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HUMILITY AND CHILD AUTONOMY IN CHILD WELFARE
AND CUSTODY REPRESENTATION OF CHILDREN

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I. Introduction

In the past twenty-five years, a critical mass of attorneys has made child representation their specialty or a significant part of their family law or child welfare practice.² They have established a recognized subspecialty, with professional organizations, multidisciplinary training, and professional standards. There has long been confusion about the role of an attorney representing children in child welfare and private custody matters, particularly with respect to who determines the positions taken in the litigation.³ In the past decade, several organizations have sought to address this confusion by promulgating standards and recommendations for representing children,⁴ and there have been two invitational symposia to discuss *178 and generate recommendations on representing children.⁵ The National Conference of Commissioners on Uniform State Laws has recently promulgated a uniform act on representing children in child welfare and custody cases.⁶

While there is consensus among commentators to move in the direction of child-directed representation, there is still resistance, especially among judges, to abandon the more familiar guardian ad litem role in which the attorney advocates the child's best interests as determined by the attorney. But even in a substituted judgment model, there is now consensus that the attorney should be guided by objective criteria, not merely the attorney's subjective views and experiences.

The well-intentioned "child savers"⁷ of the late 1960s and *179 early 1970s, when they stayed in the field long enough to see beyond short-term outcomes, learned that what they thought were decisions made in the best interests of children did not always have the beneficial results they had intended. The more they learned about children's attachments and priorities and actual outcomes, the more they realized just how much they did not know and how the unintended consequences of positions taken on behalf of children made their lives worse, not better. Neurobiology, medicine, and child psychology have provided greater information on the effects of child abuse and long-term outcomes.⁸ By the turn of the twenty-first century, a consensus, born of humility, was reached within the legal community concerning child representation in child welfare and custody cases. It was realized that even specially trained attorneys are not equipped to determine what is in the child's best interests. The profession has moved towards giving the child greater autonomy in directing legal representation to allow the child's own position and perspective to be given real advocacy and allowing the judge, not the attorney, to evaluate all of the evidence in determining what is in the child's best interests. However, in representing the child, attorneys have a greater understanding of their need for multidisciplinary *180 collaboration in fulfilling their role as counselors, as well as advocates, for their child clients. This article discusses the recent standards and models of representation and recommends increasing the child's autonomy in directing his or her own representation.

II. The Standards

In 1994, the American Academy of Matrimonial Lawyers (AAML) adopted Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (AAML Standards).⁹ The AAML Standards take the basic position that children should not routinely be appointed attorneys in custody cases, but that when attorneys are appointed for “unimpaired” children, they should be client-directed.¹⁰ The AAML Standards recognize a “serious threat to the rule of law posed by the assignment of counsel for children [in] the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests.”¹¹ Therefore, if the child is deemed “impaired,” a status presumed for children under the age of twelve, the attorney should only present evidence to the court and explain the proceedings to the child, but should not advocate any position at all.¹² The AAML Standards have been criticized for its artificial and impractical distinction between “impaired” and “unimpaired” children, and for abandoning all advocacy for younger children,¹³ and were explicitly *181 rejected by two sets of American Bar Association (ABA) standards¹⁴ and two symposia.¹⁵

The ABA Abuse and Neglect Standards describe a role similar to that of an adult's attorney, advocating the client's expressed position, but provide for advocacy of the child's objectively determined legal interests for certain circumstances.¹⁶ In acquiescence to the reality that courts continue to appoint attorneys in a dual attorney/guardian ad litem role, the ABA Abuse and Neglect Standards strongly recommend abolishing such a role, but do provide *182 some guidance for an attorney who must serve in that role.¹⁷

Because of concerns that the ABA Abuse and Neglect Standards tipped the scale too far towards autonomy at the expense of beneficence,¹⁸ the National Association of Counsel for Children (NACC) initially endorsed the ABA Abuse and Neglect Standards with reservation as to the ABA's Standard B-4, which deals with the attorney's position when the child cannot meaningfully participate or when the child's directions are deemed injurious to the child.¹⁹ The NACC later wrote its own revised version of Standard B-4, which directs the attorney to assume a substituted judgment role based on objective criteria when the child cannot meaningfully participate. The revised version would also require the attorney to request appointment of a guardian ad litem, a discretionary act under the ABA Abuse and Neglect Standards, if the child's wishes are seriously injurious to the child.²⁰

The ABA Custody Standards build on the Abuse and Neglect Standards, with due regard for the concerns underlying the NACC revisions, and continue the client-directed model embodied in the Abuse and Neglect Standards, but also, creates the role of a “best interests attorney,” who is not bound by the child's directives.²¹ Unlike the AAML Standards, the ABA Custody Standards envision a robust advocacy role for the Best Interests Attorney, with the only (but very significant) difference between an attorney functioning in *183 that role and one functioning in a client-directed role being that the Best Interests Attorney may determine the position to be advocated,²² with the related ability to use, without disclosing, client confidences.²³ Determination of the position taken, however, as with the Abuse and Neglect Standards, is a matter of objective determination of the child's legal interests.²⁴ The ABA Custody Standards also require attorneys to establish and maintain a relationship with their child clients, whether acting as a child's attorney or as a Best Interests Attorney.²⁵

III. The Symposia and the Peters Model

In December 1995, Fordham University Law School convened the Conference on Ethical Issues in the Legal Representation of Children, which culminated with the development of a set of recommendations.²⁶ The Fordham Recommendations provided that the child's expressed wishes are always part of a best-interests determination and that the “traditional” client-directed role²⁷ of attorney for a child can, under some circumstances, include consideration of the child's best interests.²⁸ Further, the *184 recommendations rejected the guardian ad litem role for children's attorneys, whereby the attorney would become a quasi-witness.²⁹

Yale professor Jean Koh Peters, the intellectual architect of the Fordham Recommendations from the Working Group on Determining the Best interests of the Child, created a model fleshing out those recommendations.³⁰ Her model of representation posits three defaults, three umbrella principles, and seven questions to keep us honest.³¹ The defaults, principles, and questions restrict the attorney's subjective discretion and require that the attorney develop a "thickly detailed" understanding of "the child-in-context."³² The representation is, therefore, more objective and principled. First, the relationship default requires the attorney to meet and get to know the child, unless there is "weighty independent evidence that the meeting would serve the client no purpose or would yield such a minimal benefit to the client that it is outweighed by the costs to the client of planning such a visit."³³ Second, the competency default views the child's competency along a spectrum within which the child can contribute as much as possible to the representation.³⁴ Finally, the ***185** advocacy default requires the attorney to represent the child's expressed preference about issues unless the client cannot do so adequately in his or her own interest.³⁵ An alternative to the advocacy default exists when addressing the situation where the attorney must represent the child's best interests.³⁶ Under the alternate default, the child's voice, not the lawyer's, continues to be a major focus.³⁷ These defaults represent the starting place from which the attorney must individualize the representation to allow maximum participation of the child, reflecting that child's uniqueness.

Peters' principle one is to "revolve one's actions around one's developing view of both the child-in-context and the theory of the case."³⁸ Principle two is to "respect one's client, whether present or absent."³⁹ Principle three is to "cultivate right relationships with other people in the child's world, keeping in mind the ways in which the child values each of these relationships."⁴⁰ These principles are designed to keep the child's attorney focused on the child's perspective, and to reduce the likelihood that the attorney's subjective views will overshadow the child's interests.⁴¹ Finally, Peters' generated a list of questions to serve as a checklist to keep the child's attorney true to the client.⁴²

***186** In January 2006, the William S. Boyd School of Law at the University of Nevada Las Vegas, convened a symposium entitled Representing Children in Families: Exploring the Relationship Between Children's Advocacy and Justice Ten Years After Fordham (Las Vegas Conference).⁴³ That conference, the most recent national consensus, endorsed all of the Fordham Recommendations and also promulgated its own recommendations.⁴⁴ Most pertinent to a discussion of the role of the child's attorney is Recommendation IV.A., which identifies practicing guidelines for children's attorneys.⁴⁵

***189** The article titled, Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, "unanimously reaffirmed the Fordham commitment to client-directed representation,"⁴⁶ stating that this is the preferred approach even in best interests representation.⁴⁷ In considering a bright-line age rule for whether a child's attorney should adopt a client-directed or best interests role, the group "rejected all such proposals and reaffirmed that all children, regardless of age, were entitled to an attorney who zealously advocates for their expressed wishes."⁴⁸ The organizers of the conference summarized seven themes of the writings produced for the symposium issue published in conjunction with the symposium: "children's voices must be heard; children's individuality must be respected; children must be understood in context; children's families are vitally important; children still need lawyers to serve as lawyers; children's lawyers need to expand their horizons; and children's lawyers must pursue justice for children."⁴⁹ A minority position within the Las Vegas Conference disagreed with limiting child representation to the client-directed model, particularly with very young children.⁵⁰

***190 IV. The Uniform Act**

In July 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (the "Act"),⁵¹ which was originally designed

to implement the ABA Abuse and Neglect Standards. The Act was later broadened to include the ABA Custody Standards. However, NCCUSL was not bound by either of the ABA Standards, and there are some provisions that do not follow either of the ABA Standards. Further, the Act is narrower in scope because as legislation, it cannot promulgate practice standards.⁵² The ABA House of Delegates will consider whether to endorse the Act at its February 2007 meeting. The Act identifies three roles for child representatives: the child's attorney (the traditional client-directed role), the best interests attorney (the role included in the ABA Custody Standards for a child's attorney who is not bound by the client's directives or objectives), and the court-appointed advisor (a new term to define "an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of a child").⁵³

The Act adopts the ABA client-directed position for attorneys in the role of child's attorney.⁵⁴ The Commissioners declined to *191 express a preference for attorneys being appointed in the role of a child-directed attorney or best interests attorney, and declined to provide legislatures with the option of a bright line age-based rule in determining which role an attorney should be appointed, but it does include factors the court should consider in determining which type of representative to appoint.⁵⁵ The Act does make clear, in *192 conformity with both ABA Standards, the AAML Standards, the Fordham Recommendations, and the UNLV Recommendations, that attorneys should not be witnesses or quasi-witnesses (submitting reports or making recommendations other than by means of legal argument based on the evidence), which is a role now assigned to a court-appointed advisor.⁵⁶ Further, in keeping with the modern trend, the Act rejects the hybrid role of attorney/guardian ad litem.⁵⁷ The Act has been criticized for embracing the role of Best Interests Attorney instead of requiring a client-directed model in all cases.⁵⁸

V. The Humble Model for the Future

The client-directed model of child representation (even as modified for children with diminished capacity to direct representation), which is the majority position expressed by the various standards and recommendations, sees the child as having at least some capacity to understand the legal process and formulate the objectives of representation, albeit with the counseling assistance of the attorney.⁵⁹ This recognition of capacity presupposes that the client can know what he or she wants to do within the context of the *193 litigation. Even a substituted judgment model of representation seeks to understand the child's situation through the child's eyes, how decisions will impact on the child's experience of his or her life.⁶⁰ The AAML Standards and both sets of ABA Standards require attorneys to establish and maintain a relationship with their child clients, whether or not they are able to direct representation, and to conduct an independent investigation.⁶¹ Regardless of the model adopted, the NACC recommends that the attorney must engage in regular and meaningful communication with the child.⁶² The Fordham Recommendations,⁶³ UNLV Recommendations,⁶⁴ and the Peters model,⁶⁵ require the attorney to get to know the "child-in-context" to a degree which goes far beyond traditional practice in representing children. The Act requires the attorney acting in either defined role to meet with the child, maintain a relationship with the child, and conduct an independent investigation.⁶⁶ Professor Peters states it most succinctly: the child's attorney must understand "how this client speaks, how this client sees the world, what this client values, and what shows this client respect."⁶⁷ All of this focus on getting to know the child client and his or her context reflects the recognition that the child has important information to provide. I *194 have argued elsewhere that we need to begin to view children and their families as experts on themselves.⁶⁸

The concern for the ramifications of legal positions taken applies to private custody cases as well as to child welfare cases. Children at the center of the dispute are often the only ones whose voices and concerns are not heard. If they are heard at all, it may be only through the filter of someone else's interpretations: the social *195 worker, custody evaluator, court investigator, or even their own attorney or guardian ad litem.

Judges and others often express concern that children not be “put in the middle” of a dispute or that they lack the maturity to make decisions in their cases, are among the most frequently feared consequences of giving children attorneys who function primarily in a traditional role. But children are in the middle of custody and child welfare cases, and it is a fiction to act as if they are not or to act as if denying them representation will shield them from the dispute and its ramifications. Zealous advocacy for the child's positions simply puts the child's perspective before the court to be considered along with the other parties' perspectives. No decision by a judge, any more than any conclusion by a scientist, can be better than the data upon which it is based, and adding the child's own perspective can only help to inform a better decision-making process. It is a gross overstatement to translate, giving children client-directed attorneys, into the proposition that children are deciding their cases or are responsible for the decision made, any more than a parent decides a case by taking a zealously advocated position. The fact that some judges routinely rubber stamp what the child's attorney or guardian ad litem advocates is most appropriately remedied by greater training for judges, not by depriving the child of a real voice at the table and real advocacy.

Attorneys have the training to investigate, organize, and analyze the facts of their cases, to counsel their clients on alternatives, to think creatively about solutions, and to advocate positions on behalf of their clients. All of the recommendations and models discussed in this article require specialized training for attorneys who undertake to represent child clients, regardless of the role assigned to the attorney. That training is necessary to equip the attorney for the special demands of dealing with a child client. But even with that training, attorneys do not have the expertise to know what is best for a given child in a given circumstance.⁶⁹ They do not *196 have the time to get to know the child, family, social structure, and resources well enough to be confident that a position taken will obtain the best result for the child. They will not be involved with the child over a long enough time and with sufficient frequency and intimacy to monitor the actual long-term outcome of the positions taken or the decisions made by the court. The reality is that attorneys come into a child's life at a moment in time and then move on. The ripples of that involvement, and the involvement of the legal system itself, will continue to affect the child and his or her family for years, perhaps for the rest of their lives. Physicians still honor Hippocrates' admonition: “[f]irst, do no harm.”⁷⁰ Attorneys for children would do well to do the same.

Because attorneys for children do not know what is best for children,⁷¹ the child client deserves the respect of having an attorney who will consider his or her positions and the reasons for those positions, who will provide independent counsel to the child to inform those positions, who will attempt to settle the disputes with the other parties, and failing that, who will be an honest broker of the *197 child's positions to the court, and who will marshal the evidence and legal arguments that support those positions.

Footnotes

- 1 Ann Haralambie is a certified family law specialist in private trial and appellate practice in Tucson, Arizona and former president of the National Association of Counsel for Children. She writes and lectures nationally and internationally on topics related to child custody and child abuse. She was on the drafting committees for the two sets of ABA Standards discussed herein, a participant at the two symposia discussed, and the ABA Advisor to the drafting committee for the National Conference of Commissioners on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (2006).
- 2 See, e.g., Marvin Ventrell, *The Practice of Law for Children*, 66 *Mont. L. Rev.* 1, 18-19 (2005) (discussing the growth in the subspecialty of child representation).
- 3 See generally Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (A.B.A. 1993).
- 4 See, e.g., Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 *J. Am. Acad. Matrim. L.* 1 (1995) [hereinafter AAML Standards]; A.B.A., *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 *Fam. L.Q.* 375 (1995), available at [http:// www.abanet.org/family/reports/standards_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf) [hereinafter ABA Abuse and Neglect Standards]; Nat'l Assoc. of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001) [hereinafter NACC Recommendations];

A.B.A., *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 *Fam. L.Q.* 131 (2003), available at <http://www.abanet.org/family/reports/standardschildcustody.pdf> [hereinafter ABA Custody Standards].

- 5 See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 *Fordham L. Rev.* 1303 (1996) [hereinafter *Fordham Recommendations*]; *Recommendations of the UNLV Conference on Representing Children in Families*, 6 *Nev. L.J.* 592 (2006) [hereinafter *UNLV Recommendations*].
- 6 See Nat'l Conference of Comm'rs on Unif. State Laws, *Unif. Representation of Children in Abuse, Neglect, and Custody Proceedings Act* (2006), http://www.law.upenn.edu/bll/ulc/RARCCDA/2006annualmeeting_approvedtext.htm (last visited Nov. 4, 2006).
- 7 The term "child savers" is discussed in reference to a late nineteenth century progressive movement in Anthony M. Platt, *The Child Savers: The Invention of Delinquency* (1969); see also *In re Gault*, 387 U.S. 1, 15 (1967) (discussing the 'child-savers movement'). The term "child-saver" has later been used more generally, usually derisively, to refer to children's attorneys and other professionals in the child welfare and family law systems who substitute their own paternalistic views of children's best interests in place of children's actual rights or family autonomy. See, e.g., Erik Pitchal, *Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing Too Much, on Behalf of Children*, 6 *Nev. L.J.* 1350, 1351 (2006) (stating that "the ideals of the Fordham Conference have not been fully realized in part because of the 'cowboy lawyer' syndrome--a situation in which children's attorneys, believing they are heroic child savers, avoid input from people with knowledge of and experience in the matter at hand--including their clients."); Richard Wexler, *Wounded Innocents: The Real Victims of the War Against Child Abuse* 210 (1995) (noting that protective services "are geared to the needs of the child savers, not the children"); Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, 32 *Colo. Law.* 65 (Jan. 2003) (stating that the "child savers were the early child advocates from which current child advocacy practice has grown," but that "the experience of over a century has taught that children deserve more than sympathy; they also deserve fair processes that respect their autonomy as individuals, family members, and rights-based citizens."); John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders in 20 G.P. Solo* 22, 23 (A.B.A. 2003) (arguing that "family autonomy and its concomitant are under an unrelenting attack from the new child savers" in the context of third-party visitation claims).
- 8 See, e.g., Child Welfare Info. Gateway, *Long-term Consequences of Child Abuse and Neglect* (2006), http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm (last visited Nov. 4, 2006) (summarizing long-term outcomes of abuse and providing additional references to source material).
- 9 See generally AAML Standards, *supra* note 4.
- 10 See *id.* at Standard 2.2, 2.3.
- 11 *Id.* at Standard 2.7, comment.
- 12 *Id.* at Standard 2.7, 2.12, 2.13.
- 13 See, e.g., Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 *J. Am. Acad. Matrim. L.* 57 (1995); Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 *Fam. L.Q.* 105 (2003); Michael D. Drews & Pamela J. Halprin, *Do Current Standards Accomplish the Goal?*, 40 *Fam. Ct. Rev.* 383 (2002); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 *Loy. U. Chi. L.J.* 1, 29-30 (2000); Jessica Cherry, *The Child as Apprentice: Enhancing the Child's Ability to Participate in Custody Decisionmaking by Providing Scaffolded Instruction*, 72 *S. Cal. L. Rev.* 811 (1999); Janet L. Dolgin, *The Age of Autonomy: Legal Reconceptualizations of Childhood*, 18 *Quinnipiac L. Rev.* 421 (1999).
- 14 See ABA Abuse and Neglect Standards, *supra* note 4, at B-3, comment (stating, "[r]ather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This standard relies on empirical knowledge about competencies with respect to both adults and children."); ABA Custody Standards, *supra* note 4, Standard IV(C-1), comment (stating, "[t]hese Standards do not presume 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. The child's ability to contribute to a determination of his or her position is functional,

depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.”).

- 15 See Fordham Recommendations, *supra* note 5, at 1309-11 (recommendation IV(B)(2) sets forth a detailed methodology for determining the child’s legal interests in an objective manner and recommends presenting multiple options to the court if there is no definitively preferable option for the child); UNLV Recommendations, *supra* note 5, at 609 (recommendations in Part IV “expressly reject the notion that there should be a bright line rule based on age or any other generic factor de-marking when a child’s lawyer should treat the child as a traditional client or as an incapacitated client”).
- 16 See ABA Abuse and Neglect Standards, *supra* note 2, at Standards B-4, B-5, comments.
- 17 See ABA Abuse and Neglect Standards, *supra* note 2, at Standard B-2, comment.
- 18 See Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model - The ABA (NACC Revised) Standards of Practice in KIDS, COURT AND COMMUNITY: PROVIDING CHILDREN ACCESS TO JUSTICE* 167 (1999).
- 19 *Id.* at 174.
- 20 See Nat’l Assoc. of Counsel for Children, *ABA / NACC Revised Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, Standard B-4 (1999), available at <http://naccchildlaw.org/training/standards.html>. However, under the NACC Standards, as well as the ABA Standards, if the attorney requests appointment of a guardian ad litem, he or she would continue to advocate the child’s expressed position. Because of the revisions made to Standard B-4, the NACC Revised Standards eliminate Standard B-5, which deals with determination of the child’s legal interests. *Id.*
- 21 See ABA Custody Standards, *supra* note 4, at Standard II(B)(2).
- 22 See ABA Custody Standards, *supra* note 4, at Standard II(B)(1).
- 23 *Id.* at Standard V(B).
- 24 *Id.* at Standard V(F), comment.
- 25 *Id.* at Standard III(E), comment; see also ABA Custody Standards, *supra* note 4, at Standard IV(B) (requiring the child’s attorney to meet with the child “upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed”); *id.* at Standard V (indicating that for the best interests attorney “[m]eetings with the children and all parties are among the most important elements of a competent investigation.”).
- 26 See Fordham Recommendations, *supra* note 5, at 1303.
- 27 The traditional client-directed role is the role of an attorney for an adult, as proscribed by rules of professional conduct. In general, the client determines the objectives of representation when the attorney is acting “traditionally.”
- 28 Fordham Recommendations, *supra* note 5, at 1410-1416. Recommendation I-A(4)(b)(xii) requires the lawyer, when developmentally appropriate, to “collaborate on the identification and selection of case strategies.” *Id.* Recommendation IV-B(3)(b) requires the lawyer for the preverbal or impaired child to achieve a detailed understanding of the child, including “the client’s own words, stories, and desires at every possible point.” Fordham Recommendations, *supra* note 5, at 1410-1416. Recommendation V-A(1) states that as with adults, “lawyers have an ethical obligation to advocate the position of the child unless there is independent evidence that the child is unable to express a reasoned choice.” *Id.*
- 29 *Id.* at 1408-1409 (providing that a lawyer for a child “should not serve as the child’s guardian ad litem or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.”). Fordham Recommendation I-A recommends changes in laws authorizing appointment of a lawyer as guardian ad litem to authorize instead appointment of a lawyer to represent the child and recommends elimination of laws requiring children’s lawyers to assume responsibilities inconsistent with those of a lawyer for the child as the client. *Id.*

- 30 See Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (1997). Professor Peters was a significant drafter of the Fordham Recommendations created from the working group on determining the best interests of the child at the Fordham Conference.
- 31 *Id.* at 49-69.
- 32 Peters, *supra* note 30, at 1-16.
- 33 *Id.* at 50-52.
- 34 *Id.* at 52-54.
- 35 Peters, *supra* note 30, at 54-56.
- 36 *Id.* at 57.
- 37 *Id.*
- 38 *Id.* at 58-59.
- 39 *Id.* at 59-61.
- 40 Peters, *supra* note 30, at 61-64.
- 41 *Id.* at 64.
- 42 Professor Peters' list of questions are:
1. In making decisions about the representation, am I making the best effort to [see] the case from my client's subjective 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 treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one I can explain to my client?
 5. Is it possible that I am making decisions in the case for the gratification of the adults, and not for the child?
 6. Is it possible that I am making decisions 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?
- Peters, *supra* note 30, at 65-69.
- 43 Susan L. Brooks, [Representing Children in Families](#) 6 Nev. L.J. 724 (Spring 2006) (informally called "Fordham II" or "Fordham Las Vegas" by many participants, especially those who were also at the Fordham symposium).
- 44 See UNLV Recommendations, *supra* note 5, at 592.
- 45 UNLV Recommendation IV.A. states:
1. Statement of Principle: Children's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child. Children's attorneys have the responsibility to create the conditions for and promote child-directed representation. Besides enhancing the child's ability to direct representation, such conditions can also help teach the child to advocate for him or herself when the attorney is not present. When children have diminished capacity or are without capacity to direct representation, attorneys should conduct representation in principled ways. When the client lacks capacity to decide, the attorney may be required to interpose other viewpoints or even to substitute her judgment for that of the client. This important step involves 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 her were capable.
 2. Recommendations for Practice Guidelines:
 - a. Assessing the Child's Capacity to Formulate a Position: 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.

- i. Only in the following limited circumstances, may the child's attorney determine the child's position on an issue, using the guidelines in parts IV.A.2.c and d below:
 - (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.
 - b. Helping the Child Formulate a Position: Children's attorneys should employ the following strategies to help the client formulate a position.
 - 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.
 - c. Children with Diminished Capacity: 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.
 - d. Children Lacking Capacity: When the child lacks capacity to communicate a position, the child's attorney should effect client-directed representation by performing the following non-exhaustive list of duties, in addition to those listed above in part IV.A.2.c above for the child with diminished capacity:
 - 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.
 - 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.
- UNLV Recommendations, supra note 5, at Recommendation IV.A.

- 46 The Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, 6 Nev. L.J. (Special Issue) 682 (Spring 2006).
- 47 Id. at 683.
- 48 See Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, supra note 46.
- 49 Bruce A. Green & Annette R. Appell, [Representing Children in Families-Foreword](#), 6 Nev. L.J. 571, 578 (Spring 2006).
- 50 See Donald N. Duquette, [Two Distinct Roles/Bright Line Test](#), 6 Nev. L.J. 1240 (Spring 2006); Robert F. Harris, [A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian ad Litem Model](#), 6 Nev. L.J. 1284 (Spring 2006).
- 51 See Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6.
- 52 Id. Because of concerns for separation of powers issues, the Act in several places gives the alternative of having some provisions adopted by court rule rather than statute.
- 53 Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6 at §§ 2(2)-(4).
- 54 Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6 at § 12. In addressing the duties of the child's attorney where the child cannot or does not provide direction, or where the direction would place the child at risk of substantial harm, the Act provides:
- (d) If a child's attorney determines that the child lacks the capacity or refuses to direct the attorney with respect to a particular issue, the attorney shall:
- (1) present to the court a position that the attorney determines will serve the child's best interests if the position is not inconsistent with the child's expressed objectives;
- (2) take no position as to the issue in question; or
- (3) request appointment of a best interests attorney or court-appointed advisor if one has not been appointed.
- (e) If, despite appropriate legal counseling, the child expresses objectives of representation that the child's attorney reasonably believes would place the child at risk of substantial harm, the attorney shall:
- (1) request the appointment of a court-appointed advisor, if a court-appointed advisor has not been appointed;
- (2) withdraw from representation and request the appointment of a best interests attorney; or
- (3) continue the representation and request the appointment of a best interests attorney.
- (f) The child's attorney may not disclose the reasons for requesting a court-appointed advisor or best interests attorney under subsection (e) except as permitted by [insert reference to this state's rules of professional conduct].
- Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6, at § 12.
- 55 Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6, at § 12. at § 4(b) (regarding abuse and neglect cases, “[i]n determining whether to appoint a child's attorney or a best interests attorney, the court may consider such factors as the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child's best interests”); id. at § 6(c) (regarding custody cases, “in determining whether a child's attorney, best interests attorney, or court appointed advisor is appropriate, the court shall consider such factors as the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, the value of an independent advocate for the child's best interests, and the value of a court-appointed advisor's expertise”).
- 56 Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, supra note 6, at § 14. Section 8(b) makes it clear that a court-appointed advisor “may take only those actions that may be taken by a court-appointed advisor who is not an attorney,” which should dissuade judges from appointing attorneys in the role of court-appointed advisor with the expectation that the attorney will function in a hybrid role. Id. at § 8(b).
- 57 Id. at § 2, 9.

- 58 See, e.g., 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).
- 59 Attorneys are expected to counsel all clients, including adults. By developing a relationship with the child client, and by understanding what is important to the child, the attorney representing a child plays a particularly important role in developing a decision-making partnership.
- 60 See Ann M. Haralambie, [Recognizing the Expertise of Children and Families](#), 6 Nev. L.J. 1277, 1280 (2006).
- 61 See AAML Standards, *supra* note 4, at Standards 2.4, 2.8, 2.12, comments; ABA Abuse and Neglect Standards, *supra* note 4, at Standard C-1; ABA Custody Standards, *supra* note 4, at Standard II(B)(2). The AAML Standards require the attorney for an unimpaired child to represent the client in a traditional role, which would implicitly involve independence in developing evidence. AAML Standards, *supra* note 4. The AAML Standards are explicit in requiring the attorney for an impaired client to investigate evidence to be presented to the court. *Id.*
- 62 See The Nat'l Assoc. of Counsel for Children, [NACC Recommendations for Representation of Children in Abuse and Neglect Cases Recommendation III\(B\)\(2\)](#) (2001).
- 63 See Fordham Recommendations, *supra* note 5, at Recommendation II(A)(3).
- 64 See UNLV Recommendations, *supra* note 5, at Recommendation IV.A.
- 65 See Peters, *supra* note 30 at §§ 1-1, 1-5.
- 66 Nat'l Conference of Comm'rs on Uniform State Laws, [Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act](#), *supra* note 6, at § 11.
- 67 Peters, *supra* note 30, at 258.
- 68 See Haralambie, *supra* note 60. In the article I argue:
Children have their own world view. They alone know what is of greatest subjective importance to them. They know what relationships matter to them. They know what activities they want to remain involved with. They can often provide valuable information on family interactions and other family resources. If we really listen to them, we may be surprised at the insights they have about what does and does not work in their families. We need to go beyond finding out what they want and explore their reasons for what they want, which may lead the attorney-client partnership in an entirely different direction. Further, we need to consider how alternative proposed placements will feel from the child's perspective. The "cure" may be worse for the child than the family dysfunction from which we seek to extricate the child. If we have nothing better to offer the child, then we have no conscionable basis upon which to intervene. [fn: This argument clearly applies to out-of-home placements, but it also applies to various services which the agency may offer the family but which may conflict with other important elements of the fabric of the family's life. For example, counseling appointments which cost the breadwinner his or her job and visitation schedules which deprive the child of favorite extracurricular activities may satisfy agency convenience at the expense of what the family needs. "Routine" services which are not offered based on an individualized need for them may discourage family members and lead to non-compliance.] We need to think about proportionality of responses in light of the impact on the entire life of the child and family. We need to find out how these services will affect the family, beyond our assumptions about the intended benefits.
See Haralambie, *supra* note 60, at 1282.
- 69 See Fordham Recommendations, *supra* note 5, at 1309, Recommendation IV(B)(2) (stating "[n]othing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients. References to the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyers, and the lawyer's lay understanding of child development and children's needs should be considered highly suspect bases for decision making on behalf of her client").
- 70 See, e.g., Peter D. Baird, [Bedside Manners for Lawyers](#), 16 A.B.A Experience 28, 31 (Winter 2006) (stating that for centuries, "physicians have been taught a negative exhortation that lawyers should learn as well. In Latin, it is 'Primum non nocere.' In English it means, '[f]irst, do no harm.'")

Hippocrates, Of the Epidemics § II(5) (Francis Adams trans., 1st ed. 400 B.C.), available at <http://classics.mit.edu/Hippocrates/epidemics.1.i.html> (stating “[t]he physician must be able to tell the antecedents, know the present, and foretell the future- must mediate these things, and have two special objects in view with regard to disease, namely, to do good or to do no harm”).

71

I do not assume that judges themselves trained as attorneys know any better than attorneys what is in the best for a child. But judges' role requires them to make decisions, for better or worse, based on application of the law to the facts presented to them through the evidence. The function of an attorney is not to act as a judge before the case is presented to the judge. The function of the attorney is to represent the client.

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