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Client-Directed Lawyers for Children: It is the “Right” Thing to Do

*This matter of representation by counsel, so that children have their own lawyer when their disposition or welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law.*¹

Linda D. Elrod*

I. Introduction

Calls for independent lawyers to make children’s voices heard in custody and child protection proceedings began decades ago.² Even though the call for children’s lawyers has not yet been fully answered and one of the early advocates, Marty Guggenheim,³ has begun to question the efficacy of lawyers for

1. Henry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 356 (1972).

* Richard S. Righter Distinguished Professor of Law and Director of Children and Family Law Center, Washburn University School of Law; Editor, *ABA Family Law Quarterly*. I thank Milfred Dale, Ph.D, licensed child psychologist, for his comments on earlier drafts. This article resulted from a debate I had with Marty Guggenheim and Marsha Kline Pruett at the annual Association of Family and Conciliation Court meeting in June 2006 entitled “What’s Wrong With Children’s Rights.”

2. *Id.*; see also Monroe Inker & Charlotte Perretta, *A Child’s Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Sarah H. 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); ANN M. HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (ABA 1993); Linda D. Elrod, *Counsel for the Child in Custody Disputes - The Time is Now*, 26 FAM. L.Q. 53 (1992); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993).

3. MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* (2005); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998). Even though Marty expresses skepticism about rights for children, he has a long and dedicated career representing and advocating for children. His book details the formidable tasks that remain if children are going to have an effective voice. I thank Marty for reminding me how much I love the child advocacy community,

children, I sense an excitement and renewed commitment to giving children a voice. Encouraging signs include the growing numbers of attorney child advocates and the leadership of the organized bar in advancing children's issues,⁴ as well as the fact that law schools are adding family law courses and sponsoring pediatric clinics.⁵ Major progress is evident in both the recognition that children are citizens entitled to rights and that children need a voice through lawyer representation when their liberty and custody are at stake.

Children, who comprise twenty-five percent of the U.S. population,⁶ rely upon others,⁷ most often their parents, to protect

which remains eternally optimistic in trying to make a difference in the lives of children and their families.

4. See Howard A. Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69, 70-72 (2006) (chronicling advances for children). Howard Davidson is the executive director of the ABA Center for Children and the Law, the most vocal and visible bar-related organization for children sponsored by the Young Lawyer's Division. Other notable ABA activities in the area of children include the 2006-07 ABA Youth at Risk Initiative; 2005 Teen Dating Violence Prevention Initiative (ABA Steering Committee on the Unmet Legal Needs of Children); AMERICA'S CHILDREN STILL AT RISK (2001); AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993); ABA JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Appendix ABA Policy Resolutions on Representation of Children (1979); ABA Guardians Ad Litem (1992); and ABA Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (1995). The ABA Family Law Section has drafted two sets of standards for lawyers representing children, and hosted three international, interdisciplinary think tanks on the best interests of the child. The ABA Child Custody and Adoption Pro Bono Project provides resources, training materials and support for child advocates. It also awards financial grants to groups starting pro bono programs. Other ABA sections, such as Litigation and General Practice, have children's committees which are involved in numerous projects.

5. See Melissa Breger, et al., *Building Pediatric Law Careers: The University of Michigan Law School Experience*, 34 FAM. L.Q. 531, 532 (2000); see also Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524 (2006) (encouraging law schools to improve their family law curricula by recognizing the multi-disciplinary nature of family court; emphasizing the multiplicity of dispute resolution processes available; placing emphasis on lawyer reflection and self-awareness, as well as competence and skills; and alerting students to the extent of violence in family law cases).

6. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (2002), TABLE NO. 14: RESIDENT POPULATION BY RACE, HISPANIC ORIGIN AND SINGLE YEARS OF AGE: 2001, available at <http://www.census.gov/prod/2003pubs/02statab/pop.pdf>.

7. See Theresa Glennon & Robert G. Schwartz, *Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1559 (1995) (noting that in reality adults must determine and protect children's rights); Barbara Bennett Woodhouse, *Youth, Voice and Power: Multi-Disciplinary Perspectives: En-*

them; to date, those “others” have not always done too well. Annually, approximately four and a half million children are reported abused and neglected;⁸ over one million children are impacted by divorce;⁹ thirty-four percent of children are born out of wedlock;¹⁰ and more than twelve million children (or 17 percent) live below the poverty line.¹¹ Children want to be heard on matters affecting them.¹² Therefore, when parents abuse or neglect their child or engage in highly conflicted cus-

hancing Children's Participation in Policy Formation, 45 ARIZ. L. REV. 751, 752 (2003) (noting that “[c]hildren’s rights are essentially defined from an adult-centric perspective as whatever rights adults think children should have”).

8. U.S. DEP’T OF HEALTH & HUMAN SERV., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 2002 xiii (U.S. Gov’t Printing Office 2004), *available at* <http://www2.acf.hhs.gov/programs/cb/publications/cm02/cm02.pdf>. (last accessed Sept. 3, 2007).

9. CHILDREN’S DEFENSE FUND, THE STATE OF CHILDREN IN AMERICA’S UNION: A 2002 ACTION GUIDE TO LEAVE NO CHILD BEHIND 13, 49 (2002), *available at* <http://www.childrendefense.org/data/minigreenbook.pdf>.

10. Brady E. Hamilton, et al., *Births: Preliminary Data for 2003*, 53 NAT’L VITAL STAT. REP. 9 (2004); see Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 612-16 (2005) (reviewing research data showing that single and adolescent parenting, substance abuse, mental health problems, adult family violence, and lack of social supports are all highly correlated with child maltreatment).

11. See Marian Wright Edelman, *Why Don’t We Have the Will to End Child Poverty?*, 10 GEO. J. ON POVERTY L. & POL’Y 273 (2003); Innocenti Research Centre, UNICEF, *Child Poverty in Rich Countries 2005*, *available at* <http://www.unicef-icdc.org/publications/pdf/repcard6e.pdf> (last accessed Sept. 3, 2007) (indicating that among the twelve industrialized OECD (Organization for Economic Co-operation and Development) countries, the United States ranks in the bottom third for child poverty); see also LAWRENCE GROSSBERG, *CAUGHT IN THE CROSSFIRE: KIDS, POLITICS AND AMERICA’S FUTURE* 175-89 (2005) (noting the failure to invest in the future, including social and economic programs for children).

12. See *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (finding that a minor lacked capacity to bring termination of parental rights petition); George H. Russ, *Through the Eyes of A Child: “Gregory K”: A Child’s Right to be Heard*, 27 FAM. L.Q. 365 (1993); Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362 (2006) (discussing the desire of foster children for a voice); see also Patrick Parkinson, Judy Cashmore, & Judi Single, *Adolescents’ Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005) (reporting that half of the young people indicated they had no say at all and the danger of predicated custody arrangements on what is perceived to be fair to parents rather than fair to children); Eric Frazier, *Teen Wants to Be Heard: DSS Says No: What Rights Do Kids Under State Care Have?*, CHARLOTTE OBSERVER, Feb. 8, 2007 (discussing teenager who wished to testify at a congressional briefing regarding the state’s improper application of Social Security benefits from his adoptive father).

tody battles, or when the state, having custody of a child, fails to provide protection and services, the child should be given a lawyer to ensure that the child's voice is heard.

When and how to give children a voice has generated substantial controversy. Some, including myself, favor traditional client-based representation which empowers a child as a "rights holder" to have their wishes presented and considered by the court. Others see the need for a lawyer to advocate for the child's "best interests" regardless of the child's wishes.¹³ Because the Model Rules of Professional Conduct provide little guidance for lawyers trying to represent a child client,¹⁴ the American Bar Association (ABA) has adopted two sets of Standards of Representation - *ABA Standards for Lawyers Who Represent Children In Abuse and Neglect Cases*¹⁵ and *ABA Standards of Practice for Lawyers Representing Children in Custody Cases*.¹⁶ Several other sets of standards,¹⁷ principles,¹⁸ and recommendations from two national conferences,¹⁹ and

13. See *infra* Section V.

14. See *infra* Section V.

15. A.B.A., *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995) [hereinafter *ABA Abuse and Neglect Standards*]. See Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999 (1996) [hereinafter Elrod, *Analysis of Standards*].

16. A.B.A., *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (2003) [hereinafter *ABA Custody Standards*]; see Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105 (2003) [hereinafter Elrod, *Raising the Bar*]; A Brief Look at The American Bar Association Standards of Practice for Lawyers Who Represent Children in Custody Cases, in 2005 FAMILY LAW UPDATE 177 (Ron Brown & Laura Morgan, eds. 2005).

17. American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAWYERS 1 (1995) [hereinafter *AAML Standards*]; National Association of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (2001), available at <http://www.naccchildlaw.org/documents/naccrecommendations.doc> (last accessed Sept. 3, 2007) [hereinafter *NACC Standards*].

18. AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.13 (2002) [hereinafter *ALI Principles*].

19. In 1995, Fordham Law School hosted an invitational conference entitled "Ethical Issues in the Legal Representation of Children." See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Recommendations*]. In 2006, the University of Nevada Law School convened a conference "Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham." See *Recom-*

even a uniform law on representation of children²⁰ now exist. While all of these guidelines and standards have some similarities, consensus is unfortunately still lacking on a national guideline defining the role children's lawyers should play. My view has long been that we need lawyers who act like lawyers representing children. Within the past few years, there are finally signs that more advocates recognize the importance of an independent client-directed lawyer model to afford children the strongest voice.²¹

This article begins with a discussion of the intersection of the debates over "rights for children" and "representation of children." I will briefly outline the issues, problems and current rights of children as well as the obstacles to getting a child's voice heard. I will then explore the perceived conflict between parental rights and children's rights if the child's voice is heard. Next, I move into the problems with the use of the best-interest standard as a deciding factor in placement issues with a few ideas for improving the standard. In the last section, I explore the wide variances on current practices and standards of representation. I conclude that children should be rights-holders and entitled to client-centered lawyers.

mendations of the UNLV Conference on Representing Children in Families, 6 NEV. L.J. 592 (2006) [hereinafter *UNLV Recommendations*].

20. National Conference of Commissioners on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act (2006), available at <http://www.nccusl.org> (last accessed Sept. 3, 2007) [hereinafter *Uniform Representation of Children Act*]. Several amendments were proposed to the 2006 Act at the 2007 annual meeting of NCCUSL.

21. See Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLINE J. PUB. L. & POL'Y 177, 177 (2006) [hereinafter *Humility and Child Autonomy*] (noting that judges seem to be the ones who do not want to move towards the client-directed model); Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385 (2006) [hereinafter *Simon Says*] (criticizing the best interests lawyer approach); *UNLV Recommendations*, *supra* note 19, at IVA.1. In January 2007, the ABA Section of Litigation threatened to aggressively oppose the *Uniform Representation of Children Act*, *supra* note 20, because it fails to mandate client-driven lawyers, allows judges to use their discretion in appointing best interest lawyers and has the potential to compromise child client confidentiality. NC-CUSL (National Conference of Commissioners on Uniform State Laws) withdrew the Act from consideration at the ABA Midyear Meeting. Email from Howard Davidson to Linda Elrod (Jan. 2007). See FIRST STAR'S NATIONAL REPORT: A CHILD'S RIGHT TO COUNSEL (2007) (noting that the goal is to have lawyers for children in all protection cases by 2008).

II. The "Rights" Debate and the Child's "Right" to Representation

*Rights have an empowering effect for they limit what we may do to others and what others may do to and for us. By empowering children, rights have the potential to minimize the victimization of the youngest members of society, even when that harm occurs privately within the family.*²²

The proper role of lawyers for children gets tangled in the "rights" debate. In 1972, law professor Henry Foster and Doris Jonas Freed authored a "Bill of Rights for Children."²³ Among the rights listed were "to be regarded as a person, within the family, at school, and before the law" and "to be heard and lis-

22. Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1596-97 (1995); see Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 101, 416 (1987) ("rights imply a respect . . . which elevate one's status from human body to social being").

23. Foster & Freed, *supra* note 1, at 347. The Bill of Rights provided: A child has a moral right and should have a legal right:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;
3. To be regarded as a *person*, within the family, at school, and before the law;
4. To receive fair treatment from all in authority;
5. To be heard and listened to;
6. To earn and keep his own earnings;
7. To seek and obtain medical care and treatment and counseling;
8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict or other sufficient cause, and his best interests would be served by the termination of parental authority;
9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and
10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.

Id. at 347.

tened to.”²⁴ The right to be heard and to have some say in what happens to a person seems to be among the most fundamental of rights.²⁵ The right to be heard does not mean giving the child the ultimate decision-making power. It means that the child has a right to have any placement decision take into consideration the unique characteristics and the perspectives of the individual child. Giving the child “rights” acknowledges the importance of the child’s voice.

While several European initiatives have explicitly recognized rights for children,²⁶ the quest for rights for children in the United States is hampered by several things: (1) the lack of an express grant of positive rights for children in the Constitution; (2) the failure of the United States to ratify the United Nations Convention on the Rights of the Child, which does provide a framework for defining and recognizing children’s rights; (3) difficulties in defining what is included within the term “rights”; (4) the perceived incapacity of some children to exercise their rights; and (5) the fear that children’s rights will come at the expense of parental rights, thus extending government power over families.

24. *Id.* But see GUGGENHEIM, *supra* note 3, at 12 (stating that Foster and Freed confused “rights” with things that are good for children and unenforceable).

25. See also VIRGINIA COIGNEY, *CHILDREN ARE PEOPLE TOO: HOW WE FAIL OUR CHILDREN AND HOW WE CAN LOVE THEM* 197 (1975) (lamenting that children are treated as property of their parents and suggesting a Child’s Bill of Rights, starting with “The Right to Self-Determination. Children should have the right to decide the matters which affect them most directly. This is the basic right upon which all others depend . . .”); Katherine Hunt Federle, *Children’s Rights and the Need for Protection*, 34 FAM. L.Q. 421, 438 (2000) (noting that “the value of rights for children lies in their potential to remedy powerlessness”).

26. See Andrew Moylan, *Children’s Participation in Proceedings – The View From Europe*, in HEARING THE CHILDREN 171, 183 (Lord Justice Thorpe & Justine Cadbury, eds. 2004) (citing as examples The European Convention on the Exercise of Children’s Rights 1996 art. 3 which gives the child a right to receive all relevant information, to be consulted and express his or her views and to be informed of the possible consequences of any decision; The Charter of Fundamental Rights in the European Union; European Convention on Contact Concerning Children 2003; and The U.N. Convention on the Rights of the Child).

A. *The Problem of Defining Rights and the Child's Status*

*We are moving from a legal system that valued children out of an occasional sense of benevolence to a system that recognizes the value of children as rights-based citizens.*²⁷

Without guidance from the United States Constitution or Congressional ratification of the U.N. Convention on the Rights of the Child,²⁸ it is difficult to define "rights" for children. There is no universal agreement on what those rights should be.²⁹ The Constitution is silent on rights for children or their families and the United States Supreme Court has been reluctant to enumerate substantive rights for children. Those advocating "rights" for children usually approach from two different, though not competing, directions: those who want to increase children's civil, political or liberty rights³⁰ and those who want to protect children with positive rights to services.³¹ I like the

27. Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 77 (2006).

28. See *infra* Section II A.

29. See Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105 (2002); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003); Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141 (2004); Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (reviewing the history of opposition to children's rights); see also Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 695-710 (2006) (categorizing three approaches to justice and rights for children: procedural - securing legal rights; legal - enlarging positive rights and liberties; and social - modifying social structures that oppress certain groups).

30. See Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979) (noting children's rights include social, protective, adult and family); JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* (1991) (noting rights in the welfare and education areas); Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1344-58 (1995) (arguing that children should have the same basic substantive rights as adults); Appell, *Uneasy Tensions*, *supra* note 29, at 154-56 (stating that emancipatory rights protect certain liberties and promote personhood); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 16 (1986) (noting that protecting individual autonomy is different from protecting human relationships).

31. See DAVID ARCHARD, *CHILDREN'S RIGHTS AND CHILDHOOD* 55-56 (2d ed. 2004) (noting children have liberty and welfare rights); Harry Brighouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 701-03 (2003) (defining welfare rights as duties adults owe to children's well-being and agency rights such as the right to act on one's own judgment); Appell, *Uneasy Tensions*, *supra* note 29.

conceptualization of Barbara Bennett Woodhouse who posits a broader theory of rights based on human rights generally, incorporating principles of equality, individual dignity, privacy, protection and empowerment.³²

The failure to obtain a clear consensus on the bundle of rights children should have does not mean that the children's rights movement is "confused and ridiculed,"³³ or that it is based on a "fatally flawed premise" of the "child's individual personhood."³⁴ Why is it so difficult to recognize the individual personhood of children? Today, 192 of 194 nations recognize the individual personhood of children by incorporating the rights stated in the UN Convention on the Rights of the Child. Puerto Rico has a Bill of Rights for Children with twenty seven provisions safeguarding children's rights.³⁵ At least two states have enacted a Bill of Rights for Children in State Care.³⁶ What is flawed is that more states and the United States do not have similar documents expressly recognizing the individual personhood of children. Instead, children rely on piecemeal federal and state legislation granting benefits in areas such as welfare and education and court decisions recognizing rights (or remedies) in a specific dispute.

Although granting children rights in some ways seems to be a logical extension of the civil rights movements for minorities and women,³⁷ children "age out" of their dependency status.

32. See Barbara Bennett Woodhouse, *Children's Rights*, in HANDBOOK OF YOUTH AND JUSTICE 377, 388-96 (White ed. 2001) (describing the five principles); Woodhouse, *Talking about Children's Rights*, *supra* note 29, at 114-22.

33. GUGGENHEIM, *supra* note 3, at 12.

34. *Id.* at 13; see also Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573, 1575 (1995) (noting that some have made fun of calls for children's rights, viewing them as misguided and counter-productive); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973) (calling children's rights "a slogan in search of a definition").

35. P.R. LAWS ANN. tit. 1, § 412 (2004) (allowing enforcement of rights in several areas).

36. N.J. STAT. ANN. § 9:6B-4 (West 2002); R.I. GEN. LAWS, § 42-72-15 (1998).

37. See Foster & Freed, *supra* note 1, at 343 (noting that the status of minority is subject to "[t]he same arguments that were advanced over the issues of slavery and the emancipation of women"); Federle, *supra* note 30, at 1344. See also JOHN HOLT, *ESCAPE FROM CHILDHOOD* 18-19 (1974) (urging equal legal treatment for children in all areas); RICHARD FARSON, *BIRTHRIGHTS* 10-11, 52-62, 83-190, 216-19 (1974) (seeking children's rights to information, self-education, freedom from corporal punishment, sexual freedom and political participation). But see GUGGENHEIM, *supra* note 3, at 8-9 (noting differences in children's status).

Historically, parents had power over all aspects of their children's lives.³⁸ Children were quasi-property or economic assets, either working in the family business, working for wages, or being educated.³⁹ The "child savers" movement⁴⁰ resulted in early government interventions to protect poor and immigrant children through child labor laws, compulsory education, and the laws of dependency and neglect. Dependency laws allowed the state as *parens patriae*⁴¹ to step in to protect children by committing them, if necessary, to a private or public agency throughout their minority. Between 1870 and 1970, the child was assumed to have no legal standing or role⁴² because children's interests were perceived as extensions of the parents' or state's interests. It was not until 1967 when the Supreme Court in the *In re Gault*⁴³ case gave children a right to counsel in juvenile proceedings and the 1974 Child Abuse Prevention and Treatment Act (CAPTA)⁴⁴ which gave children a right to a

38. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, Ch. 16 (1765) (detailing the power of parents over their children); JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 58 (1690) (noting that the power parents have over children arises from the duty to care for the child during childhood).

39. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES Ch. 4 (1994) (detailing history of the changing status of children in America); Woodhouse, "Who Owns the Child?", *supra* note 29, at 1041-46.

40. ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 108-11 (1969).

41. See Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

42. Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 Touro L. REV. 745, 750 (2006).

43. *In re Gault*, 387 U.S. 1 (1967).

44. Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101-19 (1996) (current version reenacted in Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36). As a condition of receiving federal child welfare funds, states must implement:

... procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate ... (or both) ... shall be appointed to represent the child in such proceedings - (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child ...

42 U.S.C. § 5106a(b)(2)(A)(xiii); 45 C.F.R. § 1340.14 (2000) (requiring every state to "ensure the appointment of a guardian ad litem ... to represent and protect the rights and best interests of the child").

guardian ad litem in protection proceedings, that the specialty area of representation for children began.⁴⁵ Since that time, child advocates have represented individual children in individual cases, brought class action lawsuits to improve systems, and worked at creating new laws to protect children and improve services.⁴⁶

Another part of the rights debate is the perceived inability of children to assert rights. Adults are presumed to have the capacity to make decisions about their child's daily lives. Children have no presumption of competency,⁴⁷ even though the child because of age and vulnerability may be most impacted by a placement decision. While children are different than adults, it is a mistake to assume that all children are incapacitated and unable to express views. Children are unique and constantly changing. As they grow, their competencies grow and are affected by not only chronological age and maturity, but also by intelligence, education, socio-economic status, geographical location, birth order, culture and life experiences.⁴⁸ As a general rule, children need more protection when they are young and more guidance as they age. Treating the need for protection as presumed incompetence, rather than differentiating between

45. Others have chronicled the history of child advocacy in the United States. See Robert G. Schwartz, *The Development and Direction of Children's Law in America*, CHILD. LEGAL RTS. J. 2 (1996); Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 18-19 (2005); Ventrell, *supra* note 27; HARALAMBIE, *supra* note 2; HAWES, *supra* note 30.

46. Davidson, *Children's Rights and American Law*, *supra* note 4; Howard A. Davidson, *Child Protection Law and Practice at Century's End*, 33 FAM. L.Q. 765 (1999) (providing overview of federal laws and making suggestions for improvements).

47. See *Schall v. Martin*, 467 U.S. 253, 265 (1984) ("[C]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."). See also *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (finding that constitutional rights of children could not be equated with those of adults because of their "peculiar vulnerability . . . inability to make critical decisions in an informed, mature manner . . . and the importance of the parental role in child-rearing"); *Roper v. Simmons*, 543 U.S. 551 (2005) (noting that children lack maturity and responsibility and are more reckless than adults; are more vulnerable to outside influences; and their character is not as fully formed); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799 (1999) (noting under liberal theories of rights, capacity to claim rights either exists fully or not at all).

48. Woodhouse, *Children's Rights*, *supra* note 32, at 380 (noting that "childhood is a journey toward autonomy").

these two concepts, denies children a voice in matters affecting them.⁴⁹

In addition to the problem of defining what rights children should have and the question of capacity, the rights debate involves difficult allocation of power and responsibility issues. While the child does have some recognized "rights," parents have the primary responsibility to meet their child's needs, including food, clothing, shelter, education, religious training, and discipline. The state has a special obligation to protect children under its *parens patriae* power only if the parents fail to do meet the child's needs. The system as it currently exists has no direct responsibility to the children. Children lack political power and standing to participate in proceedings which affect them. Compound that with no right to counsel, and "rights not only fail to be indicated; they fail also to be created."⁵⁰

B. *The Importance of U.S. Ratification of the U.N. Convention on the Rights of the Child*

*The concept of rights . . . marks the minimum essential protections that all persons owe to each other in our society. Children are humans, too . . .*⁵¹

The United Nations Convention on the Rights of the Child (CRC)⁵² has been called "the most important children's rights document in history."⁵³ One hundred ninety-two countries⁵⁴

49. See Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 297 (1995) (noting that nothing in rights rhetoric prevents acknowledging that children need some forms of freedom but also need guidance, support and even control to protect them from harm); Rodham, *supra* note 34, at 489.

50. A.J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 320, 324 (1970).

51. Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 338 (1996) ("[I]f we exclude any human beings from our system of rights, we violate one of the fundamental principles on which our constitutional system of laws, and our very society, is established.").

52. The United Nations Convention on the Rights of the Child, 28 I.L.M. 1448 (Nov. 20, 1989) available at <http://www.ohchr.org/english/countries/ratification/11.htm> (last accessed Sept. 3, 2007) [hereinafter U.N. Convention]. The United States is a signatory to the Convention and is bound "not to contravene" it. Vienna Convention on the Law of Treatise, art. 18, 1155 U.N.T.S. 331 (1980).

53. Woodhouse, *Talking About Children's Rights*, *supra* note 29, at 108. It has also been called "a Bill of Rights for all the world's children." See Alastair Nicholson, *The United Nations Convention on the Rights of the Child and the Need for Its*

have recognized children as “rights holders” by adopting the CRC. The CRC provides a comprehensive framework for recognizing and protecting children’s rights and the rights of their families. The United States has not ratified the CRC which not only protects children, but also empowers them by giving them a voice in custody decisions. CRC Article 12 provides:

1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For the purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The CRC sets no minimum age for a child to be able to express his or her views, but recognizes the child has an evolving capacity for decision making. The CRC does not limit the contexts in which children can express their views.

CRC Article 3 makes the best interests standard universally applicable.⁵⁵ In addition to hearing the child’s voice, the CRC recognizes the importance of children in families. In protecting families, the CRC accords children a “right to know and be cared for by his or her parents”⁵⁶; “the right of the child to preserve his or her . . . family relations as recognized by law”⁵⁷; “the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”⁵⁸; the right to maintain on a regular basis . . . personal relations and direct contacts with both parents” when the par-

Incorporation into a Bill of Rights, 44 FAM. CT. REV. 5 (2006) (noting importance of document granting rights).

54. U. N. Convention, *supra* note 52, at art. 11.

55. *Id.* at art. 3 (“[I]n all actions concerning children, whether undertaken by public or private . . . authorities . . . the best interests of the child [shall be] . . . a primary consideration.”). Admittedly, the best interests of the child standard is indeterminate and subject to ambiguities but it is better than not putting the focus on the child. See *infra* section IV.

56. U. N. Convention, *supra* note 52, at art. 7.

57. *Id.* at art. 8.

58. *Id.* at art. 9 (“[E]nsure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial

ents live in different countries;⁵⁹ and “the right to the protection of the law against . . . interference with his or her privacy or family.”⁶⁰ In addition, a child has the right to “freedom of association.”⁶¹

Two other important provisions of the CRC could also protect children. Article 19 requires states to protect children even from parents or guardians⁶² and Article 27 requires states to “. . . recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”⁶³

Ratification of the Convention itself would be a major step forward in improving the laws that protect and secure rights for children.⁶⁴ The CRC obligates its parties to draft legislation and programs to protect children, to create procedures assuring fairness in removing children from their homes, and to assure that the child’s voice is heard. Article 12 makes the ability of a child to express his or her views an internationally recognized human right which could be regarded as customary interna-

review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”).

59. *Id.* at art. 10.

60. *Id.* at art. 16.

61. *Id.* at art. 15.

62. *Id.* at art. 19.

[T]ake all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child

Id. The United States has ratified the Optional Protocol on the Sale of Children, Child Prostitution and Pornography, G.A. Res. 54/253, Annex II, U.N. Doc., A/RES/541263 (Mar. 16, 2001).

63. *Id.* at art. 27.

[T]he parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Id.

64. See *Recommendations of the Conference Reports of the Working Groups: Lessons of International Law, Norms and Practice*, 6 NEV. L.J. 656, 659 (2006); See also Davidson, *Children’s Rights and American Law*, *supra* note 4.

tional law.⁶⁵ It is time to move beyond the political and economic arguments⁶⁶ that have kept Congress from ratifying the CRC and give children full rights of citizenship.

C. *Constitutional Rights of Children*

*A prime part of the history of our Constitution is the story of the extension of constitutional rights and protections to people once ignored and excluded.*⁶⁷

The United States Supreme Court has noted that constitutional rights “do not mature and come into being magically only when one attains the state-defined age of majority.”⁶⁸ Since 1954, the Supreme Court has increasingly applied equal protection, due process, and other constitutional provisions to children’s claims.⁶⁹ Children are “persons” under the Fourteenth Amendment entitled to equal protection in education,⁷⁰ in laws that establish ages of majority,⁷¹ and in custody disputes involv-

65. *Beharry v. Reno*, 183 F. Supp. 2d 584, 600-01 (E.D.N.Y. 2002) (indicating the CRC could be read as customary international law). See also Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2039-40 (1993).

66. Mary Ann Mason, *The U.S. and the International Children’s Rights Crusade: Leader or Laggard*, 38 J. SOC. HIST. 955 (2005). See also Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children’s Rights*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 437 (1996); Barbara Bennett Woodhouse, *U.N. Convention on the Rights of the Child: Cultural and Political Barriers to Ratification by the U.S.A.*, CONTEMPORARY INTERNATIONAL LAW ISSUES: NEW FORMS, NEW APPLICATIONS 420 (Whyboo P. Heere ed., 1997).

67. *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing RICHARD MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 193 (1987)).

68. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

69. Susan Gluck Mezey, *Constitutional Adjudication of Children’s Rights Claims in the United States Supreme Court 1953-1992*, 27 FAM. L.Q. 307 (1993) (reviewing cases between 1953 and 1993).

70. *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483 (1954) (finding that the stigma of separatism, even if school facilities were of equal quality, deprived black children of the equal protection of the laws guaranteed to all persons under the 14th Amendment); *Plyler v. Doe*, 457 U.S. 202 (1982) (extending the Equal Protection Clause to immigrant children by striking a Texas law excluding children of illegal aliens from attending school).

71. See *Stanton v. Stanton*, 421 U.S. 75 (1975) (striking state laws that established different ages of majority for men and women); *Craig v. Boren*, 429 U.S. 190 (1976) (prohibiting state law which set minimum drinking age based on gender).

ing interracial parents.⁷² Children, including those born out of wedlock,⁷³ are also persons within the meaning of the Bill of Rights.⁷⁴ Children have procreative rights⁷⁵ as well as First Amendment rights.⁷⁶ In several cases, the Supreme Court has recognized that the child has an interest, but balanced it against those of others.⁷⁷

Children have both procedural and substantive due process rights. The United States Supreme Court found that due process must be applied to children being transferred from a juve-

72. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (finding the adverse effects of racial bias on the child cannot be a legitimate factor for denying custody to mother who married a man of a different race).

73. *See Levy v. Louisiana*, 391 U.S. 68 (1968) (finding that illegitimate children had a right to file a claim as beneficiaries under state wrongful death statute); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (striking down state law that excluded illegitimate children from worker's compensation); *Gomez v. Perez*, 409 U.S. 535 (1973) (requiring fathers to support children born out of wedlock the same as those born in wedlock); *N.H. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Trimble v. Gordon*, 430 U.S. 672 (1977) (requiring states to justify intestacy law that discriminated against illegitimate children).

74. *In re Gault*, 387 U.S. 1, 41-42 (1967); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

75. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (recognizing a minor's right to seek judicial approval for an abortion instead of parental consent); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (recognizing minor's right to access to contraceptives); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) (recognizing a minor's right to elect an abortion).

76. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (suspending children for wearing armbands infringed on their First Amendment right to express their political views); *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *rev'd* 2007 WL 1804317 (U.S. Jun 25, 2007) (the Ninth Circuit found that a student's banner referring to marijuana use at school-sponsored event fell under free speech); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (upholding students' right to form a religious club at school as an aspect of free expression); *Erzonik v. City of Jacksonville*, 422 U.S. 205 (1975); *Ginsberg v. New York*, 390 U.S. 629, 636 (1978) (discussing minor's First Amendment rights and New York obscenity law); *but see Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260 (1988) (allowing school principal to censor a student newspaper); *Bethel Sch. Dist No. 403 v. Fraser*, 478 U.S. 675 (1986) (allowing public schools to regulate vulgar, lewd or plainly offensive speech).

77. *See Smith v. Org. of Foster Families*, 431 U.S. 816 (1977) (balancing children's interests in staying in foster care placements with reunification rights of parents); *Santosky v. Kramer*, 455 U.S. 745 (1982) (balancing children's rights to protection from physical abuse with family interest in not terminating parental rights unnecessarily); *Reno v. Flores*, 507 U.S. 292, 304 (1993) (acknowledging that child's "best interests" may be subordinated to interests of parents and others).

nile court to an adult court.⁷⁸ In 1967, the Supreme Court boldly asserted that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”⁷⁹ in its decision that children in delinquency proceedings have a right to procedural due process, including the right to a lawyer when the child’s physical liberty is at stake. Although the child’s rights are not as extensive as an adult’s, children have been given additional protections in criminal proceedings.⁸⁰ In finding that the Eighth Amendment prohibited sentencing juveniles to death for crimes committed as juveniles, Justice Kennedy looked at the UN Convention on the Rights of the Child as evidence of an international consensus against the juvenile death penalty.⁸¹

The Supreme Court has recognized the due process rights of children subjected to state action⁸² and school disciplinary proceedings.⁸³ State and federal courts have affirmed that chil-

78. *Kent v. United States*, 383 U.S. 541, 554 (1966) (waiving jurisdiction by the juvenile court). See also Woodhouse, *Children’s Rights*, *supra* note 32, at 383-87.

79. *In re Gault*, 387 U.S. 1, 41-42 (1967) (finding juvenile in delinquency proceeding had due process rights to notice of the charges, a lawyer, to confrontation and cross-examination of witnesses, and to assert the privilege against self-incrimination). The Supreme Court, however, disclaimed any effort to “consider the impact of . . . constitutional [guarantees] upon the totality of the relationship of the minor and the state.” *Id.* at 13.

80. See *Breed v. Jones*, 421 U.S. 519 (1975) (extending the bar against double jeopardy to juvenile proceedings noting that commitment of a minor to an industrial school is a deprivation of liberty whether criminal or civil); *In re Winship*, 397 U.S. 358 (1970) (extending the reasonable doubt standard of proof); but see *McKiever v. Pennsylvania*, 403 U.S. 528, 545 (1971) (finding due process did not require jury trial for juvenile); *Schall v. Martin*, 467 U.S. 253 (1984) (finding that preventive detention serves legitimate state objective in protecting juvenile); *Fare v. Michael C.*, 442 U.S. 707 (1979) (permitting confession where juvenile asked for probation officer instead of lawyer).

81. *Roper v. Simmons*, 543 U.S. 551, 576 (2005). See Sanford J. Fox, *Beyond the American Legal System for the Protection of Children’s Rights*, 31 FAM. L. Q. 237, 243-47 (1997) (discussing use of international human rights of children in domestic courts); *UNLV Recommendations*, *supra* note 19, at 601 (recommending that lawyers for children be familiar with international law and norms, including conventions, treaties and case law from the European Union on children).

82. See *Parham v. J.R.*, 442 U.S. 584, 606 (1979) (acknowledging children’s due process rights in commitments to mental institutions, but finding procedures were adequate to prevent erroneous commitment when parents had to consult with doctors).

83. See *Goss v. Lopez*, 419 U.S. 565 (1975) (finding student has a right to notice of charges as well as the opportunity to present his or her case before being dismissed from school); *Ingraham v. Wright*, 430 U.S. 651, 653 (1977) (recognizing

dren in foster care possess substantive due process rights under the United States Constitution, including the right to be free from unreasonable risks of harm, the right to reasonable safety, and the right to the provision of adequate services.⁸⁴

The Supreme Court has not yet found a due process right to counsel in dependency proceedings,⁸⁵ or in child custody disputes between parents. In *Mathews v. Eldridge*⁸⁶ the Supreme Court set the stage for recognition of additional due process rights, stating that “procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments.”⁸⁷ The child has a “liberty” interest at stake in dependency proceedings,⁸⁸ or any time the government (through a judicial officer) makes a custody order.⁸⁹

One recent case increases the optimism of those who seek competent advocacy for children. In 2005 a federal district court found that children involved in deprivation proceedings, child neglect or dependency cases, have a constitutional right to counsel.⁹⁰ Even though Georgia had a statute mandating appointment of an attorney for a child, the court stated:

due process right to notice and hearing of student subjected to corporal punishment in schools); see also *New Jersey v. T.L.O.*, 469 U.S. 724 (1985) (balancing the rights of the child with the school’s need to maintain safety and order, the Supreme Court noted that the Fourth Amendment applied to children but allowed warrantless searches of students in public schools based on reasonable suspicion).

84. *Braam v. Washington*, 81 P.3d 851, 856-57 (Wash. 2003) (citing cases).

85. See Jacob E. Smiles, *A Child’s Due Process Right to Legal Counsel in Abuse and Neglect Proceedings*, 37 FAM. L.Q. 485, 486-87 (2003) (arguing there is a right under *Eldridge*).

86. 424 U.S. 319 (1976).

87. *Id.* at 332. *Eldridge* requires that courts balance (1) the private interest at stake; (2) the risk of error involved under current procedural protections; and (3) the government’s interest in the proceeding, including fiscal and administrative burdens. *Id.* at 335.

88. Smiles, *supra* note 85 (noting that in dependency proceedings, the child has a liberty interest in safety, familial relationships, emotional and social interests, and an interest in a stable and permanent home). See *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

89. The same arguments can be advanced when a court orders that one parent have residential custody of a child, thereby restricting the child’s liberty.

90. *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (finding the high caseloads of attorneys who represent children precluded effective representation).

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 [termination of parental rights] proceedings. These include a child's interest in his or her own safety, healthy, 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 parent⁹¹

Other courts have also found that a child has a constitutional right to counsel in child abuse cases.⁹² To date, the numbers are few. Hopefully, more cases will acknowledge that children have a constitutional right to counsel when their custody is at issue.

D. *Statutes and Welfare Rights*

As noted earlier, the Constitution does not mention families, so finding welfare rights is a stretch. There is no affirmative obligation to provide social welfare programs. Congress, however, has enacted several statutes⁹³ that fall under the heading of welfare protection for children, including federal and state child labor laws, education laws,⁹⁴ health assistance,⁹⁵ Social Security Income, and state and federal laws to fund agen-

91. *Id.* at 1359-60.

92. See *Roe v. L.T. Conn.*, 417 F. Supp. 769, 780 (D.C. Ala. 1976); *In re Jamie TT*, 599 N.Y.S.2d 892 (App. Div. 1993); *In re S.A.W.*, 856 P.2d 286, 289 n. 9 (Okla. 1993); *In re Adoption/Guardianship No. 6Z970003*, 731 A.2d 467 (Md. Ct. Spec. App. 1999), *rev'd on other grounds*, 746 A.2d 379 (Md. 2000) (finding twelve year old child was constitutionally entitled to an opportunity to be heard on whether the guardianship would be in his best interest).

93. See *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* ch. 8 (Marvin Ventrell & Donald N. Duquette, eds. 2005) (including a more complete listing of federal laws).

94. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2000) (providing funding for all states to ensure that all children, regardless of disability, have the right to free, appropriate public education); Education for Homeless Children and Youths Act, 42 U.S.C. §§ 11431-11435. There are some states that grant education rights by Constitution or statute. See, e.g., GA. CONST. Art. 8, § 1, PI; ILL. CONST. Art. 10, § 1; COLO. REV. STAT. ANN. § 22-33-103 (2006).

95. State Children Health Insurance Program (SCHIP), Pub. L. No. 105-33; Social Security Act, Title XXI, 42 U.S.C. §§ 1397aa - 1397f.

cies to provide protective, foster care, and adoption services for children.⁹⁶ These child protection laws have been easier to enact than a statement of “rights” for children. But it is difficult to make the separation between needs, interests and rights. We can say that a child has a “right” to a stable family, good education, or adequate medical care; we can also say that to become a productive member of society, a child needs a stable family, a good education and adequate medical care.

Statutory rights are important because they give children standing to enforce their rights. Without a statute, courts are reluctant to expand the rights available.⁹⁷ A federal court used the New Jersey Child Placement Bill of Rights⁹⁸ to support its decision that children maltreated in a state placement adoptive home not only had a federal constitutional claim for deprivation of procedural and substantive due process, but also had a private claim for damages under New Jersey law.⁹⁹ Without enforceable rights, children remain vulnerable. Legislators are willing to have the state, as *parens patriae*, protect abused and neglected children but seem less interested in announcing rights for children that might cost the state money when children seek to assert and enforce those rights. While the United States is doing a better job of forging national protection laws, the United States lags behind other countries in expressly acknowledging or incorporating liberty, equality and dignity rights for children.¹⁰⁰

96. Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101 *et seq.* (1974) (introduced legal definitions of abuse and neglect covering children until their 18th birthday; mandatory reporting requirements for acts (or failures to act) by parents or caretakers that subject children to physical or emotional harm or risk of harm; financial assistance to state child protection agencies, conditioning funding on state legislative and practice reforms; guardian ad litem required in juvenile protection proceedings); Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 50, (codified at 42 U.S.C. § 602 (1982)); Adoption and Safe Families Act, 42 U.S.C. §§ 620-629a, 670-679 (1997).

97. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (finding due process clause did not apply because state had no affirmative duty to protect individual from harm caused by private citizen).

98. N.J. STAT. ANN. § 9:6B-1-6 (West 2002).

99. *K.J. ex rel Lowry v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d 728, 741-45 (D.N.J. 2005).

100. See Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 2-30, 52 (1999).

III. Conflicts Between Parents and Children When Both Have Rights

*[N]otions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children.*¹⁰¹

Must it always be either less or more, either plain or grand? Is it always "or"; is it never "and"? . . . ?¹⁰²

Major objections against granting children rights are raised by those who see a potential conflict with parental authority and family autonomy.¹⁰³ But there does not have to be a conflict. Appointing counsel for a child to get the child's voice in the proceeding merely adds one more, perhaps the most important, voice and perspective to the placement issue. Theoretically, the more information the decision-maker has about an individual child, the more likely the decision will be child-centered.

The Supreme Court has reiterated that parents have the fundamental right to the care, custody and control of their child.¹⁰⁴ Parents traditionally are considered to be the presumptive representatives of the child's best interests.¹⁰⁵ Em-

101. *Parham v. J.R.*, 442 U.S. 584, 631 (1979) (Brennan, J., dissenting).

102. STEPHEN SONDHEIM, *Moments in the Woods, on INTO THE WOODS* (1987). See also Woodhouse, *The Constitutionalization of Children's Rights*, *supra* note 100 (noting that "[w]e tend to perceive rights as a zero-sum game in which others' gains are our losses, rather than as a common enterprise in which each new right adds value to its neighbors").

103. See GUGGENHEIM, *supra* note 3, at 246-47; Wardle, *The Use and Abuse of Rights Rhetoric*, *supra* note 51 (constitutionalizing children's associational claims is corrosive of the nature of family by spurring factionalization); see also Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM. & MARY BILL OF RTS. J. 1101 (2003); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL OF RTS. J. 1071, 1072-73 (2003) (observing that parental autonomy serves the child's welfare by encouraging greater parental investment in child rearing); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 483-84 (1996) (expressing fear that denial of parental rights may have a long term effect of reducing parental commitment to children); ALI *Principles*, *supra* note 18, at § 2.13 cmt.(b) (suggesting that appointment of an advocate for a child may constitute "undesirable and inappropriate intrusion on parental authority").

104. *Troxel v. Granville*, 530 U.S. 57 (2000).

105. *Id.* at 68; *Parham v. J.R.*, 44 U.S. 584, 602 (1979); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

powering parents to speak for children in choosing their religion, school, health care and associations, is presumed to protect the children's interests – and generally does. Usually parents' and children's interests coincide. Most parents want their children to be fed, clothed, housed, free from harm, educated and treated with dignity and respect. Therefore, as a general rule, we can say that a child has the right to be raised by his or her parents without state intervention unless the child is at risk of serious harm, or where divorced or separated parents are unable to resolve a dispute.

Even if parents and children's interests are usually the same, this does not mean that the child's voice should not be heard when there is a potential for conflict. The Supreme Court has assumed in several cases that directly impacted a child's relationship or educational interests that the child's interests were the same as that of the parent.¹⁰⁶ Marty Guggenheim contends that the most egregious error of the children's rights movement is when there is a separation of a child's interests from his or her parents' interests.¹⁰⁷ If the interests of parents and children were always indistinguishable, this would be true. This is just not the case. As Justice Stevens noted in his dissent in *Troxel v. Granville*:¹⁰⁸

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies – the child. . . .

106. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (assuming daughter and legally presumed father had same interest in not having contact with biological father, the court noted, "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship"); *Wisconsin v. Yoder*, 406 U.S. 205, 230-31 (1972) (assuming child and parent would concur in opposing mandatory secondary education); *Troxel v. Granville*, 530 U.S. 57 (2000) (assuming mother's interests and children's were same in limiting paternal grandparent's visitation); but see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (noting that decision to allow noncustodial father standing to challenge daughter's recitation of pledge of allegiance "implicates the interests of a young child who finds herself at the center of a highly public debate").

107. GUGGENHEIM, *supra* note 3, at 13.

108. 530 U.S. 57, 88 (2000).

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.¹⁰⁹

If there is recognition that the child has an interest, then that interest must be presented to the decision-maker along with the interests of the parents.

So when should the child's voice be added to the debate? My answer is whenever the child's interests and the parent's interests are not aligned, or the same. Most of these instances occur when the child needs protection because the parents have lost sight of the needs of their children for some reason. Three reasons that come instantly to mind are abuse and neglect situations, domestic violence in the family and high conflict custody cases. In abuse and neglect cases or when there is domestic violence, a child may have to be removed from parental custody or may already be in state custody. When parents abdicate their responsibility to provide food, shelter or a safe environment, and the state steps in as *parens patriae*, the child's lawyer can ensure that the child's voice is heard as to placement preferences, provision of services that may help keep the family together¹¹⁰ or to see that foster care is a safer alternative.¹¹¹

109. *Id.* at 86-88 (citation omitted). See also *id.* at 97-98 (Kennedy, J., dissenting) (stating that assertion of a parent's rights may intrude upon the child's established relationships with a nonparent caregiver). See also *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting). Justice Douglas in his dissent states: "The Court's analysis assumes the only interests at stake . . . are those of the Amish parents on the one hand, and those of the state on the other." *Id.* at 241. "While the parents, absent dissent, normally speak for the entire family, the education of a child is a matter on which the child will often have decided views . . ." *Id.* at 244.

110. Susan Brooks, *Family Systems Paradigms for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1 (1996); Berta Esperanza Hernandez-Truyol, *Asking the Family Question*, 38 FAM. L.Q. 481 (2004); see also *UNLV Recommendations*, *supra* note 19, at 599 (noting that effective representation of the child in context requires knowledge and assessment of the child and family).

111. For a discussion of the current state of the foster care system and recommendations for improvement, see *Children, Families, and Foster Care*, 14 THE FUTURE OF CHILDREN 1 (Winter 2004).

In high conflict custody cases, a lawyer for the child can protect the child from becoming a casualty in a zero sum game. One or both parents may have self-destructive tendencies that are exacerbated by litigation. One or both parents may have personality disorders or a win-at-any cost mentality. Courts routinely deny children standing in custody cases¹¹² even though the children's futures are at stake. Judges place maximum emphasis on the custody and parenting time decisions awarding what is perceived as fair and equitable to the parties; other issues, such as the child's wishes or needs for stability, get lost. When a parent embroiled in a bitter custody fight demands to see the child's treating therapist's records, the child's voice is relevant in a judge's decision as to whether waiving the therapist-patient privilege is in the child's best interests.¹¹³

When a parent demands 182.5 days of physical custody as a "constitutional right,"¹¹⁴ the child's voice should be added as to whether that arrangement meets the child's needs depending on age, adaptability, activities and attitude. The judge, with the benefit of input from both parents and the child (and possibly other professionals), can then make an individualized finding based on the specific child whether shared residency is in the child's best interest.

The child's voice should be heard in cases that involve maintaining relationships with persons who have a positive sig-

112. *In re Marriage of Osborn*, 135 P.3d 199 (Kan. Ct. App. 2006) (denying teenage child standing to modify father's visitation so she could attend a summer camp); *Miller v. Miller*, 677 A.2d 64 (Me. 1996) (denying children's request to intervene in parent's divorce and be represented by counsel to advocate for their wishes).

113. *In re Berg*, 886 A.2d 980 (N.H. 2005) (finding no abuse of discretion in refusing to waive therapist-patient privilege and noting that when custody of the child becomes the subject of a bitter contest, the personal interests of the contestants in almost all cases obliterate that which is in the best interests of the child, making the interests of both parents become potentially, if not actually, adverse to the child's interests).

114. *See Arnold v. Arnold*, 679 N.W.2d 296 (Wis. Ct. App. 2004) (finding custody award should be in the child's best interests; father had no constitutional right to 50/50 residency split); *Griffin v. Griffin*, 581 S.E.2d 899, 902 (Va. Ct. App. 2003) (noting that the best interests test "reflects a finely balanced judicial response to . . . parental deadlock"). *See also Margaret F. Brinig, Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1358 (2005) (arguing that best interest standard qualifies as a compelling state interest).

nificance in their lives.¹¹⁵ Some state and federal courts have found that a child has the “right” to maintain such relationships.¹¹⁶ If a child is in foster care, the child should have a right to maintain contact with family members to the extent it is in the child’s best interests. When divorcing parents decide on split custody or deny siblings the opportunity to live together or visit with each other, the children should have a voice.¹¹⁷ When a mother attempts to cut off the child’s contact with a man who believed and acted as if he were the father,¹¹⁸ the child’s voice should be heard as to whether to maintain a relationship. When an unmarried couple intentionally procreates either through assisted reproduction technologies or through adoption, the child’s voice should be heard as to whether the biological or legal parent can cut off the child’s relationship with the parent’s former partner when the couple separates.¹¹⁹

115. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 24 (2006) (calling the United States one of the least protective of children’s welfare in terms of state decision making about children’s relationships). See also David D. Meyer, *The Modest Promise of Children’s Relationship Rights*, 11 WM. & MARY BILL OF RTS. J. 1117, 1137 (2003) (noting that if children had relationship rights, judges might “give greater credence to the emotional losses suffered by children when important familial bonds are severed”); Suelyn Scarnecchia, *A Child’s Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL’Y 41, 45-46 (1995) (arguing for a child’s right to maintain existing relations with nonbiological parent).

116. See, e.g., *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) (recognizing fundamental right of a child to be raised by parent); *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000) (recognizing that a child has a fundamental right to preserve relationship with parent); *In re Santos*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (noting that child may have constitutional right to maintain relationship with adoptive parents); *Webster v. Ryan*, 729 N.Y.S.2d 315 (Fam. Ct. 2001) (recognizing child has a constitutional right to maintain relationship with “parent-like” figures).

117. See Ellen Marrus, “Where Have You Been, Fran?: The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation”, 66 TENN. L. REV. 977 (1999); William Wesley Patton, *The Status of Siblings’ Rights: A View into the New Millennium*, 52 DEPAUL L. REV. 1 (2001).

118. See *In re Gallagher*, 539 N.W.2d 479 (Iowa 1995) (finding mother’s husband has standing to claim custody of two-year old he had parented under mistaken belief in his paternity); *Karen P. v. Christopher J.B.*, 878 A.2d 646 (Md. Ct. Spec. App. 2005) (granting custody to mother’s former boyfriend who believed he was the father until mother revealed otherwise in litigation); *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990) (estopping mother from challenging husband’s paternity when she had told him he was child’s father). See also *In re Marriage of Riggs and Hem*, 129 P.3d 601 (Kan. Ct. App. 2006) (allowing stepfather visitation where he was only father child had known for six and a half of child’s seven years).

119. See GUGGENHEIM, *supra* note 3, at 120 (noting that there is nothing unfair in saying that a parent who has voluntarily invited someone else to share

The interests of the child should be at the center of any decision-making. If the child is capable of articulating a perspective, the child should have client-directed counsel to get that voice before the court and the court should seriously consider it. Even if the child is unable to articulate a view, the child's attorney can offer a child-focused assessment of the child's needs. Because the child's best interests may be different than one or both of the parent's interests, the child should have a voice. Giving the child a voice, however, does not necessarily "conflict." Listening to the child does not mean not listening to the parents or others involved in the dispute.¹²⁰ The key is to add the child's voice to the voice of others being presented.¹²¹

IV. What is in the Best Interests of a Child?

*[A judge] acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly*¹²²

Although the "best interest" of the child is the standard used for placement in child abuse and neglect cases after a child has been adjudicated in need of care, the major use (and some

parenting and develop a significant relationship with the child cannot deny access when the relationship ends). Several cases have denied a same-sex partner status to seek custody or visitation with a child conceived or adopted by one partner during the relationship. See *Janice M. v. Margaret K.*, 910 A.2d 1145 (Md. Ct. Spec. App. 2006); *C.E.W. v. D.E.W.*, 2004 Me. 43, 845 A.2d 1146 (Me. 2004). See also Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623, 650-55 (2004) (discussing intentional parenthood cases in the United States). But see *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006) (rejecting co-parenting agreements for two children); *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006) (denying same sex partner de facto parent status for child conceived by artificial insemination during relationship); *Jones v. Barlow*, 153 P.3d 808 (Utah 2007) (same).

120. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1840-41 (1993) (noting that "[a]sking the child question[s], listening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide").

121. Gary B. Melton, *Parents and Children: Legal Reforms to Facilitate Children's Participation*, 54 AMER. PSYCH. 935, 936 (1999) (noting "the participation of children (as well as other interested adults) - to help them feel they are heard - will usually bring parents and children together in shared decision making").

122. *Finlay v. Finlay*, 148 N.E. 624, 636 (N.Y. 1925) (Cardozo, J.).

would argue abuse) of the best interest of the child standard occurs in custody litigation between parents, both of whom are usually fit. While the state generally does not intervene in the intact family,¹²³ when there is a dispute over who is a parent,¹²⁴ when the state steps in to protect an abused or neglected child, or when parents fight over custody and residency of their child, a judge is charged with placing the child according to the "best interests of the child."¹²⁵

The best interests standard emerged after centuries of a paternal presumption, followed by nearly a hundred years of maternal preference under the tender years doctrine.¹²⁶ Because the standard is vague, what is in a child's best interest is in the eye of the decision-maker, making it difficult to predict outcomes. In the 1970s mental health professionals offered the view that stability was the key factor and that sole custody

123. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-47 (1977) (noting in dicta that the state could not destroy an intact family merely by showing that it would promote the child's best interests).

124. When challenging the paternity of a presumed father, many courts require that the best interests of the child be fully considered in resolving competing presumptions. See *Ban v. Quigley*, 912 P.2d 1014 (Ariz. Ct. App. 1990); *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000); *Dep't of Health & Rehab. Servs. v. Privette*, 617 So. 2d 305, 309 (Fla. 1993); *In re Marriage of Ross*, 73 P.2d 331, 339 (Kan. 1989); *Evans v. Wilson*, 856 A.2d 679 (Md. 2004); *C.C. v. A.B.*, 550 N.E.2d 365, 373 (Mass. 1990); *In re Paternity of B.J.H.*, 573 N.W.2d 99, 102 (Minn. Ct. App. 1998); *In re Paternity of Adam*, 903 P.2d 207, 211 (Mont. 1995); *M.F. v. N.H.*, 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991); *McDaniels v. Carlson*, 738 P.2d 254, 261 (Wash. 1987); *In re Paternity of C.A.S.*, 468 N.W.2d 719, 726 (Wis. 1991).

125. See Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820-56 (1999) (defending the best interest of the child standard). See generally LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, Ch. 4 (2004 rev. ed. & Supp. 2007).

126. See MICHAEL GROSSBERG, *A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN AMERICA* (1996) (tracing use of best interests in custody cases). See also Linda D. Elrod, *Reforming the System To Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 505-09 (2001) [hereinafter Elrod, *Reforming the System*]; MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 79-80 (1991) (noting that "[A]s equality and the concurrent concept of gender neutrality have become incorporated into custody decision making, such old, tested, gendered rules that permitted predictable, inexpensive decisions to be made without protracted litigation have been set aside. . . . The result has been increased state regulation of the post-divorce family."). *Id.*

should be awarded to the “psychological parent.”¹²⁷ The civil rights and no fault divorce movements of the 1960s and 1970s led to more women in the workforce, to an increase in father participation in parenting, and to more disputes over child custody. These disputes have led to legislative changes in a number of areas—changing the terminology from “custody” and “visitation” to the more neutral “parenting time”¹²⁸; using court service officers and mental health professionals to conduct investigations and assess parenting capacity;¹²⁹ debates over joint custody or shared parenting,¹³⁰ and new presumptions of best interests, such as the American Law Institute’s approximation rule.¹³¹ While the standard remains indeterminate, the basic tenet - that the person deciding the placement of a child should consider the individual child’s welfare - should not be controversial.

127. See JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1973) (setting out the concept of the psychological parent, the importance of continuity of relationships in a child’s life, an emphasis on the child’s sense of time, and using the least detrimental alternative); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *IN THE BEST INTERESTS OF THE CHILD* (1986); JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 613-14 (2001) (acknowledging that Goldstein, Freud and Solnit deepened lawyers’ basic understanding of children’s developmental needs).

128. See COLO. REV. STAT. ANN. § 14-10-105 (West 2006); WASH. REV. CODE ANN. § 26.09.181(1) (West 2006).

129. See Wingspread Conferees, *High Conflict Custody Cases: Reforming the System for Children - Conference Report and Action Plan*, 34 FAM. L.Q. 589, 596 (2001) [hereinafter *Wingspread Conference Report*]; ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY* (2004). A recent symposium issue contained several articles dealing with differing views of what child custody evaluators can do. See Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005).

130. IOWA CODE § 598.41 (2006) (“[I]f the court denies a request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.”). Joint custody has been criticized by those who see it as awarding fathers’ rights without duties (Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991)); by those who see joint custody as a bargaining chip to reduce child support (Brinig, *Parental Autonomy*, *supra* note 114, at 1367-68 (noting that the strengthening of presumption for joint custody awards increased them and decreased amount of child support paid)); and by those who find it inappropriate in high conflict cases. See Elrod, *Reforming the System*, *supra* note 126, at 508-09.

131. See ALI *Principles*, *supra* note 18, at § 2.09 (2)(3); SCHEPARD, *CHILDREN, COURTS AND CUSTODY*, *supra* note 129, at 165, 167-70.

Marty Guggenheim joins the chorus of those criticizing the best interest standard,¹³² observing that child custody cases are “not really about children” but about the “interests” of the adults.¹³³ I can think of no better reason for giving the child a voice in the custody proceeding to make the decision more child-focused and provide the judge with additional information. To not give the child a voice in his or her placement treats the child as an item of property to be divided which seems to be directly contrary to the child’s best interests.

Even the United States Supreme Court, which does not hear custody matters as a rule, mentioned that parents at odds with each other do not always have the child’s interests at heart:

Experience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the es-

132. GUGGENHEIM, *supra* note 3, at 152-59. The “best interest of the child” standard has been discussed (and criticized) at length in other articles. See, e.g., Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1165, 1181 (1986) (noting that the vagueness of the best interest standard “provides maximum incentive to those who are inclined to wrangle over custody”); Robert H. Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (finding that courts lack capacity to determine which parent is “better” or to discern a child’s best interest; providing a judicial determination of a subjective issue can actually harm children); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (noting that uncertainty in the outcome rewards the parent who is willing to risk litigation); Cheri L. Wood, *Childless Mothers? - The New Catch-22: You Can’t Have Your Kids and Work For Them Too*, 29 LOY. L.A. L. REV. 383, 401-02 (1995) (stating “the indeterminate and speculative nature of custody decisions . . . leaves the parties’ expectations up in the air—and without, in some cases, the prospect of settlement”).

133. GUGGENHEIM, *supra* note 3, at 143. “What bothers judges is having to accept that their order will gravely hurt the losing parent. Anyone even remotely familiar with child custody litigation appreciates the emotional baggage they carry for the contesting adults. The adults are fighting for the most important thing in their world.” *Id.* at 156. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481-82 (1984) (commenting that “legislatures have failed to convey a collective social judgment about the right values”); Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. & CONCIL. CTS. REV. 377, 384 (1997) (observing that the lack of scientific knowledge by the decision maker may result in a custody decision based on personal experience and beliefs of the judge).

trangement of husband and wife beclouds parental judgment with emotion and prejudice.¹³⁴

Research on children of divorce has shown that divorce itself harms a substantial number of children.¹³⁵ Children of divorce feel as if they have been forced to grow up in two worlds which "creates endless and often painful complications."¹³⁶ Children caught in the middle of high-conflict custody cases suffer depression, have less financial support and are at a higher risk of mental illness, substance abuse and educational failure.¹³⁷ One of the most important factors in a child's postdivorce adjustment, and the single best predictor of a poor outcome, is the level and intensity of the conflict.¹³⁸

134. *Ford v. Ford*, 371 U.S. 187, 193 (1962).

135. JUDITH S. WALLERSTEIN, JULIA M. LEWIS, & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000) (finding that one third of children of divorce had serious psychological problems that persisted into adulthood); E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR WORSE: DIVORCE RECONSIDERED* 229 (2002) (finding 20-25 percent of children from divorced families manifest serious social, emotional or psychological problems); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, in 15 *FUTURE OF CHILDREN: MARRIAGE AND CHILD WELL-BEING* 75, 77 (2005) (finding that children of divorce score lower than those of married parents on educational and psychological measures).

136. ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* 21-22, 30-31 (2005) (noting children of divorce were more likely than children from intact families to admit that they felt like a different person with each parent, felt like outsiders in their own home, felt more mature than their years, had frequent feelings of being alone, felt more unsafe emotionally, and were less likely to seek comfort from their parents).

137. See John H. Grych, *Interparental Conflict as Risk Factor for Child Maladjustment*, 43 *FAM. CT. REV.* 97 (2005); Elrod, *Reforming the System*, *supra* note 126, at 496, n. 3-6; JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF HIGH-CONFLICT AND VIOLENT FAMILIES*, 4-5 (1997). See also Catherine C. Ayoub *et al.*, *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 38 *FAM. & CONCILIATION CTS. REV.* 297, 297 (1999).

138. See Janet R. Johnston, *High-Conflict Divorce*, 4 *THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE* 165, 176 (1994) (showing that inter-parental conflict after divorce and the custodial parent's emotional distress are jointly predictive of an increase in problematic parent-child relationships and adjustment problems for children); see also Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 *VA. J. SOC. POL'Y & L.* 98, 108-09 (2002); CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* 19 (1994); Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta-Analysis*, 110 *PSYCHOL. BULL.* 26 (1991).

While only a small number of parents engage in extensive and protracted litigation,¹³⁹ these cases present difficult issues and harm children because of the level of distrust, anger and fear between the parents. Large numbers of these high conflict cases involve domestic violence because batterers are more likely to contest custody.¹⁴⁰ Mothers sometimes are afraid to raise allegations of domestic violence for fear that the judge will think she is trying to gain an advantage for sole custody or trying to alienate the child.¹⁴¹ Recent research, however, shows that half of the allegations of child abuse made during custody litigation are substantiated.¹⁴² Children need an independent voice in high conflict cases,¹⁴³ especially where violence is present, because neither of the parent's attorneys have an obligation to advocate for the child.¹⁴⁴

139. See Elrod, *Reforming the System*, *supra* note 126, at 495, n. 11 (citing sources indicating less than 25 percent of cases are high conflict cases). See also MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* (1999).

140. LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 98 (2002) (noting that batterer's have a need for control and a sense of entitlement, *id.* at 9-10, and use children as weapons to achieve control, *id.* at 72); Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Domestic Violence Cases*, 102 W. VA. L. REV. 237, 253 (1999) (stating that perpetrators of domestic violence are likely to use custody to control the victim). See also PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, *CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* (2003).

141. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Custody Cases*, 35 FAM. L.Q. 527 (2001) (discussing problems with calling parental alienation a syndrome and how allegations harm victims). See also Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 763 (2005) (offering divorce-specific reasons for children, especially young adolescents, to make an alignment with one parent and reject the other, including anger and hurt, moral indignation, worry and sympathy for left-behind parent, and untenable loyalty conflicts and guilt).

142. Janet R. Johnston, et al, *Allegations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 284-85 (2005) (reporting results of study and citing other studies with similar results).

143. See Elrod, *Reforming the System*, *supra* note 126; *Wingspread Conference Report*, *supra* note 129, at 596.

144. Goodmark, *From Property to Personhood*, *supra* note 14, 245. Goodmark discussed the harm that children experience in household with domestic violence, in addition to the fact that the child's wishes will be adverse to at least one of the parents. *Id.* at 319. See also Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 38 FAM. L. Q.

When the stakes are highest (because it involves one's child) and the outcome is unpredictable (because of the best interests standard), the parents are more likely to hire experts, engage in strategic behaviors, and litigate.¹⁴⁵ As parents engage in manipulative and adversarial behaviors, the likelihood of conflict and litigation increases, which in turn, increases the potential for harm to the children. To help minimize the harm, some states have required parents to draft proposed parenting plans, attend parent education classes about the effects of divorce on children,¹⁴⁶ or in extreme cases, allowed courts to appoint special masters or parenting coordinators.¹⁴⁷ Several other interventions have been recommended for highly con-

197, 207-10 (2005) (recommending ways for child's representative to protect child's best interests).

145. GUGGENHEIM, *supra* note 3, at 158; Elrod, *Reforming the System*, *supra* note 126, at 499 (noting that, "an emotional dispute between two parents who profess love for a child turns into courtroom battles with armies of lawyers, mental health professionals, doctors, and court service officers all professing to know the 'right' answer for a child's future"). A 1997 Oregon Task Force Report on Family Law found that "too often, children were treated like property The combative atmosphere made it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce was final." *Id.* at 503. *See also* *Wingspread Conference Report*, *supra* note 129; Attorney Griev. Comm'n v. Kerpelman, 420 A.2d 940 (Md. Spec. Ct. App. 1980) (disciplining attorney who advised his client to physically take the child from his estranged wife when she had court-ordered custody); Mosley v. Nevada Com'n on Judicial Discipline, 22 P.3d 655 (Nev. 2001) (disciplining a judge for his repetitive litigation and tactics in custody dispute); Hendrickson v. Hendrickson, 603 N.W.2d 896 (N.D. 2000) (reporting that parents filed numerous motions for modification and had three appellate decisions between 1995 and 2000).

146. *See* Solveig Erickson & Nancy VerSteegh, *Mandatory Divorce Education Classes: What Do the Parents's Say?*, 28 WM. MITCHELL L. REV. 889, 895 (2001) (showing 28 state parent education programs). *See* IOWA CODE § 598.19A (2006); N.H. REV. STAT. ANN. § 458-D:1 (2004). For more discussion of the value of parent education programs, *see* Lucy S. McGough, *Protecting Children in Divorce: Lessons from Caroline Norton*, 57 ME. L. REV. 13 (2005); Victoria L. Lutz & Cara E. Grady, *Necessary Measures and Logistics to Maximize the Safety of Victims of Domestic Violence Attending Parent Education Programs*, 42 FAM. CT. REV. 363 (2004). Courts have upheld orders that parents attend these programs. *See* Kagin v. Kopowski, 10 F. Supp. 2d 756 (E.D. Ky. 1998) (upholding an order to attend parent education against First Amendment challenge even though class was sponsored by church); Nelson v. Nelson, 954 P.2d 1219 (Okla. 1998).

147. *See* Fultz v. Smith, 97 P.3d 651 (Okla. Ct. App. 2004); AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164 (2006) (noting one role is for parenting coordinator to reduce harmful conflict and promote best interests of children); *Id.* at 168, Guideline VI.

flicted couples.¹⁴⁸ The best intervention, however, may be the appointment of a client-directed lawyer for the child. A lawyer for the child may make the entire process more child-centered. Empowering the child may actually diminish the stress of the high conflict case and make parents less competitive as they focus on the child's perspectives and needs.

One attempt to limit what is perceived as unbridled judicial discretion is to add specific factors into state statutes to make the best interests standard more concrete.¹⁴⁹ If legislatures do not provide the weight to be given to the factors, judges have enormous discretion without all the relevant information.¹⁵⁰ At present, the wishes of the parents as presented by their attorneys tend to dominate the process. Adding more information about the child's life and the child's perspective would result in the judge being able to "weigh" these additional details, rather than ignoring them. The child's needs and perspectives should be weighed at least as heavily as the parents' wishes. The factors themselves need to be more child-centered, incorporating the child's perspective and the child's voice. Even when parents

148. See Elrod, *Reforming the System*, *supra* note 126, at 516-46 (offering several recommendations to help reduce conflict); SCHEPARD, *supra* note 129, at ch. 4-7, 9-12. For a view from psychologists, see MITCHELL A. BARIS ET AL, *WORKING WITH HIGH CONFLICT FAMILIES OF DIVORCE: A GUIDE FOR PROFESSIONALS* (2001); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y 129 (2002).

149. See LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, § 4.3, § 4.4 (2004 rev. ed. & Supp. 2007). See e.g. COLO. REV. STAT. § 14-10-124 (2006).

[T]he court shall consider all relevant factors, including: (I) The wishes of the child's parents as to parenting time; (II) The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences . . . ; (III) The interaction and interrelationship of the child with . . . parents, . . . siblings, and any other person who may significantly affect the child's best interests; (IV) The child's adjustment to his or her home, school, and community; (V) The mental and physical health of all individuals involved . . . ; (VI) The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party; (VII) Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support; (VIII) The physical proximity of the parties to each other . . . ; (IX) Whether one of the parties has been a perpetrator of child abuse or neglect . . . ; (X) Whether one of the parties has been a perpetrator of spouse abuse . . . ; (XI) The ability of each party to place the needs of the child ahead of his or her own needs . . .

Id.

150. Elrod, *Reforming the System*, *supra* note 126, at 518-19.

are in agreement, the judge needs to review the agreement carefully looking at it from the perspective of the child because parents may make parenting plans to suit their desires or convenience that seriously disrupt the child's life¹⁵¹ or are not developmentally appropriate.¹⁵² The parents may agree to a schedule or plan that will result in the loss of something important to the child, such as living with a sibling, being captain of the football, cheerleading or drill team, or working at a good job. Relocation cases can be potentially harmful to children if their voices are not considered.¹⁵³

Almost all states include the child's preference either by statute or case law as a factor in a child custody dispute.¹⁵⁴ For example, K.S.A. 60-1610(a)(3)(B)(iii) provides that the court shall consider "the desires of the child as to the child's custody or residency." Without a client-directed lawyer for the child, the child's voice is heard, if at all, by the attorneys representing the individual parents who each think the child's view is the same as their client's. Some parents want to include the child's voice because they have convinced themselves, and maybe the child, that the child's wishes are to be with them. On the other hand, some parents want to exclude the child's voice because they know the child's voice will add to the other parent's argument. The fact that the child is suggestible, bribable or being manipulated does not mean that the child's voice should not be heard. The judge, as ultimate decision-maker, should have the benefit of all relevant information.

151. See *Colvin v. Colvin*, 914 So. 2d 661 (La. Ct. App. 2005) (reversing award alternating child's custody yearly). See also SCHEPARD, *supra* note 129, at 171 (stating that no study shows that a rigid, equal time division between parents is in the child's best interests and noting that mandated presumption of equal custody undermines the child's voice).

152. Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98 (2002).

153. See Linda D. Elrod, *A Move in the Right Direction? - Best Interests of the Child Emerging as Standard for Relocation Cases*, 3 CHILD CUSTODY J. 29 (2006). See *Dickenson v. Cogswell*, 848 N.E.2d 800 (Mass. App. Ct. 2005) (denying that a move was in the child's best interests because of potential negative effect on parent-child relationship).

154. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: An Explosion of ERISA, Jurisdiction, and Third Party Visitation Cases*, 40 FAM. L.Q. 545, Chart 2, col. 2 (2007).

Courts disagree on how to obtain the preference and the weight it is to be given.¹⁵⁵ Only a few states allow the preference of a child over a certain age to be the deciding factor,¹⁵⁶ mainly in adolescence.¹⁵⁷ There are problems with giving the child the trump card, to decide the ultimate placement issue, in custody cases because of the potential for manipulation, parental pressure, or other factors.¹⁵⁸ As noted earlier, however, this does not mean that the child's voice or perspective is irrelevant. The judge needs a picture of the family and the world from the child's perspective, the child-in-context.

When parents attempt to manipulate the system to their advantage and to their child's disadvantage, the child's voice should be heard. For example, in a recent case, a father demanded to see the treating therapist's records on the child. The New Hampshire Supreme Court recognized that the child had a separate interest to consider, even if the parent and a guardian *ad litem* agreed that a child's therapist-client privilege should

155. See *Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004) (stating that parents are entitled to tape of in-camera interview with child); *Abbott v. Virusso*, 862 N.E.2d 52 (Mass. App. Ct. 2007) (requiring court to make electronic recording of in camera interview with child); *Clark v. Clark*, 721 N.W.2d 6 (N.D. 2006) (failing to interview children was not reversible error); *Brown v. Brown*, 606 S.E.2d 785 (S.C. Ct. App. 2004) (finding trial judge did not need to interview children as to their preferences when guardian *ad litem* told judge); *K.E.S. v. C.A.T.*, 107 P.3d 779 (Wyo. 2004) (finding that the court should not interview the children in camera over parental objection).

156. See GA. CODE ANN. § 19-9-1(3)(A)(2005); W. VA. CODE R. § 44-10-4 (2005).

157. See Woodhouse, *Talking About Children's Rights*, *supra* note 29, at 122; *In re Marriage of Osborn*, 707 N.W.2d 337 (Iowa Ct. App. 2005) (awarding primary residency to father where thirteen year old had strong preference that was given great weight and eleven year old autistic son had clear preference); *Sassower-Berlin v. Berlin*, 820 N.Y.S.2d 602 (App. Div. 2006) (giving great weight to the express wishes of the 13-year-old child's vehement opposition to resuming visitation with their mother); *Eimen v. Eimen*, 131 P.3d 148 (Okla. Civ. App. 2005) (modifying physical custody to father where teenage children complained that 50-50 percent split arrangement was inconvenient, disruptive and uncomfortable and children wanted to live with him); *Basden v. Cole*, 123 P.3d 566 (Wyo. 2005) (changing custody of 13 year old to mother based on child's continuing desire to live with mother and her increasing needs for mother's care). *But see* *O'Connor v. Dyer*, 795 N.Y.S.2d 686 (App. Div. 2005); *Brown v. Brown*, 606 S.E.2d 785 (S.C. Ct. App. 2004) (finding preferences of 6- and 10-year-old children not controlling because they lacked sufficient maturity and were influenced by permissive parent).

158. See HARALAMBIE, *supra* note 2; Emily Buss, *You're My What? The Problem of Child's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1702-03 (1996).

be waived. The court felt that when a minor is mature enough to assert the privilege personally, the assertion may be given substantial weight based upon the child's age, intelligence and maturity; the intensity with which the child advances his preference; and whether the preference is based upon undesirable or improper influences.¹⁵⁹

So what about the best interest standard? Is it value laden? Yes. Is it indeterminate? Yes. Is it used subjectively, rather than objectively? Yes. Should parents make decisions about their children in most cases? Yes. Having said that, if parents refuse to make the decision, have harmed their child, or argue about what is in their child's best interests, a judge is the one required to make the best interest decision. The judge cannot delegate the best interest finding to a lawyer, a guardian *ad litem*, a mental health professional, mediator, or anyone else.¹⁶⁰

Instead of abandoning the best interests standard, the standard should be made more child-centered.¹⁶¹ Let's start with a child-centered, rather than parent-desired, most-convenient-to-parents' plan. A truly child-centered parenting plan would focus on the needs of the particular child and be built to:

(1) maintain, or at least minimally disrupt, the child's stable positive relationships with the other parent, siblings, extended family members, friends, groups (Scouts, church, 4-H), and professionals, such as doctors, therapists, and others;

(2) ensure that the child's education and activities are not, or are only minimally disrupted or affected;

(3) ensure that necessary changes are handled in a way to minimize the negative impacts and maximize the child's ability to develop new or similar supports in the future setting.

To develop this type of a child-centered plan requires that the judge have the necessary information about the child's life. The judge must seek and hear the child's perspective; presume

159. *In re Berg*, 886 A.2d 980, 987-88 (N.H. 2005).

160. *See C.W. v. K.A.W.*, 774 A.2d 745, 749 (Pa. 2001) (trial court's reliance on guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a nonjudicial officer"); *Hastings v. Rigsbee*, 875 So. 2d 772, 777 (Fla. Dist. Ct. App. 2004) (overarching problem is that trial court effectively delegated its judicial authority to parenting coordinator). *See also In re Marriage of Elmer*, 936 P.2d 617 (Colo. Ct. App. 1997); *Wrightson v. Wrightson*, 467 S.E.2d 578 (Ga. 1996).

161. Woodhouse, *Children's Rights*, *supra* note 32, at 399-400.

the child is capable of participation; and craft a plan that is developmentally appropriate for each child.¹⁶² Those making custody decisions should hear the child's voice, not because children should decide the custody issue, but because the judge needs information about the child's perspective to fashion an appropriate order. The point is not to put the child in the middle by forcing the child to choose between parents but to elicit the child's view about the situation and how the child sees the future. It is not just the preference of whether to live with mother or father, but the picture of the family from the child's perspective that will inform the judge's decision. The client-directed lawyer for the child can ensure the best interest standard does not forget the child at its center.

V. Client-Directed Lawyers Give Children A Voice

*The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client . . .*¹⁶³

When circumstances require a judge to make a decision about the child's future, the judge must have sufficient information and enough perspectives to assess the child's best interests. A client-directed attorney should be appointed to represent a child who is in state protection or when the parents are contesting custody and interests are not aligned.¹⁶⁴ As noted earlier, the U.N. Convention on the Rights of the Child Article 12 gives children a basic right to be heard in cases concerning the child's custody and many state statutes currently provide that the child's preference is one factor to consider.¹⁶⁵ Every set of standards and recommendations developed since 1995 have rec-

162. Woodhouse, *supra* note 7, at 751.

163. ABA *Custody Standards*, *supra* note 16, at IV, Cmt. A.

164. Elrod, *Reforming the System*, *supra* note 126, at 525; Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1584 (1996). See Howard Davidson, *The Child's Right to be Heard or Represented in Judicial Proceedings*, 18 *PEPP. L. REV.* 255 (1991); Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 *CREIGHTON L. REV.* 757 (1990); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523, 1562-65 (1994).

165. Elrod & Spector, *supra* note 154, Chart 2. . See *supra* notes 154-55.

ognized that, at least in some instances, a child should have a “lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as are due an adult client.”¹⁶⁶

The existing models are many and varied for lawyer participation in both child protection and custody cases. While federal law mandates that a “guardian ad litem” be appointed in child protection cases, there is no such requirement in custody cases where appointment is discretionary.¹⁶⁷ Even if appointed, only a few jurisdictions have either training requirements or clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do.¹⁶⁸ But just because the child lacks standing¹⁶⁹ and there is a lack of clarity over the role of the lawyer representing a child, does not mean that the lawyer for the child “is the least

166. *ABA Abuse and Neglect Standards*, *supra* note 15, at A-1, A-2; *see ABA Custody Standards*, *supra* note 16, at 133; *Fordham Recommendations*, *supra* note 19, at 1301 (“[t]he lawyer should assume the obligations of a lawyer, regardless of how the lawyer’s role is labelled [sic], be it as guardian ad litem, attorney ad litem, law guardian”); *UNLV Recommendations*, *supra* note 19, at 596.

167. *See Appointment Laws in Adoption, Guardianship, Unmarried Parent and Divorce Cases*, in Elrod & Spector, *supra* note 154 (chart prepared by ABA Child Custody Pro Bono Project). Few courts have addressed the due process rights of a child to have independent advocacy in custody cases. *See* Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 560 (2000); *Reed v. Albaaj*, 723 N.W.2d 50 (Minn. Ct. App. 2006) (noting guardian ad litem appointment is discretionary absent abuse or neglect); *Poll v. Poll*, 588 N.W.2d 583 (Neb. Ct. App. 1999) (finding child had no due process right to counsel in modification proceeding). *But see* *Meldrum v. Novotny*, 599 N.W.2d 651 (S.D. 1999) (finding reversible error in not appointing an attorney for nine year old after death of the mother in custody dispute between father and mother’s boyfriend with whom child had lived for six years); *In re Support of C.L.F.*, 727 N.W.2d 334 (Wis. Ct. App. 2006) (finding error where trial court failed to appoint replacement guardian ad litem where parents could not agree on school).

168. *See* ARIZ. R. FAM L. PROC. RULE 10 (2005); 17B ARIZ. REV. STAT. COMMONWEALTH OF MASS., THE TRIAL CT., PROBATE AND FAMILY CT. DEPT., STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS (2005); ME. SUPR. JUD. CT., STANDARDS OF PRACTICE FOR GUARDIANS AT LITEM IN MAINE CTS. (2005); JUD. COUNCIL OF VA., STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS AD LITEM (CHILDREN) (1995); S.C. BAR CHILDREN’S COMM., GUIDELINES FOR GUARDIANS AD LITEM FOR CHILDREN IN FAMILY CT. (1998); N.H. GUARDIAN AD LITEM BD., CHAPTER GAL 300 CERTIFICATION REQUIREMENTS (2005).

169. *See supra* note 112.

necessary of a group of costly professionals.”¹⁷⁰ I believe that highly skilled, professional lawyering for children has the potential to best protect children and their families.

A. *Eliminating the Term “Guardian ad litem”*

*[Guardians ad litem have been] investigators, expert witnesses, lawyers, lay advocates for an incompetent child’s best interests, mediators, negotiators, supervisors, monitors, friends or advisors to the court, and ears or arms of the court, recommenders, fact finders and de facto decision makers.*¹⁷¹

When the court appoints a guardian ad litem for a child in need of care or when parents are warring over custody,¹⁷² confusion exists over the definition of a “guardian ad litem.”¹⁷³ Over twenty states currently have a guardian ad litem who advocates for the best interests of the child by conducting an investiga-

170. GUGGENHEIM, *supra* note 3, at 159 (lamenting that the lack of clarity allows lawyers to decide who is a better parent based on internal criteria of a good parent).

171. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 2002 LOY. J. PUB. INT. L. 106, 115.

172. See *Short ex rel Oosterhous v. Short*, 730 F.Supp. 1037, 1039 (D. Colo. 1990) (noting “the need for an independent guardian ad litem is particularly compelling in custody disputes. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict.”). See also *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977); Ralph J. Podell, *The “Why” Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973) (describing the child as a “disenfranchised victim used as a pawn in a game of chess being played between its warring parents who frequently want the court to physically cut up and divide the child between them in the same manner that they have [done] emotionally”).

173. See *Fox v. Wills*, 822 A.2d 1289, 1292 (Md. Ct. Spec. App. 2003) (naming four different roles an attorney appointed to represent a child can fill: “waiver of privilege, pure representation, pure investigation, or a combination”). See also FLA. STAT. § 39.4085(20) (2006) (all dependent children “have a guardian ad litem appointed to represent, within reason, their best interests, and where appropriate, an attorney ad litem appointed to represent their legal interests”). Numerous scholars have commented on the problem of role definition. GUGGENHEIM, *supra* note 3, at 162-63; Elrod, *Counsel for the Child*, *supra* note 2, at 57-58 (discussing wide variety of state approaches to representatives for children); Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L. J. 966, 1014 (2006) (noting that state laws are “extremely varied, unclear and lacking uniformity within and among jurisdictions”); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1615 (1996) (discussing roles).

tion, writing reports or otherwise making recommendations¹⁷⁴ with some required to inform the court if the child's wishes differ;¹⁷⁵ eight jurisdictions appoint a child's attorney;¹⁷⁶ the remaining twenty jurisdictions appoint either a hybrid guardian (best interests attorney and child's attorney)¹⁷⁷ or a combina-

174. See WIS. STAT. §767.045(4) (2006) (calling for independent guardian ad litem who is not bound by child's wishes); Raven Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 271, 277, n. 106 (1998) (describing role of GAL in Wisconsin). See also *Ex Parte R.D.N.* 918 So. 2d 100 (Ala. 2005) (finding that court's ex parte communications with the guardian ad litem violated the fundamental right of the father to procedural due process because the parties had no opportunity to contest the GAL recommendation in open court); *In re Marriage of Bates*, 819 N.E.2d 714 (Ill. 2004) (allowing cross examination of GAL who is functioning as fact finder and advocate for the child's preference); *Kennedy v. Maine*, 1999 Me. 85, 730 A.2d 1252, 1256 (Me. 1999) (noting guardian ad litem in custody disputes investigates the facts, learns where the welfare of the ward lies, and reports facts to the court); *Auclair v. Auclair*, 730 A.2d 1260 (Md. Ct. Spec. App. 1999) (guardian ad litem is agent or arm of court); *D.J.L. v. Bolivar County Dep't of Human Servs.*, 8242 So. 2d 617, 623 (Miss. 2002) (noting guardian ad litem in custody disputes investigates the facts, learns where the welfare of the ward lies, and reports facts to the court); *Heistand v. Heistand*, 673 N.W.2d 541 (Neb. 2004) (same); *Clark v. Alexander*, 953 P.2d 145, 152 (Wyo. 1998) (same).

175. See *In re Elizabeth A.*, 617 S.E.2d 547, 554 (W. Va. 2006) (finding the guardian ad litem has duty to faithfully respect the interests of the child and advocate on the child's behalf); *In re Esperanza M.*, 955 P.2d 204 (N.M. Ct. App. 1998) (praising guardian ad litem for presenting child's wishes to court while espousing a contrary position was in the child's best interests); *Bizzell v. Bizzell*, No. CA 03-557, 2004 WL 576228, at *5 (Ark. Ct. App. 2004) ("if the child's wishes differ from the [attorney] ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem"). See also ME. REV. STAT. TIT. 22, 4005(1)(E) (2005); KAN. SUP. CT. ADM. ORDER NO. 100 (2006).

176. See *Schult v. Schult*, 699 A.2d 134 (Conn. 1997) (noting attorney representing minor child could advocate position contrary to the guardian ad litem); *Sheiman v. Sheiman*, 804 A.2d 983, 989 (Conn. App. Ct. 2002) (finding attorney for the child should argue on behalf of his or her client, based on the evidence and applicable law); *Div. Of Youth & Fam. Servs. v. Robert M.*, 788 A.2d 888, 905-06 (N.J. Super. Ct. App. Div. 2002) (finding that "[l]aw guardians are obliged to make the wishes of their clients known, to make recommendations as to who a child's desires can best be accomplished, to express any concerns regarding the child's safety . . . and in a proper case to suggest the appointment of a guardian ad litem"). But see *Miller v. Miller*, 677 A.2d 64 (Me. 1996) (finding that children were not entitled to attorney of their choosing where a guardian ad litem had been appointed even though the children contended that the guardian did not represent their position).

177. See HARALAMBIE, *supra* note 2, at 37. See also CAL. WELF. & INST. CODE § 317 (West 2006); COLO. REV. STAT. ANN. § 19-1-103, § 19-1-111, § 19-3-203 (WEST 2006); D.C. CODE § 16-2304(b)(3) (2006); ILL. COMP. STAT. § 405/2-17 (2006); KAN.

tion of different kinds of representation. Some states have a lawyer guardian ad litem for a child without capacity and a lawyer for an older child.¹⁷⁸

Judges often ask guardians ad litem to perform a variety of roles for which they are not qualified or trained such as parent coordinator, mediator, case manager and counselor.¹⁷⁹ Such requests create numerous potential ethical conflicts for lawyers.¹⁸⁰ The *ABA Abuse and Neglect Standards* retained the term guardian ad litem only because it was the language used in CAPTA and by most states in 1995. The 2003 *ABA Custody Standards* eliminated the term guardian ad litem.¹⁸¹ Recommendations from a recent UNLV Conference called for amending CAPTA to call for a client-directed attorney.¹⁸² The most recent standards, recommendations and the Uniform Representation of Children Act agree that lawyers should not be guardians ad litem who write reports and testify as witnesses or quasi-witnesses.¹⁸³ The 2006 version of the *Uniform Representation of Children Act* eliminates the term "guardian ad litem" but substitutes a "court-appointed advisor" who is "an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of the child in child protective proceedings."¹⁸⁴ This latter approach keeps in mind that there may be the need for someone to be advocating the "best inter-

STAT. ANN. § 38- 2205 (2007); MASS. GEN. LAWS ANN. CH. 119, § 29 (West 2006); N.Y. FAM. CT. ACT § 249 (2005); N.C. GEN. STAT. § 7B-600 (2004); 23 PA. CONS. STAT. ANN. § 6382 (West 2006); TEX. FAM. CODE § 107.012 (Vernon 2006).

178. See MICH. COMP. LAWS ANN. § 712A.17d (1)(h) (West 2005). This model is endorsed by several scholars. See Donald N. Duquette, *Two Distinct Roles/ Bright Line Test*, 6 NEV. L.J. 1240 (2006); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996) (arguing that children who cannot instruct counsel should not have counsel).

179. Elrod, *Raising the Bar*, *supra* note 16, at 181. See also Margaret Dore, *Court-appointed Parenting Evaluators and Guardians Ad Litem: Practical Realities and an Argument for Abolition*, 18(4) DIVORCE LITIG. 53 (2004).

180. See *Fox v. Wills*, 822 A.2d 1289 (Md. Ct. Spec. App. 2003) (noting that each one of the roles that an attorney for the children can assume may lead to an inherent tension between the attorney's role as advocate for the child and his or her duty to the court. In some cases, this may lead the attorney perilously close to violating ethical rules); *In re Christina W.*, 639 S.E.2d 770 (W. Va. 2006) (discussing guardian ad litem's duties to disclose abuse and conflicts under ethical rules).

181. *ABA Custody Standards*, *supra* note 16, at cmt. II.

182. *UNLV Recommendations*, *supra* note 19, at V.A.2.

183. See Haralambie, *Humility and Child Autonomy*, *supra* note 21, at 192.

184. *Uniform Representation of Children Act*, *supra* note 20, at § 2(2)-(4).

ests" of the child. The entire discussion of lawyers for children could be simplified greatly if states would abolish the term "guardian ad litem" or at the least refuse to allow lawyers to serve as guardians ad litem.

B. *"Best Interests Attorney"*

The biggest debate in the area of child representation is whether the lawyer should represent the "best interests" of the child or whether the lawyer should function in a traditional attorney/client relationship with the child. The disagreement is not whether the lawyer should act like a lawyer. The *ABA Custody Standards*, *Fordham* and the *UNLV Recommendations* specify that a lawyer appointed to represent a child should act like a lawyer regardless of the age of the client.¹⁸⁵ The question is whether the lawyer is bound by the client's wishes. The *ABA Custody Standards* provide for two types of attorneys, the child's attorney, just as in the *Abuse and Neglect Standards*, and a "best interests" attorney. The best interest attorney, not a traditional "guardian ad litem,"¹⁸⁶ is not bound by the child's wishes. However, the best interest attorney acts as an attorney at all times, establishing and maintaining a relationship with the child, conducting an investigation, interviewing witnesses, presenting evidence, and advocating for the child.¹⁸⁷ The *Uniform Representation of Children Act* adopted the ABA client-directed model for lawyers appointed as child's attorneys but also includes the best interests attorney who is not bound by the client's directives.¹⁸⁸ The "best interest attorney" advocates for the child's best interests based on relevant facts applied to state law¹⁸⁹ and can use confidential information for the purpose of

185. *ABA Custody Standards*, *supra* note 16, at 133. For a more complete history of the drafting process, see Elrod, *Raising the Bar*, *supra* note 16. See also *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, in *UNLV Recommendations*, *supra* note 19, at 683.

186. *ABA Custody Standards*, *supra* note 16, at V.F. The drafting committee could not garner enough consensus to only specify that all states move to appointment of an attorney for the child.

187. *Id.* at § II.B.2 (requiring to provide legal services to protect a child's best interests) and § III.B (specifying that neither child's attorney or best interests attorney can testify, file a report or make recommendations).

188. *Uniform Representation of Children Act*, *supra* note 20, at § 2(2)-(4).

189. *Id.* at § 13(a).

performing his or her duties.¹⁹⁰ The most common criticism of the “best interests attorney” arises because the attorney can substitute his or her view of what is in the child’s best interest. Placing too much emphasis on the attorney’s determination of best interests all too often ends up usurping the role of the judge.¹⁹¹

Lawyers should not substitute their judgment of best interests for the child’s wishes. Most lawyers are not sufficiently trained in what is in the best interests of a child¹⁹² nor are they appointed as social workers or judges.¹⁹³ As trained advocates, lawyers can empower the child client and speak for them. Many fear that too many “best interests” lawyers substitute their own judgment for that of the child. A child, as a separate individual with potentially discrete and independent views, deserves an attorney who advocates the child’s articulated position to the extent possible.¹⁹⁴ Children’s attorneys should take their direction from the client to the extent possible, advocating the decision the child would make if she or he were capable.¹⁹⁵ So then, the real issue gets back to “capacity.”

190. *Id.* at § 13(d).

191. *Simon Says*, *supra* note 21, at 1389 (criticizing the Uniform Act’s best interest attorney as a hybrid type of representative that advocates have tried to eliminate).

192. Elrod, *Analysis of Proposed Standards*, *supra* note 15, at 2002.

193. *Simon Says*, *supra* note 21, at 1390.

194. *ABA Abuse & Neglect Standards*, *supra* note 15, at § B-4. Stating that a child’s attorney “should elicit the child’s preferences in a developmentally appropriate manner, advise the child, and provide guidance” and “should represent the child’s expressed preferences and follow the child’s direction throughout the course of litigation.” *Id.*

195. *UNLV Recommendations*, *supra* note 19, at IV.A.1.i.(A)-(D). Stating that the child’s attorney should be allowed to determine the child’s position on an issue only if:

(A) the child lacks sufficient capacity to communicate; (B) the child lacks the capacity to make adequately considered decisions in connection with the representation; (C) in child welfare cases, the child’s expressed preferences would be seriously injurious; or (D) when the attorney is functioning in a jurisdiction that requires the attorney to exercise substituted judgment or act as a guardian ad litem.

Id.

C. *The Capacity Issue - Are There Bright Lines?*

*Every child is presumed competent and entitled to his or her representation to the fullest extent feasible given the child's cognitive and developmental capacities, absent a showing that he or she is unable to comprehend or make adequately considered decisions in connection with the representation after being counseled by his or her attorney.*¹⁹⁶

Few disagree that a child who has the capacity to direct litigation should be able to do so.¹⁹⁷ The difficulty with client-directed representation always gets back to the capacity issue and the fact that some children, infants and preverbal, lack it; some children, who arguably have capacity, lack judgment. However, just because the child lacks the maturity to consider all of the implications of a custody determination does not mean that their voice should be silenced. The answer to the question of whether a child has the capacity to direct a lawyer is that it depends on the child, the issue, and the situation.

To ensure the child's voice is heard, we need to reverse the presumption of incapacity and start with a presumption of capacity.¹⁹⁸ Some states presume capacity at a certain age so that children over that age are given a client-directed lawyer; below a best interests lawyer.¹⁹⁹ The *AAML Standards* set the age of

196. First Star website, <http://www.firststar.org/policy rtc.asp> (last visited July 15, 2007).

197. See Duquette, *supra* note 178 (finding child above seven should be able to direct representation). See also *AAML Standards*, *supra* note 17, at 2, § 2.2 (the attorney should discuss with a child of twelve or older the objectives of representation); PETERS, *supra* note 127.

198. *UNLV Recommendations*, *supra* note 19, at IV.A.2.a (starting with presumption that the child is capable and that incapacity on one issue does not lead to blanket incapacity; the attorney should evaluate the child's capacity to communicate and formulate a position for each decision the client would make and should not extrapolate to other matters the inability to communicate as to one matter). See also *Fordham Recommendations*, *supra* note 19, at 1302-09 (noting that the lawyer should not assume the child is incompetent if the child wishes for something that is unwise).

199. See N.M. STAT. § 32A-4-10(C)(E)(2006) (providing that children over the age of fourteen get lawyers; under fourteen get guardians ad litem; and stating that "when a child reaches fourteen years of age, the child's guardian ad litem shall continue as the child's attorney; provided that the court shall appoint a different attorney for the child if: (1) the child requests a different attorney; (2) the guardian ad litem requests to be removed; or (3) the court determines that the appointment of a different attorney is appropriate"). See also IDAHO CODE ANN. § 16-1614 (2005) (for child over twelve years old, attorney can be either guard-

12 as the age of capacity for client-directed lawyering.²⁰⁰ Some have suggested that attorneys should presumptively function as client-directed attorneys for children age seven and above.²⁰¹ That's a good start.

The problem is that for children, capacity is an evolving process and is contextual. It is not an all or nothing proposition. It is true that it is easier to be the client-directed lawyer for a client who can actually direct the representation. It is more difficult to be a client-directed lawyer for an infant or a pre-verbal child. The lawyer's responsibilities with respect to the child client will vary depending on whether the child has the capacity to direct each aspect of the representation.

ian ad litem or client-directed); MINN. STAT. ANN. § 260C.163 (West 2005) (child over ten gets client-directed attorney); WIS. STAT. ANN. § 48.23 (West 2005) (child over twelve get counsel; child under twelve may have a guardian ad litem instead of counsel).

200. *AAML Standards*, *supra* note 17, at 2.2. "There is a rebuttable presumption children twelve and older are unimpaired and that children younger than twelve are impaired." *Id.* "[T]he essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives." *Id.* The *AAML Standards* indicate that the role of the counsel is dictated by whether the child is "impaired," stating that "the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives." *Id.* See also Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57, 67 (1995) (criticizing the *AAML Standards* for treating impairment as an all or nothing proposition based on age instead of recognizing the individuality of children). The *AAML Standards* are also criticized because they mandate that the lawyer "keep the client informed and should adduce facts which the decision-maker should consider, but not advocate a position with regard to the outcome of the case or contested issues." *Id.* at 69 (citing *AAML Standards* § 2.7, 2.8, 2.11, 2.12, 2.13).

201. *UNLV Report of the Working Group on the Role of Age and Stage of Development*, in *UNLV Recommendations*, *supra* note 19, at 623; Duquette, *supra* note 178, at 1241-43, 1248 (arguing that the client-directed model does not work for young children because it lacks guidance for nonverbal children; will not work for children who lack basic cognitive and judgment skills to make decisions about advocacy; and can lead to "unrestrained and unreviewed lawyer discretion" which defeats the rationale for the client-directed approach); Sarah H. Ramsey, *Representation of the Child in Protective Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L. Q. 287, 311 (1983) (indicating that seven is the age by which children are capable of making decisions).

The *Abuse and Neglect Standards* reject the idea that children of certain ages are impaired, disabled, incompetent, or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent.²⁰² The Fordham Recommendations agreed that “neither chronological age by itself nor legal condition is determinative of capacity.”²⁰³ The determinative requirement for capacity is the ability of the child to express a position as to the direction of legal action.²⁰⁴

The *ABA Abuse and Neglect Standards* require the lawyer to determine “whether the child is ‘under a disability’ [pursuant to the Model Rules] with respect to each issue in which the child is called upon to direct the representation.”²⁰⁵ The Model Rules of Professional Conduct, however, provide little guidance. Lawyers are to represent clients in the traditional attorney-client relationship unless the client has “diminished capacity.” The Commentary to Model Rule 1.14 indicates that even a child as young as five or six and certainly those of ten or twelve will often have the ability “to understand, deliberate upon, and reach conclusions about matters affecting his own well-being.”²⁰⁶ Even if a client has “diminished capacity, the Model Rules require a lawyer to intrude on a client’s decision-making capacity to the least extent possible”²⁰⁷ but allow the lawyer to take reasonably necessary protective action to protect a client from physical harm.²⁰⁸

202. *ABA Abuse and Neglect Standards*, *supra* note 15, at § B-3.

203. *Report of the Working Group on Determining Child’s Capacity to Make Decisions*, in *Fordham Recommendations*, *supra* note 19, at 1339-40.

204. *Id.*

205. *ABA Abuse and Neglect Standards*, *supra* note 15, at § B-3.

206. MODEL RULES OF PROF’L CONDUCT R. 1.14, cmt. 1 (2002).

207. *Id.* at cmt. 3 (“[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished . . . because of minority . . . the lawyer shall, as far as reasonable possible, maintain a normal client-lawyer relationship with the client”). Some have suggested that either Rule 1.14 should be amended or a separate Model Rule for Representing Children should be adopted. See *Fordham Recommendations*, *supra* note 19, at 1314.

208. *Id.* at Rule 1.14(b). See also *In re Christina W.*, 639 S.E.2d 770 (W.Va. 2006) (While a guardian ad litem owes a duty of confidentiality to the child, this duty is not absolute; where honoring the duty of confidentiality would result in the child’s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the court in order to safeguard the best interests of the child. In addition to weighing a child’s opinion against the child’s best interests in abuse and neglect proceedings, a guardian ad litem must also balance the child’s desire for confidentiality with the guardian’s duties to the court. Guardian ad litem

The *Uniform Representation of Children Act* does not set a bright line age but rather lists factors for the court to consider in appointing either an attorney, a best interests lawyer or a representative for the child. The factors include "the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceedings, and the value of an independent advocate for the child's best interests."²⁰⁹

D. *Child Centered Representation*

*... lawyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client.*²¹⁰

The key to child-centered representation is to understand the wishes and needs of a particular child in the context of the child's family and the type of litigation. Child-centered representation means that the lawyer knows as much as possible about the child client, the child's developmental stage, the child's family, the child's activities and interests, and the child's needs. In all cases, the lawyer will develop a theory of the case based upon the individual child.

Both sets of ABA Standards and both sets of Recommendations require that the lawyer must meet and get to know the child.²¹¹ The lawyer must do a thorough investigation of the facts surrounding the current custody dispute and the role of all participants, including parents, extended family or others. The lawyer must talk with important people in the child's life to gain perspective on this child's needs and interests. The lawyer will prepare to present evidence, and examine and cross examine witnesses as in other cases. In other words, the child cli-

should have disclosed inappropriate touching by mother's boyfriend so child would not unsupervised.).

209. *Uniform Representation of Children Act*, *supra* note 20, at § 4(b) (abuse and neglect cases); § 6(c) (custody cases adding "the value of a court-appointed advisor's expertise").

210. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1509 (1996).

211. See *ABA Abuse and Neglect Standards*, *supra* note 15; *ABA Custody Standards*, *supra* note 16; *Fordham Recommendations*, *supra* note 19.

ent deserves the same quality of representation that adult clients receive, taking into consideration the unique circumstances of the child.²¹²

For the client who can direct representation, the child's attorney helps the client formulate a position.²¹³ When the client cannot direct representation, the approaches vary depending on the lawyer's role. Both sets of *ABA Standards* recommend that lawyers advocate for the client's legal interests when the child

212. Peters, *supra* note 210, at 1505, 1508 (encouraging lawyers to represent children in a lawyerly way and respect the unique perspective of the child client).

213. *UNLV Recommendations*, *supra* note 19, at IV.A.1.b. To help the client formulate a position, the lawyer should:

- i. Establish or reaffirm the lawyer-client relationship;
- ii. Directly and regularly address confidentiality;
- iii. Start with the child's agenda;
- iv. Meet with the client regularly, and, with the client's consent, the attorney should meet with the client in the client's environment;
- v. Assess the child's capacity to decide but make sure this assessment does not serve as a proxy for formulating a position for the child;
- vi. Empower the child to make certain, even if not all, decisions;
- vii. Help the child to develop decision-making capacity:
 - (A) Model the decision-making process by thinking through consequences with the child;
 - (B) Help the child to understand the different pressures operating on him/her, including negative influences;
- viii. Explore and determine the universe of options with the child:
 - (A) Solicit the child's suggestions;
 - (B) To help further define options, ascertain that the child knows about available services;
 - (C) After consultation with the client and if the child consents, consult with others with relevant information (such as the child's parents, schools, kin, service providers, foster parents, individual evaluators);
- ix. Encourage the child to speak with others (including parents);
- x. Bring the child to court and explain the court process;
- xi. Bring the child to administrative and informal proceedings related to his/her case;
- xii. Help the child to understand whether or not the child has the right to participate in the proceedings;
- xiii. Help the child to understand that the client has the right to have his or her wishes advocated without attribution.

at IV.A.1.e. Helping Children Advocate for Themselves: Children's attorneys should help their child clients become effective advocates and problem-solvers for themselves and to better understand and take active roles if they wish in court proceedings, placement decisions, and other administrative actions affecting them.

Id. at 609-10.

is unable to direct the representation.²¹⁴ The *Fordham Recommendations* require a lawyer representing an impaired or preverbal child to make decisions on behalf of the child “in a contextual, self-aware, deliberate and principled manner.”²¹⁵ When children have diminished capacity, the *UNLV Recommendations* recognize that the attorney may be required to substitute his or her judgment for that of the client and recommends gathering information from a wide range of sources as well as familiarizing oneself with the child’s family, community and culture in order to arrive at or to advocate for a decision the child would make if she or he were capable.²¹⁶ The

214. See *ABA Abuse and Neglect Standards*, *supra* note 15, at § B-4, B-5; *ABA Custody Standards*, *supra* note 16, at V(F), cmt.; *Fordham Recommendations*, *supra* note 19, at 1309-11 IV(B)(2); *UNLV Recommendations*, *supra* note 19, at 609. See also FLA. STAT. § 39.4085(20) (2006) (all dependent children “have a guardian ad litem appointed to represent, within reason, their best interests, and where appropriate, an attorney ad litem to protect their legal interests”). The National Association of Counsel for Children adopted the *ABA Abuse and Neglect Standards* except that the *NACC Standards* call for the lawyer to use a “substituted judgment” role based on objective criteria if the child cannot meaningfully participate. The attorney is required to request the appointment of a guardian ad litem if the child’s wishes could seriously injure the child. *NACC Standards*, *supra* note 17, at B-4.

215. *Fordham Recommendations*, *supra* note 19, at 1312-13.

216. *UNLV Recommendations*, *supra* note 19, at IV.A.1.c. When the child has diminished capacity, the child’s attorney should promote client-directed representation by:

- i. Adopting a position requiring the least intrusive state intervention;
- ii. Being guided by goals that are respectful of and reflect what the client would want and the decision the child would make if the child could formulate a position;
- iii. Respecting the child’s family and social connections;
- iv. Being familiar with the child’s family, community and culture and take precautions to avoid imposing the attorney’s personal standards and cultural values;
- v. Giving special weight to the parent’s preference in the absence of conflict regarding the particular matter at issue, parental incapacity, or harm to the child;
- vi. Utilizing the following rights and values as further guidance:
 - (A) Limitation of state intervention in the child’s life;
 - (B) The child’s right to have his or her family respected;
 - (C) The child’s liberty interest to be free from state custody; and
 - (D) The family’s liberty interest in parental determination of what is in the child’s interests.

Id. at 610.

UNLV Recommendations also require the attorney to advocate for the client's legal interests.²¹⁷

Jean Koh Peters has set out one of the most complete models for child-focused representation which restricts an attorney's discretion by developing a "thickly detailed" understanding of the child in context.²¹⁸ Although her book and research mainly focus on child protection proceedings, the principles are equally applicable to any child custody contest. The Peters model offers three defaults, three overarching or "umbrella" principles, and seven questions to keep lawyers focused on the child.²¹⁹ The point is that client-directed lawyers for children can represent even the youngest of clients. With the development of objective, rather than subjective, criteria and guidelines to keep the representation focused on the child, the client-based model makes the most sense for lawyer representation.

217. *Id.* at IV.A.2.d. (suggesting that the lawyer i. obtain additional pertinent information through investigation and consultation; ii. involve parents in the process, but recognize that parents cannot direct the representation; iii. protect the child's legal interests). *See also id.* at II.A.3 (requiring lawyer to give special weight to the parents' assessments of the child's interests).

218. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997).

219. *Id.* at 49-69. The seven questions to keep lawyers "honest" in representing the child's position and not the lawyer's are:

1. In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?
2. Does the child understand as much as I can explain about what is happening in his case?
3. If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?
4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?
5. Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?
6. Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

Id.

VI. Conclusion

*Children's Voices Must be Heard.*²²⁰

The more time we spend talking about the child's perspective, the more we can expect the process and decisions to be informed by the child's voice. The more information a judge has about the child, the child's family, and what placement can best protect this child and help this child thrive, the better the long term outcomes for children. The child's perspective is only one part of the picture that should be given to the judge, but an essential part.

I agree that "[p]reserving a system that produces protracted, costly custody litigation whenever parents are unwilling to resolve disputes is in the interest of a small number of people, least of all the children."²²¹ Therefore we need to keep working to change the system to better address the needs of children and their families. We do not need fewer lawyers for children, we need more better trained, better paid, and more respected lawyers for children. Lawyers for children not only need all of the skills in interviewing, negotiating, counseling and trial techniques, but they also need to know how to talk to children and have training in child development, child advocacy, and child welfare. Judges need to recognize the need for lawyers for children to ensure that the child's voice is heard and that all relevant information is presented. Progress is being made and the system is changing. When drafting the first set of *ABA Abuse Neglect Standards*, I remember Howard Davidson insisting that there be a section on Courts, because judges have much of the power necessary to change the current system. They can appoint client-directed lawyers for children and be clear about what they want them to do; they can keep their caseloads reasonable; they can try to get them adequate pay. The entire system needs to be reworked to make it work better for children.²²²

220. Bruce A. Green & Annette R. Appell, *Representing Children in Families-Forward*, 6 NEV. L.J. 571, 578 (2006).

221. GUGGENHEIM, *supra* note 3, at 173.

222. See generally *Reforming the System*, *supra* note 126; SCHEPARD, *supra* note 129.

Do children's rights serve children's interests? My answer is an unequivocal yes. Children need both procedural and substantive justice. Children need to be recognized as citizens with rights, making it imperative that the United States incorporate the major principles of the U.N. Convention on the Rights of the Child as a "Bill of Rights" for children.²²³ To date no state has suited up an army of appropriately-trained child attorneys with adequate time, resources and compensation to advocate for children's rights and ensure that the child's voice is heard in all custody disputes. Let's try it.

223. See Davidson, *supra* note 4; Nicholson, *The United Nations - Bill of Rights*, *supra* note 53.