model is not entirely new, is largely consistent with the American Bar Association Standards,¹⁷² and incorporates the thinking of several incisive commentators, including Jean Koh Peters, Martin Guggenheim, and Robert Mnookin. It builds upon the earlier points of this article, including the child’s specific legal interests in the litigation, the right to representation, the child’s “party” status, and her right to be present and participate. However, before outlining the approach it may be helpful to critique the existing prevalent models—“best interests” versus “child’s wishes.”

As has been noted earlier and widely chronicled, one deficiency of the “best interests” model is its inherent subjectivity. That, of course, is true. “Best interests” represents only an opinion,

over the age of thirteen. See U.S. NAT’L CTR. ON CHILD ABUSE & NEGLECT, *supra* note 82, Table 4.4-1.

¹⁷² See *supra* Part III.B.

and in a given case the attorney may lack even the knowledge or expertise to formulate that opinion. Further, unlike an expert forensic or other witness, the attorney's opinion is not tested through the crucible of cross-examination. However, there are additional and, perhaps more fundamental flaws in employing the standard to legal representation.

First, the "best interests" of the child is largely irrelevant unless and until parental malfeasance has been proven (neglect, abuse or dependency).¹⁷³ Counsel for the child may believe firmly and may be able to prove beyond a reasonable doubt that her client's "best interests" require placement, but that position is irrelevant in the absence of a finding of abuse or neglect, and the entry of an appropriate adjudicatory order. 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. Given the fact that "best interests" are irrelevant for much of the proceeding, the legislative penchant of telling attorneys for children that they must advocate only "best interests" is rather nonsensical.¹⁷⁴

For other reasons, the prescription to advocate "best interests"

¹⁷³ Although the "best interests" standard plays no role in adjudication of guilt, it may, in part, guide preliminary orders, such as temporary removal or protective orders. *See, e.g.,* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1429-30 (1996).

¹⁷⁴ One could say that the ultimate goal should guide counsel, and that this position at the adjudication level should be shaped by that goal. Although true to some extent – and lawyers are used to working backward from the hoped for disposition – the suggestion falls apart in many cases. Say, for example, that the child's best interest is to remain home coupled with parental supervision and services. Should the lawyer in that event assist in proving the case, thereby risking that the child will be placed, or should she assist the defense, and thereby risk that the child will remain at home without adequate supervision or

for dispositional purposes is equally nonsensical. “Best interests” is the legal standard to be applied by the court in determining a post-finding disposition, and is accordingly the standard that controls each and every party’s argument.¹⁷⁵ The parent’s attorney argues “best interests,” the petitioning agency or prosecuting attorney argues “best interests”; and so must the child’s attorney. Each may have a radically different position, but each has the responsibility of convincing the court, to the greatest extent possible, that his position equates with “best interests.”

Telling the child’s attorney to advocate “best interests” is like telling the attorney for a spouse in a divorce proceeding to argue that the marital property should be distributed “equitably.” Of course—that’s the law. The bar needs no statutory reminder, and would find a legislative admonition to argue “equitable distribution” insulting. Nor do lawyers need prompting to argue that each of their respective clients should be awarded, in accord with “equitable distribution,” the Alfa Romeo purchased by the couple last year. They know what their client’s interests are and know how to shape the argument to the substantive law. The lawyer for the child is in precisely the same position.

As has been discussed, the idea of expressing the “child’s wishes,” as opposed to “best interests,” originated with the first

services? Or, as a third alternative, should the lawyer sit on her hands?

¹⁷⁵ See, e.g., N.Y. FAM. CT. ACT § 631 (“An order of disposition shall be made . . . solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition.”).

statute granting the child counsel¹⁷⁶ and has been a persistent theme. However, that is not how lawyers usually view their relationship with their client, young or old. It is not that simple. For example, virtually every defendant in a criminal case wishes to be acquitted and makes that point to counsel. And, indeed, the attorney ordinarily attempts to find justification for dismissal. Nevertheless, at the end of the day most defendants plead guilty. That is not their wish; it is reality. The client is convinced by counsel to plead guilty, often after intense negotiations and discussions. Counsel may have to be more persuasive in dealing with his client than in dealing with his adversary. In other words, a lawyer does not simply take the client's wish and run, telling the court that she is only expressing her client's desires. Rather, through discussions with her opponent, a sober evaluation of the evidence, and through often difficult discussions with her client, the defendant agrees to a settlement to avoid the risk of a harsher outcome. So it goes with most cases, civil or criminal.

To bring the matter closer to home, counsel for the parent in a child protective case is never instructed by the legislature or the court to advocate the client's wishes. The parent usually wishes to be exonerated, and counsel will work for that result whenever feasible. But most cases are resolved with an admission, coupled with a negotiated disposition. Frequently, the lawyer has to labor intensively to convince the client to agree to a specific resolution (the client may be adamant despite the counter riding evidence).¹⁷⁷ If all

¹⁷⁶ N.Y. FAM. CT. ACT § 241.

¹⁷⁷ In a few cases, counsel's efforts to achieve client consent may fail, and as a last resort the case must proceed to trial.

fails, counsel must try the case.

The attorney-client relationship is reflected in the applicable rules of professional responsibility. Thus, Rule 1.2 of the American Bar Association Rules provides that, subject to qualification, “a lawyer shall abide by a client’s decision concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.” The attorney needs to follow the client’s objectives and needs the client’s agreement, or at least her acquiescence, in making the major decisions, including a proposed disposition.¹⁷⁸ The approach respects, but does not depend entirely on the client’s desires. The relationship is collaborative. The attorney advises his client of the law and his evaluation of the facts. Usually, the client respects the lawyers’ professional judgment. An equivalent equation should be applied when representing the child, unless the child is of insufficient age or is otherwise too impaired to permit even an approximation of the ordinary attorney-client relationship.

With these factors in mind, it is not surprising that the case law covering the child’s attorney’s role and responsibility is inconsistent. Neither “best interests” nor “child’s wishes” suffice.

¹⁷⁸ A telling example of an accepted or at least tolerated attorney-client dynamic is the recent United States Supreme Court case of *Florida v. Nixon*, 543 U.S. 175 (2004). In a death penalty case the client appealed on the ground that he had not consented to his attorney’s strategy of conceding guilt at trial (and arguing mitigation). *Id.* at 185. The defendant had indeed never agreed to counsel’s suggestion, but had not articulated any disagreement. *Id.* at 186. The Supreme Court affirmed the conviction and death sentence, “[w]hen counsel informs defendant of the strategy counsel believes to be in the defendant’s best interest and the defendant is unresponsive, counsel’s strategic choice is not impeded by any blanket rule demanding the defendant’s explicit consent.” *Id.* at 192. *Nixon* may not portray a good representative model for adults or for children, but it does underscore the wide scope of attorney discretion in pursuing a case.

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Compounding the dichotomy, it may be difficult or impossible to determine which model a given attorney is following in a given case. Is her position based on the “child’s wishes,” is it posited on the child’s “best interests,” or is it a fusion position between wishes and best interest extremes, and has the child agreed, acquiesced, or even stated a position? Given the inconsistencies in the applicable statutory and case law, any of the above may be the credible explanation for the attorney’s articulated position. And, unless expressed by counsel, the court cannot discern the basis of the lawyer’s position or strategy. The rather primitive and conflicting existing formulas should be abandoned.

B. Defining the Appropriate Attorney-Child Client Relationship

The building blocks of a better representation model were essentially outlined in Part II. The foundation is the legal interests and rights of the child. Of equal significance is the child’s status in the proceeding, the child’s right to representation, and the appropriate level of her presence, participation, and involvement. As in any case, the attorney’s role and responsibilities must reflect the client’s rights, interests, and risks.

The child’s legal interests include protection, family integrity, continuing relationships with parents, siblings, grandparents, and other important persons in the child’s life, individual autonomy, and the delivery of appropriate services, including medical treatment, psychological counseling, education, and homemaker assistance. The formidable legal interests array, outlined more specifically in Part II,

and the complex subsets and variations within each identified interest, is what counsel should be evaluating, obtaining supporting evidence, and subsequently advocating within the context of “best interests.” The “best interests” plan, however, need not and should not be created out of the attorney’s perceptions and independent judgment. Instead, a collaborative endeavor between client and attorney must be forged. For this purpose, the child must know her legal rights and options, just as the adult client must be apprised of the case’s parameters. The attorney’s role is to explain the relevant legal interests, outline the feasible specific case options, and develop a case plan with the child’s involvement.¹⁷⁹ The attorney should almost never ask her child client, or an adult client, the point blank question, “what are your wishes?” Rather, the attorney should counsel the child concerning these issues, discuss alternatives, advise as the feasibility of differing approaches and outcomes, and finally, seek the child’s guidance.¹⁸⁰

Counsel should also assume that the child has a constitutional right to representation. As discussed in Part I.C., several courts have concluded that the right to counsel is of constitutional dimension, though the issue has yet to be definitively determined nationally. Accordingly, the child is entitled to effective representation and counsel who takes a position and fights for his client’s interests (and not a guardian ad litem who writes a report with recommendations,

¹⁷⁹ See PETERS, *supra* note 22, at 96-98.

¹⁸⁰ In discussions between an attorney and a client, the client’s wishes may be evident (e.g., exoneration or maximum financial recovery), or may depend on the legal alternatives and possibilities as outlined by counsel (e.g., whether to reject a settlement offer). Lawyers learn how to structure a discussion to incorporate a myriad of factors.

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and is heard no more or, worse, testifies in defense of his report). Furthermore, the child is entitled to effective representation regardless of any contrary legislative prescription.

Similarly, counsel should advocate that the child has full party status. In several states the child indeed enjoys formal party status, by statute or through case law. In many others, the child has gained most of the rights of a party without formal designation—in other words, has gained *de facto* recognition as a party to the proceedings. Counsel should be guided accordingly and assert the appropriate “party” rights. As attorney for a party, counsel may file motions, serve notice, subpoena, depose, call witnesses, cross-exam, appeal, issue legal demands, and attend conferences—to list some of the obvious attorney powers. On the other hand, as attorney for a party the lawyer cannot engage in *ex parte* judicial conversations, draft reports or testify, and cannot act as a guardian ad litem. When necessary, the attorney should litigate the issue at the trial and appellate court levels, a measure that has succeeded in several states. Last, as a party the child is entitled to be present and participate in the proceedings, a right her counsel should implement.

To my mind, the child’s presence and participation is crucial. Bringing the child into the proceedings and, literally, into the courtroom, would constitute an enormous achievement, unless the child is very young or is otherwise impaired. As discussed in Part II.D., the child’s presence, and surely the child’s participation, are not precluded in any jurisdiction. At least one state, California, requires, with some exceptions, that the older child be present in court. By

itself, the child's presence would dramatically change the attorney-client dynamic. First, the attorney would have to discuss the proceedings, the meaning of different legal events, and the possible case outcomes with child prior to the relevant court date. Second, if the child were present the attorney could hardly advocate a position without her involvement. The relationship would perforce become more collaborative, and less attorney-directed. The child's presence would be a check on attorney laziness or incompetence; it's not as easy when your client is standing next to you.

Finally, the child would be present and available when the near inevitable settlement negotiations take place. For better or for worse, child protective cases are discussed and frequently determined in attorney conference rooms, mediation sessions, or, for that matter, in the corridors of the courthouse.¹⁸¹ The practice has been to exclude the child from the building, and thereby from the give and take of the discussions. Yet the child may be able to participate in a meaningful way—and in a way that satisfies all the parties.¹⁸² Johnny may not have thought of the possibility of living with his aunt while mom is in rehab, but that option, first raised in a hurried courthouse discussion, may be just what he wants. How could his attorney know that if Johnny is absent from the scene? How can the attorney work through the frequently complex case logistics without his client? For example, Billy may want to stay where he is until the end of the middle school basketball season so he can remain on the team—and

¹⁸¹ The luxury of a more elaborative negotiation process outside the courthouse is not available to many attorneys who provide representation in protective cases.

¹⁸² Interestingly, no one would seriously think of excluding a different party, such as the

then move in with Aunt Alice. Or Mary, who has been in placement, may object or, alternatively, may prefer the new expanded visitation schedule her father demands as a *quid pro quo* for not contesting continued placement. How can her lawyer know in her absence? Or know that the requested visitation schedule conflicts with Mary's school activities? In addition, the child's presence might help her understand and "buy into" the disposition—a participant is more likely to be satisfied than one who has been excluded. And the child could even meet that remote figure, the judge, in the courtroom or in chambers,¹⁸³ formally, through an in-camera interview, or informally, by just saying hello.

Of course, presence of the child cannot be universal. It is usually inappropriate to bring the very young child to the courthouse. The adolescent child should not be present when sensitive parental psychological and psychiatric reports are discussed, to cite one additional example. Further, presence in the courthouse should not in every instance lead to courtroom presence. There are occasions when the child should be present in court, occasions when he should be present during negotiations, and occasions when he should be present in the courthouse and thereby available for attorney-client discussions, but not appear in court or participate in negotiations. The idea is to maximize children's involvement without micro-managing the details.¹⁸⁴

parent.

¹⁸³ On occasion, I have brought the older child to court to meet the judge, just to say hello. It's always a positive experience.

¹⁸⁴ One impediment to the child's presence is the horrendous physical state of many urban juvenile and family courts. But then, I suspect it would be more feasible to obtaining the

C. The Young Child

The traditional representation model cannot be applied to the very young. Obviously, an infant or a preverbal child should not be expected to assume the role of a “client” in the manner envisioned by the rules of professional responsibility, or form a relationship with an attorney that even remotely resembles the standard attorney-client arrangement. Since child protective cases involve children of every age, those who advocate a traditional model need an alternative or default approach.¹⁸⁵ Further, applying a traditional model to children necessitates defining a boundary: just when does a minor reach the stage when he should be treated by his attorney as though he were an adult client?

Several possible solutions have been proposed. Professor Guggenheim has suggested that the young child’s attorney assume a “neutral” position and desist from articulating a specific outcome.¹⁸⁶ That would significantly ameliorate the problem, but at a substantial cost.¹⁸⁷ The younger child would be effectively unrepresented and, at least in the absence of a guardian ad litem, would have no representative to argue for his interests. The system would revert to the pre-*Gault* era for that age group.

The American Bar Association approach is to retain the

funding to improve the environment if children were actually present.

¹⁸⁵ On the other hand, the “guardian ad litem” or “best interests” school need not worry. Counsel can formulate and articulate her view of “best interests” regardless of the child’s age, a fact which adds the allure of a straight “best interests” approach.

¹⁸⁶ See Guggenheim, *supra* note 173, at 1416 (arguing that a lawyer who is not neutral invites the danger that the lawyer may negatively influence the outcome, by advocating for an outcome that is actually not in the best interests of the child).

¹⁸⁷ It is also questionable whether children just above age seven possess the requisite

attorney role when the child is very young, but add to the mix through the appointment of a guardian ad litem; “[t]o the extent that a child cannot express a preference, the child’s attorney should make a good faith effort to determine the child’s wishes and advocate accordingly or request the appointment of a guardian ad litem.”¹⁸⁸ The problem is that the request for an independent guardian ad litem will almost always fall upon deaf ears. American legislators believe that the attorney should act as the guardian ad litem¹⁸⁹ and are not about to fund a companion guardian ad litem. Another disadvantage of the ABA standard is the assumption that a child of sufficient age to verbalize a preference is also of sufficient age to guide the attorney, i.e. maintain at least an approximation of the “adult” attorney-client relationship. That is not always true. A five year old may be able to verbalize a preference, but may be incapable of understanding the basic ramifications of that preference.

It is, of course, possible to appoint both a guardian ad litem and an attorney in each and every case, and allocate decision making in accord with the child’s abilities. The United Kingdom does just that. The court must appoint a guardian ad litem in almost every “care” proceeding (equivalent to neglect, abuse or dependency) from a certified list of social workers.¹⁹⁰ The guardian ad litem, who is publicly compensated, then retains an attorney, who is also paid by

competency.

¹⁸⁸ See A.B.A. STANDARDS OF PRACTICE *supra* note 77, Standard B-4.

¹⁸⁹ See *supra* Part III.A.

¹⁹⁰ Children Act, 1989, c. 41, §41(1) (U.K.). The court is required to appoint “unless it is satisfied that it is not necessary to safeguard the child’s interest.” *Id.* In practice, such a negative finding is rare.

the government.¹⁹¹ In turn, the attorney follows the instructions of the guardian ad litem unless the child is of sufficient age and maturity to guide the attorney, whereupon the attorney “takes instructions” from the child, and assumes a more traditional attorney-client relationship.¹⁹² The presence of a guardian ad litem, coupled with a clear demarcation of authority, enables the attorney to assume a child oriented approach, incorporating even the younger child’s desires (say the nine year old, who may lack full competency to engage in the ordinary attorney-client relationship, but has definitive preferences). As noted by one British children’s law scholar:

It cannot be sufficiently emphasized that it is the role of the child’s solicitor to act as an advocate for the child. His advocacy should be based upon the child’s stated wishes and feelings. It is the role of the guardian ad litem to ascertain the wishes and feelings of the child and to take those views fully into consideration in putting a view to the court about what is in the best interests of the child. The conflict arises from the fact that what the child wants may not be what the child needs. In a situation of divergence between the views of the child and the guardian ad litem, the solicitor is placed in a difficult position, but it should be made clear that his role is to stand firmly alongside his client, the child, and continue to put the views of that child to the court as forcibly as would be the case if the guardian ad litem were in agreement with the views expressed. The appropriate balance between rights and welfare can only be achieved if the solicitor stands his ground on behalf of the child, even in the face of opposition from the guardian ad litem.¹⁹³

¹⁹¹ Family Proceedings Rules, 1991, R. 4.11A (U.K.).

¹⁹² *Id.* R. 4.12(1)(a).

¹⁹³ JUDITH E. TIMMS, CHILDREN’S REPRESENTATION: A PRACTITIONER’S GUIDE 104 (1995)

The British approach offers several advantages, and may constitute the best model. But it is costly, necessitating governmental expenditures for the social work guardian ad litem and the attorney. For that reason, it is not likely to be adopted in this country or at least will not be implemented wholesale in the foreseeable future.

That leaves us with the present American situation, where counsel is virtually on his or her own. And the attorney will ordinarily maintain a caseload involving children ranging from infants to adolescents. When representing the preverbal child and in the absence of a separate guardian ad litem, counsel has no choice but to independently evaluate the case and advocate her conclusions regarding the child's interests. For some issues, and in some cases, the task may be relatively easy. If the child needs specialized services, such as medical care, counsel's position concerning that topic should be clear. If the young child has been abandoned or seriously abused and an acceptable kinship arrangement is possible, the lawyer's strategy is obvious. If the parent needs rehabilitative services, it is in the child's interest to insure implementation and counsel may have to fight for appropriate services or placement. Other cases may necessitate tough choices for the very young child's attorney, but that, under the present system, cannot be avoided.

On the other hand, for the older child, including most pre-

(cautioning that some solicitors nevertheless "have watered down the strength of their advocacy" to accommodate the guardian ad litem's position). *But see* Judith Masson, *Representation of Children in England: Protecting Children in Child Protection Proceedings*, 34 FAM. L.Q. 467, 486 (2000) (arguing that English attorneys often avoid following the child's instructions).

adolescents, there is no reason to compromise the attorney-client relationship. Children above the age of ten usually comprehend the issues and are capable of formulating a position with the assistance of counsel—even if, on occasion, the assistance should be more structured than with an adult.

That leaves an intermediate age range, generally ages five through ten, where counsel faces or should face, the tricky task of maximizing the child's input and participation without necessarily granting her a veto over her attorney's position. The required lawyering skills and competences have been addressed in several publications and are beyond the scope of this article.¹⁹⁴ The issue is also addressed in the Model Rules of Professional Conduct, which provides that: “[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished . . . because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”¹⁹⁵ As an ethical matter, the attorney is obligated to maximize the idicia of a normal attorney-client collaborative relationship with the young child.

A few brief observations may provide some additional

¹⁹⁴ See, e.g., PETERS, *supra* note 22, at 112-45; TIMMS, *supra* note 193, at 104.

¹⁹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2006). The commentary to the rule advises that:

a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Id. cmt. 1.

perspective. Children do not suddenly mature; one does not wake up one morning and pass the magic divide into legal capacity. It is a gradual process, one that a child's attorney should carefully evaluate. Further, a given child may be competent regarding some issues, but not others. For example, the seven year old may not understand why he has been removed from the home he knows, but he may be perfectly competent to advise his counsel concerning a substitute home, such as with a relative. I have often been surprised by the insight of a child as young as five, which is not to say that every five year old is insightful, and I have been happy to advocate a position consistent with the client's wishes. Children are also frequently able to understand the realities and the ramifications of a given course of action. For example, a ten year old may wish to remain home with her drug addicted mother, but may understand and accept her counsel's private statements that the court will never agree, and that the better course is to advocate for the help her mother needs, with the goal of minimizing the placement duration while maximizing visitation; as soon as mom is ready, counsel will advocate reunification. Lawyers give similarly difficult advice to clients of every age. And clients of every age usually take counsel's advice or agree to compromise their position.¹⁹⁶ The skills we learn in school and hone in practice are ones we often utilize when dealing with our clients as well as with our adversaries. We should not dismiss the child or cease communications which may lead to an agreed upon

¹⁹⁶ Children may, in fact, acquiesce more readily when in their attorney's recommendation. I have found most eight-year-olds to be more flexible and amenable than the not infrequently encountered obstructionist adult client.

approach simply because our client is young.

As noted, for the older child, including adolescents, most pre-adolescents and young adults,¹⁹⁷ the normal attorney-client relationship, or at least an approximation of that relationship, should always prevail. The dynamics are outlined in the preceding section. Therefore, a very significant percentage of children involved in protective proceedings should be equated with adults for purposes of the attorney-client relationship. And most children, excluding the preverbal, should be involved and engaged with their attorney, even when the arrangement falls somewhat short of a complete client oriented approach. Last, it is worth noting that child protective proceedings frequently span several years, commencing with the initial case, through extension of placements, permanency hearings, perhaps termination of parental rights proceedings, and adoption. Children do not remain at the same level. The child's attorney may start with a young client, but conclude with a fully matured adolescent client. A perceptive broad approach, one which engages the child to the maximum extent possible, will in the long run be rewarding to the child and to the attorney.

V. CONCLUSION

The concept that children who are involved in child protective proceedings are entitled to legal representation is of recent origin.

¹⁹⁷ Although jurisdiction in an initial child protective case ordinarily ceases when the child attains the age of eighteen, the child may be in placement far beyond the age of majority. See N.Y. FAM. CT. ACT § 1089(d)(2)(ii) (“[N]o placement may be made or continued beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday.”). Quite to the contrary, I have personally represented “children” who

Perhaps remarkably in light of the historic animosity to representation, today a clear majority of children are assigned counsel—and universal representation may be achievable in the near future. The positive development of representation, however, has been compromised by the absence of a consensus concerning the role of counsel, and a parallel absence concerning the specific role and rights of the child. A majority of the applicable state statutes provide that counsel should represent the child’s “best interests,” as does the Federal CAPTA Act. On the other hand, a significant number of statutes also stipulate that the attorney should represent or convey to the court the “child’s wishes.” Simultaneously, the organized bar and the academy have gravitated toward either a “child’s wishes” or a traditional attorney-client model. Given the mix of unrealistic and often inconsistent statutes, and the influence of the organized bar, it is not surprising that the case law has been hopelessly confused and conflicted.

The maturation of children’s representation may be realized only by jettisoning the “best interests” and the “child’s wishes” approaches. Legislatures should simply get out of the business of telling lawyers how they should represent the child client by repealing a nonsensical statutory prescription, one which only mimics the relevant substantive law. In the absence of a statutory evolution—and legislatures have evidenced no inclination to move beyond “best interests”—lawyers for children should be guided by standards promulgated by the organized bar, determine their role

were twenty years of age.

independently, irrespective of the statutory prescriptions, and advocate for specific children's rights and interests. Attorneys should also use specific legislative provisions which benefit their client, even when those provisions conflict with the overarching "best interests" approach. For example, the attorneys should implement the child's right to choose counsel by applying the "right to choose" statutes and by carefully outlining the possibility with every child client. Similarly, the attorney should emphasize the child's right to be heard both directly and indirectly, through counsel.

One significant advance would be a concerted effort to enforce the child's constitutional right to representation and the parallel constitutional right to effective counsel. The constitutional principles have been recognized whenever raised, establishing a precedent which should be replicated nationally. There is simply no excuse to forgo an assertion of the basic principle. Another fertile issue worth pursuing is party status. Recognition that the child is indeed a party in interest, with the significant ramifications flowing from party status, has been accomplished in several jurisdictions and the child has been granted "virtual" party status in several additional states. Universal acceptance should be achievable through rigorous litigation by attorneys who represent children throughout the country. Attorneys should also remain continually cognizant of the childclient's specific legal interests, including protection, family integrity, autonomy and ameliorative services, and should zealously work with their clients to implement each specific right.

The remaining issue, one that is key to the maturization of

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legal representation, is the child's presence and participation. Good lawyering is dependent upon client involvement, whether the client is six or sixty years of age. The majority of children should be in the courthouse, as in California, where they can discuss the case with counsel, assert their position and, when appropriate, be present in the courtroom seated next to their attorney, as is every other party. It is incumbent on the lawyer to utilize every appropriate mechanism to maximize the child's involvement, including intensive client consultation, the development of client goals, and the child's participation throughout the proceedings.

The legal profession knows the elements of effective lawyering. In my opinion, what is needed is the application of those elements to children's representation. There are several precedents and positive trends upon which a better system may be constructed. The culmination, clearly achievable, is a collaborative attorney-child client relationship based upon the child's legally cognizable substantive rights (e.g., protection, autonomy, family integrity and governmental services), one which equals or at least closely approximates the historic traditional approach to fulfilling individual legal needs and rights.

