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Representing Children

PRACTICAL AND THEORETICAL PROBLEMS WITH THE AAML STANDARDS FOR REPRESENTING "IMPAIRED" CHILDREN

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Introduction

The American Academy of Matrimonial Lawyers (A.A.M.L.) has recently adopted Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings ("Standards").[1] This article discusses the aspects of the Standards which apply to "impaired" children, arguing that the categorization of children is impractical in application and not based on sound empirical evidence concerning child development, and that the diminished role of attorneys for "impaired" children, precluding such attorneys from advocating a position, deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney. Finally, the article recommends that attorneys for all children take strong, informed advocacy positions on behalf of their clients, and that organizations seeking to promulgate standards for such attorneys focus on assisting attorneys to make the case- and issue-specific decisions necessary for accommodating children's developmental limitations.

*58 I. The Distinction Between "Impaired" and "Unimpaired" Children

A. The Standards

A major structural component of the Standards is the distinction between "impaired" and "unimpaired" child clients, as determined by the attorney. Standard 2.1 states: "In order to define the appropriate nature of his or her role and responsibilities as counsel for a child, counsel should determine whether the child client is 'impaired' or 'unimpaired."' The Comment to Standard 2.1 indicates that children may be impaired "depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors."[2]

Standard 2.2 provides a rebuttable presumption that children twelve and older are "unimpaired" and that children under twelve are "impaired." The Comment to Standard 2.2 indicates 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."[3] Further, according to the Comment, the presumptive dividing line at age twelve was based on the literature concerning cognitive development,[4] the fact that children as young as twelve have been afforded various constitutional rights, including free speech[5] and abortion privacy rights,[6] ***59** and the views of judges who consider children's custodial preferences.[7]

B. Problems with the Presumptive Age of Impairment

1. Child Development Literature

The literature on cognitive development cited in the Comment to Standard 2.2 is somewhat dated, the literature cited does not consistently support the Standard's position, and the Piagetian concepts of rigid, linear developmental stages upon which the Standard's position is based have been called into question. [8] Child development (which encompasses more than only cognitive development) is meaningful in a forensic context only with respect to specific issues. Therefore, developmental abilities must be seen in a contextual and functional light. [9] Viewed in this way, child development experts have reached conclusions different from those reflected in the Comment to Standard 2.2.

***60** One of the book chapters cited in the Comment points out the important limitation that there has not been systematic research on the competence of children to participate in the decisionmaking process concerning their custody. [10] In another book chapter cited by the Comment, the following qualification is expressed: "Although it is unlikely that children younger than age 7 will be judged competent according to the more stringent standards, it is likely that many may have reasonable preferences and ideas about what happens to them." [11]

It is difficult to use cut-off points, even rebuttable presumptions, for determining competency, or "impairment," because as Allen Buchanan and Dan Brock point out in the context of medical decisionmaking, "[f]or children as well as adults, competence is relative to a specific decision, and an adolescent's competence may vary over time with changes in his or her condition and so may be intermittent or fluctuating." [12] Therefore, it is difficult to speak in terms of child clients being "impaired" or "unimpaired." Older children, who may be deemed "unimpaired," may actually be incompetent with respect to certain issues involved in the representation. If one instance of "impairment" were to render a child "impaired," thereby altering the attorney-client relationship, then no child (and perhaps no adult) could be deemed "unimpaired." Buchanan and Brock further explain:

The statement that a particular individual is (or is not) competent is incomplete. Competence is always competence for some task -- competence to do something. . . . [T]he notion of decision-making capacity is itself incomplete until the nature of the choice as well as the conditions under which it is to be made are specified. Thus competence is decision-relative, not global. A person may be competent to make a particular decision at a particular time, under certain circumstances, but incompetent to make another decision, or even the same decision, ***61** under different conditions. A competence determination, then, is a determination of a particular person's capacity to perform a particular decision-making task at a particular time and under specified conditions. [13] It is not helpful to look at children's competency in terms of a theoretical "reasonable person"; rather, their competency should be compared to that of adults, whose own competency may vary over time and who may not in fact "make important life decisions in a manner that would be judged competent according to prevailing legal standards." [14]

A number of sources show the fragility of the empirical base upon which Standard 2.2 rests, and we may seriously underestimate the competence of children. For example, one study of six- to nine-year-old children concerning the decision to receive an inoculation against swine flu found that even such young children made decisions comparable to those of adults, causing the researcher to state, "our major conclusion is that children are far more competent in decision making than adults believe them to be. Children can learn decisionmaking and, when given the opportunity, make remarkably responsible decisions." [15] Similarly, with respect to psychoeducational decisionmaking Donald Bersoff argues that we should presume that children are capable of making decisions as well as adults and that the burden should fall on those seeking to deprive children of choice to prove a "significant risk of irreversible damage or clear and convincing empirical evidence that at particular ages children do not have sufficiently developed skills to exercise discretion." [16]

The recognition by psychologists that competency is contextual, incremental, and changing, even for adults, makes the attempt to label a child as either "impaired" or "unimpaired" in toto a misleading and disempowering responsibility, and one for which the attorney qua attorney has no particular qualifications.

***62** It is important to realize that the various experts quoted above are talking about decisionmaking, which is a part of directing legal representation. However, the child's attorney can form a decisionmaking partnership with the child, a relationship which may influence the child's decisionmaking. This model is discussed in part in more detail below, but in determining "impairment" it is useful to realize that a functional definition must include the attorney's part of the relationship as well as the child's.

2. Children's Constitutional Rights

The United States Supreme Court has recognized constitutional rights in children under twelve as well as for older children. Most relevant are the pronouncements in United States v. Kent [17] and In re Gault [18] that children accused of delinquent offenses have a constitutional right to counsel. There was no specified age triggering the right to counsel, even though most delinquency statutes permit prosecution of children as young as seven or eight years. There is no question that alleged delinquents younger than twelve have the right to have counsel competently represent them. [19] Similarly, children in delinquency proceedings have the Fifth Amendment right against self-incrimination, must be given Miranda warnings, and have the Sixth Amendment right to confront and cross-examine adverse witnesses. [20] Children are entitled to require that the state prove delinquency allegations against them beyond a reasonable doubt. [21]

The Supreme Court also made clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [22] Children are considered to be "persons" to whom the Constitution applies. [23] For example, First Amendment [24] and Fourth ***63** Amendment [25] rights are extended to children, although not identically to their application to adults. [26] In the abortion context the Court has recognized that "[c] onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." [27] Due process is required in school disciplinary proceedings; although, the scope of protection depends on the severity of the punishment. [28] In none of these cases did the Court put an age limit on the exercise of the constitutional rights involved.

Children have a right to attend public schools which are not legally or factually racially segregated. [29] They have a right to be free from discrimination based on national origin. [30] If they are civilly committed, they have the right to reasonable care and safety. [31] The Supreme Court has intimated that foster children may also have the right to state protection from physical abuse. [32] These rights are particularly illustrative because they are designed to protect children who have done nothing wrong. Children involved in a domestic relations dispute are similarly without fault and in need of protection. The rights guaranteed by the cases cited in this paragraph do not depend on the child's abilities to make decisions, but they do recognize that there are certain basic needs of children which are worthy of protection. Children's interests in living in a safe and stable environment with people they feel close to and in contact with significant persons in their lives are similar interests worthy of protection.

***64** Having the assistance of independent counsel can help to promote and protect those interests. Counsel can present evidence of the child's attachments, preferences, and individual needs, as well as the ability and willingness of the respective parents to meet those needs. Counsel can highlight any dangers posed by the parents or their circumstances and any insensitivities to the child's needs. Further, counsel can suggest ways to maximize the child's best interests or expressed wishes. Expert witnesses and other adults involved with the child client can assist in the attorney's formulation of a child-oriented position even without direct instructions from the child.

In the delinquency context the Supreme Court has stated that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children." [33] In the custody and visitation context, young children may be in the same position: having no voice and receiving no advocacy, despite the fact that they are the most directly affected by the court's decision.

3. Judicial Views of Children's Preferences

The Comment to Standard 2.2 refers to a survey of Virginia judges [34] which was conducted "to determine whether and to what extent they are interested in the views of children who are the subject of the custody dispute." [35] In that survey, 89% of the judges surveyed ranked the preferences of children fourteen or older as dispositive or extremely important, 96% ranked the preferences of children ten to thirteen as extremely or somewhat important, and 92% ranked the preferences of children six to nine as somewhat important or not important. [36] There was no indication that the judges surveyed were responding with reference ***65** to represented children. One would certainly hope that represented children would have the benefit of independent and trained input into their preferences and that the expression of those preferences would include an objective basis for the preference, something which judges may or may not ascertain on their own while eliciting the preference.

The issue of whether a child's custodial preference is given great weight by the judge is an entirely separate issue from whether the child's position should be presented independently to the court. [37] Having a child's attorney advocate a position simply means that certain evidence is presented to the court and interpreted to the court from the child's perspective, not that the court will order what the child's attorney has advocated. The fact that a judge does not follow a preference does not mean that the child should be deprived of an advocate. In addition, the child's attorney advocates a much more comprehensive position than merely the child's custodial preference, which is only one of many factors to be considered. Therefore, the fact that judges may be more likely to give considerable weight to a twelve-year-old's preference than to a six-year-old's is not an indication that a six-year-old's overall position in the case will not be adopted or given considerable weight by the court.

Further, basing a standard on the actual practices of judges, especially based on a survey of judges in one state, without regard for the judges' knowledge of child development, should not constitute a basis for determining whether there is empirical support for a standard that would deprive children of a meaningful voice in court. Judges, who are themselves attorneys, have no particular expertise to determine custody and visitation issues. They are as vulnerable to their own values, biases, and philosophies as untrained children's lawyers are. Choosing a particular ***66** age of assumed competency based on actual judicial practices could merely reflect uninformed stereotypes and prejudices rather than a critical empirical assessment of children's capacities.

C. The Attorney's Incompetence to Determine Impairment

The Standards point out that attorneys are not trained to be able to make decisions about the "impaired" child's best interests. [38] It is illogical to assume, then, that attorneys qua attorneys have the capacity to assess whether a child is "impaired" or not, something few mental health professionals are skilled to assess, [39] even in the forensically common situations of determining juvenile capacity to waive Miranda rights or competency of juvenile delinquents to stand trial as adults. [40]

Further, there is no empirical basis for the idea of global impairment or unimpairment. No child will be competent across the board, with respect to all decisions which need to be made or positions which need to be taken during the course of custody/visitation litigation. [41]

The Comment to Standard 2.2 states that "the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, ***67** to speak thoughtfully about the case and the client's interests at stake, and to appreciate the consequences of the available alternatives." [42] The Comment recognizes that attorneys must be given "meaningful guidance" in determining whether or not the child is "impaired" in order to avoid "dramatically disparate behavior" by different attorneys. However, the Standards do not provide adequate guidance nor indicate how the attorney is to gain that guidance apart from the Standards.

What does the attorney do if the child comprehends some of the issues in the case but not others? What if the child speaks thoughtfully about some aspects of the case but not others? What if the child appreciates only short-term consequences or only some of the alternatives? The Standards require an all-or-nothing determination of impairment, but impairment itself is not an all-or-nothing condition. This is a fundamental empirical flaw in the Standards' distinction between "impaired" and "unimpaired" children.

The Comment to Standard 2.2 advises the attorney to "focus on the process by which a client reaches a position, not the position itself."[43] So long as the child is old enough to be presumed ***68** unimpaired, the lawyer must treat the child as unimpaired if the child is able:

(a) to understand the nature and circumstances of the case, (b) to appreciate the consequences of each alternative course of action, (c) to engage in a coherent conversation with the lawyer about the merits of the litigation, and (d) to express a preference that similarly situated persons might choose or that is derived from rational or logical reasoning . . . .[44]

No guidance is given, however, with respect to determining that a particular child under the age of twelve is "unimpaired." Assuming that the same four criteria are to be applied, attorneys still have no particular competence to assess how the child fares under each criterion. Subjective values are just as likely to influence the attorney's decision concerning impairment as they are to influence the attorney's advocacy position for an "impaired" child client.[45] Further, why is "rational or logical reasoning" the only touchstone? Many adults make important decisions about important issues based on other domains of functioning.

As discussed more fully below, properly trained children's attorneys may be able to make some determinations about the competencies of children with respect to particular issues in the case. However, this same ability is what gives those attorneys the right to participate in formulating the position of an "impaired" child client. To assume that the attorney is unable to perform the second function is inconsistent with the requirement that the same attorney perform the first, especially in an all-or-nothing way.

*69 II. Differences in Representation of "Impaired" and "Unimpaired" Children Under the Standards

A. The Standards

The nature of the representation and duties owed to the court and client are different under the Standards depending on whether the attorney deems the child to be "impaired" or "unimpaired." In general, the attorney's relationship with an "unimpaired" child client is in most respects the same as it is for adult clients not under a disability.[46]

However, the role of the attorney for an "impaired" child client is vastly different. As conceptualized by the Standards, the attorney for an impaired child client should keep the client informed[47] and should adduce facts which the decisionmaker should consider,[48] but should not advocate a position with regard to the outcome of the case or contested issues.[49] The Standards advise counsel not to accept appointment as attorney for the child if the attorney is required to make a recommendation on the outcome of the case.[50] Similarly, attorneys serving as guardians ad litem, whether for "impaired" or "unimpaired" children, are not to make such recommendations.[51] Therefore, under the Standards, attorneys representing "impaired" children (or as guardians ad litem for "impaired" or "unimpaired" children) are primarily directed to provide factual information for the court, with no advocacy duties whatsoever.

*70 B. Attorney as Fact-Finder But Not Advocate is a Perversion of the Role of Attorney

Under the Standards attorneys for "impaired" children are not zealous advocates of any position, which seems to conflict with an attorney's basic ethical duty to represent the client zealously within the bounds of the law.[52] The Standards regarding the

representation of impaired children constitute a radical departure from the generally accepted practice for children's attorneys, adopting the minority view of attorney-as-investigator, which had not been advocated seriously for more than a decade.[53] As Robyn-Marie Lyon notes "If an interested party is entitled to an attorney, surely it is not merely to counsel him, but also to speak for him to the court and to other parties. Independent counsel for a minor is no less obligated to speak for the child-client."[54]

While the various guidelines,[55] cases,[56] and statutes[57] concerning the representation of children differ in many respects, to ***71** the extent that they address the issue, the majority of them do expect the child's attorney to advocate something, whether it is the child's expressed wishes or the attorney's view of the child's ***72** best interests.[58] The Commissioners' Note to ***73** Section 310 of the Uniform Marriage and Divorce Act[59] states that "[t]he attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests."[60]

New Hampshire previously mandated appointment of counsel for children in contested custody or visitation cases.[61] In New Hampshire counsel serve as guardians ad litem. The statute provides that "[w]hen the child's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or some other reason, the guardian ad litem shall be the holder of the privilege [[[[of confidential communications with the child], and have authority to waive the privilege, but only so long as the guardian ad litem reasonably believes that the child cannot act in the child's own interest."[62]

In discussing the role of the guardian ad litem Tara Muhlhauser points out the need to combine the roles of investigator, ***74** champion, and monitor, because only in a symbiotic combination can the guardian ad litem fully represent the child's interests or wishes.[63] Advocacy provides a great deal of assistance to the judge. Not only can the child's advocate provide a more complete factual record for the court, but he or she can organize and analyze the evidence, which a skilled and attentive judge could probably do also. However, of particular importance is that the advocate can offer creative solutions and alternatives and point out inadequacies and dangers in the positions advocated by the other parties. Nowhere is this more important than in cases involving child abuse. Child advocacy, particularly as it relates to abused children, has emerged as a recognized specialty,[64] with its own multidisciplinary professional organizations,[65] periodic professional literature,[66] ongoing professional conferences, and resource centers.[67] For example, in addition to numerous law school child advocacy clinics, Loyola University Chicago Law School has an integrated three-year curriculum to train child advocates, the Civitas ChildLaw Center. As more attorneys become trained through such resources, more attorneys will have creative, state-of-the art recommendations and options to offer the court. The Standards completely preclude this information from coming before the judge if the child is deemed "impaired," a needless denial of assistance for the child and court.

***75** One of the major benefits of requiring that children's attorneys be specially trained[68] is that attorneys will have particular competence to fulfill advocacy roles which are somewhat different than those ordinarily performed by attorneys for adult clients. They will have more knowledge upon which to make objectively child-oriented decisions in cases of "impaired" children. Such training allows the attorney to function as an advocate, but provides the basis upon which the ethical standards set forth in the Model Rules of Professional Conduct[69] ("Model Rules") and the Model Code of Professional Responsibility[70] ("Code") can be applied to impaired or disabled clients.

C. Representing an "Impaired" Child Does Not Need to be Unduly Subjective

The Comment to Standard 2.7 "rejects as fundamentally flawed a rule that gives attorneys the authority to advocate the result they themselves prefer."[71] It is important to realize that requiring or permitting an attorney to exercise independent judgment is a question separate from that of what criteria are used to inform that judgment. For example, there are certain hierarchical needs[72] which do not particularly involve the attorney's subjective values, the child's physical and emotional safety being chief

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among them. [73] Jinanne S.J. Elder has suggested that the ***76** following "presumptions and assumptions" inform decisions regarding children's needs:

1. Provision of basic needs. . . .

2. Provision and maintenance of nurturance, stability and continuity . . . and the avoidance of unnecessary disruptions that can interfere with [the child's] growth and development.

3. Freedom from abuse or neglect . . . .

4. Maintenance of the family. . . . This includes retaining ties among siblings . . . and maintaining ties with biological fathers, even in some cases, where a child is born to a married woman whose husband is not the biological father. . . . In certain circumstances, it also includes at least considering the strong emotional bonds that may exist between a child and a nonbiological caretaker. [74]

Robyn-Marie Lyon, who favors the substituted-judgment model of child representation, suggests that an attorney formulate a position based on evidence of the child's current desires, opinions by persons such as teachers, counselors, babysitters, and neighbors about what the child will desire, and "evidence of what similarly situated mature people wish had been advocated," with the most important source of information coming from the child. [75] Lyon suggests that relevant information includes the ***77** child's separation behaviors when leaving each parent and any pattern of asking for a particular person when the child is hurt, afraid, or in trouble.

Using such information allows the attorney to make a relatively objective determination of the child's needs from the child's perspective, as an adjunct to the "impaired" child's actual expressions of interest. [76] In addition, children's attorneys can seek the expertise of appropriately qualified medical, mental health, and social work professionals to inform their position. [77] Lois Weithorn points out that professional relationships such as those between attorney and client are working partnerships. She advises professionals not to "underestimate the degree to which children's ideas relative to their own needs and goals will provide essential and valuable information." [78] A properly trained child's attorney should have the information, or ability to acquire information and consultation, which will permit a professional and objective ***78** assessment of what the child's position should be, incorporating any input the child client is capable of providing. [79]

Standard 1.2 and its accompanying Comment require that children's attorneys have special training in representing children. The Comment indicates that the training "should include methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping parties to de-escalate conflict," including an interdisciplinary focus. [80] Without specialized and on-going training, the attorney for an "impaired" child is likely to make subjective decisions. However, with proper training, attorneys can learn some of the more objective criteria for assisting in determining the child's position and how to apply them. The Standards oppose the attorney's using independent judgment because as the result of the opinions and values of individual attorneys, "similarly situated children would be subject to dramatically divergent representation depending on the views of the particular lawyer assigned the task. This arbitrariness is the antithesis of the rule of law." [81]

***79** The Comment to Standard 2.7 is simply empirically wrong when stating, in the matrimonial context, that "[w]hen lawyers represent unimpaired clients, the individual lawyer's personal views are virtually irrelevant." [82] Adult choices are vulnerable to persuasion, and even to the subtle influence of the way in which issues are presented. [83] Emotional distress, economic duress, family pressure, peer pressure, and a whole host of other things influence "rational" decision-making by adults who are not otherwise considered to be disabled or impaired. The choice of attorney interjects another source of influence and potential manipulation.

Matrimonial practice is replete with examples of divergent outcomes based on the personal values and opinions of matrimonial attorneys. [84] Attorneys may encourage or discourage joint custody based on personal philosophies. They may refuse to press claims of abuse based on personal biases. They may encourage or discourage alternate dispute resolution based on experience and philosophies. Spousal maintenance may be offered or denied based on the attorney's personal opinions. Specific parenting plans and visitation schedules may be proposed or opposed based on the attorney's personal values and opinions.

***80** In few areas of the law are the attorney's personal values and views as determinative as in matrimonial law. This is largely because the entire field, especially as it relates to custody and visitation, is highly subjective and discretionary, and because litigants are typically under severe emotional distress during all phases of the litigation, rendering them particularly susceptible to persuasion by their counsel. While statutes may provide lists of factors for the courts to consider, those factors, and even society's views about parenting, do not provide clear guidance in determining custody and visitation. [85] Further, limiting the “impaired” child's attorney to the role of neutral fact-finder does not insulate the attorney from using subjective biases and values to determine which facts are brought before the court. [86]

The Comment to Standard 2.7 recognizes that “cases may be decided differently because of the quality of counsel's skill,” a result which is deemed “unavoidable.” [87] But the Comment makes the point that attorneys must abide by the client's decisions, making personal values irrelevant to the attorney's conduct. This statement underestimates the power of the matrimonial attorney's persuasion and predictions, which may be dependent on that attorney's values. Those values, as well as the attorney's skill, may be outcome determinative.

The fact is that who the attorney is and what the attorney's values, biases, and prejudices are, may result in cases being decided differently regardless of the minority or impairment of the attorney's client. Even the determination that a child is impaired ***81** is often an arbitrary, value-laden decision. [88] It is the field of law itself which is discretionary and subjective for all participants, from the parents' attorneys to the custody evaluators to the judge. [89] Allowing the child's attorney a certain amount of discretion in representing the “impaired” child client does not necessarily involve undue subjectivity. Rather than eliminating advocacy for “impaired” children because of the attorney's discretion, the Standards would be more helpful if they referred to the objective criteria which can provide guidance in exercising that discretion.

III. Artificiality of the Distinction

A. The Distinction is Inflexible

The Standards make the distinction between “impaired” and “unimpaired” all-or-nothing. There are neither degrees of impairment nor scope of issues for which the child is impaired which are recognized by the Standards. Such an inflexible distinction, which deprives “impaired” clients of any advocacy whatsoever, is in stark contrast to an attorney's existing responsibilities under ethical codes.

Rule 1.14 of the Model Rules of Professional Conduct discusses the ethical implications of representing parties under a disability, including the disability of minority. [90] That rule requires ***82** attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired. While the Model Rules do not provide more specific guidance for children's attorneys, they do allow a proper amount of flexibility in applying the ethical standard. Under Rule 1.14 a client can be under a disability (“impaired”) with respect to some decisions but not with respect to others. Further, an attorney need modify the attorney-client relationship insofar only as it is not possible to maintain a normal relationship. [91]

Similarly, Ethical Consideration 7-11 of the Model Code states that the attorney's responsibilities “may vary according to the intelligence, experience, mental condition or age of a client.” [92] The attorney must “consider all circumstances then prevailing

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and act with care to safeguard and advance the interests of the client.” [93] Ethical Consideration 7-12 provides that where a client under a disability has no legal representative, the attorney “may be compelled in court proceedings to make decisions on behalf of the client.” [94] EC 7-12 provides further that “[i]f the client is capable of understanding the matter in question or of contributing to the advancement of his interests, . . . the lawyer should obtain from him all possible aid.” [95] As the Model Rules do, the Code permits the attorney a great deal of latitude in modifying the traditional attorney-client relationship to meet the particular disabilities of the client. [96]

***83** While Standard 2.8 also states that “[t]o the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship,” [97] that directive is severely limited by the requirement of Standard 2.7 that the impaired child's attorney “not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation.” [98] Zealous advocacy is a basic duty of an attorney in a litigated case. Therefore, it is difficult to imagine a “normal” attorney-client relationship which prohibits advocacy.

The Comment to Standard 2.8 refers to the Comment to Model Rule 1.14, which states that “a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.” [99] However, the Standards use the Model Rule in support of the requirement that the “impaired” child's attorney inform and advise the child about the case, ironically ignoring the obvious fact that in a custody or visitation case, virtually the entire litigation concerns “matters affecting the client's own well-being.” [100] The Standards allow no flexibility for advocating a position for an “impaired” child client with respect to some or all of these personally relevant issues nor for recognizing degrees of impairment and competence.

An example of a partially disabled client which is familiar to matrimonial lawyers is the representation of an economically disadvantaged battered spouse. The competent attorney recognizes the dynamics of spousal abuse and the impairment of the client resulting from those dynamics. The attorney will advise the client to obtain domestic violence counseling and will take special precautions to protect the client from making decisions unduly influenced by the impairing circumstances. That does not mean that the attorney will seek appointment of a guardian ad litem or make a wholesale change in the normal attorney-client relationship. Rather, the attorney will make some adjustments to the representation. [101]

***84** Similarly, abused children of any age may have impaired ability to make rational judgments concerning their home life. [102] However, they can certainly have input in decisions and may have clearly determinable needs and objectives to advance in a matrimonial proceeding. [103]

The comment to Model Rule 1.14 notes that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” [104] Professor of Psychiatry and Pediatrics Stephen Billick has suggested a graduated degree of involvement in decisionmaking by child clients: a seven to eight-year-old child may participate in decisionmaking; from nine to eleven years of age a child may jointly decide with his parent; from twelve to fourteen years of age a child decides with parental ratification; from fourteen years on, the child should decide. [105] Children as young as seven years old have been deemed capable of directing their attorney's representation, [106] and seven is widely seen as an important milestone. [107] ***85** Children as young as two or three years of age can think independently and have stable and meaningful opinions. [108]

The law of child witnesses has moved away from presumptive ages of competency. [109] At common law the presumptive age of competency was fourteen years. [110] The Federal Rules of Evidence provide that every person is presumed competent. [111] Many states have adopted the Federal Rules of Evidence or have otherwise eliminated presumptive ages for competency. [112] Children as young as three years old have been ruled competent to ***86** testify. [113] Competency to testify involves the ability

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to perceive and relate. Those abilities are also involved in directing representation or, at least, in informing counsel of facts and opinions which allow the attorney to take a position in the case. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses. [114]

It can be argued that even children too young to be competent to testify still benefit from the advocacy model of representation. Children too young to communicate verbally can nevertheless communicate individual needs. For example, physicians and psychologists regularly assess attachment and bonding between infants and their caretakers. [115] Abuse and neglect often ***87** can be identified without verbal confirmation by children. [116] As discussed above, attorneys can make a determination of children's objective needs based on certain hierarchical needs. [117] It can be argued that the children who are least able to give voice to their interests may be the most in need of independent advocacy of their interests. [118]

Competency, in general, is largely functional, whether for adults or children, and involves areas of varying scope and complexity. [119] The Academy's Bounds of Advocacy, for example, provide that attorneys representing adult clients with impaired decisionmaking ability (based on emotional problems, substance abuse, or other reasons) should recommend that the client seek counseling or treatment. [120] Children do not mature in a linear or comprehensive fashion. [121] For example, children's intellectual and emotional maturation is not synchronized. As they develop, children's developmental scores will be scattered across various areas, with a different scatter pattern later on. [122] Further, some decisions which must be made in custody or visitation cases are more complex than others, requiring different degrees of maturity, experience, and judgment. [123] Sarah H. Ramsey suggests that ***88** children's attorneys in child protection cases "assess the child's cognitive ability, emotional maturity, language development, and information and experience in relation to the decision to be made." [124]

Children often have strong opinions about where they want to live and with whom. They have opinions about who makes them feel safe and loved, who scares them, and who hurts them. They know what activities they do and do not enjoy and what friends and relatives they want to see often. Emotional needs are not rationally determined issues, and whether or not the child is able to articulate the reasons for why he or she feels a certain ***89** way and has certain preferences, those feelings and preferences are real.

Even very young children may be able to understand, consider, and direct a position with respect to some decisions (being "unimpaired" with respect to those decisions) while being unable to lend significant aid with respect to others (being "impaired" with respect to those decisions). For example, young children may know who they like to spend time with and what activities are important to them. They may be able to direct counsel to schedule visitation that does not interfere with scouting. They are often able to state whether or not they want third party visitation. On the other hand, they may not be able to appreciate that a "preferred" parent is negligent, abusive, or irresponsible, and therefore an inappropriate physical custodian.

The United States Supreme Court has discussed the differences between a child's maturity to make various types of decisions, distinguishing, for example, between abortion decisions and decisions relating to marriage, voting, and pornography. [125] The Arizona Court of Appeals discussed the various levels of maturity in distinguishing the age limit for various privileges from young children's capacity and standing to file a termination of parental rights petition on their own behalf: [126]

Children may not marry, drive a car, join the armed services or consent to surgery without the consent of a parent or guardian because the legislature has determined these acts require a certain level of maturity and capacity. The same cannot be said of a severance proceeding. Maturity has nothing to do with a child's interest in the substance of such a proceeding. [127] Under traditional rules of representing a client under a disability, an attorney would have the flexibility of following the traditional role of attorney with respect to the former decisions, while making an independent judgment with respect to the other decisions. The same rationale applies to the interest of "impaired" children in having independent advocacy in custody and visitation cases

dealing with their lives. The children could direct their legal positions ***90** with respect to some issues, and could inform but not direct counsel with respect to issues they were not sufficiently mature to decide. [128]

B. Trained Children's Attorneys Have the Skills and Duty to Go Beyond an Inflexible Preclusion of Advocacy for Their Most Vulnerable Clients

The role of an attorney for a young child must take into account a recognition of the fact that the client may be unable to direct counsel because of developmental immaturities. The Standards take the position that because of that inability, the child should not have an attorney. However, attorneys can be trained to learn how to advocate for young children. [129] This clearly goes beyond what legal training provides and requires exposure to multidisciplinary teaching from the fields of mental health, social science, and medicine. [130] The attorney who has this specialized training will learn how to determine a child's objective and subjective needs, how to recognize abusive and neglectful circumstances, and how to maximize the child's interests. Usually consultation with experts already involved in the case will be necessary to determine these matters.

The child's attorney is the only attorney in the case who can focus solely on the needs and perspective of the child. A trained child advocate should be familiar with alternative custody and visitation plans which the parents' attorneys and the judge may not be familiar with. For example, the child's attorney may be able to offer evidence and creative suggestions on how to deal with visitation when there is a high level of conflict between the ***91** parents. [131] A trained child advocate may also be better equipped to prove or disprove abuse issues, which is a highly specialized area of the law. [132] For example, the child's attorney may be aware of models for intervention which can protect a preschool aged child as well as allowing parental contact when there is some concern that the child has been sexually abuse by a parent entitled to visitation, but there is not enough evidence to prove abuse. [133]

If the attorney representing the child has special training and experience, the court will benefit from the specialized knowledge the child advocate possess. Few matrimonial lawyers acquire this specialized knowledge and even fewer stay abreast of the rapidly changing body of knowledge concerning child abuse and children's memory. [134] Trained child advocates generally have a particular interest in children's issues and a greater commitment to staying current on those issues. [135]

Ethical standards for attorneys “remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis, typically in business transactions or in litigation.” [136] This model is inadequate when applied to legal proceedings involving personal family relations, particularly when the parties may be impaired to some degree. Modification of the ethical standards is appropriate even when the “impaired” client is an adult. For example, attendees at a symposium on the ethical issues involved in representing the elderly recommended that attorneys explicitly be given “discretion to act to protect individuals with diminished capacity from various types of harm,” being ***92** authorized to take protective steps even without the client's permission, “guided by the goal of intruding into the client's autonomy to the least extent necessary to protect that person.” [137]

Children caught up in custody or visitation litigation have the same need for protection from harm from their own poor judgment as well as from external sources. A major reason for requiring specialized training for children's attorneys is to give them the skills necessary to assess and recognize their clients' interests and potential areas of harm and to present a position which will aid the clients and the court. The judge, who is not an investigator or a confidante to the child cannot adequately provide that protection, and the parents' attorneys have their own client's interests to weigh. Only the child's attorney is in a position to provide advocacy and protection for the child, and that attorney has an ethical duty to do so. Failure to properly investigate the case and advocate the child's position could constitute malpractice. [138]

IV. Conclusion

The judge is responsible for making the ultimate decisions in the case. He or she is not an investigator or an advocate for a position. The child's attorney represents the voice of the child (whether the child's expressed wishes, best interests, or a combination). Presentation of facts underlying the position is only one part of the attorney's responsibility; advocating the child's position is another part.

The Comment to Standard 3.2, concerning guardians ad litem, expresses the fear that the judge will simply defer to the child's attorney's position. While that is a practical reality in many cases, it represents a dereliction of the judge's duties. [139] In law, the position of the child's attorney or guardian ad litem is not entitled to any more weight than any other argument or evidence ***93** and is not binding on the court. [140] The proper remedy for the problem of improper deference or undue reliance is to educate judges about exercising their mandatory obligation to exercise independent discretion, not to remove the advocacy for the most affected and least powerful person in the case: the child. The judge should no more accept the child's attorney's position automatically than he or she would accept a mother's or father's position automatically.

Children are the least able to present their interests effectively to the court, [141] and the trend towards providing independent counsel for children is the first step towards putting the child's perspective into the process of determining the child's best interests. Unfortunately the determination that a child is “impaired” under the Standards denies that child advocacy. The best that the Standards deliver to such a child is the hope that the judge will consider the evidence presented without any independent interpretation, reminders, or organization from the child's attorney, and reach a decision in the child's best interests. With the other parties' attorneys vigorously advocating their respective positions, it is only the child who is left without a voice.

The emasculated view of the attorney for an “impaired” child client mandated by the Standards prescribes a form of lawyering which could amount to unethical conduct and malpractice. In light of the Standards' recognition of the need for specialized, multi-disciplinary training for children's attorneys and articulation of the duties for attorneys for “unimpaired” children, one would have hoped for a comprehensive and enlightened set of standards to guide attorneys for all children in how to determine and zealously advocate the child's position.

Footnotes

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1 Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (American Academy of Matrimonial Lawyers 1994) [hereinafter A.A.M.L. Standards].

2 Id. s 2.1.

3 Id. s 2.2 cmt.

4 The Comment cites Gary B. Melton, Children's Competence to Consent, in Children's Competence to Consent 1 (Gary B. Melton et al. eds., 1983); Lois A. Weithorn, Involving Children in Decisions Affecting Their Own Welfare, in Children's Competence to Consent 235 (Gary B. Melton et al. eds., 1983); Lois A. Weithorn & Susan A. Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 Child Dev. 1589, 1589-91 (1982); Barbel Inhelder & Jean Piaget, The Growth of Logical Thinking (1958).

5 The Comment cites Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

6 The Comment cites Belotti v. Baird, 443 U.S. 622 (1979); Ohio v. Akron Reproductive Health Ctr., 497 U.S. 502 (1990); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

7 The Comment cites Elizabeth S. Scott et al., Children's Preferences in Adjudicated Custody Decisions, 22 Ga. L. Rev. 1035, 1050 (1988).

8 See, e.g., Rosemary Rosser, Cognitive Development: Psychological and Biological Perspectives 11, 24 (1994) ("Detection of early competence is damaging to Piaget's analysis since he constrained knowledge acquisition to specific time frames"; "[t]he stage hypothesis has not fared all that well empirically"); Richard A. Shweder et al., Culture and Moral Development, in The Emergence of Morality in Young Children 1, 13 (Jerome Kagan & Sharon Lamb eds., 1987) ("It has come to be acknowledged that human cognitive growth is not very stagelike, and no single cognitive stage (preoperational, concrete operational, formal operational) is a characteristic property of an individual's cognitive functioning."); Rochel Gelman & Renee Baillargeon, A Review of Some Piagetian Concepts, in 3 Manual of Child Psychology 167 (John H. Flavell & Ellen M. Markman eds., 1983) ("the experimental evidence available today no longer supports the hypothesis of a major qualitative shift from preoperational thought"). See generally Elizabeth S. Spelke, Where Perceiving Ends and Thinking Begins: The Apprehension of Objects in Infancy, in 20 Perceptual Development in Infancy: Minnesota Symposium on Child Development 197 (A. Yonas ed., 1988); John H. Flavell, Cognitive Development (2d ed. 1985); Charles J. Brainerd, Piaget's Theory of Intelligence (1978); Alternatives to Piaget: Critical Essays on the Theory (Linda S. Siegel & Charles J. Brainerd eds., 1978).

9 For a discussion of determining competency contextually in criminal cases, see, e.g., Steven K. Hoge et al., Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by their Attorneys, 10 Behav. Sci. & L. 385, 386 (1992).

10 See Melton, supra note 4, at 15. Melton's caveat was echoed in the context of delinquency cases: "We have no social science research evidence, however, with which to determine the importance of these elements of functioning and knowledge (actually, or as perceived by legal professionals) for a juvenile's participation in the trial process. Further, different abilities may be more or less important for different types of juvenile court proceedings." See Thomas Grisso et al., Competency to Stand Trial in Juvenile Court, 10 Int'l J. of L. & Psychiatry 11 (1987).

11 See Weithorn, supra note 4, at 246.

12 See Allen E. Buchanan & Dan W. Brock, Deciding for Others: The Ethics of Surrogate Decision Making 217 (1989).

13 Id. at 18. (Footnote omitted; emphasis in original). In a book chapter cited in the Comment to Standard 2.2, Lois Weithorn takes a similar position. Weithorn, supra note 4, at 243.

14 Weithorn, supra note 4, at 243.

15 See Charles E. Lewis, Decisionmaking Related to Health: When Could/Should Children Act Responsibly?, in Children's Competence to Consent, supra note 4, at 75, 91 (emphasis in original).

16 See Donald N. Bersoff, Children as Participants in Psychoeducational Assessment, in Children Competence to Conset, supra note 4, at 149, 170.

17 383 U.S. 541 (1966).

18 387 U.S. 1 (1966).

19 Of course, a child will not continue in the delinquency process if he or she is found incompetent to stand trial, a fact which ensures as a practical matter a certain degree of competency.

20 See In re Gault, 387 U.S. 1 (1966).

21 See In re Winship, 397 U.S. 358 (1970).

22 See In re Gault, 387 U.S. at 13 (1967).

23 See Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).

24 Id. See also Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 64 (1943).

25 See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985).

26 Id. See also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

27 See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

28 See, e.g., Goss v. Lopez, 419 U.S. 565 (1975).

29 See, e.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).

30 See, e.g., Lau v. Nichols, 414 U.S. 563 (1974).

31 See, e.g., Youngberg v. Romeo, 407 U.S. 307 (1982).

32 See DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 201 (1989) (such children, unlike Joshua DeShaney, who had been returned to parental care, may be in a situation "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect").

33 See Kent v. United States, 383 U.S. 541, 556 (1966).

34 See Scott, supra note 7.

35 A.A.M.L. Standards, supra note 1, s 2.2 cmt.

36 Id. at 1050. It is interesting to note that in a survey of 156 California judges and 82 mental health professionals, the latter accorded more weight to the preferences of five-year-olds than judges did. See Thomas Reidy et al., Child Custody Decisions: A Survey of Judges, 23 Fam. L.Q. 75, 84 (1989). See also Carol R. Lowery, The Wisdom of Solomon: Criteria for Child Custody from the Legal and Clinical Points of View, 8 L. & Hum. Behav. 371, 377 (1984).

37 It is interesting to note that the Comment to Standard 2.13 states that "impaired children have the same right as all other children to make their views known to the judge." Therefore, even though the Comment to Standard 2.2 notes that judges do not give much weight to young children's preferences, one rationale for presuming that children under twelve are "impaired," the Standards nevertheless expect the "impaired" child's attorney to communicate his or her preference, unless specifically prohibited by the child. It is also interesting to note that the attorney is bound by the directions of the "impaired" child with respect to this nondisclosure issue. This seems to be inconsistent with the rationale for denying "impaired" children attorneys who are advocates.

38 A.A.M.L. Standards, supra note 1, s 2.7 cmt. n.27 indicates that making a recommendation on the outcome of the case is beyond the competence of an attorney.

39 Cf., in the context of incapacities in elderly clients, Jan E. Rein, Clients with Destructive and Socially Harmful Choices -- What's an Attorney to Do?: Within and Beyond the Competency Construct, 62 Fordham L. Rev. 1101, 1138 (1994) (footnotes omitted) ("The rule [Model Rule 1.14] does not state which of the many tests and medical models for determining competency the lawyer should use in exercising this judgment. It offers no clue about how to determine task-specific, partial or intermittent incapacity, nor does it acknowledge what an unrealistic expectation it places on lawyers. As Professor Allee remarked, '[d]etermining competency is difficult for medical and behavioral experts, much less for lawyers ....'").

40 Personal conversation with forensic psychologist, professor, and expert on competencies Thomas Grisso, Ph.D., University of Massachusetts, January 21, 1995.

41 See, e.g., Buchanan & Brock, supra note 12; Bersoff, supra note 16, at 149, 151, 172-73; Michael J. Saks, Social Psychological Perspectives on the Problem of Consent, in Children Competence to Consent, supra note 4, at 41, 50; Weithorn, supra note 4, at 235, 243.

42 A.A.M.L. Standards, supra note 1, s 2.2 cmt.

43 Id. s 2.2(b) cmt. In the context of impaired elderly clients, one commentator has written:

[I]n reaction to the paternalism of the substantive view of capacity, lawyers have fallen back on what they know best: procedure. The result is an abstract view of capacity that purports to rely on an individual's decision-making processes. This process-based view suffers from the impossibility of considering process separate from substance, and from a lack of attention to human connection. A balanced, contextual view of capacity considers both process and substance, and situates the senior citizen in a network of family, care-givers, and peers.

... The process-based standard ... raises a new set of problems. The flight from substance leads to a denial of context -- a quest for some pure kernel of capacity free of the ambiguity of concrete situations. We tend to reify capacity -- to make it into a thing to be discovered. This view misconceives capacity. Rather than being a thing, capacity is a shifting network of values and circumstances. Separating substance from process in decisions about capacity is both wrong and impossible. Peter Margulies, Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, 62 Fordham L. Rev. 1073, 1075, 1083 (1994) (footnote omitted). The same criticism can be made of the process-based view reflected in the Standards.

44 A.A.M.L. Standards, supra note 1, s 2.2(b) cmt. (footnote omitted).

45 See, e.g., Robyn-Marie Lyon, Speaking for a Child: The Role of Independent Counsel for Minors, 75 Cal. L. Rev. 681, 700 (1987) ("a private assessment [of the child's competence] is open to the danger that the attorney, either consciously or unconsciously, will judge the child to be incompetent simply because she disagrees with the child's substantive decision. The problem is exacerbated by the possibility that the child's attorney might be inflexibly committed to specific positions regarding a child's competence, autonomy and best interests.")

46 See A.A.M.L. Standards, supra note 1, s 2.3 ("Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client."). Standard 2.6 makes some accommodations based on children's special vulnerabilities by requiring the child's attorney to protect the child by expediting the proceedings and encouraging settlement in order to reduce litigation-related trauma. A.M.M.L. Standards, supra note 1, s 2.6.

47 See id. s 2.8.

48 See id. ss 2.11, 2.12 & 2.13.

49 See id. s 2.7.

50 See id. s 2.7 cmt. n.27.

51 See id. s 3.2.

52 One commentator states:

The argument against the appointment of counsel is that the attorney filling the role is unable to perform the proper job of an attorney because there is no client who is able to give directions on how to proceed with the case. This view overlooks the fact that there are circumstances in which there are identifiable steps which the attorney can take in the course of the representation, even without direction. Louis I. Parley, Representing Children in Custody Litigation, 11 J. Am. Acad. Matrim. Law. 45, 48-49 (1993) (footnote omitted).

53 See, e.g., Martin Guggenheim, The Right to be Represented But Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76 (1984) (it is of note that Professor Guggenheim was a primary architect of the A.A.M.L. Standards); Juvenile Justice Standards, Counsel for Private Parties, Standard 3.1(b) (Institute of Judicial Administration/American Bar Association 1976).

54 See Lyon, supra note 45, at 693 (1987) (footnote omitted).

55 See, e.g., Colorado Guardian Ad Litem Mission Statement (Colorado State Bar Guardian ad Litem Standards Committee 1992) (2.7: "The GAL should advocate a legal position on behalf of the child rather than use litigation as an investigative tool;" 5.1: "The GAL should formulate an independent position after considering all relevant information ...;" 5.2: "The GAL should make clear recommendations to the court concerning the best interests of the child at every stage of litigation ...."); New Hampshire Guidelines for Guardians ad Litem #5 (Guardian ad Litem Committee of the Justices and Clerks of the Superior Court 1983) (the guardian ad litem's report or reports "shall set forth findings and conclusions or recommendations"); Law Guardian Representation Standards Volume II: Custody Cases (New York State Bar Association Committee on Juvenile Justice and Child Welfare 1992) (Standard A-7:

"The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations;" Standard B-2: "The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings;" Standard C-4: "The law guardian should deliver a summation, and prepare any necessary memoranda of law."); Serving as a Guardian ad Litem in Family Court (State Bar of Wisconsin Family Law Section 1993) ("The GAL is an advocate for the best interests of a minor child regarding legal custody, physical placement and support;" "The GAL should prepare a recommendation for the court at the pretrial;" "The GAL may submit a trial brief setting forth a recommendation for his or her ward.").

56 See, e.g., Carter v. Brodrick, 816 P.2d 202 (Alaska 1991) (role of guardian ad litem in custody disputes is to zealously represent child); Veazey v. Veazey, 560 P.2d 382 (Alaska 1977) (guardian ad litem has the power and responsibility to represent the client zealously and to the best of his ability; the child needs an advocate who will plead his cause as forcefully as the attorneys for competing custody claimants plead theirs); In re Marriage of Barnthouse, 765 P.2d 610 (Colo. App. 1988), cert. denied, 490 U.S. 1021 (1988) (attorney permitted to make a recommend contrary to the child's wishes); John O. v. Jane O., 601 A.2d 149 (Md. Ct. Spec. App. 1992) (child's attorney must present child's expressed position but is not obligated to advocate for that position); In re Marriage of Rolfe, 699 P.2d 79 (Mont. 1985) (appointed attorney must advocate child's interests); In re Dewey S., 573 N.Y.S.2d 769 (N.Y. App. Div. 1991) (law guardian for three-month-old child is to help arrive at an appropriate outcome); In re Baby Girl Baxter, 479 N.E.2d 257 (Ohio 1985) (first and highest duty of child's attorney is zealous representation and championing of client's cause); In re Davis, 465 A.2d 614 (Pa. 1983) (court criticized attorney's lack of representation on behalf of the child but suggested that the attorney should have submitted the child's preference to the court and explained why he disagreed); Weiderholt v. Fischer, 485 N.W.2d 442 (Wis. Ct. App. 1992) (guardian ad litem must advocate child's best interests); de Montigny v. de Montigny, 233 N.W.2d 463 (Wis. 1975) (guardian ad litem is more than an adjunct to the court; nominal representation breaches professional responsibilities).

57 See, e.g., Ind. Code Ann. s 31-1-11.5-28 (Supp. 1992) (the court may require a report from the guardian ad litem); Mass. Gen. Laws Ann. ch. 215, s 56A (1986) (requiring written report to court); Wis. Stat. Ann. s 767.045(4) (Supp. 1992) ("The guardian ad litem shall be an advocate for the best interests of a minor child as to legal custody, physical placement and support.... The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation ....").

58 The debate of the last two decades has been waged primarily over the issue of whether the child's attorney should advocate the child's expressed wishes or the child's best interests (or both), not whether the attorney should remain neutral or be an advocate. See, e.g., Donald T. Kramer, 1 Legal Rights of Children s 2.25 (2d ed. 1994); Linda D. Elrod, Child Custody Practice and Procedure ss 12.01-12.19 (1993); The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases 24-52 (Ann M. Haralambie ed., 1993) [hereinafter The Child's Attorney: A Guide]; Jeff Atkinson, 2 Modern Child Custody Practice ss 13.01-13.16 (1986); Marvin Ventrell, The Child's Attorney, Fam. Advoc., Winter 1995, at 73. Rebecca H. Heartz, Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness, 27 Fam. L.Q. 317 (1993); Parley, supra note 52; Shannan L. Wilber, Independent Counsel for Children, 27 Fam. L.Q. 349 (1993); Angela D. Lurie, Representing the Child-Client: Kids are People Too: An Analysis of the Role of Legal Counsel to a Minor, 11 N.Y.L. Sch. J. Hum. Rts. 205 (1993); Linda D. Elrod, Counsel for the Child in Custody Disputes: The Time is Now, 26 Fam. L.Q. 53 (1992); Howard A. Davidson, The Child's Right to be Heard and Represented in Judicial Proceedings, 18 Pepp. L. Rev. 255 (1991); Jinanne S.J. Elder, The Role of Counsel for Children: A Proposal for Addressing a Troubling Question, 35 Boston B.J. 6 (1991); Martha Fineman, The Role of Guardians ad Litem in Custody Contests, in Who Speaks for the Children? The Handbook of Individual and Class Child Advocacy (J. Westman ed., 1991); Catherine M. Brooks, When A Child Needs a Lawyer, 23 Creighton L. Rev. 759 (1990); Tara L. Muhlhauser, From "Best" to "Better": The Interests of Children and the Role of the Guardian ad Litem, 66 N.D. L. Rev. 633 (1990); Shari F. Shink, Reflections on Ethical Considerations, in Lawyers for Children (ABA Center on Children and the Law 1990); Howard A. Davidson, Child Advocacy, A.B.A. J., December 1, 1988, at 119. Jacqueline A. Jacobs, Incompetent Clients, 2 Geo. J. Legal Ethics 305 (1988); John H. Lightfoot, Children's Rights, Lawyers' Roles, 10 Fam. Advoc. 4 (Winter 1988); Donald N. Duquette & Sarah H. Ramsey, Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation, 20 U. Mich. L. Rev. 1 (1987); Lyon, supra note 45; Robert Schwartz, A New Role for the Guardian Ad Litem, 3 J. Disp. Resol. 117 (1987); Tari Eitzen, A Child's Right to Independent Representation in a Custody Dispute, 19 Fam. L.Q. 53 (1985); Linda L. Long, When the Client is a Child: Dilemmas in the Lawyer's Role, 21 J. Fam L. 607 (1982-83); Sarah H. Ramsey, Representation of the Child in Child Protection Proceedings: The Determination of Decision-Making Capacity, 17 Fam. L.Q. 287 (1983); Stephen W. Bricker, Children's Rights: A Movement in Search of Meaning, 13 U. Rich. L. Rev. 661 (1979); Kim J. Landsman & Martha L. Minow, Note, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, 87 Yale L.J. 1150 (1978); James R. Redecker, The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases, 23 Vill. L. Rev. 521 (1978); Brian G. Fraser, Independent Representation for the Abused and Neglected Child: The Guardian

ad Litem, 13 Cal. W. L. Rev. 16 (1976); Monroe Inker & Charlotte Perretta, A Child's Right to Counsel in Custody Cases, 5 Fam. L.Q. 108 (1971). See generally Annotated Bibliography of Guardian ad Litem Law Review Articles (National Legal Resource Center for Child Advocacy and Protection 1980). Cf. Hillary Rodham, Children Under the Law, 43 Harv. Educ. Rev. 487, 495 (1973).

59 See Ariz. Rev. Stat. Ann. s 25-321 (1991); Colo. Rev. Stat. Ann. s 14-10-116 (West 1989); Ill. Ann. Stat. ch. 750, para. 5/506 (Smith-Hurd 1992); Minn. Stat. Ann. s 518.165 (West 1995); Mo. Rev. Stat. s 452.490 (1994); Mont. Code Ann. s 40-4-205 (1994); Wash. Rev. Code s 26.09.110 (Supp. 1995).

60 See Unif. Marriage and Divorce Act s 310, 9A U.L.A. 443 (1979) (emphasis added).

61 See N.H. Rev. Stat. s 458.17b (1992) (now providing for discretionary appointment, N.H. Rev. Stat. Ann. s 458:17-a (1994). Cf. Wis. Stat. Ann. s 767.045 (West 1994) (mandating appointment in contested custody and visitation cases). See also Minn. Stat. Ann. s 518.165(2) (West 1990) (mandatory appointment of a guardian ad litem if custody or visitation are in issue "if the court has reason to believe that the minor child is a victim of domestic abuse or neglect," unless those issues are before the court in a separate juvenile dependency and neglect action); Mo. Ann. Stat. s 452.423(1) (Vernon Supp. 1994) (mandatory appointment if child abuse or neglect are alleged); Or. Rev. Stat. s 107.425(3) (1991) (mandatory appointment where requested by one or more of the children); Vt. Stat. Ann. tit. 15, s 594(b) (1989) (mandatory appointment before child may be called as a witness).

62 N.H. Rev. Stat. s 458.17-a(II) (1994).

63 See Muhlhauser, supra note 58, at 638-639 ("if they become mutually exclusive the champion's advocacy will be diluted by a lack of relevant information and the investigator will not be able to provide facts, alternatives, and recommendations to the court. Without championship and investigation, the monitor role loses effectiveness because advocacy and information must be present for an effective check on the progress of the permanent reunification plan.")

64 See generally Davidson, supra note 58.

65 Those organizations include the National Association of Counsel for Children, the American Professional Society on the Abuse of Children, and the International Society for the Prevention of Child Abuse and Neglect.

66 See, e.g., The Guardian, Law Guardian Reporter, The APSAC Advisor, Child Abuse and Neglect: The International Journal, The Journal of Child Sexual Abuse, The Journal of Interpersonal Violence.

67 The primary resource center for attorneys is the ABA Center on Children and the Law.

68 This training is mandated by A.A.M.L. Standard 1.2.

69 Model Rules of Professional Conduct (1994).

70 Model Code of Professional Responsibility (1982).

71 A.A.M.L. Standards, supra note 1, s 2.7 cmt.

72 See, e.g., Mary K. O'Connor, Considering Developmental Needs, in Resource Guide for Custody Evaluators: A Handbook for Parenting Evaluations (Phil Bushard & Dorothy A. Howard eds., Preliminary Symposium Issue, 1994); Ann M. Haralambie, 2 Handling Child Custody, Abuse, and Adoption Cases ss 24.01-24.09 (2d ed. 1993); Rachel B. Burkholder & Jean M. Baker, Child Development and Child Custody, in The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases, supra note 58, at 145-169.

73 One psychologist has described the following basic characteristics parents must possess to meet the needs of even very young children: If the child is to be successful, two elements must be present: (1) The capacity for altruistic behavior must exist in the parent. (2) The parent must have the capacity to understand the reciprocal nature of what the child has to offer, as opposed to a conscious awareness of what it takes from a parent. These two capacities cannot be assumed to be present in all parents. Frank G. Bolton, Jr., When Bonding Fails: Clinical Assessment of High-Risk Families 28 (1983). Dr. Bolton describes the first level of the child's needs:
Early childhood development rests with the secure provision of physical needs. The establishment of a sense of security regarding the physical needs provides the child with the opportunity for developmental risk taking. This risk taking is best described as a movement from a secure base of physical satisfaction to the insecure world of behavioral options. Id. at 45.

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74 See Elder, supra note 58, at 6.

75 See Lyon, supra note 44, at 703-704. There are conceptual problems with the substituted-judgment model, probably more with the label than Lyon's application of the model. Substituted judgment traditionally has been applied in cases where a previously competent person is no longer competent. Under those circumstances, there is a historical basis for extrapolating what the person's position probably would be if he or she were restored to competency. The child, on the other hand, is "impaired" because of his or her immaturity. The child has never been deemed competent, so there is no history to provide the basis for substituted judgment. As Lyon describes her model, however, she is suggesting a standard of representation which combines best interests and the child's wishes and a particularized determination of the individual child's needs. The difficulty comes when Lyon asks the attorney to speculate, in effect, as to whether the child would change his or her opinion with increased maturity. Id. at 704. There is no reason to believe that attorneys possess the ability to make this kind of prediction.

76 See also David Murphey, Identifying the Best Interests of the Child, in Advocating for the child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates 23 (Donald N. Duquette ed., 1990).

77 The Honorable Margaret M. Houghton, former Presiding Domestic Relations Judge of the Pima County, Arizona Superior Court, and Ann Haralambie created a multidisciplinary panel of experts who agreed to consult with attorneys appointed to represent children in domestic relations cases. Those experts, as well as the panel of appointed attorneys, agreed to work on a sliding scale. The expert consultation could include evaluations and testimony on behalf of the child. See generally Ann M. Haralambie, Attorneys for Children in Domestic Relations Cases: Pima County's Program, in New Issues for Child Advocates -- 1993 (Ann M. Haralambie ed., 1993); Representing Children in Domestic Relations Cases: Training Materials (Ann M. Haralambie ed., 2d ed. 1992). This resource allows children's attorneys to obtain objective, professional assistance in assessing the child's maturity and competence to make various decisions and to formulate a position for those who would be deemed "impaired" by the Standards.

78 See, Weithorn, supra note 4, at 255-57.

79 This same suggestion has been made with respect to attorneys representing the impaired elderly:
The various state bar associations might ameliorate this problem [of dealing with the questionably competent client] while promoting better legal services for the questionably competent elderly by requiring that lawyers who are likely to represent the elderly take a certain number of continuing legal education or other special training courses designed to assist them in providing such representation competently. These courses might cover such topics as geriatric psychology, common physical impediments to the ability to utilize existing mental capacity, the content and pitfalls of legal standards that address competence, and the nature and availability of community services to aid the elderly. Rein, supra note 39, at 1141.

80 A.A.M.L. Standards, supra note 1, s 1.2 cmt.

81 See A.A.M.L. Standards, supra note 1, s 2.7 cmt. This concern for arbitrariness was previously articulated by Martin Guggenheim. Guggenheim, supra note 53. Lyon points out that "the element of arbitrariness depends upon Guggenheim's assumption that the champion makes subjective judgments. To the extent that attorneys are guided by established procedures and explicit factors to determine the child's position, that arbitrariness is reduced, if not eliminated." Lyon, supra note 45, at 691. Perhaps the greatest missed opportunity of the Standards is their failure to articulate those "established procedures and explicit factors" which would assist attorneys in representing children. Instead, the Standards take the easy, if controversial, route of simply directing attorneys to take no position at all when the child is deemed "impaired."

82 A.A.M.L. Standards, supra note 1, s 2.7 cmt.

83 See, e.g., Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Science 453 (1981) (decisionmaking by professionals affected by how the choice was framed). See generally Mark Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41 (1979).

84 See, e.g., Reidy et al., supra note 36 at 75; Deborah L. Rhode, Gender and Professional Roles, 63 Fordham L. Rev. 39, 50 (1994). One study showed that in child protection cases in North Carolina black children represented by black attorneys were less likely to be removed from their homes than black children represented by white attorneys. See Robert F. Kelly & Sarah H. Ramsey, Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Intervention, 21 J. Fam. L. 405, 438 (1983). There are similar theoretical and practical biases in custody evaluators. See, e.g., Martha L. Deed, Court-ordered Child Custody Evaluations: Helping or Victimizing Vulnerable Families, 28 Psychotherapy 76, 80

(1991). See also Jack C. Wall & Carol Amadio, An Integrated Approach to Child Custody Evaluation: Utilizing the "Best Interest" of the Child and Family Systems Frameworks, 21 J. Divorce & Remarriage 39, 46 (1994).

85 See, e.g., Robert H. Mnooken et al., In the Interest of Children: Advocacy, Law Reform, and Public Policy 18 (1985). Sarah H. Ramsey points out that child protection cases involve significant decisions about the child and family which involve difficult choices and disagreements among experts. She poses the question, "[w]hy not trust the child's judgment about what is right for him, at least to the extent of having his position freely advocated, especially since age is not an accurate predictor of capacity?" Ramsey, supra note 58, at 297. There are many areas of disagreement concerning what constitutes child abuse or neglect. See, e.g., Jill E. Korbin, Sociocultural Factors in Child Maltreatment, in Protecting Children from Abuse and Neglect: Foundations for a New National Stragegy (Gary B. Melton & Frank D. Barry eds., 1994).

86 See, e.g., Wilber, supra note 58, at 355-56.

87 A.A.M.L. Standards, supra note 1, s 2.7 cmt.

88 See, e.g., Ann M. Haralambie, 1 Handling Child Custody, Abuse, and Adoption Cases s 4.06 (2d ed. 1993). See also, in the elder law context, Rein, supra note 35, at 1144-45.

89 For example, forensic psychologist and professor Thomas Grisso argues that custody decisions cannot be supported by scientific and clinical evidence alone, but rather, include application of legal and social values. See Thomas Grisso, Evolving Guidelines for Divorce/Custody Evaluations, 28 Fam. & Conciliation Cts. Rev. 35, 40 (1990). The standard of "best interests of the child" itself contemplates using "community norms, parental experience, and common sense." See Daniel W. Shuman, Psychiatric and Psychological Evidence s 13.02 (2d ed. 1994). There are a number of types of bias which may affect the way an evaluator processes the information received during an evaluation. See, e.g., Arthur Williams, Bias and Debiasing Techniques in Forensic Psychology, 10 Am. J. Forensic Psychol. 19, 20-21 (1992). Even two highly qualified mental health professionals may reach different conclusions because they accept different theoretical models. See Thomas J. Reidy et al., supra note 36, at 79.

90 Model Rule of Professional Conduct Rule 1.14 (1994).

91 Id.

92 Model Code of Professional Responsibility EC 7-11 (1982).

93 Id.

94 Id. EC 7-12.

95 Id.

96 The Standards missed a wonderful opportunity to provide the guidance that both the Model Rules and the Model Code lack. What children's attorneys sorely need is a set of sensitive and practical guidelines to help them modify their traditional roles when dealing with the real world issues which arise while representing children. Instead, the Standards skirt the issue by drawing an inflexible boundary and denying advocacy to those who fall on the "impaired" side of that boundary. As good procedure is suggested in Jean Koh Peters, The Roles and Content of Best Interests in Child-Directed Lawyering for Children in Child Protective Proceedings, 64 Fordham L. Rev. -- (forthcoming 1996). See generally, Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. -- (forthcoming 1996).

97 A.A.M.L. Standards, supra note 1, s 2.8 cmt.

98 Id. s 2.7.

99 Model Rules of Professional Conduct Rule 1.4 (1994).

100 Id.

101 See, e.g., Lisa G. Lerman, Handling Domestic Violence Cases, in Family Law and Practice (Arnold H. Rutkin ed., 1985); Catherine F. Klein & Leslye E. Orloff, Representing a Victim of Domestic Violence, Fam. Advoc., Winter 1995, at 25.

102 See, e.g., David L. Kerns, Child Abuse and Neglect: The Pediatric Perspective, in Foundations of Child Advocacy (Donald C. Bross & Laura Freeman Michaels eds., 1987).

103 For a discussion of the development stages and their relevancy to abuse, custody, and visitation issues, see generally, Haralambie, supra note 72, at ss 24.01-.09.

104 Id. Rule 1.14 cmt.

105 See Stephen B. Billick, Developmental Competency, 14 Bull. Am. Acad. Psych. & L. 308 (1986).

106 See, e.g., Model of Representation in Dependency Court, Pennsylvania Judicial Deskbook 7 (Juvenile Law Center of Philadelphia 1986). For a summary of the developmental characteristics of seven-year-old children, see generally, Ramsey, supra note 58, at 311-14. Ramsey proposes seven as the presumptive age for considered decisionmaking. Id. at 316.

107 British Psychologist and child development expert Penelope Leach has written:
Seven -- or six or maybe eight -- is acknowledged as some kind of watershed by almost every school of thought in Western culture. Freud's latency period, Piaget's concrete operations and Kohlberg's conventional morality are all located in this time frame, and classical learning theory pinpoints it as the period when mental processes, including speech, begin to mediate between the stimuli children receive and their responses. Whether the focus is on children's feelings, understanding or thoughts, their judgments, beliefs or reasoning, the beginning of middle childhood promises a new maturity and a new desire to learn that is recognized in every culture.
Penelope Leach, Children First: What Our Society Must Do -- And is Not Doing -- For Our Children Today 146 (1994). Sarah Ramsey states that the research supports a rebuttable presumption that seven-year-olds are capable of making considered, reasoned decisions. Ramsey, supra note 58, at 316.

108 See, e.g., Alayne Yates, Child's Preference -- Developmental Issues, Fam. Advoc., Winter 1988, at 34.

109 See generally, Haralambie, supra note 72, at s 24.17.

110 See generally Annotation, Competency of Young Child as Witness in Civil Case, 81 A.L.R.2d 386 (1962).

111 See Fed. R. Evid. 610. The federal Child Victims' and Child Witnesses' Rights Act, 18 U.S.C.A. s 3509 (West Supp. 1995), also presumes the competency of child witnesses. A competency hearing is held only when a party alleges that the child is not competent to testify. See 18 U.S.C.A. s 3509(c).

112 See, e.g., Ariz. R. Evid. 601; Me. R. Evid. 601; Miss. Code Ann. s 13-1-5; Mont. R. Evid. 601; Neb. Rev. Stat. s 27-601 (1993); N.C. Gen. Stat. s 7a-634 (1989); Ohio Rev. Code Ann. s 2151.3511 (Anderson 1990); Utah R. Evid. 601; Wyo. R. Evid. 601. See, also, In re Basilio T., 5 Cal. Rptr.2d 450 (Cal. Ct. App. 1992); Gotwald v. Gotwald, 768 S.W.2d 689 (Tenn. Ct. App. 1988). Some states provide that child abuse victims may testify without any competency findings. See, e.g., Ala. Code s 15-25-3(c) (Supp. 1992); Colo. Rev. Stat. s 13-90-106(1)(b)(II) (Supp. 1994); Colo. Rev. Stat. s 13-90-117.5 (Supp. 1994); Ga. Code Ann. s 24-9-5(b) (Supp. 1991); Mo. Ann. Stat. s 491.060(2) (Vernon Supp. 1994); S.C. Code Ann. s 19-11-25 (Law Co-op Supp. 1993); Utah Code Ann. s 76-5-410 (1990); W. Va. Code s 61-8B-11(c) (1993). But for states adopting a ten-year presumptive age of competency, see, e.g., Ill. Ann. Stat. ch. 725, 125/6 (Smith-Hurd 1992); Mich. Comp. Laws Ann. s 600.2163-2163a (West 1986 & Supp. 1994); Iowa R. Evid. 601; Minn. Stat. Ann. s 595.02(1)(f) (West 1988 & Supp. 1994); Mo. Ann. Stat. s 491.060 (Vernon Supp. 1994); Tenn. Code Ann., s 24-1-101 (1985).

113 See, e.g., Strickland v. State, 550 So. 2d 1042 (Ala. Crim. App. 1988), aff'd sub nom. Ex Parte Strickland, 550 So. 2d 1054 (Ala. 1989); George v. State, 813 S.W.2d 792 (Ark. 1991); Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991); State v. Hussey, 521 A.2d 278 (Me. 1987); United States v. Frazier, 678 F. Supp. 499 (E.D. Pa.), aff'd., 806 F.2d 255 (3d Cir. 1986). For other cases permitting testimony by young children, see, e.g., People v. Lamb, 264 P.2d 126 (Cal. Ct. App. 1953) (four-year-old); People v. District Court, 791 P.2d 682 (Colo. 1990) (four-year-old); Feleke v. State, 620 A.2d 222 (Del. Super. Ct. 1993) (nine-year-old); Gallagher v. State, 395 S.E.2d 358 (Ga. Ct. App.), cert. denied, (Sept. 4, 1990) (seven-year-old); Watson v. State, 512 N.E.2d 885 (Ind. Ct. App. 1987) (five-year-old); Wombles v. Commonwealth, 831 S.W.2d 172 (Ky. 1992) (eleven-year-old); State v. Bean, 582 So. 2d 947 (La. Ct. App.), cert. denied, 586 So. 2d 567 (La. Ct. App. 1991) (eight-year-old); Bowen v. State, 607 So. 2d 1159 (Miss. 1992) (six-year-old); In re R.R., 398 A.2d 76 (N.J. 1979) (four-year-old); People v. Chesnard, 572 N.Y.S.2d 719 (N.Y. App. Div. 1991) (seven- and eleven-year-olds); Commonwealth v. Trimble, 615 A.2d 48 (Pa. Super. Ct. 1992) (five-year-old); State v. Evans, 838 S.W.2d 185 (Tenn. 1992) (seven-year-old); Heckathorne v. State, 697 S.W.2d 8 (Tex. Ct. App. 1985) (five-year-old). See also, People v. Norfleet,

371 N.W.2d 438 (Mich. Ct. App. 1985) (trial court should have conducted further inquiry on competency of seven-year-old); State v. Dwyer, 440 N.W.2d 344 (Wis. 1989) (trial court should have conducted further inquiry on competency of four-year-old). See generally, John E.B. Myers, The Competence of Young Children to Testify in Legal Proceedings, 11 Behav. Sci. & L. 121 (1993).

114 See, e.g., Parley, supra note 52, at 48 ("the law has always recognized that children are different when it comes to competency and that there are no rules about when a child is old enough to be relied on as an accurate reporter of facts nor when a child is able to express an opinion about his or her life").

115 See, e.g., Mary Ainsworth, Attachment Beyond Infancy, 44 Am. Psych. 709 (1989); Bolton, supra note 73; John Bowlby, Separation, Anxiety and Anger (1973); John Bowlby, Attachment (1969).

116 See, e.g., Haralambie, supra note 72.

117 See discussion at II(C).

118 One commentator in the elder law context recommends that attorneys zealously represent the expressed wishes of the client, without attempting to assess competency. See Maria M. das Neves, Note, The Role of Counsel in Guardianship Proceedings of the Elderly, 4 Geo. J. Legal Ethnics 855, 862 (1991). Another commentator in the child protection context indicates that decisions may be more accurate "not necessarily because the child's view was correct, but because another point of view would be represented." Ramsey, supra note 58, at 297.

119 See, e.g., M. Powell Lawton, Competence, Environmental Press, and Adaptation of Older People, in Aging and the Environment: Theoretical Approaches 33 (M. Powell Lawton et al. eds., 1982); R. Kane & R. Kane, Assessing the Elderly: A Practical Guide to Measurement (1981).

120 See Bounds of Advocacy Standard 2.11 (American Academy Matrimonial Lawyers 1991), reprinted in 9 J. Am. Acad. Matrim. Law. 1 (1992).

121 See, e.g., Franklin E. Zimring, The changing Legal World of Adolescence 127 (1982).

122 See, e.g., Leach, supra note 107, at 106-07.

123 This is true in the law of adult competency, as well, where impaired adults may be deemed legally incompetent to make some decisions, but competent to make others. See, e.g., Fisher v. Adams, 38 N.W.2d 337 (Neb. 1949) (competent to marry; incompetent to manage business affairs). With respect to the desire of seventeen-year-old mildly retarded child who functioned on the level of a six- to ten-year-old to choose which of her divorced parents she should live with, the New Jersey Supreme Court ruled that the child's preference should be honored unless it could be proven by clear and convincing evidence that she lacked the capacity to make that specific choice. See In re M.R., 638 A.2d 1274 (N.J. 1994). A case note discussing that case stated that a proper goal is to allow developmentally disabled persons "to make as many decisions as possible while protecting them from the harmful effects of bad decisions they do not fully understand." See Civil Competency, 18 Mental & Physical Disability L. Rep. 261 (1994).

Forensic psychologist and professor Thomas Grisso has emphasized:

The interactive characteristic of legal competencies requires consideration of the congruency or incongruency between a person's functional abilities and the degree of performance demand that is made by the specific instance of the context in that case. Thus, a finding of legal incompetency speaks to a condition of person-context incongruency, not merely to a condition of the person alone. Therefore, assessments should strive to evaluate and describe the relevant environmental and social situations (e.g., the trial faced by the defendant, or the child for whom custody arrangements are to be made) to which to compare the examinee's abilities. Thomas Grisso, Evaluating Competencies: Forensic Assessments and Insruments 30 (1986). In the context of evaluating parents, Dr. Grisso states:

Generally ... the significance of a particular weakness or deficit in parenting ability will lie in its comparison to the needs or demands of the specific child and the resources or deficits of ancillary caretakers. In theory, at least, a parent may be incompetent or inadequate to care for one child in a particular social context, yet adequate to care for another child or to do so within some other social context. Id. at 206. See generally William Gaylin, The "Competence" of Children: No Longer All or None, 21 J. Am. Acad. of Child Psychiatry 153 (1982).

124 See Ramsey, supra note 58, at 316.

125 See, e.g., Bellotti, 443 U.S. at 635; McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

126 See In re Matter of the Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994).

127 872 P.2d at 1243.

128 It is important to remember that a child's decision to take a position in a case is not tantamount to deciding that his or her position will be adopted. The fact that the judge is the final decisionmaker adds another layer of protection against a child's foolish choices.

129 See, e.g., The Child Attorney: A Guide, supra note 58; Foundations of Child Advocacy (Donald C. Bross & Laura Freeman Michaels eds., 1987).

130 Any disabled or "impaired" clients need "seasoned, highly skilled, and ethically sensitive lawyers to handle their more complex legal problems," and those attorneys will need training beyond what can be provided through continuing legal education alone. See Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. Rev. L. & Soc. Change 609, 641-46 (1989/1990).

131 See, e.g., Carla B. Garrity & Mitchell A. Baris, Caught in the Middle: Protecting the Children of High-Conflict Divorce (1994).

132 See, e.g., Haralambie, supra note 72.

133 See, e.g., Sandra Hewitt, Therapeutic Management of Preschool Cases of Alleged but Unsubstantiated Sexual Abuse, 70 Child Welfare 59 (1991).

134 See, e.g., Haralambie, supra note 72, at ss 24.10-.15.

135 The existence of such growing organizations as the National Association of Counsel for Children and the American Professional Society on the Abuse of Children as well as the numerous conferences held on child advocacy issues reflects the recognition of child advocacy as a professional specialty.

136 See Bruce A. Green & Nancy Coleman, Forward, 62 Fordham L. Rev. 961, 967 (1994) (referring to the inadequacy of ethical standards as applied to representing eldery impaired clients).

137 Id. at 976.

138 For a more complete discussion of the ethical and malpractice issues involved in representing children, see, e.g., The Child's Attorney: A Guide, supra note 58.

139 See, e.g., Wilber, supra note 58, at 351.

140 See, e.g., Blake v. Blake, 541 A.2d 1201 (Conn. 1988); Richelson v. Richelson, 536 A.2d 176 (N.H. 1987); Shainwald v. Shainwald, 395 S.E.2d 441, 445 (S.C. Ct. App. 1990).

141 This is particularly true where no independent, child-centered custody/visitation evaluation has been performed.

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