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THE CHILD CLIENT

Representing Children In Child Protective Proceedings

Merril Sobie
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INTRODUCTION

The representation of children in child protective proceedings, i.e. 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 twentieth 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 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 as yet 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, her "best interests", both approaches unfortunately oversimplify the complex nature of representing children, who range in age from 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). 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. Last, 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".

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 gravitate beyond a "best interests" or a "child's wishes" paradigm, and, to the greatest extent possible, 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 his 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, recognition of the child's interests including protection, family integrity, and autonomy, and his right to legal representation akin to that of any other party to the litigation.

Part I will outline 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,

perhaps most significantly, 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 caselaw. 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.

PART I: THE CHILD'S RIGHT TO REPRESENTATION

Section 1. 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 nineteenth century, and, then, evolved slowly through several generations. At that time, 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.

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[2] Under common law, parental rights reigned supreme; see Sir William Blackstone, Commentaries on the Laws of England, 3rd ed. By Thomas Cooley, Basic 1, R. 451 (1884). The only "safety net", for children, if we can call it that, were 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; see e.g., David M. Schneider, The History of Public Welfare in New York State, 1609-1866, University of Chicago Press, 1938, at 75-77. The poorhouses expanded rapidly during the early nineteenth century, contributing to the need for a formal child protective system; see Robert H. Bremner, Children and Youth in America, Vol. 1, at 639 (1970).

[3] See Anthony J. Platt, The Child Savers, University of Chicago Press, 1969.

In 1877 New York enacted a comprehensive "Act for Protecting Children," granting the courts jurisdiction over any child under the age of 14 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 protection acts.

Under the early child protective measures, the courts (specifically the lower trial courts) were granted summary commitment power, i.e., 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 twentieth century.[9]

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[4] New York Laws, 1877, Chapter 428.

[5] Revised Laws of Illinois, 1879, pp. 309-13; the Illinois Act was initially limited to girls.

[6] See New York Laws, 1884, Chapter 713.

[7] See People X. Rel. Van Riper v. New York City Catholic Protectory, 106 N.Y. 604, 13 N.E. 435 (1887), for a discussion of the plenary powers exercised by the courts, limited, as is that case, 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).

[8] See In the Matter of Petition of Alexander Ferrier, 103 Ill. 367 (1882), and People v. Ewer, 141 N.Y. 129, 36 N.E. 4 (1894).

[9] The first juvenile court was established in Illinois in 1899; Revised Statutes of the State of Illinois, 1899m Chapter 23.51.

Indeed, early "child saver" acts continued, with only minor revision, through most of the twentieth century.[10] One has only to read the landmark 1967 Gault decision[11] to view the largely unchanged nineteenth century landscape. (Although, Gault involved juvenile delinquency, similar if not identical procedures were applied nationally to child protective proceedings.) Hidden behind strict privacy and confidentiality rules, the mid-twentieth 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 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

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[10] See, e.g. Children's Court Act, State of New York, §2(4), 1923.

[11] In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 7527 (1967).

[12] Motions such as continuing jurisdiction, modification, or periodic reviews were unknown. But see Matter of Knowack, 158 N.Y. 482, 53 N.E. 676 (1899), where the New York Court of Appeals held that a parent who had self-rehabilitated could petition the court to reclaim custody.

considered a party, and any form of private or public representation was precluded. In truth, there was little that counsel for the parent, or for the child, could have achieved. Writing shortly before the Supreme Court Gault decision, Professor Alfred J. Kahn observed:

> Most children's courts cases are heard without counsel, and many with experience in children's court agree that lawyers, as currently prepared, ordinarily 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] And 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 (as opposed to summary placement or general supervisory orders) have become the norm, 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

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[13] Alfred J. Kahn, A Court for Children, Columbia University Press (1963), at p. 100.

[14] Although the first child representative statute preceded Gault by five years (see Section 2), the attorney's role was extremely tentative and uncertain, at least until the Supreme Court's 1967 decision.

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. So too, the status of the child as an integral part of the proceedings has only evolved during the past two generations. It is these issues which will be discussed in succeeding sections.

Section 2. 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

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[15] Judicial modification of existing child protective orders have been possible for a long time (see Matter of Knowack, supra note 12), but were rarely used before the late twentieth century.

[16] L. 1962, c. 686, codified as Section 241 of the New York Family Court Act.

[17] NY Fam. Ct. Act §249(a).

[18] NY Fam. Ct. Act §242.

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 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 enacted during the nascent period of child representation, 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.

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[19] See 45 CFR §134.14.

[20] § 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; 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. 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.

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 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 (unlike attorneys, CASA volunteers cannot subpoena records, call witnesses, conduct cross-examination, file motions, or appeal).[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

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[22] See Jean Koh Peters, Representing Children in Child Protective Proceedings; Ethical and Practical Dimensions, Lexis Law Publishing, 1997, at 28-29.

[23] See Pub. L. No. 101-647 (1990).

[24] 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. The common practice, however, is to employ CASA in lieu of legal representation.

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 legal representation of children, i.e., 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, i.e., 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 attorney,[28] or if the guardian ad litem's recommendations conflict with the child's wishes.[29]

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[25] The current CAPTA provision, as amended in 2000, stipulates that "In 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.A. §5106a(b)(2)(A)(ix) (West 2004].

[26] See, e.g., N.C. Gen. Stat. §7B-600 (2004), D.C. Code Ann. §16-2304(b)(3) (2004), Kan. Stat. Ann. §38-1505(a)((2004), and PA Cons. Stat. Ann. §6382 (West 1999).

[27] See, e.g. Nev. Rev. Stat. Ann. §432B, 420(1) (2004), and S.C. Code Ann. §20-7-1510(B) (2004).

[28] Wash. Rev. Code Ann. §13.34.100(6) (West 2004).

[29] N.H. Rev. Stat. Ann. §169-C:10(II) (2004), Wis. Stat. Ann. §48.235 (West 2004).

However, the close to equal division masks the fact that most of the larger states require legal representation; those include California,[30] the District of Columbia,[31] Illinois,[32] Massachusetts,[33] and New York[34]. And, although assignment in every neglect or abuse case is not required in Texas, 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 (and, the number grows each year). That, in itself, constitutes an important achievement. As has been noted, the number of children represented in any manner or form was zero in

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[30] See Cal. Wel. & Inst. Code §317. 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; Los Angeles Dept. of Children and Family Services v. The Superior Court of Los Angeles County; 51 Cal. App. 4th 1257, 59 Cal. Rptr. 2d 613 (Ct. of Appeal, 2nd App. Dist. 1996).

[31] D.C. Code Ann. §16-2304(b)(3) (2004).

[32] Il. St. Ch. 705 §405 12-17 (2004).

[33] Mass. Gen. Laws Ann. Ch. 119, §29.

[34] N.Y. Fam. Ct. Act §249.

[35] Tex. Fam. Code Ann. §107.012; the Texas statute uses the unusual term "attorney ad litem".

1960. Forty-five years later, a clear majority are represented by an attorney, and the remainder are at least afforded representation by a non-lawyer guardian ad litem.

Section 3. The Child's Constitutional Right to Counsel

One intriguing albeit largely unanswered question is whether 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, i.e., proceedings in which a child is accused of committing a crime.[37]

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[36] Gideon v. Wainwright, 372 U.S. 355, 83 S. Ct. 792, L.Ed. 2nd 799 (1963).

[37] In re Gault, 387 U.S. 1, 875 Ct. 1428, 18 L.Ed. 2nd 527 (1967).

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 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. 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 non 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.

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[38] Lassiter v. Department of Social Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed. 2nd 640 (1901).

[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 Adoption of K.L.P., 735 N.E.2d 1071 (App. Ct. Ill., 2nd Dist. 2000), Matter of Ella B., 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972).

[40] Roe v. Conn, 417 F. Supp. 769 (D.C. Ala. 1976).

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 analysis,[41] the court in Matter of 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 constitutional required.

In the same year as Jamie T.T. 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]

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[41] Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

[42] Matter of Jamie TT, 191 A.D. 2nd 132, 599 .N.Y.S. 2nd 892 (3rd Dept. 1993), New York statutorily provides for representation (see N.Y Family Court Act §249); 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.

[43] Matter of Guardianship of S.A.W., 856 P.2d 286 (Okla. Sup. Ct. (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. An interesting albeit non-definitive case is In the Interest of D.B. and D.S., 385 So.3rd 83 (Fla. Sup. Ct. 1980), in a case which involved the constitutional right to counsel for indigent parents stated, as brief dicta, that they found no constitutional right of counsel for the child (385 So.2d 83, 91).

To complete the current caselaw, this year a Federal District Court in Georgia held, in Kenny A. v. Sonny Perdue, that the child involved in a protective case is constitutionally entitled to counsel.[44] Interesting, 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 . . . The Court concludes that plaintiff foster children have a right to counsel in deprivation and TPR proceedings under the Due Process Clause of the Georgia Constitution.[46]

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[44] 356 F.Supp.3d 1353 (N.D. GA. 2005). The decision applies to "deprivation" proceedings, the Georgia equivalent of neglect or dependency, and to termination of parental rights proceedings.

[45] See O.C.G.A. §15-11-6(b) (2004).

[46] 356 F.Supp.3d 1353, 1359.

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, none of the succeeding cases have cited Roe or mentioned any other precedent (by 2005 and Kenny A. there were three earlier precedents). It's 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 not children's lawyers throughout the country thought of the issue? Have they not read the caselaw? (The virtual absence of litigation which would improve the lives of children may be a sad commentary on the ability of 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.

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[47] Another interesting pro child's right to counsel case is In re Adoption/Guardianship Number T97036305, 350 MD. 1, 746 A.2d 379 (Court Appeals MD. 2000). Since Maryland provides representation, the court did not reach the constitutional issue, but emphasized the importance of counsel.

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]

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[48] That was the issue in Jamie TT, supra note 42; the child had an attorney, but the case was reversed on the ground that he failed to provide effective representation.

[49] However, the issue could not be completely resolved, particularly in cases involving very young children; Part IV, Section 3.

PART II: THE CHILD'S LEGAL STATUS IN A PROTECTIVE PROCEEDING

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 suit 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 not qualify. As a corollary, an attorney's authority and actions reflect the individual client's legal status. To cite 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 scope 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, everyone understands 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 have, 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 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, failing that, negotiates or litigates for the least restrictive disposition. But what about a child protective case?

This part will discuss the basic attributes of what we might 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.

Section 2. The Child as a Party

In a civil proceeding (and a child protective case is civil litigation), 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] and, further, 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

[50] N.Y. Civil Practice Law & Rules 1001(a) (McKinney's 2004).

[51] Id. §1012.

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]

Every child protective proceeding involves two obvious necessary parties – the parent (or other person responsibility for the child), 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 a 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 (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

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[52] In some circumstances, a non-party may enjoy one or more of these rights; the point is that party status confers these rights automatically.

[53] See page 6.

the child's specific rights and interests had been injected into the proceedings. That person would likely (or hopefully) 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. 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 an attorney, the individual assigned to meet the CAPTA requirement 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.

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[54] See In. Code Ann. §3103409-7 (2004) which stipulates that "The (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. C. J. §3-801(r) and Minn. R. Proc. For Dist. Ct. R. 909 (1999) which deems the guardian ad litem a party. Also see In re Williams, 805 N.E.2d 1110 (Sup. Ct. Ohio 2004), when the Ohio 'Supreme Court held that the 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.3d 562, 1998 ME 243 (Sup .Jud. Ct. Maine, 1998).

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 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, 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, which provided for the legal representations of children well before 1974 CAPTA mandate, the child, acting through counsel, has the statutory right to file certain motions,[59] and the

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[56] 746 A.2d 379 Md. 1 (Ct. of Appeals, Md., 2000).

[57] 746 A.2d 379, 380.

[58] See Ill. Comp. Stat. Ann. Cd. 705 §405/1-5 [West 2004].

[59] See N.Y.S.F.C.A. §1039.

right to move for the modification or recision of any relevant court order.[60] In addition, the child, through her attorney, may file a petition (subject to court approval),[61] or appeal an adverse order.[62] Delaware has held that the child is, in effect, a de facto party, concluding 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

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[60] N.Y.F.C.A. §1061.

[61] See Matter of St. George, (N.Y. Fam. Ct. Monroe Co. 2000).

[62] See Commitment of Fernando v. Legal Aid Society of N.Y.C., 275 A.D.2d 280, 712 N.Y.S.2d 537 (1st Dept. 2000).

[63] Matter of the Petition Samantha Nicole Frazer, 721 A.2d 920 (1998) (Sup. Ct. Del. 1998).

[64] See Kenny A. v. Sonny Perdue, 356 F.Supp. 2d 1353 (DC North Georgia 2005).

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 child protective cases would resolve many of the problems and dilemmas which continue to plague the field, and 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 rights 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.

Section 3. The Right of the Child to Choose Counsel

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[65] See Section 2. 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, Kenny A. v. Sonney Perdue, supra note 44, was in part predicated on the fact that the child is indeed a party.

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 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, "We recognize that a minor's right to select substitute counsel is not absolute. However, in the present case the judge

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[67] Akkiko M. v. Superior Court, 163 Cal. App.3d 525, 209 Cal. Reptr. 568 (1985).

[68] N.Y.F.C.A. §241.

[69] Matter of Elianne M., 196 A.D.2d 439, 601 N.Y.S.2d 481, 482 (1st Dept. 1993); see also Albanese v. Lee, 272 A.D.2d 81, 707 N.Y.S.2d 171 (1st Dept. 2000), and Redder v. Redder, 17 A.D.3d 10, 792 N.Y.S.2d 201 (3d Dept. 2005).

[70] In the Interest of A.W., 248 Ill. App. 3d 971, 618 Misc.2d 729 (App. Ct. 16th Div. 1993), and Wagstaff v. Superior Court, Family Court Division, 535 P.2d 1220 (Sup. Ct. Alaska 1975).

conducted an extensive hearing, with both sides presenting evidence to address the issue of whether A.W. was coerced or manipulated into the decision to substitute private counsel for the 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 caselaw 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 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

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[71] 618 N.E.2d 729, 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's 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 though 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.

Last, 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 (the Court "may" appoint counsel), this set of statutes takes cognizance of the child's right to seek independent counsel to

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[73] Me. Rev. Stat. Ann. Tit. 22 §4005(1)(F) (West 2004).

[74] Rev. Code Wash. (ARCW) §13.34.100 (2004).

[75] N.H. Rev. Stat. Ann. §169-C:10 (IT) (2004).

[76] Page's Ohio Rev. Code Ann. §2151.281(17) 2005. See also Miss. Code Ann. §43-21-121(4) (2004), Minn. R. Juv. Ct. Proc. R. 40.02 (West 2003), and R.I. Gen. Laws §40-11-14 (2004).

represent his position. Put simply, a child would not ordinarily ask the Court for a lawyer to 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 representation. . .[77]

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 statutes granting the child the right to choose his counsel. Several additional states provide for the appointment of counsel when

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[77] American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect cases, 1996; Standard H-5. 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.

[78] Recommendations of The Conference on Ethical Issues in The Legal Representation of Children Recommendation, VIII, C, 2, 3.

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 she 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.

Section 4. 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] And in those states which afford full party status to the child, the juvenile may surely appear and otherwise participate in the proceedings – that's the essence of

[79] Limiting the child's presence for a specific purpose or event is, of course, a different matter. See, e.g., In re Ty L., 218 Wis.2d 834, 581 N.W.2d 595 (Wis. Ct. App. 1998) where, 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.

[80] See e.g., Ill. Comp. Stat. Ann. Ch. 705 5405-5 (West 2004), and Minn. R. Juv. Proc. R. 39.01 (2003), which stipulates that a child over the age of 12 may participate.

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 "If 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 (though attendance occurs with some frequency), but a significant majority of children above the age of 8 or 10 are present in the courthouse, where they can discuss the case with their attorney, participate at meetings and, when appropriate, appear in the courtroom -- seated next to their lawyer,

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[81] See footnote 54 and 55.

[82] One study found that only 10-18 percent of represented children appeared in court at all; Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem, *infra* note 8, at 6-13, 14.

[83] Cal. Wel. & Inst. Code §13.51, the statutory modification 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's areas equipped with children's sized furnishings. I have visited the courthouse twice in the past few years, and admired the child friendly architecture and furnishings, and the presence of large numbers of children.

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 "In 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 this year New York enacted legislation authorizing mediation[88]. Not surprisingly, California, which utilizes mediation techniques, permits the child's

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[85] ABA Standards, supra note 77, Standard D-5. The need for great child participation has also been addressed in the New York 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"; Standard C-4, Law Guardian Representation Standards, Part III, Child Protective Proceedings, New York State Bar Association, 1996.

[86] Id. Given the prevailing practice of child exclusion, the commentary notes that "It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing." 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.

[87] District of Columbia Courts Annual Report, 2004, p. 83.

[88] Family Court Act Section 1018, effective 12/21/05.

involvement, stipulating that '[t]he child has a right to participate in the dependency 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. And 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

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[89] Rule 1405.5(d)(2)(B) of the California Rules of Court (2004).

[90] In one example California County, Santa Clara, 75 percent of the cases referred for mediation resulted in a partial resolution; Journal of the Center for Families, Children and the Courts, Judicial Counsel of California, Vol. 5 (2004) at p. 63. Similarly, the District of Columbia, which refers every case to mediation panels, reported a 74 percent mediation settlement rate in 2004; District of Columbia Courts Annual Report, 2004, p. 83.

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 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 see 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 (whereby 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,

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[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 (2004), and Revised statutes Missouri §452.385 (2004). The practice has also been long recognized by caselaw; see, e.g., Lincoln v. Lincoln, 24 N.Y.3d 230, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969).

of at least equal significance, granting the child a forum to express her views as a participant. On 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 himself 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. Same child, same contestants, same facts, same disposition, but significantly different levels of participation.

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[93] Two reported cases in which the procedure was used are Cruz v. Commonwealth of Pennsylvania, 472 A.2d 725, 58 Pa. Comwlth. 147 (Commonwealth Ct. Penn. 1984), and Matter of Bernelle P., 59 A.D.2d 764, 398 N.Y.S.3d 714 (2nd Dept. 1977); the practice is also authorized by court rule in West Virginia; Rule 8, Rules of Procedure for Child Abuse and Neglect Proceedings.

[94] Forty-six states plus the District of Columbia require consideration of the child's wishes in custody matters; se 38 Family Law Quarterly, 777 Chart 2 following p. 808 (2005).

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 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 (see the previous section), that right cannot be intelligently employed unless the child-client sees the lawyer in action. And, 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]

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[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:

> . . . should lawyers adopt the roles of the professors? 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, Kluwer Academic Publishers (1997), at p. 80.

Section 5: What Are the Child's Legal Interests?

It need hardly 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 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

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[97] Once upon a time that was not considered to be so; see page 6. But the clear twenty-first century consensus is that the child has an independent legal interest in the action.

[98] See page 6.

[99] See Part III.

[100] In most legal actions the legal interests of a specific party is so evident that we don't 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 apposite). 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.

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. 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,

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[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. Wel. & Instit. Code, §361(a) (2005).

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 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 though 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

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[103] Uniform Juvenile Court Act §30 (1968).

[104] See, e.g., N.Y. Fam. Ct. Act §1054 (McKinney's 2004).

[105] See, e.g., N.Y. Fam. Ct. Act §1-56 (McKinney's 2004).

[106] See, e.g., Cal. Wel. & Instit. Code §361.2 (2003).

[107] N.Y. Fam. Ct. Act §1055(a) (McKinney's 2004).

[108] Cal. Wel. & Instit. Code, §362.2 (2003).

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 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 lease 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

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[109] See, e.g., Cal. Wel. & Instit. Code, §364(d), which requires that the court order's duration be set at "not more than six months from the time of the hearing".

[110] See, e.g., In re Adoption/Guardianship Number T97036005, 358 Md. 1, 746 A.2d 379, 387, supra note 47, where the court concluded 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 Termination of Parental Rights to Diana P., 279 Wis.2d 169, 694 N.W.2d 344 (2000), In re C.R., 364 N.J. Super. 263, 835 A.2d 340 (2003), and In re Clifton B., 81 Cal. App. 4th 415, 96 Cal. Rptr.2d 278 (2000).

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. Similarly, the parent is usually legally entitled to rehabilitation services – and 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 organized 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,

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[112] See, e.g., K.H. through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990), and C.R.S.A. 526-6-102 (Colorado).

[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.

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. And those rights exist 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 child's legal rights, coupled with a holistic approach with the child in securing and enforcing those rights.[115]

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[114] See, e.g., Matter of Kathleen Quigley Berg and Eugene Berg, 2005 (N.H. Sup. Ct. 2005), where the court held 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.

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

PART III. THE ROLE OF CHILD'S COUNSEL

For over 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 legislature or court has on occasion prescribed the contradictory formula of advocating both "best interest" and "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 twenty-first century caselaw. 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, i.e. toward either a "child's wishes" lawyering model or, more recently, a conventional or "adult" attorney-client model. For their part, the judiciary appears to be hopelessly conflicted concerning the role of child's counsel.

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[116] See, for example, the seminal 1996 Special Fordham Law Review issue entitled "Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, Vol. LXIV, pp. 1279-2132 (March 1996). Similar controversy has shaped the representation of children in child custody cases.

[117] See, e.g., Utah Code Ann. §78-3A-912(8)(a) (2005) and Ark. Code Ann. §9-27-316(5)(B) (2005).

In a subsequent section[118] I shall discuss why I believe the "best interests" vs. "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.

Section 1. The Legislatures Speak

The granddaddy statute, New York's 1962 Act, provided for counsel ". . . to help protect their [the children's] interests and to help 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 advocates "best interests". ("Interests" are not synonymous with "best interests" – for example, 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.) 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

[118]Part IV, Section 1.

[119] N.Y. Fam. Ct. Act §241 (1962).

[120] Ibid.

counsel who may compromise her position.[121] The grandfather statute is best described as ambivalent, and, as will be outlined in Section "3", 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 child representation.[122] As states gradually replaced or supplemented lay guardian ad litems (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.

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 that a guardian ad litem has a unique role to protect the interests of the child . . .[t]his role is different from the traditional role played by attorneys. We hold that when a court

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[121] See Part II, Section 3.

[122] Federal Child Abuse and Treatment Protection Act, supra note 19, §1340.14(g).

[123] Montana Code Ann. §40-4-205(1) (2004).

appoints a guardian ad litem [which it is required to do], the guardian is not to act as an attorney."[124] And in 1999 California amended it's relevant provision by adding the caveat "counsel 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" 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 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, 35 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

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[124] Jacobsen v. Thomas, 323 Mont. 183,100 P.3d 106 (Mont. Sup. Ct. 2004).

[125] Cal. Welfare & Inst. Code §317.

[126] Katherine Hunt Federle in her 2000 article, supra note _____ at page 425 found 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] Jean Koh Peters, supra note 22, at pp. 30-32. One example is Colorado, see Colo. Rev. Stat. §19-3-602(3) (West 2004).

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 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 Solomanic 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

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[128] Ibid.

[129] See Me. Rev. Stat. Ann. Tit. 22 §4005(1)(F) (West 2004), and S.C. Code Ann. §20-7-122(5) (2004).

[130] Cal. Welfare & Inst. Code §317(e) (2005).

[131] See Part II, Section 3.

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 organized bar and academy are another matter.

Section 2. 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]

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[132] See Part I, Section 3.

[133] See Part II, Section 2.

[134] Jacob L. Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buffalo Law Rev. 501 at 519 (1963). Isaacs did advocate a more adversarial or lawyer-client approach in juvenile delinquency cases.

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 which strongly endorsed the guardian ad litem model of representation, i.e. the attorney role envisioned by Congress.[136]

The tide began to turn in 1983 when Professor Sarah Ramsey advocated a largely child's wishes approach and 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

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[135] Fam. Ct. Act §241, see supra note 16.

[136] Brian Fraser, Independent Representation for the Abused and Neglected Child: The Guardian ad Litem, 13 Cal. W.C. Rev. 16 (1976).

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

[138] See, for example, Robert H. Mnookin, In the Interests of Children: Law Reform and Public Policy, (1985), where Professor Mnookin criticized heavily the "best interests" model of representation.

the mode espoused by the early writers or the guardian ad litem. Thus from Ramsey 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 simply espousing the child's wishes.[140] It's 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 (and scholars differ concerning the role of the lawyer in those situations; see page ____). Nevertheless, the academy is today strongly against the "best interests" paradigm, and in favor of the more traditional or, if you will, 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

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[139] Jean Koh Peters supra note 22 at 39. 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. Law Quarterly 441 (2000). As the title suggests, Duquette would add "best interests" and "wishes" models.

[140] See Part III, Section 3, p. 55.

[141] ABA Standards supra note 77, Standard A-1.

bound by the child's expressed preferences."[142] However, the attorney guardian ad litem's standing is subsequently severely truncated, if not superceded, by the following 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 "child's attorney" role and empowerment differs from a lawyer representing an adult is quickly dispelled by the definitional section's commentary: "To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position".[144] And, for good measure, the commentary to the guardian ad litem definition cautions that "these standards, however, 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

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[142] Id., Standard A-2.

[143] Id., Standard B-2.

[144] Commentary to Standard A-1. The commentary also states that "In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client".

[145] One study found that approximately 31 percent of all children represented in protective proceedings are over the age of 13; Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem, U.S. Dept. of Health and Human Services, 1990, Table 4.4-1. Ergo, the large majority of children are capable of assisting their attorney.

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 can't 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 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, 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

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[146] Id., Standard B-4.

[147] Wisely, the ABA Standards never mention the child's "wishes", and instead refer to the child's "preferences" or "position".

[148] National Association of Counsel for Children, Revised Version of ABA Standards of Practice For Lawyers who Represent Children and Abuse and Neglect Cases (1999).

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": "Although other issues remain unresolved, the profession has rendered a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations."[150]

The philosophy of the legal profession or, more accurately, the organized bar and academy, is accordingly diametrically opposite that of legislators, 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 caselaw.

Section 3. The Contemporary Caselaw

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. The by now extensive caselaw 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 caselaw is far from uniform. Several courts have resisted the legislative prescription, while others have tried to posit their decisions in both camps, precipitating inconsistent

[149] Recommendations of the Conference on Ethical Issues in The Legal Representation of Children, supra note 78, Recommendation I. The recommendations continue by stating that ". . . the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's expressed preference, unless the child's expressed position is prohibited by law or without any factual foundation"; Recommendation B-4(3).

[150] Id., Recommendation IV.B.1.

and sometimes conflicting opinions. This section will, by way of illustration, present a sample of mostly twenty-first century cases.

A. 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 ". . . 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 of 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 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]

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[151] State et rel. Jeanne U. v. G. Canady Jr., 210 W. Va. 88, 554 S.E.3d 121, 130 (2001), citing to In re Lindsey C., 196 W.Va. 395, 473 S.E.2d 110 (1995).

[152] D.J.L. v. Bolivar Co. Dept. of Human Services, 824 So.2d 617, 623 (2002); see also Jacobsen v. Thomas, supra note 124.

[153] Mary-Gay Kennedy v. State of Maine, 730 A.2d 1252, 1257 (1999).

[154] In re the Custody of C.J.S., 37 P.3d 479, 482 (Colo. Ct. of App., Div. III 2001).

In several cases the courts, while applying the statutory "best interests" formula, have at least recognized the conflict. In Ohio, the court opined that "[b]ecause 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 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).

B. Cases which held that the Attorney Must Advocate the Child's Position

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[155] In re Devonte Griffin, ____, 2001 WL 43106 (Court of Appeals of Ohio, 2nd Dist. 2001.

[156] In re Jonathan L. Slusher, 2002 WL 971765 (Ohio App. 3 Dist. 2002).

A significant number of courts have held that counsel for the child is bound by the traditional attorney-client rules and must act accordingly, i.e. assume the role of advocate for the child's interests and position rather than the attorney's "best interests" beliefs. A Connecticut appellate court, quoting earlier cases, 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:

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[157] Sherman v. Sherman, 72 Conn. App. 193, 804 A.3d 983, 989 (App. Ct. of Conn. 2002), quoting in part Schult v.Schult, 241 Conn. 767, 778, 699 A.2d 134 (1997) and Ireland v. Ireland, 246 Conn. 413, 436, 717 A.2d 676 (1998). Sherman was a child custody case, but the reasoning is applicable to child protective proceedings. See also In re Care and Protection of Georgette, 439 Mass. 28, 785 N.E.2d 356 (2003) where the Supreme Judicial Court of Massachusetts held that 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] Division of Youth and Family Services v. Robert M., 347 N.J. Super. 44, 788 A.2d 888, 905 (Sup. Ct. N.J. App. Div. 2002).

> . . . due process requires that Justus be given the opportunity to be heard in a meaningful way, that is, by presentation of evidence on the question of whether the termination of his parent-child relationship with George W. is in his best interests. 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]

C. The "Conflict" Cases

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

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[159] In re Adoption/Guardianship No. 6Z97003, 127 MD. App. 33, 731 A.2d 467, 480-489 (Ct. of Special Appeals MD. 1999). See also Matter of Williams, _____ (Ct. Appeals Ohio 11th District 2002) where an Ohio Appellate Court held that trial court should have investigated whether a six year old should be assigned counsel to represent his interest and wishes, giving "due regard" to the child's maturity and understanding of the proceedings.

[160] Carroll v. The Superior Court of San Diego County, 101 Cal. App. 4th 1423, 124 Ca. Rptr.2d 891 (Ct. Appeal Cal. 4th Dist. 2002).

child's wishes,[161] several courts have determined that the attorney must indeed perform conflicting roles. One recent illustration is In the Matter of 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] adding, as the Court's imprimatur, "[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 found that the law guardian did not act improperly by advocating a position that he believed to be in

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[161] See, e.g., Me Rev. Stat. Tit. 22 §4005(b)(e) (2004).

[162] 124 N.M. 735, 955 P.2d 204 (Ct. Appeals N.M. 1998).

[163] 955 P.2d 204, 212.

[164] Ibid.

[165] In an attempt to avoid conflicting roles a Maryland court has held 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; Fox v. Wills, 151 Md. App. 31, 822 A.2d 1289 (Ct. Spec. Appeals Md. 2003).

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 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. v. Lisa Ann Ramos.[169] An attorney represented two children (in separate cases) who had been placed several years earlier, as a result of child protective proceeding. 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

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[166] Carballeira v. Shumway, 273 A.d.2d 753, 756, 710 N.Y.S.2d 149 (3rd Dept. 2000).

[167] Albanese v. Lee, 272 A.D.2d 81, 707 N.Y.S.2d 171 (1st Dept. 2000).

[168] Rueckert v. Reilly, 282 A.D.2d 608, 723 N.Y.S.2d 232 (2nd Dept. 2001).

[169] 307 Ill. App.3d 907, 718 N.E.2d 623 (1999).

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 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, i.e. 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. Ergo, 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. Or, 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

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[170] Similarly, the child who allegedly commits a crime is entitled to a "real" lawyer, rather than a guardian ad litem replica; see, e.g. In re Johnston, 755 N.E.2d 457 (Ct. Appeals Ohio, 2001). See also Joanne B., 94 P.3d 783 (N.M. 2004) for a discussion of the inherent conflicts when the same attorney represents the same child, in this case 14 years of age, in child protective case, where the attorney is under a "best interests" mandate, and in a juvenile delinquency case, where the attorney must be a zealous advocate.

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]

Every case discussed in this section has been decided in the past five 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.

[171] Approximately one-third of all children represented in child protective proceedings are over the age of 13; see footnote _____.

PART IV: TOWARD A NEW PARADIGM

Section 1. The Problems with "Best Interests" – and with "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 the "wishes" of the child.

As has been noted earlier and as has been widely chronicled, one deficiency of the "best interests" model is its inherent subjectivity. That, of course, is true. "Best interests" represents an opinion, and in a given case the attorney may lack the knowledge or expertise to formulate that opinion. Further, unlike an expert forensic or other witness, his opinion is not tested through the crucible of cross-examination. However, there are additional and, perhaps more fundamental flaws in employing that standard to legal representation.

[172] See Part III, Section 2, pp. 52, 53.

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" 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 which controls every party's argument.[175] The parent's attorney argues "best interests", the

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[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 Law Review 1399 (1996) at 1429.

[174] One could say that the ultimate goal should guide counsel, and that his 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 he assist the defense, and thereby risk that the child will remain at home without adequate supervision or services? Or, as a third alternative, should the lawyer sit on her hands?

[175] See, e.g., N.Y. Fam. Ct. Act §625, governing the disposition of a termination of parental rights case: "An order of disposition shall be made . . . solely on the basis of the best interests of the child, and there

petitioning agency or prosecuting attorney agues "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 her 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 originated with the first statute granting the child counsel,[176] 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

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shall be no presumption that such interests will be promoted by any particular disposition". It has also been observed that, in part because of the _____ role overlap in the lawyer timing a "best interest" approval, lawyers who represent their clients' best interests are too passive and are too ready to follow the direction of the state. In contrast, lawyers who represent their clients' wishes are more independent of state influence and are more involved with their clients and their cases. Ramsey, supra, note at 320.

[176] N.Y. Fam. Ct. Act §241; see p. 8.

attempts to find justification for dismissal. Nevertheless, at the end of the day most defendants plead guilty. That's not their wish – it's reality. The client is convinced by counsel to plead guilty, often after intense negotiations and discussions. And counsel may have to be more persuasive in dealing with his client than in dealing with his adversary. In other words, a lawyer doesn't simply take the client's wish and run, telling the court that, after all, she's 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 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

[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.

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. The client (usually) 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 caselaw covering the child's attorney's role and responsibility is inconsistent. Neither "best interests" nor "wishes" suffice. 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, for that matter, is it a fusion position between wishes and best interest extremes, and does the child

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[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, 160 L.Ed.2d 565, 125 S.Ct. 551 (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). The defendant had indeed never agreed to counsel's suggestion, but had not articulated any disagreement. The Supreme Court affirmed the conviction and death sentence:

> When 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; 125 S.Ct. 551, 563.

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.

agreed, acquiesced, has even stated a position? Given the inconsistencies in the statutory and caselaw, 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.

Section 2. Defining the Appropriate Attorney-Child Client Relationship

The building blocks of a better representation model are 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, her right to representation, and the appropriate level of her presence and participation, i.e., the child's 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, psychological counseling, educational, 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" (I have no quibble with "best interests" as a substantive legal standard). 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 her adult client) the point black question "what are your wishes", but, rather, 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, Section 3, several courts have concluded that the right to counsel is of constitutional dimensions (though the issue has yet to be definitively determined nationally). Accordingly, the child is entitled to effective representation, i.e., counsel who takes a position and fights for his client's interests (and not a guardian ad litem who writes a report with recommendations, and, then is heard no more or, worse, testifies in defense of his report). And the child is entitled to effective representation regardless of any contrary legislative prescription.

Similarly, counsel should advocate that the child has full party status (see Part II, Section 2). In several states the child indeed enjoys formal party status, by statute or

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[179] See Jean Koh Peters, supra, note 22, Chapter 4, pp. 77-98.

[180] In discussions between attorney and 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 the myriad factors.

through caselaw. 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, i.e. assert "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, i.e., 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 or for other reasons; see the next section). As has been discussed in Part II, Section 4, the child's presence, and surely the child's participation, are not precluded in any jurisdiction (at least to this author's knowledge). And 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. And 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 which satisfies all the parties. (No one would seriously think of excluding a different party, such as the parent.) 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 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

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

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,[182] 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. And the adolescent child should not be present when sensitive parental psychological and psychiatric reports are discussed, to cite but one 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.[183]

Section 3. 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

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

[183] 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 funding to improve the environment if children were actually present.

"client" in the manner envisioned by the rules of professional responsibility, or form a relationship with an attorney which 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.[184] 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.[185] That would significantly ameliorate the problem, but at a substantial cost.[186] 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 attorney role when the child is very young, but add to the mix through appointment of a guardian ad litem:

> To 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.[187]

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[184] 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.

[185] Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, LXIV Fordham Law Review, 1399 at p. 1416 (1996).

[186] It is also questionable whether children just above age seven possess the requisite competency.

[187] American Bar Association Standards, supra note 77, Standard B-4(1).

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 litem,[188] 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.[189] The guardian ad litem, who is publicly compensated, then retains an attorney, who is also paid by the government.[190] 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, i.e.,

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[188] See Part III, Section 1.

[189] Children Act 1989, Ch. 41, §41(1); the court is required to appoint "unless it is satisfied that it is not necessary to safeguard the child's interest"; in practice, such a finding is rare.

[190] Family Proceedings Rules, 1991, Rule 4.11.

assumes a more traditional attorney-client relationship.[191] The presence of a guardian ad litem, coupled with a clear demarcation of authority, enables the attorney to assume in 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.[192]

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.

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[191] Family Proceedings Rules, 1991, 4.12(1)(a).

[192] Judith E. Timms, Children's Representation, A Practitioner's Guide, Sweet and Maxwell, 1995, at p. 104. Timms continues by 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, Representing Children in England: Protecting Children in Child Protection Proceedings, 34 Fam. L. Q. 467 (2000); Masson argues that English attorneys often avoid following the child's instructions.

That leaves us with the present American situation, whereby counsel is virtually on his 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, that may be a relatively easy task. 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-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 (or, in

some cases, even soliciting the young client's preference). The required lawyering skills and competences have been addressed in several publications, and are beyond the scope of this article.[193] The issue is also addressed in the Model Rules of Professional Conduct: "When 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".[194] 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 perspective. Children do not suddenly mature; one does not wake up one morning and pass the magic divide into legal capacity. It's 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 may be perfectly competent to advise his counsel concerning a substitute home (say 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 happy to advocate a position consistent with the client's wishes. Children are also frequently able

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[193] See, e.g., Jean Koh Peters, supra note 22 at pp. 112-145, and Judith E. Timms, supra note 192.

[194] ABA Model Rules of Professional Conduct, supra note ____, Rule 1.14(a). 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."

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.[195] 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 approach simply because our client is young.

As noted, for the older child, including adolescents, most pre-adolescents and young adults, [196] the normal attorney-client relationship, or at least an approximation of that relationship, should always prevail. The dynamics are outlined in the preceding section. Ergo, 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

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[195] Children may, in fact, acquiesce more readily when in their attorney's recommendation. I have found most eight year olds be more flexible and amenable than the obstructionist adult client.

[196] Although jurisdiction in an initial child protective case ordinary ceases when the child attains the age of eighteen, he child may be in placement far beyond the age of majority. For example, in New York, Family Court Act Section 1055-a(g) (McKinney's 2004) stipulates that "no 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." I have personally represented "children" who were twenty years of age.

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 an 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.

CONCLUSION

The concept that children who are involved in child protective proceedings are entitled to legal representation is of recent origin. 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 caselaw 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 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 (where they exist), 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 counsel, and the right to effective counsel. The constitutional principle has been recognized whenever raised, establishing a precedent which should be replicated nationally. There is simply no excuse to forgo an assertion on the basic constitutional 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 the rigorous litigation if the issue by attorneys who represent children throughout the country. Attorneys should also remain continually cognizant of the child-client'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 which is key to the maturization of legal representation, is the child's presence and participation. Good lawyering is dependent upon client involvement, whether the client be 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, whether that be intensive client consultation, the development of client goals, the child's participation in the proceedings or the employment of in-court testimony or in-camera interview.

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.