Training for
Children’s Legal Representatives
in
Private Custody Cases

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IX. Domestic Violence (Tab 11)

- June 6th Training Outline developed by Leigh Goodmark, 4 pp

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  3. Child Custody and Visitation Decisions in Domestic Violence Cases: Legal trends, Research Findings, and Recommendations, Daniel G. Saunders, Ph.D., VAWnet, vaw.umn.edu/Vawnet/custody.htm, 10 pp
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- Ch. 11, Representing the Child, Child Sexual Abuse in Civil Cases, Ann Haralambie, pp 279- 297
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  4. In Family Law, How is Mediation Different from a Settlement Meeting, Norman B. Pickell, 9 pp
  5. *Arbitration, Mediation, or Settlement Conference- Which is Best for You?* Nicholas Martin, 2 pp
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  8. *The Parenting Coordinator Role*, Robin Deutsch, Ph.D. 2 pp

• Child Representatives Approach to Settlement (Tab 14)
  1. Selected ABA Standards for Lawyers Representing Children in Custody Cases, 2 pp
  2. *Court-Appointed Legal Representation of Children in Texas Family Law Cases, Conciliatory Phase 5.13, 5.24 & 5.34*, Debra H. Lehrmann, 18 pp

• Child Representatives Tasks in ADR (Tab 15)
  1. Sample letters by Kelly Browe Olsen, 2 pp
  2. *Keys to Successful Mediation*, Kenneth O. Simon, 6 pp
  3. What to Do Next in Mediation: Ten Tips to Consider- Part I & II, AFCC Newsletter, Spring & Winter 2004, Robert M. Smith, 2 pp
  4. *The Child Interview in Mediation*, Marriage & Family Counseling Service, Chicago, IL, 8 pp

XII. Survey (Tab 16)
Please complete and return

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AMERICAN BAR ASSOCIATION  
CHILD CUSTODY and ADOPTION PRO BONO PROJECT

**OUR VISION**
Enhance the lives of children impacted in private custody cases.

**OUR MISSION**
To design and implement programs and policies that foster children’s well-being, development and safety, and provide children meaningful participation, in divorce, adoption, unmarried parent, guardianship and protective order cases.

**OUR ACCOMPLISHMENTS**
- Helped draft and pass national Standards of Representation for Lawyers Representing Children in Custody Cases
- Produced in-depth, multi-disciplinary, seven-hour training DVD and materials CD for attorneys representing children
- Distributed and monitored approximately $100,000 in grants to local initiatives to increase the quality and quantity of pro bono representation of children
- Provided advice and assistance to 300 persons and entities on policy and representation efforts
- Established annual national award to honor an attorney providing significant pro bono representation to children in custody cases
- Developed Child Custody Resource Library, providing free access to over 300 documents on issues relating to representing children in custody cases
  - Conducted over 20 national presentations and trainings
- Established and maintain a national Child Custody List Service
OUR RESOURCES

- Project Website: www.abachildcustodyproject.org
- Standards of Representation for Lawyers Representing Children in Custody Cases
  - Trainings and Presentations
  - Networking
  - Mini-grants
- Technical Assistance
- Child Custody Programs Directory and Database
- Child Custody List Service

For more information, contact:

ABA Child Custody and Adoption Pro Bono Project
321 N. Clark, Chicago, IL 60610
(312) 988-5805; gillespg@staff.abanet.org
www.abachildcustodyproject.org

Sponsored by the Standing Committee on Pro Bono and the Family Law Section.

Funded through the ABA FJE by Bill and Melita Grunow in honor of Ann Liechty.
ABA Child Custody Library

Categories

MM- Adoption
NN- Divorce
OO- Guardianship
PP- Parentage

(The following categories are found under each of the four above substantive areas):

Alternative Dispute Resolution
Bar/Foundation Involvement
Best Interests Standards
Case Development
Child Abuse
Child Centered Approach
Child Development
Child’s Voice
Community Education Materials, Adult
Community Education Materials, Child
Domestic Violence
Ethics/Conflicts
Fees/Payment Issues
Funding/Resource Development
Holistic Advocacy
Intake/Referral/Brief Advice Systems
Judicial/Court Involvement
Law Schools
Legislation/Regulations
Non-Attorney Volunteers
Partnerships
Program Descriptions, Adult Education
Program Descriptions, Adult Representation
Program Descriptions, Child Education
Program Descriptions, Child Representation
Program Manuals
Psychological Issues
Public Relations/Marketing
Recruitment/Education
Scholarly Research
Standards
Statistics
Training Manuals
Visitation
Program Directory

The ABA Child Custody and Adoption Pro Bono Project has developed a directory of programs that provide representation to children in custody and adoption matters through volunteer attorneys. Each listing includes the following information as available:

- Contact information,
- General program description,
- Role of child’s legal representative, types of cases and number of cases handled yearly by volunteer attorneys,
- Number and type of staff in programs,
- Number and type of volunteers,
- Training provided to volunteers, and
- Financial information.

The Project updates the Directory as information is made available. The most up to date directory is available at

www.abachildcustodyproject.org
State Law Charts

1. Child Preference, 3 pp
2. Appointment Laws in Divorce Cases, 5 pp
3. Appointment Laws in Adoption, Guardianship & Unmarried Parent, 3 pp
4. Funding for Those Representing Children, 4 pp
5. State Requirements for Appointment as Child’s Legal Representative or GAL in Domestic Relations, 1 p
## Child Preference Chart

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE- Child Preference/Best Interests</th>
<th>TAKE CHILD'S WISHES INTO CONSIDERATION?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Code § 30-3-152 (2000)</td>
<td>NO</td>
</tr>
<tr>
<td>D.C.</td>
<td>D.C. CODE 1981 § 16-911</td>
<td>CW</td>
</tr>
<tr>
<td>Hawaii</td>
<td>H.R.S. §571-46 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Indiana</td>
<td>IC 31-17-2-8 , 31-17-2-12 (2000)</td>
<td>CW IF AT LEAST 14</td>
</tr>
<tr>
<td>Iowa</td>
<td>I.C.A. § 598.41 (2000)</td>
<td>NO</td>
</tr>
<tr>
<td>Kansas</td>
<td>K.S.A. § 60-1610, 60-1614 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Kentucky</td>
<td>KRS § 403.270, 403.290 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Maryland</td>
<td>Md. FAMILY LAW Code Ann. § 9-103 (2000)</td>
<td>NO, BUT IF OVER 16, CAN PETITION TO CHANGE CUSTODY</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>M.G.L.A. 251 § 56A (2000)? 208 §31</td>
<td>NO</td>
</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Child Preference</td>
</tr>
<tr>
<td>------------------</td>
<td>-----------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Minnesota</td>
<td>M.S.A. § 518.166 (2000)</td>
<td>CW IF OF SUFFICIENT AGE &amp; CAPACITY</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Miss. Code Ann. § 93-5-24</td>
<td>NO</td>
</tr>
<tr>
<td>Missouri</td>
<td>V.A.M.S. 452.375, 452.490 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Montana</td>
<td>MCA 40-4-212, 40-4-215 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Nebraska</td>
<td>R.R.S. Neb. § 42.364, 43-272.01 (2001)</td>
<td>CW IF OF SUFFICIENT AGE &amp; CAPACITY</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. Cent. Code, § 14-09-06.2 (2001)</td>
<td>CW IF OF SUFFICIENT AGE &amp; CAPACITY</td>
</tr>
<tr>
<td>Ohio</td>
<td>R.C. § 3109.04 (2001)</td>
<td>CW IF OF SUFFICIENT AGE &amp; CAPACITY (need to be interviewed in chambers)</td>
</tr>
<tr>
<td>Oregon</td>
<td>O.R.S. § 107.137 (1999)</td>
<td>NO</td>
</tr>
<tr>
<td>South Carolina</td>
<td>S.C. Code Ann. § 20-7-515 (2000)</td>
<td>NO STATUTE</td>
</tr>
<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws § 25-4-45 (2001)</td>
<td>CW IF OF SUFFICIENT AGE &amp; CAPACITY</td>
</tr>
</tbody>
</table>
### Child Preference Chart

<table>
<thead>
<tr>
<th>State</th>
<th>Statute Information</th>
<th>CW/NS Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah</td>
<td>Utah Code Ann. § 30-3-5, 30-3-10 (2000)</td>
<td>CW (added weight to children over 16)</td>
</tr>
<tr>
<td>Vermont</td>
<td>15A V.S.A. § 594 (2001)</td>
<td>NO</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Wis. Stat. § 767.24, 767.081 (2000)</td>
<td>CW</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Wyo. Stat. § 20-2-201 (2001)</td>
<td>NO BY STATUTE, YES BY CASE LAW</td>
</tr>
</tbody>
</table>

**CW IF OF SUFFICIENT AGE & CAPACITY:** Court must take child’s wishes into consideration in custody and visitation decisions if the child is of the age and capacity to form an intelligent preference.

**CW:** Statute only states that courts must consider child’s wishes in making determination.

**NS:** Statutes do not state what factors a court must take into consideration when making determination.

**NO:** Factors that a court must take into consideration do not include the child’s wishes.
## Appointment Laws in Divorce Cases

<table>
<thead>
<tr>
<th>State</th>
<th>WHEN APPOINTED</th>
<th>ROLE OF APPOINTED PERSON*</th>
<th>WHO IS APPOINTED</th>
<th>IMMUNITY</th>
<th>FEES</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>AK</td>
<td>Discretionary</td>
<td>Atty (Preference)</td>
<td>Atty or Gov’t Atty</td>
<td>Yes</td>
<td>Parties or State</td>
<td>No</td>
</tr>
<tr>
<td>AZ</td>
<td>Discretionary</td>
<td>Atty-</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>Yes</td>
</tr>
<tr>
<td>AR</td>
<td>Discretionary</td>
<td>Atty “Atty Ad Litem”</td>
<td>Atty</td>
<td>No</td>
<td>Parties or State</td>
<td>Yes</td>
</tr>
<tr>
<td>CA</td>
<td>Discretionary</td>
<td>Hybrid</td>
<td>Atty or Gov’t Atty</td>
<td>Yes</td>
<td>Parties or County</td>
<td>No</td>
</tr>
<tr>
<td>CO</td>
<td>Discretionary</td>
<td>Atty, “Legal representative” (BI)</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or State</td>
<td>No</td>
</tr>
<tr>
<td>CT</td>
<td>Discretionary</td>
<td>Atty (interest of child)</td>
<td>Atty</td>
<td>Yes- Case Law Yes-other Professional</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>DE</td>
<td>Discretionary</td>
<td>Atty (Ch Atty)</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or State</td>
<td>Yes</td>
</tr>
<tr>
<td>D.C.</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
</tr>
</tbody>
</table>

*GAL: Guardian Ad Litem; BI: Best Interests; Ch Atty: Child Advocate; Atty or Gov’t Atty: Attorney or Government Attorney; Atty or other Professional: Attorney or Other Professional; Atty or Gov’t Atty: Attorney or Government Attorney; Yes: Yes; No: No; Parties: Parties; County: County; State: State; Profes-sional: Professional.
<table>
<thead>
<tr>
<th>State</th>
<th>WHEN APPOINTED</th>
<th>ROLE OF APPOINTED PERSON*</th>
<th>WHO IS APPOINTED</th>
<th>IMMUNITY</th>
<th>FEES</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>FL</td>
<td>GAL Required if abuse</td>
<td>Atty (atty or advocate) GAL</td>
<td>Atty or “citizen certified by GAL program”</td>
<td>Yes</td>
<td>Parties</td>
<td>No for citizen</td>
</tr>
<tr>
<td>GA**</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Any trained person</td>
<td>No</td>
<td>Parties</td>
<td>Yes</td>
</tr>
<tr>
<td>HI</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty (in practice also custody evaluators who are social workers or psychologists)</td>
<td>Yes</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>ID</td>
<td>Discretionary</td>
<td>Atty</td>
<td>Atty</td>
<td>No</td>
<td>Parties or County</td>
<td>No</td>
</tr>
<tr>
<td>IL</td>
<td>Discretionary</td>
<td>Hybrid or GAL or Atty</td>
<td>Atty or Gov’t Atty</td>
<td>Yes</td>
<td>Parties</td>
<td>Yes by County</td>
</tr>
<tr>
<td>IN</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or CASA trained</td>
<td>Yes</td>
<td>Parties</td>
<td>Atty- No Other- Yes</td>
</tr>
<tr>
<td>IA</td>
<td>Discretionary</td>
<td>Atty GAL</td>
<td>Atty</td>
<td>No</td>
<td>Parties or County</td>
<td>No</td>
</tr>
<tr>
<td>KS</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or County</td>
<td>Yes</td>
</tr>
<tr>
<td>KY</td>
<td>Discretionary</td>
<td>GAL (friend of court)</td>
<td>Atty</td>
<td>No</td>
<td>Parties or County</td>
<td>Yes by County</td>
</tr>
<tr>
<td>LA</td>
<td>Required if Abuse</td>
<td>Atty</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or Pro Bono Atty</td>
<td>No</td>
</tr>
<tr>
<td>ME</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or other Professional</td>
<td>Yes</td>
<td>Parties</td>
<td>Yes</td>
</tr>
<tr>
<td>MD</td>
<td>Discretionary</td>
<td>Atty GAL (case law)</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>MA</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or “disinterested person” (case law)</td>
<td>Yes</td>
<td>Parties or State</td>
<td>No</td>
</tr>
<tr>
<td>MN</td>
<td>Required if Abuse</td>
<td>GAL</td>
<td>SCt Rule 902 has qualifications, can be lawyer or non-lawyer</td>
<td>No</td>
<td>Parties or State</td>
<td>Yes</td>
</tr>
<tr>
<td>State</td>
<td>WHEN APPOINTED</td>
<td>ROLE OF APPOINTED PERSON*</td>
<td>WHO IS APPOINTED</td>
<td>IMMUNITY</td>
<td>FEES</td>
<td>QUALIFICATIONS</td>
</tr>
<tr>
<td>-------</td>
<td>----------------</td>
<td>---------------------------</td>
<td>------------------</td>
<td>----------</td>
<td>------</td>
<td>----------------</td>
</tr>
<tr>
<td>MS</td>
<td>Required if Abuse</td>
<td>GAL</td>
<td>Atty or other professional</td>
<td>No</td>
<td>Parties or County</td>
<td>Atty=No Other=Yes</td>
</tr>
<tr>
<td>MO</td>
<td>Required if Abuse</td>
<td>GAL</td>
<td>Atty or CASA</td>
<td>Yes</td>
<td>Parties or State</td>
<td>Yes</td>
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<tr>
<td>MT</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or other</td>
<td>No</td>
<td>Parties or Fees Waived</td>
<td>No (pending)</td>
</tr>
<tr>
<td>NE</td>
<td>Discretionary</td>
<td>Atty (protect interest) Investigate &amp; call witness ------------------------------- GAL (case law)</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or County</td>
<td>No</td>
</tr>
<tr>
<td>NV</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or other professional</td>
<td>Yes</td>
<td>Parties or County</td>
<td>No</td>
</tr>
<tr>
<td>NH</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty “except in extraordinary circumstances”</td>
<td>Yes</td>
<td>Parties or State</td>
<td>Yes</td>
</tr>
<tr>
<td>NJ</td>
<td>Discretionary</td>
<td>Atty (Best Interest) ------------------------------- GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>NM</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>NY*</td>
<td>Discretionary</td>
<td>Atty (Law Guardian) ------------------------------- GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or Indigent Fund or Gov’t</td>
<td>Yes</td>
</tr>
<tr>
<td>NC**</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Does not specify (except if abuse, use atty)</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>ND</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or County</td>
<td>Yes</td>
</tr>
<tr>
<td>OH</td>
<td>Discretionary</td>
<td>GAL or Atty for Child (12/05 Recommendation)</td>
<td>Atty or other</td>
<td>Yes</td>
<td>Parties</td>
<td>Yes by County</td>
</tr>
<tr>
<td>OK</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td>OR</td>
<td>Required if Minor Requests</td>
<td>GAL</td>
<td>No</td>
<td>Parties</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>PA</td>
<td>Discretionary</td>
<td>Atty (in practice Atty, GAL or Hybrid)</td>
<td>Atty</td>
<td>Yes</td>
<td>No Statute</td>
<td>No</td>
</tr>
<tr>
<td>State</td>
<td>WHEN APPOINTED</td>
<td>ROLE OF APPOINTED PERSON*</td>
<td>WHO IS APPOINTED</td>
<td>IMMUNITY</td>
<td>FEES</td>
<td>QUALIFICATIONS</td>
</tr>
<tr>
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</tr>
<tr>
<td>RI</td>
<td>RI St S 15-5-16.2(c)</td>
<td>Discretionary</td>
<td>Atty (GAL)</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
</tr>
<tr>
<td>SC</td>
<td>SC Code § 20-7-1545 (eff 1/15/03) Stat Def</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or Layperson</td>
<td>No</td>
<td>Parties</td>
</tr>
<tr>
<td>SD**</td>
<td>SD Codified L § 25-4-45.4</td>
<td>Discretionary</td>
<td>Atty (Best Interest)</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties</td>
</tr>
<tr>
<td>TN</td>
<td>TN Code 36-4-132</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Does not specify (atty by practice)</td>
<td>Yes</td>
<td>Parties</td>
</tr>
<tr>
<td>TX</td>
<td>TX Fam Code 107, 107.021</td>
<td>Required if in best interest</td>
<td>Atty (Atty Ad Litem (Ch Atty) &amp; Amicus Atty (BI Atty)) (GAL)</td>
<td>Atty or other Adult</td>
<td>Yes</td>
<td>Parties</td>
</tr>
<tr>
<td>UT</td>
<td>UT ST §30-3-11.2 UT ST §78-7-45</td>
<td>Discretionary</td>
<td>Atty (Ch Atty)</td>
<td>Atty or Gov’t Atty</td>
<td>Yes</td>
<td>Parties</td>
</tr>
<tr>
<td>VT</td>
<td>15-11-3-§594 15-11-3A-§ 669 Fam Ct Rule 7</td>
<td>Required if Minor is Witness</td>
<td>Atty (BI Atty)</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
</tr>
</tbody>
</table>

**RI St S 15-5-16.2(c)**

**SC Code § 20-7-1545 (eff 1/15/03) Stat Def**

**SD Codified L § 25-4-45.4**

**TN Code 36-4-132**

**TX Fam Code 107, 107.021**

**UT ST §30-3-11.2 UT ST §78-7-45**

**VT 15-11-3-§594 15-11-3A-§ 669 Fam Ct Rule 7**
<table>
<thead>
<tr>
<th>State</th>
<th>WHEN APPOINTED</th>
<th>ROLE OF APPOINTED PERSON*</th>
<th>WHO IS APPOINTED</th>
<th>IMMUNITY</th>
<th>FEES</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>VA*</td>
<td>Required if Abuse</td>
<td>GAL or Atty for Child</td>
<td>Atty</td>
<td>No</td>
<td>Parties</td>
<td>Yes</td>
</tr>
<tr>
<td>WA</td>
<td>Discretionary</td>
<td>GAL</td>
<td>Atty or other</td>
<td>Yes</td>
<td>Parties or County or Pro Bono</td>
<td>Yes</td>
</tr>
<tr>
<td>WV</td>
<td>Required if abuse alleged unless certain conditions present</td>
<td>Atty (Ch Atty)</td>
<td>Atty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>code §48-11-302(b)</td>
<td>code § 48-11-302(a)</td>
<td>-----------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>W.Va Trial Ct Rule 21.01</td>
<td>code § 48-11-302(a)</td>
<td>------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>W. Va Trial Ct Rule 21.01</td>
<td>Discretionary</td>
<td>GAL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WI</td>
<td>Required if contested unless certain conditions present</td>
<td>GAL</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties or County</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Wis. Stat § 767.407</td>
<td>Discretionary</td>
<td>Atty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Stat Def</td>
<td>Discretionary</td>
<td>Atty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WY**</td>
<td>Required if Abuse</td>
<td>Hybrid (BI)</td>
<td>Atty</td>
<td>Yes</td>
<td>Parties</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Wy stat 14-3-211</td>
<td>Discretionary</td>
<td>Atty</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

** Jurisdictions without a specific statute relating to appointment of attorneys and/or GALs in their domestic relations code. These jurisdictions use the child protection or general defense of infant’s statutes to appoint attorneys and/or GALs.

**Stat Def= Jurisdictions having a definition of the roles and responsibilities of the attorney and/or GAL in the statute

**Stat Rule= Jurisdictions having specific codes or rules related to the duties, responsibilities, and obligations of an attorney or GAL for minor.

**Discretionary = Appointment within judge’s complete discretion.

**Required = Appointment required in all cases; also allows discretionary appointment if the factors for mandatory appointment are not met.

**Abuse = Child abuse or neglect alleged or shown (standards vary by state).

**Atty = Private or legal service or pro bono attorney.

**Other Professional = Psychologists, social workers, or CASAs.

**Gov’t Atty = Attorney employed by a state or county office.

CODE:
- *Role of Appointed Person
  - GAL = Guardian ad Litem – reports to the court what is in the “best interests” of the child.
  - Atty = Typical attorney tasks but “client” varies between Child and “Best Interests”
  - Hybrid = Child representative has elements of both the GAL (best interest) role and the attorney role (advocate for the child).
- **Jurisdictions without a specific statute relating to appointment of attorneys and/or GALs in their domestic relations code. These jurisdictions use the child protection or general defense of infant’s statutes to appoint attorneys and/or GALs.
- Stat Def= Jurisdictions having a definition of the roles and responsibilities of the attorney and/or GAL in the statute
- Stat Rule= Jurisdictions having specific codes or rules related to the duties, responsibilities, and obligations of an attorney or GAL for minor.
- Discretionary = Appointment within judge’s complete discretion.
- Required = Appointment required in all cases; also allows discretionary appointment if the factors for mandatory appointment are not met.
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- Atty = Private or legal service or pro bono attorney.
- Other Professional = Psychologists, social workers, or CASAs.
- Gov’t Atty = Attorney employed by a state or county office.
<table>
<thead>
<tr>
<th>STATE</th>
<th>Adoption</th>
<th>Guardianship</th>
<th>Unmarried Parent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Req’d if contested</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td></td>
<td>Discretionary if not contested</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>No statute</td>
</tr>
<tr>
<td>Arizona</td>
<td>Discretionary</td>
<td>Discretionary Req’d to terminate guardianship</td>
<td>No statute</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>No statute</td>
</tr>
<tr>
<td>California</td>
<td>No reference to appointment in adoption statute</td>
<td>Req’d if abuse or neglect</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>Colorado</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Discretionary</td>
<td>Req’d if abuse or neglect</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td></td>
<td>Discretionary in all other cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>Discretionary</td>
<td>Discretionary: “should”</td>
<td>Discretionary</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>No statute</td>
</tr>
<tr>
<td>Florida</td>
<td>Discretionary Required if abandoned infant</td>
<td>No reference to appointment in the g’ship statute.</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Georgia</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>Idaho</td>
<td>No reference to appointment in adoption statute</td>
<td>Required</td>
<td>No statute</td>
</tr>
<tr>
<td>Illinois</td>
<td>Required</td>
<td>Discretionary Req’d if abuse or neglect</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Indiana</td>
<td>No statutory reference to appointment; often done and not prohibited by</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>State</td>
<td>Statute Requirement</td>
<td>Guardianship Requirement</td>
<td>Termination Requirement</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------</td>
<td>--------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>Iowa</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Kansas</td>
<td>No reference to appointment in adoption statute</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Req’d if adoption follows termination or if both parents are deceased</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
</tbody>
</table>
| Louisiana   | Req’d if father opposes adoption.  
Req’d if termination proceeding | Discretionary | No statute |
<p>| Maine       | Discretionary       | Discretionary            | No statute              |
| Maryland    | Req’d if minor over 10 | Required if guardianship with right to consent to adoption | Required |
| Massachusetts | Required if contested | Discretionary | Discretionary |
| Michigan    | No reference to appointment in adoption statute | Discretionary | Discretionary |
| Minnesota   | Discretionary       | Discretionary            | Discretionary           |
| Mississippi | Req’d if contested  | No reference to guardianship statute. | Discretionary |
| Missouri    | Required            | Discretionary            | Required                |
| Montana     | Discretionary       | Discretionary            | Required                |
| Nebraska    | Discretionary       | Discretionary            | Required                |
| Nevada      | No reference to appointment in adoption statute | Discretionary | Required |
| New Hampshire | Discretionary | Discretionary | Discretionary |
| New Jersey  | Req’d if contested  | Discretionary            | Discretionary           |
|             | Req’d if            |                          | Req’d if parent         |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Action Type</th>
<th>Appointment Type</th>
<th>Requirement Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Mexico</td>
<td>contested</td>
<td>objects</td>
<td>Req'd if minor is a party</td>
</tr>
<tr>
<td>New York</td>
<td>Required</td>
<td>Req'd if infant</td>
<td>Required</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Discretionary if contested</td>
<td>Discretionary</td>
<td>Required</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Required</td>
<td>Discretionary</td>
<td>Required</td>
</tr>
<tr>
<td>Ohio</td>
<td>Discretionary</td>
<td>Req'd if guardian has an adverse interest, otherwise discretionary</td>
<td>Requires party’s request</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Req'd if contested</td>
<td>Discretionary</td>
<td>No statute</td>
</tr>
<tr>
<td>Oregon</td>
<td>No reference to appointment in adoption statute</td>
<td>No reference to appointment in g’ship statute</td>
<td>No statute</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Required if contested and involuntary</td>
<td>No reference to appointment in g’ship statute</td>
<td>No statute</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Discretionary</td>
<td>No reference to appointment in g’ship statute</td>
<td>Discretionary</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Required</td>
<td>Discretionary</td>
<td>Req’d if action seeks to legitimize minor</td>
</tr>
<tr>
<td>South Dakota</td>
<td>No reference to appointment in adoption statute</td>
<td>Discretionary</td>
<td>No statute</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Discretionary</td>
<td>Required unless waived</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Texas</td>
<td>Discretionary</td>
<td>Discretionary appointment of GAL as substitute of the Required attorney at litem</td>
<td>Discretionary</td>
</tr>
<tr>
<td>Utah</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>Vermont</td>
<td>Req’d if contested</td>
<td>Discretionary</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>Virginia</td>
<td>No reference to appointment in adoption statute</td>
<td>No reference to appointment in g’ship statute</td>
<td>Req’d if minor is a party</td>
</tr>
<tr>
<td>State</td>
<td>Washington</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>---------------</td>
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<td>---------------</td>
<td>---------------</td>
</tr>
<tr>
<td>West Virginia</td>
<td><em>No reference to appointment in adoption statute</em></td>
<td>Discretionary</td>
<td>Req'd if father brings action</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Req'd if contested</td>
<td>Req'd if contested</td>
<td>Required</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Discretionary</td>
<td>Discretionary</td>
<td>Req'd if minor is a party</td>
</tr>
</tbody>
</table>

*REQUIRED= Appointment of counsel for minor is always required.
*DISCRETIONARY= Appointment of counsel for minor is completely within judge’s discretion.
*REQUIRED IF CONTESTED= Appointment of counsel is required when one or more parties is contesting the petition.
*NO STATUTE= No statutory reference relating to the appointment of counsel for minors in these proceedings.
*REQUIRED IF MINOR IS A PARTY= Required when the child is a party to the parentage action.
*NOTE:  If the adoption or guardianship actions are the result of child abuse or neglect, or dependency, the relevant child protection statutes usually apply to the necessity for counsel for minors. These statistics refer to circumstances not directly involving the child protection system.
Funding for those who represent children

Draft 10/19/05

Alabama
Dom Rel: parties
Adoption: parties
Parentage: parties
Guardianship: parties

Alaska
Dom Rel: the order for costs, fees, and disbursements shall be made against either or both parents, except that, if one of the parties responsible for the costs is indigent, the costs, fees, and disbursements for that party shall be borne by the state.

Arizona
Dom Rel: court may order against either or both parents.

Arkansas
Dom Rel: Administrative Office of the Courts or the parties to pay all or a portion of the expenses, depending on the ability of the parties to pay
Guardianship: admin office of the courts or parties

California
Dom Rel: parties and if together are financially unable to pay all or a portion then by the county.
Parentage: parties (excluding any governmental entities)

Colorado
Dom Rel: any or all of the parties; except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the state.
Adoption: paid by relinquishing parents, but if indigent by the state
Parentage: parties

Connecticut
Dom Rel: order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of the attorney or in whole or in part from the estate of the child. If the child is receiving or has received state aid or care, the reasonable compensation of the attorney shall be established by, and paid from funds appropriated to, the Judicial Department.
Guardianship: shall be paid as a part of the expenses of administration
Parentage: shall be paid as part of the expenses of administration

Delaware
Dom Rel: parties

District of Columbia
Dom Rel: parties

Florida
Dom Rel: parties
Adoption: Dept. will not be held liable for fees for agency or intermediary

Georgia
Parentage: parties
Adoption: county

Hawaii
Dom Rel: by parties
Parentage: payable in whole or in part by any or all parties as the circumstances may justify

Idaho
Dom Rel: parties, but if both parents indigent then county

Illinois
Dom Rel: parents, parties, and marital estate or child’s separate estate
Adoption: parties or guardians must anticipate making financial accommodations if families not able to pay fees. (Cook County CIR Rule 10.7)
Parentage: parents, parties, marital estate or the child’s separate estate

Indiana
Dom Rel: parents
Parentage: parties
Adoption: parties
Guardianship: parties

Iowa
Dom Rel: parents or if indigent by the county
Parentage: person who brings action

Kansas
Parentage: parties and if indigent then general fund of the county

Kentucky
Dom Rel: county
Others: parties

Louisiana
Dom Rel: parties or if parties’ ability to pay limited, pro bono atty.

Maine
Dom Rel: parties

Maryland
Adoption: parties
Guardianship: parties
Dom Rel: parties
Paternity: parties or county

Massachusetts
Dom Rel: commonwealth

Michigan
Dom Rel: not paid unless court approval; parties
Guardian: parties

Minnesota
Dom Rel: parties or if incapable state courts/county.
Adoption: adopting parents, provided such parents be given a reasonable opportunity to be heard
Parentage: parties

Mississippi
Dom Rel: county general fund
Adoption: county general fund

Missouri
Dom Rel: parties or public funds
Funding for those who represent children

Adoption: cannot claim fee as costs if minor is a party to the suit

Montana
Dom Rel: parties of if indigent, costs must be waived
Parentage: parties

Nebraska
Dom Rel: parties or if indigent may have county pay

Nevada
Parentage: parties or if indigent may have county pay

New Hampshire
Dom Rel: parties or indigent defense counsel
Others: as stated in the order or between parties

New Jersey
Dom Rel: parties
Other: parties

New Mexico
Dom Rel: parties
Adoption: by funds appropriated to the administrative office of the courts

New York
Dom Rel: parties, indigent fund or government
Adoption: parties
Guardianship: parties
Parentage: parties

North Carolina
All cases in appointment of GALs: parties

North Dakota
Dom Rel: parties or county
Parentage: parties or if indigent by the county

Ohio
Dom Rel: parties
Parentage: parties or county

Oklahoma
Dom Rel: parties
Adoption: parties

Oregon
Dom Rel: parties (not for indigent defense services)

Pennsylvania
Adoption: by the county and/or adopting parents

Rhode Island
Dom Rel: parties

South Carolina
Dom Rel: parties
Adoption: parties
Parentage: parties
Guardianship: parties

South Dakota
Dom Rel: parties
Funding for those who represent children

Tennessee
  Dom Rel: parties or may be waived upon motion for an indigent person
  Others: parties
Texas
  Attorney ad litem: by parties
Utah
  Dom Rel: parties
  Others: parties
Vermont
  Dom Rel: parties
  Parentage: parties
Virginia
  Dom Rel (under CP statute): parents
Washington
  Dom Rel: parties or county
  Adoption: county
West Virginia
  Dom Rel: parties
  Adoption: parties
  Parentage: parties
  Guardianship: parties
Wisconsin
  Dom Rel: parties or if both indigent then county
  Adoption: parties or if both indigent then county
  Parentage: parties or if both indigent then county
  Guardianship: parties or if both indigent then county
Wyoming
  Parentage: parties
## STATE REQUIREMENTS FOR APPOINTMENT AS CHILD’S LEGAL REPRESENTATIVE OR GAL IN DOMESTIC RELATIONS

<table>
<thead>
<tr>
<th>STATE</th>
<th>REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARKANSAS</td>
<td><em>S Ct Admin Rule 15-4</em>. Ten hours of initial education on Child Development; Ad Litem roles, including ethics and relevant substantive state, deferral and case law; family dynamics including substance abuse, domestic abuse and mental health issues. 4 hours of CLE annually.</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>Rule 10. Representation of Children; Minors and Incompetent Persons. Rules of Family Procedure (10/19/2005) Child’s Attorney, Best Interest Attorney or Court Advisor must be qualified through training or experience in type of proceeding in which appointment is made.</td>
</tr>
<tr>
<td>DELAWARE</td>
<td>Educated, trained and screened by Office of the Child Advocate.</td>
</tr>
<tr>
<td>GEORGIA</td>
<td>Superior Court Rule 29.9. Each circuit shall approve/provide training for GAL including inter alia domestic relations laws and procedure, role/responsibilities/ethics of GAL, recognition of child’s best interest, interviewing, child and family development and dynamics, domestic violence and various types of abuse and available services.</td>
</tr>
<tr>
<td>ILLINOIS</td>
<td><em>S.Ct Rule 906 (2006).</em> Each circuit court shall develop qualifications and educational requirements. May include requirements for 10 hours of CLE in child development, role of GAL and child representative, ethics, relevant substantive state, federal and case law in custody and visitation, abuse and mental health issues, and periodic continuing CLE.</td>
</tr>
<tr>
<td>KANSAS</td>
<td>Prerequisite education prior to appointment of not less than 6 hours including 1 hour of professional responsibility and continuing education of not less than 6 hours annually.</td>
</tr>
<tr>
<td>KENTUCKY</td>
<td>Screening and panel requirements varying by county.</td>
</tr>
<tr>
<td>MAINE</td>
<td>16 hours of child-related education issues of child development and child abuse and neglect and 6 hours of CLE in child related issues annually.</td>
</tr>
<tr>
<td>MINNESOTA</td>
<td>40 hours of pre-service training per MN GAL program curriculum on family law etc plus 8 hours of CLE annually. Internship requirements: observe a variety of family and juvenile court proceedings and intern with an experienced GAL on at least 2 family court cases.</td>
</tr>
<tr>
<td>MISSOURI</td>
<td>Standards with Comments for Guardians Ad Litem in Missouri Juvenile and Family Court Matters. Each attorney to have 12 hours of child related education and 6 hours of CLE in child related issues annually. Training shall be approved by Supreme Court education committee and shall include at least the 10 listed areas.</td>
</tr>
<tr>
<td>NEW HAMPSHIRE</td>
<td>Supreme Court State-wide GAL Guidelines and Rules of Application, Certification and Practice. Require 20 hours training in course approved by respective court and must “accept reasonable number of publicly funded cases annually.”</td>
</tr>
</tbody>
</table>
## STATE REQUIREMENTS FOR APPOINTMENT AS CHILD’S LEGAL REPRESENTATIVE OR GAL IN DOMESTIC RELATIONS

<table>
<thead>
<tr>
<th>State</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NEW YORK</strong></td>
<td>12 hours of child-related education and either: (1) have represented families in child protection or domestic relations, or (2) participation in the NY Law Guardians Office mentor attorney program in at least 2 hearings in domestic relations. 6 hours of child related CLE within 2 years.</td>
</tr>
<tr>
<td><strong>NORTH DAKOTA</strong></td>
<td>18 hours of child-related education and 18 hours of child related CLE within 3 years. (Supreme Court Rule)</td>
</tr>
<tr>
<td><strong>OHIO</strong></td>
<td>Prerequisites vary by county.</td>
</tr>
<tr>
<td><strong>PENNSLYVANIA</strong></td>
<td>Judicial screening of individual custody masters in their courtrooms.</td>
</tr>
<tr>
<td><strong>SOUTH CAROLINA</strong></td>
<td>6 hours of family law CLE in custody and visitation, may be waived. (effective 1/2003)</td>
</tr>
<tr>
<td><strong>TENNESSEE</strong></td>
<td>Prerequisites vary by county, but all require between 3-6 hours of child related CLE annually.</td>
</tr>
<tr>
<td><strong>UTAH</strong></td>
<td>Certified by Director of Office of GAL as having met minimum qualifications. May be required to take 1 pro bono case for every 5 compensated cases.</td>
</tr>
<tr>
<td><strong>VIRGINIA</strong></td>
<td><em>VA Supreme Court Standards pursuant to 16.1-266.1.</em> GAL must be active member of Bar and attend 7 hours of approved training in 8 specified areas and 6 hours biennially thereafter.</td>
</tr>
<tr>
<td><strong>WASHINGTON</strong></td>
<td>Training and screening through a state panel and educational program. 30 hours of specific GAL training through the state office and attendance at all yearly GAL CLE state offered programs.</td>
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<tr>
<td><strong>WISCONSIN</strong></td>
<td>30 hours of specific GAL training through the state office and attendance at all yearly GAL CLE state offered programs.</td>
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4/5/2007
<table>
<thead>
<tr>
<th><strong>Uniform Adoption Act (1994)</strong></th>
<th><strong>Appointment</strong></th>
<th><strong>Child Preference</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 3-201</td>
<td>* Court shall appoint representation for child if parental rights are being terminated. * Child shall have representation in contested adoption. * Child may have representation in uncontested adoption</td>
<td>§ 2-402 * Child’s consent not required if 12+ but find not in best interest.</td>
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<tr>
<th><strong>Uniform Parentage Act (2000 Amendments)</strong></th>
<th><strong>Appointment</strong></th>
<th><strong>Child Preference</strong></th>
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<tbody>
<tr>
<td>§ 602</td>
<td>* Child may maintain proceeding</td>
<td>§ 4-104 * Child’s consent required if 12 and over.</td>
</tr>
<tr>
<td>§ 603</td>
<td>* Child not necessary party</td>
<td></td>
</tr>
<tr>
<td>§ 608</td>
<td>* Child must be represented in motion to deny genetic testing</td>
<td></td>
</tr>
<tr>
<td>§ 612</td>
<td>* Court appoint representation if child is party unless finds its in child’s best interest to not be represented</td>
<td></td>
</tr>
<tr>
<td>§ 637</td>
<td>* Finding is binging on child if genetics testing was done or if child was a represented party.</td>
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Relevant Uniform Law Provisions on Appointment of Representation for Minor & Child Preference

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<tr>
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<tbody>
<tr>
<td>Article 2- Guardianship of Minor</td>
<td>* Court may appoint GAL at any time if representation of interest is inadequate</td>
</tr>
<tr>
<td></td>
<td>§ 205 (c)</td>
</tr>
<tr>
<td></td>
<td>* Court may appoint attorney for minor if interest of minor is not being adequately represented “giving consideration to the choice of the minor if the minor has attained 14 years of age.”</td>
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<tr>
<th>§ 203 Objection by Minor…</th>
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<tr>
<td>* Minor who is 14 may prevent or terminate appointment by filing written objection in court</td>
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</table>

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<tr>
<th>§ 204 Judicial Appointment</th>
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<tbody>
<tr>
<td>* (a) Minor may petition for appointment of guardian</td>
</tr>
<tr>
<td>(b) Appoint if in best interest and…</td>
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</table>

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<tr>
<th>§ 206</th>
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<tbody>
<tr>
<td>* Shall appoint nominee of minor 14 and +, unless court finds “contrary to the best interest of the minor.”</td>
</tr>
</tbody>
</table>
High-Conflict Custody Cases: Reforming the System for Children

Conference Report and Action Plan*

Conference sponsored by
the American Bar Association Family Law Section
and The Johnson Foundation

Wingspread Conference Center
Racine, Wisconsin
September 8-10, 2000

The goal of this interdisciplinary, international conference was to develop recommendations for changes in the legal and mental health systems to reduce the impact of high-conflict custody cases on children. The participants in the conference wish to thank the American Bar Association Family Law Section and The Johnson Foundation for bringing us together to discuss this extremely important topic and for facilitating the creation of this conference report.

PREAMBLE

High-conflict custody cases seriously harm the children involved. Children caught in the middle of high-conflict cases face perpetual emotional turmoil. They may become alienated from a parent or be harmed by exposure to domestic violence. Children trapped in high-conflict custody disputes may be at greater risk for substance abuse and educational failure. In addition, high-conflict custody cases drain court, family and mental health resources, take additional time, and create anxiety for all involved, from the legal

*The Conference reporter was Sarah H. Ramsey and the final report was submitted on November 1, 2000. For additional information or to comment on the Report, contact the Conference organizer, Linda H. Elrod, or the reporter (contact information is included on the attached participants list).
and mental health professionals to the litigants and their families. Children suffer in an adversarial system that declares winners and losers and does not provide adequate support mechanisms for the parties.

High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute -- parents who have not managed their conflict responsibly; attorneys whose representation of their clients adds additional and unnecessary conflict to the proceedings; mental health professionals whose interaction with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict. High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.

Family law is unique. Unlike cases in which the litigants never see each other after the judge or jury makes a decision, cases involving custody of children are never final and can continue throughout the child’s minority. Civil and criminal laws may be involved. The goal of the family law system should be to give the parties the tools to restructure their lives after the immediate case. Central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and to enable the family to manage its own affairs. To accomplish this, judges, lawyers and mental health professionals need to adopt new models for resolving family disputes that focus on the welfare of children.

These new models need to be supported by an increase in research on high-conflict families and the impact of conflict on children. We need to find ways to distinguish high-conflict cases from those in which the parents are able to manage their affairs without significant state intervention. We have too little information on the impacts of custody disputes, divorce and dispute resolution processes. From necessity, we too often proceed from anecdotal information and individual observation. Case management, intervention, education, and therapy programs need to be evaluated. Research and evaluation should be interdisciplinary and directed at developing and improving the new models and identifying successful strategies for lessening the harm caused to children from custody disputes.

These new models also need adequate financial support. Judges, lawyers and mental health professionals should work together to raise the status of courts that handle family matters and to ensure that these courts have adequate support and access to services for the families that they serve. Appropriate legal representation and mental health assistance should be available to all families without regard to income. Funding should be structured to ensure high quality, independent services.

The conference identified mental health professionals, lawyers and judges as those having the greatest power to influence the conduct of high-conflict custody cases and concluded that they should bear the primary responsibility for preventing or reducing conflict in high-conflict cases. High-conflict
custody cases need a specialized approach. Judges, lawyers and mental health professionals should have special training in handling high-conflict cases. They must develop ways to work together under new collaborative models to more effectively identify and resolve high-conflict custody cases. They must remain sensitive to the need to encourage cooperative parents to resolve their disputes and not burden them with unnecessary intervention. They should provide information to parents about the legal process, the availability of conflict-reducing dispute resolution mechanisms, and the harm caused to children by parental conflict. These new models should hold all the participants in custody cases accountable for their contribution to increasing or decreasing levels of conflict, be sensitive to the rights and privacy of individuals and be prepared to intervene to the extent necessary to protect children.

A key element for the development and implementation of a model to address high-conflict custody cases is the collaborative efforts of the bench, bar and mental health professionals. Our report makes recommendations in specific categories to each of these groups and is designed to stimulate action by articulating "operational principles" that can form the basis of policy and procedural changes.

I. MENTAL HEALTH PROFESSIONALS

Basic Principle: Mental health professionals should take a proactive role in developing a community that supports responsible, healthy parenting and in developing resources and abilities to meet the needs of separating, never married, and divorced families.

1) Clarify Roles

   a) Mental health professionals should ensure that the legal community and court are aware of and adhere to the ethical rules and standards promulgated by their mental health professional organizations concerning child custody evaluations and other custody related issues. Mental health professionals are obligated also to understand court-connected rules or standards of practice, if any, and to adhere to these standards in conducting these evaluations or investigations. If a conflict exists between standards, these should be discussed in joint meetings with court representatives.

   b) The mental health community must be clear about and respect the role boundaries and responsibilities that are involved in the process of divorce and separation, distinguishing among roles of evaluator, therapist, parent coordinator, mediator, arbitrator and other professionals involved in the case.

   c) Mental health professionals should, in collaboration with other service providers and attorneys, consider ways to conserve the family's available financial resources and time and prioritize and coordinate their efforts when recommending services. When multiple mental health professionals work with separated and divorced families, they should coordinate their roles in order to bring about the best outcome for the family and the child.
2) Improve Child Custody Evaluations

a) Child custody evaluations should be neutral and include evaluations of both parents and all children and be undertaken with the agreement of the parents and the children, if appropriate, or by court order.

b) A "child custody evaluation" is comparative and focuses on family relationships, parental capacities, and the needs of the children. In contrast, a "parental capacity evaluation" focuses on one parent. A "parental capacity evaluation" should not be confused with a "child custody evaluation." A "child custody evaluation" requires the voluntary or court-ordered participation of both parents and the children. A "parental capacity evaluation" can be conducted on behalf of one parent alone.

c) Qualifications for child custody evaluators should be uniform and each state should have a court rule or statute establishing these qualifications. Mental health professionals should strive to develop and adhere to national qualification guidelines for child custody evaluations in divorce proceedings.

d) Child custody evaluators should have training and continuing education in relevant areas including the differentiation of different types of conflict; the impact of conflict on child and adult development and functioning; child- interview techniques; custody evaluation protocols; domestic violence; child abuse and neglect; substance abuse; and basic principles of child custody law and procedure are essential for neutral evaluators.

e) If there are conflicting custody evaluations, the court should order that the evaluators meet and attempt to resolve their differences before they testify in court. Meeting structures that reduce conflict among professionals should be considered, such as using the child's representative to chair or a mediator to facilitate the meeting. If the evaluators are unable to resolve differences, they should report the reason(s) for their differences to the court.

f) In reporting or testifying about their custody or visitation recommendations, mental health professionals should distinguish among their clinical judgments, research-based opinions, and philosophical positions. In addition, mental health professionals should summarize their data-gathering procedures, information sources and time spent and present all relevant information on limitations of the evaluation that result from unobtainable information, failure of a party to cooperate or the circumstances of particular interviews.

g) Evaluation reports should be written in plain English.

(1) Avoid technical jargon.

(2) Accentuate positive parental attributes as well as negative ones.
(3) Avoid adding to the family's shame by stigmatizing or blaming parents or children.

(4) Psychiatric diagnoses should not be used unless they are relevant to parenting.

(5) Legal terms should be used only when necessary.

(6) If making a recommendation to the court regarding a parenting plan, reports should provide clear, detailed recommendations that are consistent with the health, safety, welfare and best interest of the child.

h) Evaluators should work with the courts to establish appropriate confidentiality requirements for custody evaluations.

(1) Before an evaluation is undertaken, the evaluator and the court should ensure that the attorneys and family members know who will have access to the report and who will be allowed to have a copy of the report.

(2) Evaluators should consider whether, when and how they should share their observations and recommendations with the parents or children as a way of reducing conflicts. When feasible, evaluators shall consider meeting with the parents to share observations and recommendations rather than leaving that to the legal professionals and the court.

3) Treatment

a) Before treating a child involved in a custody dispute, mental health professionals should make good faith efforts to obtain permission of both parents, except for immediate needs in cases of emergency. If permission is not obtained, unless one parent has sole legal custody, the parent must get a court order for treatment. Mental health professionals should make affirmative efforts to determine if a custody dispute is contemplated.

b) Mental health professionals involved in treating members of divorcing and separating families should describe their obligations of confidentiality to their clients and obtain adequate informed consent prior to beginning treatment.

c) Mental health professionals who are involved in treating members of a divorcing or separating family should get signed waivers of confidentiality to allow them to confer among themselves concerning issues of parenting and the child's interest and welfare. Such shared communication should remain confidential and not be revealed to the parties or their attorneys.

d) Children's therapists should be aware of the possible negative impact of their testimony on the therapeutic relationship. When required to testify, children's therapists should:

(1) assure that privilege has been appropriately waived;
(2) clearly indicate that they do not have the information needed to make specific recommendations regarding custody or visitation;

(3) explain that information they provide to the court on how the child may react to proposed arrangements can be based only on developmental needs or stated preferences of the child, and not on a comparison of the parents.

II. LAWYERS

Basic Principle: Lawyers should take a proactive role in reducing conflict between disputing parents and promoting collaborative problem solving with parents, mental health professionals and the court.

1) The Lawyer's Responsibility to Promote Conflict Resolution

a) Lawyers should diligently exercise their counseling function in assisting their clients to avoid inappropriate conflict in dealing with custody-related issues, including the ways in which the parties and counsel pursue litigation. Lawyers should discuss with client parents the negative consequences of custody conflicts and disputes on their children and should advise parents about the availability of resources to reduce conflict.

b) Lawyers should discuss alternatives to litigation, such as mediation, with their clients.

c) As a general rule, lawyers should encourage their clients to cooperate with forensic custody and mental health evaluations.

d) Lawyers have a duty to realistically evaluate their client's case and not raise false expectations.

e) Lawyers should encourage early court interventions to identify issues in high-conflict cases and should refer clients to available resources and processes to help them resolve their conflicts outside the courtroom.

f) Lawyers should assist one another and the court in expeditiously determining the best interests of the child by cooperating in defining and limiting the issues, procedures, and evidence necessary to determine the best interest of the child.

g) Lawyers should maintain a civil demeanor and encourage their clients to follow their example.

h) Lawyers and parties should not use the media, child protective services, or other means to create or exacerbate conflict and should be sensitive to the child's need for privacy.

i) Lawyers should be trained in child development, child abuse and neglect, domestic
violence, family dynamics, and alternative conflict resolution and be knowledgeable about cross-disciplinary issues affecting their high-conflict custody cases, such as competencies of other professionals and available community resources.

j) Lawyers should develop and participate in special continuing legal education programs for high-conflict custody cases and encourage law schools to incorporate interdisciplinary training in mental health and dispute resolution into the family law curriculum to improve lawyers’ ability to reduce conflict in custody cases.

2) The Child’s Representative

a) As a general rule, in high-conflict cases a child should have a lawyer or representative who is independent of the parents and their lawyers. In some limited circumstances a representative for the child may not be necessary, perhaps in cases involving very young children in which the judge believes that the child’s interests are being properly considered by the parties, for example.

b) Taking into account lawyers’ ethical rules, jurisdictions should define and describe the roles to be played by the different legal representatives of children, distinguishing, for example, between the role of a guardian ad litem and the child’s lawyer.

c) Jurisdictions should adopt appointment criteria and performance standards for appointment of children’s representatives.

1) Ethical Considerations

a) The legal profession should develop protocols for working with unrepresented opposing parties in high-conflict cases.

b) The ethical rules should be revised to develop separate rules specific to the context of family law, particularly to include rules which promote achievement of the collaborative, cooperative principles set forth above.

c) Mechanisms need to be developed that will allow independent representation of indigent parents, but prevent the inappropriate use of public funds to fuel conflict. Providing public funding for attorneys for indigent parents in custody proceedings creates an ethical dilemma in the context of high-conflict custody cases. On the one hand parents who need legal assistance and are indigent should receive it; on the other hand, when parents are paying their attorneys themselves, the cost of litigation can serve as a means for constraining conflict.

III. THE COURT SYSTEM
Basic Principle: Courts should proactively seek ways of helping parents in a custody dispute protect or restore healthy relationships with their children and develop mechanisms for resolving disputes with each other in a timely manner in the best interests of their children.

1) Improve Case Management

   a) There should be a timely identification and screening process that includes short assessment tools to identify high-conflict cases.

   b) Courts should impose control and structure on high-conflict custody cases through the use of management tools such as pre-trial conferences.

   c) There should be a quick and efficient calendaring system that prioritizes high-conflict cases.

   d) Courts should have designated case managers and adequate technology and information management systems to link and track cases involving the same parties and to facilitate connection to community resources.

   e) Courts should have a system for coordinating and monitoring the multiple claims, deadlines, services, and other litigation and resource requirements in high-conflict cases.

   f) Courts should require the timely development and submission of plans from parents that, in a manner that seeks to preserve a meaningful role for both parents, describes the time each parent will spend with the child and the responsibility and system for making decisions about the child, consistent with the need for physical and emotional safety of parents and child.

2) Provide Services

   a) The following services and programs should be available to all families, without regard to income, through the court or referrals:

      (1) Mediation.

      (2) Custody evaluations conducted by a joint neutral evaluator appointed by the court who should serve throughout the case.

      (3) Investigations, such as assessments of the child's home environment and education status.

      (4) Education programs tailored to meet the needs of different families, such as a program that emphasized constructive parenting behavior and preserving safety for high conflict families.
(5) Parenting monitors, coordinators, or masters who are professionals trained to manage chronic, recurring disputes, such as visitation conflicts, and to help parents adhere to court orders.

(6) Group and individual mental health treatment with specific goals designed to help parents manage their conflict responsibly and ease the stress on the child.

(i) Supervised visitation and transfer of the child from one parent to another.

(ii) Drug and alcohol screening and treatment referrals.

(iii) Domestic violence services.

(iv) Trained children's representatives.

b) Interventions and services should be carefully tailored to meet the unique needs of each individual or family. Issues that should be considered in developing a service plan are the level of intrusiveness of the services, the number of requirements being imposed, accountability for the adequacy of the service, and the parents’ level of interest in the service.

c) The court should disseminate objective literature to all parties involved in custody disputes on the laws and procedures involved. Parents and children should have a roadmap that explains the court system, what is expected of them and the roles of other participants. The courts should distribute information about community resources available to the family.

3) Appropriate Selection of Judges

a) Judges handling high-conflict custody cases should have specialized education and training on dynamics of high-conflict cases and effective ways to manage conflict.

b) Judicial assignment should promote continuity and tenure that assist handling high-conflict cases.

c) Judges should be trained in child development, child abuse and neglect, domestic violence, family dynamics and alternative conflict resolution and be knowledgeable about cross-disciplinary issues affecting high-conflict custody cases, such as competencies of other professionals and available community resources.

3 Improve representation
a Judges should assist lawyers in maintaining focus and reducing conflict.

b Judges should utilize appropriate sanctions for lawyers who file frivolous or bad faith motions.

c Judges should take the initiative in maintaining civility and reasonableness in pleadings and interactions among counsel and the parties.

d Courts should be empowered to appoint a lawyer or representative for the child in high conflict custody cases.

e Judges and lawyers should insure that specialized education and training is required for all of the child's representatives in high-conflict cases.

f Judges should determine if parents wish to proceed pro se and should provide additional educational materials to parents who chose to proceed pro se. If parents need counsel but are indigent, counsel should be appointed.

3 Structural Changes

a Courts should continue to explore ways to coordinate services, reduce fragmentation and provide continuity and consistency for a variety of family disputes through implementing new structures such as the unified family court model.

b Procedures should be created to identify deficiencies of a custody evaluation report prepared by a court-appointed evaluator. There should be a presumption that the court will order only one evaluation, rebuttable through a separate hearing on whether a new evaluator should be appointed because of report inadequacies or other unusual circumstances.

c Courts should develop procedures for expeditious and cost-effective procedures for examination and cross-examination of evaluators, such as telephone conferences; audio or video examinations; videoconferences; and scheduling of appearances.

d Courts should work toward constraining costs and developing means of resolving custody cases that will be affordable for most parents.
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**CHILD CUSTODY EVALUATIONS**


APA Guidelines for Child Custody Evaluations.


**THE ROLE OF COURTS AND LAWYERS**


Willson A. McTavish, *The Best Interests of Children in High-Conflict Custody/Access Cases: The Role of the Children's Lawyer for Ontario.*

**ALTERNATIVE DISPUTE RESOLUTION**


*Model Standards of Practice for Family and Divorce Mediation*, 39 Fam. Ct. Rev. 121 (Jan. 2001) (created by the Symposium on Standards of Practice convened by AFCC, the American Bar Association Family Law Section and the National Council of Dispute Resolution Organizations)


**IMPROVING PROFESSIONAL PRACTICE**


Sarah M. Buel, *The Impact of Domestic Violence on Children: Twelve Practical Recommendations for Lawyers, Advocates, Judges, Probation and Court Personnel*.


For the Sake of the Children, Chapter 5: Complications of High-Conflict Divorces, Joint Committee on Child Custody–Canada (1998).

Divorce is disruptive for children at all ages. But the small percentage of divorces that are high conflict, where the separating parents continue to litigate and fail to come to a resolution of their postdivorce situation in the first 2 years, are qualitatively and quantitatively more disruptive of the child’s continued psychological development. Further, the conflict itself interferes with the utility of the usual help available to children of divorce.

Children whose parents separate or divorce are consistently reported to have more feelings of depression, sadness, anxiety, anger, and lowered self-esteem. They experience more social disruption, academic decline, and behavioral difficulties at home and at school than their peers (Emery, 1982; Felner, Farber, & Primavera, 1980; Guidubaldi & Ferry, 1985; Hess & Camara, 1979; Hetherington, 1979; Hetherington, Cox, & Cox, 1985; Hodges & Bloom, 1984; Jacobson, 1978; Kurdek & Berg, 1983; Peterson & Zill, 1986; Wallerstein & Kelly, 1980). Data from the National Center for Health Statistics indicate that compared with children from intact families, children from single-parent and remarried families were more than twice as likely to have emotional and behavioral problems (Zill & Schoenborn, 1990). Not only the existence but the magnitude of this difference is important (Emery, 1994). Researchers find that the differences are generally small. Children from divorced families who suffer the most often come from overlapping groups involving chronic interparental conflict (Amato & Keith, 1991; Emery, 1982, 1988; Grych & Fincham,
and poor parent-child relationships (Maccoby & Mnookin, 1992). Inter-parental hostility and aggression, disruptions in attachment, and diminished parenting may continue well beyond the early stages of the divorce process and sometimes continue throughout the time the child is at home and beyond. In Maccoby and Mnookin's study of 1,124 families in California, one quarter of the couples studied were in high conflict and continued dispute 3½ years after the separation.

Children of divorced parents are at risk in adulthood of their own divorce (Glenn & Kramer, 1987). Wallerstein and Blakeslee (1989) found that children from divorced families are often ill prepared for the challenges of adult relationships. Additionally, divorce becomes a normalized solution to an unhappy or difficult marriage.

FACTORS CONTRIBUTING TO THE NEGATIVE IMPACT OF DIVORCE

The factors with a negative impact on children of divorced parents are complex. Wallerstein (1991) proposes that divorced parents often suffer from compromised parenting capacities, thus disturbing the parent-child relationship and consequently the child's psychological well-being. The absence of parental emotional, physical, and spiritual availability is an enduring fear of children of divorced parents (Wallerstein, 1991).

In high-conflict divorces, children are often involved in their parents' legal disputes over the custody or coparenting arrangements. These families present a particularly challenging group for clinicians and the family court system. Children of high-conflict divorce are at risk for more behavioral, cognitive, emotional, and social dysfunction than other children of separated and divorced parents (Amato & Keith, 1991; Grych & Fincham, 1990; Johnston & Campbell, 1993; Johnston, Gonzalez, & Campbell, 1987; Johnston, Kline, & Tscharn, 1989; Long, Forehand, Fauber, & Brody, 1987; Radovanovic, 1993). These children continue to witness family hostility and violence, even after their parents divorce (Emery, 1982; Maccoby & Mnookin, 1992).

High-conflict divorces often involve the most severe impairments of parenting. Parental judgment is compromised as the conflict becomes the primary focus of the moment. Our clinical work, as well as that of others (Johnston & Campbell, 1988), suggests that often parents who are in high conflict have not been able to resolve the feelings of loss or betrayal associated with the marital separation. Clinical experience suggests that parents in high conflict will merge their needs with those of their child. The absence of appropriate caretaking or empathic response to the children may result in a "hypervigilant monitoring" (Wallerstein, 1991) by children, or a kind of learned helpless response. Children may stop expecting the parent to respond empathically to them. They may come to feel that parents respond only when the child's needs mirror the parents' or the child is undemanding. These children are often not
Factors Contributing to the Negative Impact of Divorce

seen by their parents as independent beings, but as extensions of the interparental conflict.

This chapter will review the literature examining the short- and long-term consequences of high-conflict divorce on children, and the specific family process factors and characteristics that affect the separation and divorce experience and what is known or not known about the interaction of these variables. To the extent that research can describe a child’s expectable developmental course, the professional can provide the court with valuable information for custody, visitation, and coparenting decision making in the resolution of high-conflict divorce.

In divorces not involving high conflict, aspects of reintegration and stabilization following divorce involve improved communication between the ex-spouses, stable and predictable patterns of access and visitation between children and the noncustodial parent, resolution of property and financial disputes, and the subjective sense of the ex-spouses and children of divorce moving on with their lives in what Ahrons (1994) has termed the “binuclear family.” In the binuclear family, both parents have created lives either singly or with new partners that are stable and permit them to cooperate together to support the developmental needs of the children. Thus the previous task of the nuclear family in supporting the needs of child development has become organized and met through a new configuration—a family comprising two separate but interrelated units.

Research on restabilization and reintegration following divorce shows a marked difference between highly conflictual and relatively nonconflictual divorcing families. Ahrons and Miller (1993) and Wallerstein and Kelly (1980) present findings consistent with an 18- to 24-month reintegration following divorce in families where severe interparental conflict does not continue following separation.

In highly conflictual divorcing families, however, there are often obstacles to the progression of family members and the family unit toward a new family configuration. Such obstacles are most often ways that either or both parents are psychologically or socially unable to relinquish and grieve the marital and family contract and result in what has been termed the “impasses of divorce” (Johnston & Campbell, 1988). In other conflictual divorces, significant impairments in familial functioning such as parent-child relationships or destructive and even violent interparental interactions prevent the development of new patterns of adaptation and stable family reorganization.

In the divorce follow-up study of families in Dane County, Wisconsin, Ahrons and Miller (1993) find specific patterns of reintegration after relatively nonconflictual divorce. This study considered the data from the initial evaluation in 1979 a year postdivorce as well as two follow-up periods, 2 and 4 years later. The final evaluation was 5 years postdivorce. They found that the quality of the postdivorce relationship and proximity of the divorcing marital partners had a significant correlation to postdivorce adjustment and the quality of
paternal involvement with the children. This sample, however, may have been biased toward relatively stable divorcing families as couples had to live in the same county and the fathers had ongoing contact with the children for the family to be admitted to the study. The period of 18 to 24 months for reintegration following divorce found in this study may be considered a benchmark for more stable and less intensively conflictual divorcing families. Kaffman (1993) also presents data consistent with an adjustment to divorce within a 2-year period in his sample drawn from the kibbutz. He found, however, that where there was a longer period of marriage as well as more intense and overt conflict in the divorcing couple the initial adjustment to divorce did not reliably occur within 2 years. The 12% of couples characterized by more intense and overt conflict continued to show difficulties in postdivorce adjustment for 5 years after separation.

Thus, whereas many divorcing families will show an initial adjustment within 2 years—what Wallerstein and Blakeslee (1989) refer to as the acute period of adjustment after divorce—a minority of families will continue to have significant difficulty and disturbance for a more extended period. These families are characterized by intensive and enduring conflict between the divorcing couple and often compromised parent-child relationships. The parents’ absorption in unremitting conflict with their ex-spouse renders them less available to address the intensified needs of children. Further, greater conflict between the ex-spouses often leads to intensified loyalty conflicts for the children and a correspondingly greater tendency to ally with one parent over the other.

Much has been learned from the study of families who litigate divorce and who utilize the court system chronically, typically the most highly conflictual divorce situations. Johnston and Campbell have conducted an ongoing study of such families in California and summarized their work in a series of papers (1985, 1987, 1988, 1993) as well as their book, Impasses of Divorce (1988). Intensive levels of enduring conflict and even physical violence in some families characterize the interactions of the divorcing couple. Children are often aligned with one parent against the other and at risk of sacrificing a relationship with one parent to stabilize and secure the relationship with the other parent. Johnston and Campbell’s (1988) typology of divorce impasse situations focuses principally on the psychodynamic aspects of the marital partners and ways that they are unable to let each other go. This structural view of the impasse is augmented by a recommendation to formulate and understand the impasse at interactional and external/social levels. Their typology outlines divorces where reactivated trauma are one form of impasse and separation-individuation conflicts are the other general form of impasse.

Reactivated trauma impasses are considered to have a relatively good prognosis for resolution. The impasse here reflects a difficulty progressing through the stages of divorce transition because of an earlier unresolved loss. The parents have fewer psychological deficits than those impasses due to separation-individuation conflicts. In this latter form of impasse, the unresolved
Factors Contributing to the Negative Impact of Divorce

psychological development of the parents with respect to individuation and autonomy complicates the divorce transition process. Johnston and Campbell (1988) identify three subtypes of difficulty in divorce impasses due to conflicts concerning separation-individuation: dependent attachment, counterdependency, and oscillating dependency. Though subtypes show different behavioral manifestations, parents in each subtype are not able to relinquish the relationship with the ex-spouse as it has become entangled and enmeshed with their own identity. High conflict and especially litigating divorcing couples typically represent the separation-individuation form of divorce impasse.

Individuals in high-conflict divorces are alternately enraged and deeply emotionally injured by the actions of their ex-spouse. The intensive and unremitting emotional engagement with their ex-spouse reflects the degree to which the ex-spouse is psychologically entangled with their identity and sense of self.

Empirical research on child and adolescent adjustment following divorce can help in understanding variables in family members' reorientation following high-conflict versus relatively nonconflictual divorces. Fine, Moreland, and Schwebel (1983) studied long-term adjustment following divorce during childhood in a college sample and found that positive experiences in family life before divorce and better quality of relationships between ex-spouses following divorce predicted better adjustment. Thus, the extent to which parental and familial conflict is acted out within the family both before and after the divorce bears importantly on the extent to which postdivorce adjustment, at least in children, occurs. Other studies of postdivorce adjustment in children and adolescents following divorce (e.g., Black & Pedro-Carroll, 1993; Brody & Forehand, 1990) derive similar findings on the importance of intensity of interparental conflict and strength of parent-child relationships in mediating the adjustment of children and adolescents after divorce. These findings consistently show that the pattern of adjustment and reorientation following divorce correlates with the systemic relationship among family members.

The addition of overt violence to a high-conflict divorce situation only intensifies the difficulties in postdivorce adjustment and reorientation following divorce. Johnston and Campbell (1993) studied litigating high-conflict divorce families and identified a number of subtypes. Although subtypes varied in chronicity and mutuality of violent behaviors, all these families where the intensity of interparental conflict had erupted into physical violence faced intensive obstacles to postdivorce adjustment. The families' capacity to progress toward stability of visitation arrangements and viable communication between the ex-spouses was held hostage to the intensity and enduring nature of interparental conflict.

High-conflict divorces are especially likely to become obstructed in the postdivorce adjustment process. Interference with the progression to postdivorce adjustment may be so substantial that progression stops, resulting in a divorce impasse. Relinquishing the emotional bonds of an unsuccessful marriage to
allow for new and more adaptive relationships for the spouses is blocked and children as well as parents are locked in a struggle around a marriage that has technically, though clearly not emotionally, ended. Children's heightened needs for consistent and supportive relationships with the noncustodial as well as the custodial parent are often neglected when parents are preoccupied with divorce conflict. Thus the quality of parent-child relationships, indicated by research as critical for mediating children's adjustment following divorce, tends to be compromised in high-conflict divorce and divorce impasse situations.

**IMPACT OF HIGH-CONFLICT DIVORCE ON CHILDREN**

Parental conflict, defined as verbal or physical aggression between parents, has emerged as the most robust predictor of children's functioning after their parents have separated (Amato & Keith, 1991; Radovanovic, 1993; Tschann, Johnston, Kline, & Wallerstein, 1989; Wallerstein, 1991). Interparental conflict before, during, and after a divorce is strongly associated with childhood behavior problems (Block, Block, & Gjerde, 1986; Emery, 1982; Grych & Fincham, 1990; Hess & Camara, 1979; Hetherington, 1979).

The preceding discussion of family process variables suggests that children's adjustment is moderated by the parent-child relationship, parenting style, and the parents' emotional adjustment. Yet there are significant variables in children that are associated with increased vulnerability to interparental conflict. Some studies suggest that individual differences among children account for much of the variability in the nature and intensity of their responses to parental divorce (Hetherington, 1979). Within child variables that have been shown to mediate the effects of interparental conflict on children include the age and developmental level of the child (Cummings, Zahn-Waxler, & Radke-Yarrow, 1984; Hetherington, 1989; Porter & O'Leary, 1980); temperament of the child (Block et al., 1986; Guidubaldi & Perry, 1985; Kurdek, 1988); and coping strategies (Radovanovic, 1993). Studies that assess children's reactions to conflict have not to date differentiated responses by the properties of the episodes of conflict. Grych and Fincham (1990) articulate a framework for assessing the impact of marital conflict on children by looking at the properties of a conflict episode. The properties of intensity, content, duration, and resolution, as well as the context of the conflict, likely affect children's processing of the conflict, and emotional and behavioral responses.

In the same way that children cope with divorce differently at different ages, children cope with interparental conflict differently at different ages. The age differences represent children's cognitive developmental level, that is, the way that children interpret the conflict between their parents. The child's understanding of the conflict is also shaped by the context in which the conflict occurs. The context of the conflict, which includes previous exposures, provides the framework in which the child can place the events or process. The child's understanding and responses to conflict are mediated in part by that framework (Grych & Fincham, 1990).
LONG-TERM EFFECTS OF HIGH-CONFLICT DIVORCE ON CHILDREN

There are few studies that examine the long-term effects of a high-conflict divorce on children’s development (Chess, Thomas, Korn, Mittelman, & Cohen, 1983; Hetherington, 1989; Johnston, Kline, & Tschann, 1989). These studies as well as cross-sectional studies do indicate that interparental or family conflict is a potential stressor. Behavior, affect, and cognition are influenced as a result of the child’s meaning making or interpretation of the conflict to which they are exposed. As children advance developmentally their resources for coping with this stressor are enhanced. They are better able to understand and cope with conflict. At the same time the longer or more chronic the conflict, the more feelings of social competence decrease (Radovanovic, 1993).

The ways in which internal and external factors combine are predictive of outcomes for children. Internal factors, including gender, age, temperament, the imprint of past experiences with conflict, stress, and trauma mediate children’s responses to conflict. External factors that influence how children cope include economic factors, the parent-child relationships, and available support people including peers, family, and other adults.

Often children of high-conflict divorces do not grow up with a parental model for working intimate relationships. Even if they learned conflict resolution strategies in other venues, the most intimate and protective relationship failed to provide the model for effective problem-solving strategies. The parental function of facilitating mood regulation is compromised. The child does not learn a model of impulse control, mood regulation, and emotional management from parents in high conflict. Functioning is compromised when these critical capacities are undeveloped or wanting.

The parental failure to protect children results in anxiety, distress, and fear which then intrudes into the time and space necessary to accomplish normal developmental functions. The child’s capacity to focus on identity development and formation is compromised. It is this potential weakness that likely leads to the failure in adulthood to maintain intimate relationships.

When exposure to interparental conflict is long, gender differences in children’s responses may emerge over time. Aggression and conduct problems may be seen more in boys during school-age years and early adolescence (Block et al., 1986; Hetherington, 1989; Werner, 1989), whereas in adolescence girls may manifest more adjustment problems than boys (Werner, 1989).

DEVELOPMENTAL LEVEL AND SHORT-TERM EFFECTS OF DIVORCE CONFLICT

Infants and toddlers up to approximately 2½ or 3 years respond to the emotion of the conflict with distress. They do not understand the content, but are struck by the emotional arousal expressed by their parents. This generates
fear and confusion in these children. Their primary need is to develop trust from being consistently well cared for and nurtured, and then with that foundation to develop autonomy and increased independence. Interparental conflict can interfere with both of those developmental processes, affecting the child's sense of security. It is not uncommon to see regression in infants and toddlers who have been exposed to conflict between their primary caregivers. They will frequently become fearful and resistant to separation. It is also not uncommon to notice that their developmental progress is arrested. Their attention is diverted from developing new skills and having new experiences.

The case of Peter, age 2.9 years, is an example of the anxiety seen in response to exposure to unresolved anger between parents. Symptoms included fear of monsters, sleep disruption, toileting regression, and regressive clinging. He also took on some self-blame stating "I bad." Over the next year, he became electively mute, language development halted as a response to the terror of the fighting between his parents. The energy typically used for developmental tasks, such as language development, was rechanneled in Peter's case to his attempts to withdraw from the conflict, and keep himself safe and protected.

Four- and five-year-old children experience things very concretely. They begin to understand the content of the arguments they hear and focus on the words that they can understand. For example, they might ask if it is true that daddy does not care about us; or ask if mommy is stupid. Children of 4 and 5 may ask if these things are true, or they may dwell on them internally.

Increased aggression with acting-out behaviors may be seen in children age 4 up to age 8. Children this age will often take on responsibility for the conflict. They are terribly worried about basic routines and concrete observable tasks. They may experience anxiety and may try to fix it or take care of the problems. Children this age are egocentric and feel quite powerful. They may take on the attributes of their favorite superheroes and attempt to care for the parent they see as suffering, or address the problem they have identified as the source of the conflict. When they discover that their powers do not work or that they are not effective in intervening, their sense of competence is devastated and they withdraw into a more helpless stance, often regressing and unable to continue development. Children this age believe that what they do or think has an effect on their environment. When they find it does not, and in fact it is their primary safety and protection figures whom they cannot affect, they are prone to confusion and disorganization that may be seen in aggressive acting-out behaviors, or in withdrawn, helpless behaviors.

In cases of great interparental conflict, where the other parent is represented as horrible, toxic, and frightening, the child experiences confusion as well as increased fear of both abandonment and punishment or rejection. Preschool children often regress, experience separation anxiety, and increased aggression.
Coping may include high use of fantasy, with imaginary friends. For example Lisa, aged 4½, experienced transitions between her parents as dangerous. She began to tell her mother "don't worry mommy, Lisa's not going to see daddy, Jessica is." In this case the child's sense of self was compromised in the transition process. Lisa used strategies of fantasy and compartmentalization to manage the task of maintaining relationships with both parents.

Early school-age children (ages 6 to 8) are often more involved with one or both parents' struggle. They may play messenger for one parent. This process of becoming involved in their parents' disputes intensifies and solidifies into adolescence.

Behavioral and emotional difficulties are more likely found in school-age children exposed to high conflict (Johnston et al., 1987; Radovanovic, 1993). As in other studies of school-age children of divorced parents, both internalizing and externalizing symptoms of general maladjustment were noted (Long, Slater, Forehand, & Fauber, 1988; Roseby & Deutsch, 1985).

These children in high-conflict families often have an underlying fragmentation of sense of self and others. If the response of either parent is unempathic or punitive during transitions, the child uses splitting as a defense, splitting off feelings of anger, shame, and helplessness. The child is doing the best he or she can to stay aligned with both parents. By feeding to each parent what they want to hear or believe, the child is working very hard to please them both, losing his or her sense of self in the process.

Later school-age children are less egocentric. They experience anger and often take sides with one parent against the other. They are quick to assess the causes of their parents' conflict and to make judgments about who is right.

School-age children tend to use repression as a defense. They can look frozen and constricted. Roseby, Johnston, Erdberg, and Bardenstein (1994) studied children (ages 6 to 12) of conflicted divorces. On the Rorschach, these children looked severely traumatized. They were guarded, hypervigilant, and had coping deficits. Almost half cope by relying on themselves for problem solving. They see themselves as their best and only resource, even though these children do not have the skills and resources to take care of themselves. These children look helpless and hopeless. There is an absence of normal fantasy or reaching out for human contact and relations. Basically the profile is of a helpless, constricted, empty child. This is the child who teachers and neighbors describe as well behaved. These children feel like nobody cares, and in fact they themselves will often say "I don't care." Often their sense of self is so submerged they cannot care.

Interparental conflict is associated for adolescents with increases in depression, anxiety, and somatic symptoms and social maladjustment. In addition, high interparental conflict is associated with parent-adolescent difficulties and difficulties at school (Forehand et al., 1991; Neighbors, Forehand, & McVicar, 1993; Wierson, Forehand, & McCombs, 1988). A study by Neighbors et al. (1993) found that adolescents' self-esteem in particular, but also their relationship with their mothers, predicted resiliency in coping
CHILDREN AND HIGH-CONFLICT DIVORCE

with the experience of severe interparental conflict. Resiliency was defined as cognitive competence. Better school functioning is associated with a positive parent-child relationship for adolescents whose parents are in high conflict (Forehand et al., 1991; Neighbors et al., 1993). Those adolescents who did not score high on self-esteem measures or had poor relationships with their mothers had more depression and anxiety.

The parent-adolescent relationship does seem to mediate the effects of interparental conflict on school functioning. There is some evidence that adolescents who remain disengaged from their parent's struggle and do not feel caught in the middle, have fewer symptoms of depression, anxiety, and deviant behaviors than those adolescents who feel caught up in the conflict.

INTERVENTIONS FOR HIGH-CONFLICT DIVORCE

The phenomenon of high-conflict divorce has been recognized relatively recently and suitable interventions are only now in developmental stages. Only a few of a potential continuum of interventions to address the pernicious effects of high-conflict divorce are widely available. Interventions to address divorce generally have become available since the groundbreaking work of Wallerstein and Kelly on divorce in 1980. Wallerstein (1991) refers to the “tormented families who are locked into protracted high conflict” as requiring specialized intervention skills for mental health and legal professionals alike. Her view is that such families are not at one end of a continuum representing divorce conflict but rather constitute a separate subtype of divorcing families with unique characteristics and features. Certainly the defining feature of these families is the intensity and unremitting nature of virulent conflict between the ex-spouses. Often such conflict existed prior to the separation and has affected the children's lives. Children in the high-conflict situation align with or fear a parent figure as their relationships and internalized representations of parents are distorted. Children's intensified needs for support and consistency from parents following separation and divorce often are neglected.

The elements of intense interparental conflict and adequacy of parent-child relationships are a central focus of interventions. Research data cited earlier underscores that the intensity of interparental conflict and quality of parent-child relationships are the most critical factors in the outcome for the child of divorce, especially in situations of high conflict. Parent monitoring, mediation, mental health treatments and psychoeducational programs all attempt to ameliorate these destructive influences on all family members, with a special focus on the needs of the children.

Mediation is by definition quite difficult in high-conflict divorce situations. The qualities most useful in approaching a mediation of disputes tend to be those most lacking in high-conflict divorce situations: separation of the child's needs from those of the couple and that modicum of trust and goodwill in the
Interventions for High-Conflict Divorce

partners that enables successful dispute resolution. Wallerstein (1991) and Grych and Fincham (1990) both relate concerns about the limitations of mediation in high-conflict divorce situations. Although mediation has demonstrated effectiveness in low and moderate conflicts, its effectiveness is more limited in high-conflict situations. In the latter, if a resolution can even be reached it often breaks down in the postmediation period. Because of the unresolved impasse that inhibits the divorcing couple's movement toward postdivorce adjustment the agreement falls prey to the tendency of the couple to reengage in conflict. Thus mediation should be seen as only one part of a broad strategy of intervention in high-conflict divorce situations.

Traditional mental health interventions of adult or child individual therapy can be problematic in situations of divorce impasse and high-conflict divorce. Although individual treatment can be helpful to family members moving toward postdivorce adjustment, in situations of divorce impasse therapists can become involved in the polarizing tensions of the divorce conflict. Adult individual therapists may, in a well-meaning way, reinforce and entrench the views of their patient, complicating the need for mediation and conflict resolution. Thus therapists may end up functioning as extended family members often do in high-conflict divorces, participating in and even intensifying what Johnston and Campbell (1988) refer to as "tribal warfare." Individual child therapists more often see the child's need for a region of relatedness free of interparental conflict but may support their child patient's alignment with or fear of one or the other parent. When individual therapy is underway or represents the only available alternative, communication among therapists is essential. Without such communication the likelihood of the therapists recapitulating and further polarizing the divorce conflict is very high.

More promising are mental health interventions specifically tailored to divorcing couples in a high-conflict divorce situation. Roseby and Johnston (1995) provide a review of group interventions for children in high-conflict divorce situations that at times involve domestic violence. Because of the high risk that these children will lose support of one parent entirely while another parent is compromised in parental functioning by the high-conflict divorce, there is a need for specialized groups for these children. Roseby and Johnston (1995, 1997) base their work theoretically on social-cognitive script formation and developmental object relations theories. The objectives of the group interventions are to enable children to formulate and review their experiences within their families, increase tolerance of negative and painful affective experiences, and encourage the development of new perspectives on divorcing family relations. Their time-limited group format for children is viewed as sufficient for low-intensity divorce conflict and as preparatory for long-term individual treatment in situations of high-conflict divorce.

Parent-focused interventions reviewed by Grych and Fincham (1990) have been found to have utility in general divorcing situations but their utility in high-conflict divorce situations has yet to be demonstrated. Interventions such
as psychoeducational and supportive time-limited groups can be useful in facilitating postdivorce adjustment in many cases. Many states are now mandating such sessions as part of the legal requirements for divorce. For the approximately 10% of cases that represent high-conflict divorce, such general divorce adjustment groups are unlikely to influence adjustment significantly. More hopeful is the counseling and mediation intervention process presented by Campbell and Johnston (1987) specifically developed for litigating, high-conflict divorcing families. Their model program, conducted on a group or individual basis, has demonstrated effectiveness in facilitating dispute resolution and lessening postagreement conflict with divorcing couples, also improving their ability to resolve conflicts on their own. The program prepares couples for mediation and dispute resolution through a series of prenegotiation counseling sessions. These sessions include extended family and therapists or attorneys when these individuals seem to be a part of the divorce impasse. Divorcing couples do not meet together until the negotiation or dispute resolution phase. Intervention is directed toward the divorce impasse. A follow-up period after agreement is reached in the negotiation phase is included to facilitate implementation and follow-through of the agreement. In this study, Campbell and Johnston studied 80 divorcing couples referred by courts due to unsuccessful attempts to mediate disputes. Individual work yielded as much success as their group approach, but staff stress and “burnout” was higher in individual approaches; and couples involved in the group approach showed a tendency to independently resolve new conflicts in the postagreement follow-up phase. This approach shows great promise as it combines the best of mediation and divorce impasse counseling in a process directed toward dispute resolution. The group method, while logistically more complicated, is important to consider as the strain of working individually with high-conflict divorcing couples is not to be underestimated.

Visitation is fraught with difficulties in high-conflict divorcing couples both before and after visitation orders are established. Visitation is a prime area for disputes and conflicts where fears, anxieties and resentments place important obstacles to reaching a visitation agreement and implementing it. Conflict over visitation, of course, involves the child more directly than conflicts over money and property. The quality of parent-child interaction is tremendously affected by divorce conflict about visitation. In the subgroup of high-conflict divorcing couples where domestic violence has occurred, visitation plans can be difficult to arrange in view of the child’s need for safety and the intensity of conflict the child may experience during visitation transfers. Transfers between parents at the beginning and end of visitations are quite problematic as here the child and parents are directly exposed to the interactional process that was highly conflicted or overtly violent. Procedures are developing in many jurisdictions and communities to supervise transfers of the child between parents or, in some cases, supervise the visitations. Hess, Mintun, Moehlman, and Pitts (1992) present one such visitation center program where professional or paraprofessional staff are available for supervising visitation transfers, supervising
on- or off-site visitations, and parent education. Utilization of such centers or locating supervisors for visitations, at least for a transitional period when agreements are being negotiated and conflict is being eased, can make visitation possible when children have been traumatized by witnessing or experiencing domestic violence. Divorcing couples who have been embroiled in such conflict or violence may require third parties to be present, at least for a transitional period, to ensure that violence or intensive conflict do not emerge when the child is being transferred between parents.

A new and useful professional role of parent monitor or special master in situations of high-conflict divorce has emerged. Parent monitors are assigned by family court judges to monitor and mediate visitation difficulties over the extended time that is required for resolution of high-conflict divorce. Such monitors are often involved in court-sanctioned evaluations that lead to visitation agreements but may be assigned when visitation plans are already in effect to implement and mediate difficulties with implementation of visitation plans. The parent monitor or special master appointment is made in order to monitor seriously conflictual visitation situations, reduce frequent nonproductive court appearances and provide ongoing court-sanctioned decision making to implement and/or mediate difficulties with visitation and decision making. These professionals require specialized training and skills in divorce conflict and mediation. Parent monitors can continue to be more or less involved as the divorcing couple and family needs over an extended time and often can significantly reduce the likelihood that disputes will require court involvement to settle. Modeling of dispute management and resolution as well as containment of conflict are important aspects of the parent monitor role. The child and the child’s quality of relationship with each parent is a major beneficiary of the parent monitor role. The monitor’s facilitation of visitation agreements and movement toward postdivorce adjustment ease the extent of conflict that the child must live with in the divorce process. This function is essential in the situation of high-conflict divorce.

Theoretical understanding of high-conflict divorces and practical understanding of the costs to children and parents embroiled in intense divorce conflict and impasse have led to interventions tailored to the specialized needs of these families. Further development of intervention models is especially needed to reduce the length of time required for postdivorce adjustment in these families. The length of postdivorce adjustment is critical for these children and families as the child’s developmental process does not and cannot wait for resolution of divorce conflict. Children’s developmental needs are increasingly compromised as divorce conflict becomes increasingly protracted.

REFERENCES


Conclusion


Developing State Specific Trainings In
Private Custody Matters
Using ABA Child Custody Trainings

The ABA Child Custody and Adoption Pro Bono Project training series is an interdisciplinary training program which examines nine key topics of critical significance to attorneys representing children. This training applies to attorneys serving as either the Child’s Attorney or the Best Interest Attorney in divorce, adoption, guardianship, unmarried parents’ cases and civil orders of protection. Each topic is taught by an expert in the field and includes significant accompanying materials for review. This series can be the basis for training attorneys to represent children in compliance with the ABA Standards on Representing Children in Custody Matters. These tapes are available free of charge in VHS or DVD form.

The following is a brief overview of each segment to assist in your use of the training series:

The **Introduction** which runs 6 minutes is presented by Linda Rio Reichmann, JD the Director of the ABA Child Custody and Adoption Pro Bono Project. This segment explains the development of the series and gives an overview of the each segment.

The **Case Development** segment, 48 minutes, is conducted by Stacey Platt, JD, Professor and Clinical instructor at Loyola University Law School in Chicago, Illinois. In the Case Development segment Professor Platt introduces a hypothetical case and takes the viewer through the representation of the children from the appointment, through the initial case development, meeting with the child including suggested topics for conversations, meeting with the parents including suggested general questions and topics for conversation, the development of ideas for other sources of information, advice on developing and asserting positions, and involvement in court proceedings. The Case Development Checklist is provided at the end of this article.

The **Cultural Competence** segment, 64 minutes, is conducted by Suzette Speight, PhD, Professor of Education, at Loyola University in Chicago. This segment involves the taping of an actual law student class taught by Professor Speight with additional comments added in to elaborate on important ideas. Dr. Speight begins with an explanation of the idea of cultural competence generally and its importance in representing children and working with families. She then develops the listener’s awareness of culture by explaining the idea of a person’s world view and its impact. In the next portion of the training Dr. Speight works with the law student class to increase their knowledge of assumptions that underlie the American family law system and the concept of family in the United States. She then covers certain skills necessary to work in a culturally competent manner, discussing interviewing in particular. The segment ends with a discussion of four different hypothetical.
The **Ethics** segment, 38 minutes, is taught by Gregg Herman, JD of Loeb & Herman, a family law expert from Milwaukee, Wisconsin. Mr. Herman considers the following questions:

1. Am I competent to represent a child in a private custody matter?
2. Who is my client? What is my role?
3. How should I deal with issues of conflicts of interest?
4. How should I deal with issues of confidentiality?
5. How should I deal with parents and other interested persons?

These questions are discussed with reference to the ABA Standards for Representing Children in Private Custody Matters and to the relevant portions of the 2002 Edition of the Model Rules of Professional Conduct.

The **Child Development** segment, 48 minutes, is taught by Dr. Kathryn Shands, a Child and Adolescent Psychiatrist from Atlanta, Georgia. Dr. Shands discusses information from child development theoreticians, Piaget and Mahler, describes some of the effects of divorce on children and applies this information to representing children, particularly regarding interviews and visitation.

The **Interviewing- Voice of the Child** segment, 28 minutes, is lead by Risa Garon, LCSW, Director, The Children of Separation and Divorce Center, Columbia, Maryland and Keith Schiszik, JD of Maryland. In addition to Ms. Garon’s and Mr. Schiszik’s taped sections there is a very thorough Power Point entitled the Art and Science of Interviewing Children created by Mindy Mitnick in the Materials.

The **Mental Health Issues & Experts** segment, 40 minutes, is taught by Robin Deutsch, PhD, Co-Director, Children and the Law Program, Massachusetts General Hospital, Boston, Massachusetts. Dr. Deutsch discusses the four primary roles that mental health professionals perform in a child custody case. She focuses in some depth on the custody evaluation, pointing out common problems and what makes a good custody evaluation. Finally she looks at mental health testing and services.

The **Domestic Violence** segment, 38 minutes, is taught by Leigh Goodmark, JD, currently a professor at the University of Maryland Law School. In this segment Professor Goodmark covers 6 primary objectives; first, to define domestic violence; second, to describe why domestic violence occurs; third, to describe barriers to escaping domestic violence; fourth, to elucidate the impact of domestic violence on children; fifth, to describe domestic violence in relation to custody laws; and finally, to consider the handling of children as witnesses in domestic violence cases.

The **Child Abuse** segment, 33 minutes, is conducted by Ann Haralambie, JD a private practitioner from Tucson, Arizona. Ms. Haralambie shares her views based on her extensive experience in private custody cases involving child abuse.

Finally, the **Alternative Dispute Resolution** segment, 40 minutes, is led by Kelly Browe Olson, JD, LLM, University of Arkansas, Alternative Dispute Resolution Clinic Director, Little Rock, Arkansas. In this segment, Professor Olson first gives an overview of
alternative dispute resolution practices, then talks about the child legal representative’s approach to settlement, and the role of the child’s legal representative in formal and informal ADR. There are several mock scenarios to help see the child’s legal representative in action in ADR.

**Suggestions for Trainings Using ABA Child Custody Training Series**

The ABA Child Custody and Adoption Project envisions the training series as a resource that can be used by local programs in many different ways. The series can be used for self-study or as the basis for group training with local professionals who are experienced in the representation of children. For all users, one of the first steps will be to gather the necessary state specific components to make the training applicable to their jurisdiction.

The following is a suggested list of information.

1. State Statutes regarding:
   - Children’s Legal Representative
   - Domestic Relations
   - Adoption
   - Guardianship
   - Unmarried Parents
   - Orders of Protection
   - Best Interests
   - Confidentiality
   - Ethics
   - Alternative Dispute Resolution

2. Court Guidelines, Standards and/or Rules re: included areas of law

3. Significant State Case Law regarding included areas of law

4. Sample Orders, Pleadings

5. Local Social and Mental Health Service Resources

In developing a training, it is important to remember that people retain 20% of what they hear, 40% of what they hear and see and 80% of what they do. The videos and written materials will provide you with basic information but they can be best used as a starting point for discussion. When possible it will be more effective to follow up viewing of a video section with a discussion that incorporates the materials. It may be effective on occasion to use part of a video and have a discussion around a few key points.

The following are some formats that have been used by other groups.

1. **Nuts & Bolts (2 hour) followed by Monthly Brown Bag Lunches**
   (Adapted from Delaware Office of Child Advocate)
A. Nuts & Bolts Session
   - Ice Breaker that Engages Group in Mission
   - Cover basic information about Program
   - How a case moves through the legal system-
     Include basic statutes and Court Rules
   - Case Development-video
   - Ethical Issues, 1st Look-video
   - Try to use at least use 2 different speakers

B. Brown Bag Lunch Series; More Advanced Issues
   - Monthly 1 hour sessions featuring one topic such as Cultural
     Competence, Child Abuse, Child Development, Communicating with
     Teenagers, Mental Health Issues, Domestic Violence, Alternative
     Dispute Resolution
   - Use video and local speaker on each issue
   - At least twice a year bring in local practitioners to present and discuss
     scenarios with attendees

2. 2 1/2 Day Full Training
   (Adapted from training presented as part of Kansas State University Intersession
   Class, developed by Linda Elrod)

   A. Day One
      - History of Child Advocacy and Rights of Children: From Property to
        Persons- Gault and Beyond- Local Speaker
      - Case Development, video (change throughout)
      - Cultural Competence, Video
      - Child Development, Video
      - Interviewing Children, Local Speaker

   B. Day Two
      - Ethical Issues, Video as well as Standards and NCCUSL Draft Law
      - Discussion of Ethical Issues
      - Child Abuse, Video
      - Practical Aspects of Representing Children, Local Speaker
      - Mental Health Experts, Tests & Services, Video
      - “Best Interests” of the Child from a Mental Health Perspective, Local
        speaker

   C. Day Three
      - Domestic Violence, Video
      - Strategies for Working with Children in Mediation, Local Speaker
      - Wrap Up
3. **1 Day Introductory Training**  
(Adapted from training developed under 2006 Child Custody Mini-Grant by Jennifer Schultz of Kids First Iowa)

<table>
<thead>
<tr>
<th>TITLE</th>
<th>PERSON</th>
<th>TIME ALLOTTED</th>
<th>SCHEDULE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration</td>
<td></td>
<td>30 min.</td>
<td>8:00 – 8:30</td>
</tr>
<tr>
<td>ABA Standards on Representing Children in Custody Cases, Local Code &amp; Case law</td>
<td>Program Director</td>
<td>45 min.</td>
<td>8:30 – 9:15</td>
</tr>
<tr>
<td>Judicial District Views</td>
<td>Local Judge</td>
<td>30 min.</td>
<td>9:15 – 9:45</td>
</tr>
<tr>
<td>BREAK</td>
<td></td>
<td>15 min.</td>
<td>9:45 – 10:00</td>
</tr>
<tr>
<td>Child Psychology Related to Separate Households, Collaborating with Therapists on Mental Health Issues</td>
<td>Local Mental Health Expert</td>
<td>1 hr 15 min.</td>
<td>10:00 – 11:15</td>
</tr>
<tr>
<td>Developing a Child Custody Case</td>
<td>ABA Video</td>
<td>30 min.</td>
<td>11:15 – 12:00</td>
</tr>
<tr>
<td>LUNCH BREAK</td>
<td></td>
<td>1 hr.</td>
<td>12:00 – 1:00</td>
</tr>
<tr>
<td>Children and the Grieving Process</td>
<td>Local Expert</td>
<td>1 hr 15 min.</td>
<td>1:00 – 2:15</td>
</tr>
<tr>
<td>BREAK</td>
<td></td>
<td>15 min.</td>
<td>2:15 – 2:30</td>
</tr>
<tr>
<td>Ethical Issues in the Representation of Children</td>
<td>Local Law Professor</td>
<td>1 hr</td>
<td>2:30 – 3:30</td>
</tr>
<tr>
<td>Techniques for Interviewing and Working with Children</td>
<td>Program Director</td>
<td>30 min.</td>
<td>3:30 – 4:00</td>
</tr>
<tr>
<td>Domestic violence</td>
<td>ABA Video</td>
<td>45 min.</td>
<td>4:00 – 4:45</td>
</tr>
</tbody>
</table>

4. Other options:

   A. Series of four Saturdays
   
   B. Self-study take home, followed by in-person session
   
   C. Self-study take home, followed by teleconference with local practitioner who discuss scenarios
   
   D. Intersperse ABA training with established local training segments

ABA Project staff will be happy to assist you in the use of the training series. Please feel free to contact Barbara Chasnoff at 312-988-5787
The Children’s Legal Representative in Private Custody Proceedings in (Put in your locale)

In re Marriage of Carl and Susan Jones

(Instructions: Modify the following to fit the basic structure of your jurisdiction. If there are specific statutes, court rules or case law that are relevant or unusual to your jurisdiction, the scenario should be adapted to explore those issues.)

Background:

Susan and Carl Jones have been married approximately 12 ½ years. Susan Jones files a dissolution of marriage action in the Domestic Relations Division of the Circuit Court. The only unresolved issue is as to custody and visitation regarding their three (3) children: Robert (14 ½), Faith (8) and Amber (5). There is some history of domestic violence. During the filing of the divorce petition and separation, Susan got an Order of Protection against Carl. Carl says that the domestic violence charges were exaggerated by Susan and that there was only a very short time around the separation when “things got a little heated.” Susan agrees and states that she has no concerns for her or the children’s safety.

At the time of separation, she and the children moved from the family apartment in (the city or town) to an apartment (out of town or in the suburbs.) Carl works primarily from home as a computer technician. After the separation, Susan got a job as a hostess at an expensive restaurant. Her sister who lives in the same apartment watches the children when Susan has to be gone. Shortly after the move, Robert was picked up by the local police in a park at midnight. He was with some boys who were drunk and he had alcohol in his possession.

Questions to be answered by application of specific state statute, rules or case law.

1- At the next status, Carl asks the court for the following:
   to appoint a representative for the children,
   to order a custody evaluation, and
   to grant him custody pending final determination because the children’s friends are near his home and because of Susan’s work schedule, the children would actually spend more time with a parent at his home?

   As to the appointment request
   ➢ Can Carl make the request?
   ➢ Can the Court grant his request or make an appointment on its own discretion?
   ➢ If so, what is the applicable statutory provision or court rule?
   ➢ What are the factors the court must consider in deciding whether to appoint someone for the children?
2- The Court appoints you, orders a custody evaluation, and enters a temporary custody order that the children will continue to live with Susan pending the final determination.

- What is your role under state law?
- Can you represent all three children?
- Are there applicable court rules?
- Do you know what the court expects from you?

3- You meet with the children. Robert tells you he hates living at his mother’s because all of his friends live by his father at the old apartment. The only good thing is that he is still with his sisters. Faith and Amber are very happy living at their mother’s home. They love their aunt whom they see frequently. Their father never pays any attention to them because he always is on the computer playing video games, etc. The apartment they lived in was very small, messy and they share a room a tiny room when there. Faith isn’t really comfortable going outside to play and has no privacy or quiet time in the apartment.

You explain to Robert you will keep all of this in mind but that there really is nothing to do until the Custody Evaluation is complete.

The next day Robert gets in trouble at school and ends up talking to a counselor at school. He tells the counselor how miserable he is because he had to move schools and leave all his friends behind and that the only friends he’s made since they moved are the ones he got in trouble with for drinking. He is really upset because no one will listen to him. She suggests that he go talk to a friend at the local Children’s Advocacy Organization.

He talks to Lindy Lawyer at CAO and tells her that he would like her to represent him.

Lindy files an Appearance in the suit.

- Does Robert have a constitutional or statutory right to an attorney of his choice?
- Should the Court appoint Lindy regardless?
- What position do you take on the motion?

4- Court denies Lindy’s motion, and orders Robert into counseling and an alcohol treatment program during the pendency of the case.

The Custody Evaluation comes in. Ellen Evaluator finds both parents fit, and recommends that Susan should retain custody of all three children because it is important for the sibling bonds to remain strong during the divorce process. She recommends liberal visitation with Carl. You meet with all the children and tell them of the recommendation. Robert is furious. He continues to be unhappy and to have problems in school. Further, Susan has too much on her plate to take him to his counseling or alcohol treatment program, and is not cooperating with her lawyer on moving along toward the divorce.

Robert wants you to file a motion for temporary change custody as to him.

- Does Robert have a right to file such a petition?
- Can you file this? Should you file this?
- Should the court have a hearing on such a motion?
5- Susan and Carl cannot come to agreement.
   ➢ What is your position regarding mediation?
   ➢ Can you request court-ordered mediation?
   ➢ If they go to mediation, what is your role?

6- Susan and Carl go through parenting class and mediation and still want to go to trial on the issue of custody.
   Susan wants all three children with a minimal schedule of visitation with Carl but great flexibility if the children want to be with their father.
   Carl wants Robert to live with him and wants liberal set visitation with Faith and Amber. The case goes to trial. After Carl’s and Susan’s attorneys make their opening statement, the Judge asks you to tell of your conversations with the children and give your beliefs as to what is in the children’s best interest.
   ➢ Can you tell the court of your meetings and conversations with the 3 children?
   ➢ Can you state your beliefs as to what is in the children’s best interest?
   ➢ Can you tell the court of the children’s wishes?

7. Each parent has included Robert and Faith on their witness list. You think that the children should not testify and recommend so to the children. Robert wants to testify.
   ➢ Should you file a motion opposing testimony from any or all of the children?
   ➢ Can Robert assert his right to testify?
   ➢ At what age does Robert’s voice become “weightier” in a custody decision?
   ➢ Is there any other way of getting the children’s testimony into the record?

8. The judge denies all motions for the children’s testimony but indicates that he will talk with Robert in camera.
   ➢ Can the judge refuse to allow Faith to testify? Robert?
   ➢ Can the judge choose to talk to only one of the children in camera?
   ➢ Who can be present during an in camera interview?
   ➢ If one parent is pro se and one is represented, how should the court handle the issue of presence during an in camera interview?

9. The Court orders that Robert live with Carl, and that Faith and Amber live with Susan. The Court further orders that the 3 children spend one weekend a month with Susan and one weekend with Carl. All goes according to plan for a few months. However, over time, Robert refuses to go to Susan’s. He says there is nothing to do and that when he is there, either Susan is working or that they fight all the time. Robert says that his father tells him that he has to go to Susan’s with Faith and Amber but that no one can make him go.
   ➢ Can Robert refuse to go to Susan’s house?
   ➢ What options are there for the court?
   ➢ What if Susan decides that she doesn’t want to see Robert? Is there anything the court can do?
Suggestions for Trainings Using ABA Child Custody Training Series.

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   - Cultural Competence, Video
   - Child Development, Video
   - Interviewing Children, Local Speaker

   **B. Day Two**
   - Ethical Issues, Video as well as Standards and NCCUSL Draft Law
Conduct several meetings rather than one long one. Interviews should occur in:
- Child’s home
- Other parent’s home, and
- Neutral setting if possible

Consider whether to interview siblings separately or together

Possible topics for discussion over several meetings:
- Briefly introduce yourself
- Let children know they can ask questions
- Confidentiality
- School/daycare/friends/activities/interests/pets
  (And who participates in these activities with them)
- Siblings
- Mom and Dad
- Daily routines in each home (as appropriate)
- What makes them happy/sad
- Who are the relevant adults in their lives
- Life before separation
- Life now; how do they feel, how is schedule working, do they understand what is happening
- Who cares for them when sick
- What does each parent do when you break a rule
- What they would change if they could
- Special issues not otherwise discussed: what they know and how they feel about it
- What have they heard or seen when parents fight
- Explain court process and your role in developmentally appropriate manner

MEETING WITH THE PARENTS

- **Purpose**
  - Obtain their version of the family and case history
  - Understand their relationship with the child
  - Assess where they are regarding the issue and the process and their ability to do what is in children’s best interests

- **Process**
  - Meet in each parent’s home if possible
  - Observe parent/child interaction
  - Explain your role, including lack of confidentiality

- **Possible topics to cover**
  - History of parenting responsibilities
- Questions raised by investigation
- Child's strengths and challenges
- Parent's strengths and challenges
- Spouses strengths and challenges as person and as parent
- Why parents got together in the first place
- Why their relationship failed
- Favorite activities with and without child
- Current relationships and involvement with child
- Rules they have set for children
- How they handle it when child breaks rules
- Parents' concerns about child's exposure to conflict/violence; what has child seen/heard
- Parents' concerns about areas of child's functioning; school, emotional, social
- What would be best for children here
- What do they think child is concerned about
- View of what doctors, therapists and teachers say about child
- Any plans to relocate
- People they would like me to interview; people you want to interview
  - Name, address, telephone, relation to parties
  - Particular area or incident known of which they have knowledge
  - Signed releases as appropriate
- Offer general information about effects of divorce on children and how to help

OTHER SOURCES OF INFORMATION

- **Purpose**
  - Gather previously unobtained information
  - Check accuracy of previously obtained information

- **Process**
  - Review child's and family's records in the following areas, as appropriate
    (obtain court orders, or releases from parents or children where needed)
    - School
    - Psychiatric/Psychological/Social service
    - Drug/Alcohol
    - Medical
    - Law Enforcement
  - Review court files of other related cases (abuse and neglect, delinquency, guardianship, domestic violence) (obtain necessary releases or court orders)
  - Obtain any additional releases needed
  - Interview persons who would have particular knowledge (as appropriate and with sensitivity to confidentiality needs)
Teachers
School psychologist or social worker
Therapist
Physician, if child has particular medical problem or injury
Care-giver
Neighbor/coach/friends/extended family

Consider existence and impact of special issues or allegations such as
Domestic violence
Physical/Sexual abuse of child
Chemical dependency
Mental health
Developmental, medical or educational needs of child

Determine need for additional evaluations in the above areas, or the need for additional custody evaluation or assessment

DEVELOPING POSITIONS AND ADVOCATING RECOMMENDATIONS

Purpose
Bring it all together
Move case to a close

Determine whether certain services are appropriate for the children and/or the parents
Mental health
Physical medical attention
Financial assistance

Form position as to parenting responsibilities which are in the best interest of each child and articulate reasons
Recognize subjectivity and personal biases

Formulate a detailed plan to:
Propose to parents/attorneys or to respond to their proposals
Assist in settling matter
Make suggestions or draft an agreement
Participate in mediation
Present to court

COURT PROCEEDINGS

Purpose
Advocate and effectuate positions
Respond to other parties’ positions
☐ Attend all relevant status and motion hearings
  ☐ Play active role in contested hearings on issues impacting the children

☐ Bring own motions or raise concerns to court’s attention, as appropriate
  ☐ Discovery motions
  ☐ Interim Orders on custody and visitation
  ☐ Services for children and/or parents
  ☐ Quash subpoenas to the children
  ☐ Bar in camera interviews
  ☐ Orders to prohibit detrimental behavior by parents toward children

☐ Pretrial preparation for case (if necessary)
  ☐ On issues not related to the children - remain neutral
  ☐ On issues related to the child
    ☐ Define the issues yourself
    ☐ Decide on witnesses
    ☐ Present own witnesses
    ☐ Cross-examine other’s witnesses
    ☐ Consider opening and closing statements, if permissible
CASE DEVELOPMENT CHECKLIST
(Use your judgment regarding whether each step is necessary in your case)

Child(ren)______________________________
Date Appointed________________________
Case No._______________________________

INITIAL CASE DEVELOPMENT

☐ Obtain appointment order
☐ Call other counsel
  ☐ Confirm appointment
  ☐ Ask for any relevant pleadings
  ☐ Ask for written permission to speak with their client outside of their presence
  ☐ Ask them to prepare their clients to speak with you
  ☐ Ask for overview of case from their client’s perspectives
☐ Correspondence to counsel to confirm telephone conversation
☐ Confirm appointment with Court Clerk or Court (if necessary)
☐ Clarify at first appearance (or earlier if appropriate) with Judge the nature and scope of appointment, if not clear from the Order
☐ Obtain copies of all other relevant pleadings
☐ Start a case timeline of family and case history
☐ Start a file
☐ Start a list of needed actions, requests, and possible recommendations
☐ Initial introductory conversation with each parent
  ☐ Brief introduction to you and your role
  ☐ Set in-person appointment time and date

MEETING WITH, GETTING TO KNOW, AND GATHERING INFORMATION ABOUT THE CHILDREN

Purpose:
☐ Develop rapport
☐ Try to understand the children- perspective, needs, how they are doing
☐ Child is not necessarily investigative source
☐ Judgment call about how much to discuss the heart of the issues- consider age, personality, interest of the child in being involved

Process:
☐ Contact the children as soon as possible after appointment
☐ Meet with child as soon as possible after first contact. First interview is to begin to establish relationship.
☐ Conduct several meetings rather than one long one. Interviews should occur in:
  ☐ Child’s home
  ☐ Other parent’s home, and
  ☐ Neutral setting if possible

☐ Consider whether to interview siblings separately or together
Possible topics for discussion over several meetings:

- Briefly introduce yourself
- Let children know they can ask questions
- Confidentiality
- School/daycare/friends/activities/interests/pets
  (And who participates in these activities with them)
- Siblings
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- Daily routines in each home (as appropriate)
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- Process
  - Meet in each parent’s home if possible
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- Possible topics to cover
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  - Consider existence and impact of special issues or allegations such as
    - Domestic violence
    - Physical/Sexual abuse of child
    - Chemical dependency
    - Mental health
    - Developmental, medical or educational needs of child
  - Determine need for additional evaluations in the above areas, or the need for additional custody evaluation or assessment
DEVELOPING AND ASSERTING POSITIONS

- **Purpose**
  - Bring it all together
  - Move case to a close

- Determine whether certain services are appropriate for the children and/or the parents
  - Mental health
  - Physical medical attention
  - Financial assistance

- Form position as to parenting responsibilities which are in the best interest of each child and articulate reasons
  - Recognize subjectivity and personal biases

- Formulate a detailed plan to:
  - Propose to parents/attorneys or to respond to their proposals
  - Assist in settling matter
    - Make suggestions or draft an agreement
    - Participate in mediation
  - Present to court

COURT PROCEEDINGS

- **Purpose**
  - Advocate and effectuate positions
  - Respond to other parties’ positions

- Attend all relevant status and motion hearings
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- Bring own motions or raise concerns to court’s attention, as appropriate
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    - Define the issues yourself
    - Decide on witnesses
    - Present own witnesses
    - Cross-examine other’s witnesses
    - Consider opening and closing statements, if permissible
IN THE CIRCUIT COURT OF LAKE COUNTY
ANYSTATE USA

Carl Jones  Petitioner,
v.
Susan Jones  Respondent.

In Re: Robert, Faith and Amber Jones, Minors.

CHILD REPRESENTATION APPOINTMENT ORDER

I. REASONS FOR APPOINTMENT

It appearing to the Court that the following reasons for appointing a Child’s Attorney or Best Interests Attorney are present:

A. Mandatory appointment grounds:
   ( ) The Court is considering allegations of child abuse or neglect that warrant state intervention.
   ( ) Appointment is mandated by state law.

B. Discretionary grounds warranting appointment:
The court believes that appointment is necessary to help the court decide the case properly, because of the following factors or allegations:
   ( ) Consideration of extraordinary remedies such as supervised parenting time, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
   ( ) Relocation that could result in substantial reduction of the child’s time with a parent or sibling;
   ( ) The child’s concerns or preferences as an important factor;
   (X) Harm to child from illegal or excessive drug or alcohol abuse by a child or a party;
   ( ) Disputed paternity;
   ( ) Past or present child abduction, or risk of future abduction;
   (X) Past or present family violence;
   ( ) Past or present mental health problems of the child or a party;
   (X) Special physical, educational, or mental health needs that require investigation or advocacy;
   (X) A high level of acrimony;
   ( ) Inappropriate parental influence or manipulation;
   ( ) Interference with custody or parenting time;
   ( ) A need for more evidence relevant to the best interests of the child;
   ( ) A need to minimize the harm to the child from family separation and litigation;
   (X) Other issue(s) to be addressed: Parental supervision of minor child regarding juvenile criminal charge

II. NATURE OF APPOINTMENT

Joe Smith, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as ( ) Child’s Attorney (X) Best Interests
Attorney, for the child(ren) Robert (14), Faith (7) and Amber (3), to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which ( ) is attached (X) has been furnished to the appointee. A Child’s Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child’s best interests. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers.

III. FEES AND COSTS

( ) The hourly rate of the lawyer appointed is $____, for both in-court and out-of-court work.

( ) The State shall be responsible for paying the fees and costs.

( ) The parties shall be responsible for paying the fees and costs. The parties shall deposit $____ with ( ) the Court, ( ) the appointed lawyer. ______________ shall deposit $____, and ______________ shall deposit $____. The parties’ individual shares of the responsibility for the fees and costs as between the parties ( ) are to be determined later ( ) are as follows: ______________ to pay ____%; ______________ to pay ____%.

(X) The lawyer has agreed to serve without payment. However, the lawyer’s costs will be reimbursed by ( ) the parties (X) the state.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _______________ 20___

__________________________
JUDGE
**Family & Case Time Line**

<table>
<thead>
<tr>
<th>Year</th>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>1988</td>
<td>*September 15, 1988</td>
<td>Robert born</td>
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<tr>
<td>1989</td>
<td></td>
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<tr>
<td>1990</td>
<td>*September 24, 1990</td>
<td>Susan (20) &amp; Carl (25) marry</td>
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<td>1993</td>
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<tr>
<td>1994</td>
<td>*July 4, 1994</td>
<td>Police respond to domestic violence call</td>
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<tr>
<td></td>
<td></td>
<td>No charges filed</td>
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<tr>
<td>1995</td>
<td>*June 6, 1995</td>
<td>Faith born</td>
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<tr>
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<td>1997</td>
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<td>1999</td>
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<td>Amber born</td>
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<tr>
<td>2001</td>
<td></td>
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<tr>
<td>2002</td>
<td>*December 2, 2002</td>
<td>Divorce Petition filed</td>
</tr>
<tr>
<td></td>
<td>*December 12, 2002</td>
<td>Court enters Order of Protection, Carl moves out</td>
</tr>
<tr>
<td></td>
<td>*December 31, 2002</td>
<td>Robert arrested for possession of liquor</td>
</tr>
<tr>
<td>2003</td>
<td>*January 2003</td>
<td>Appointed to represent Robert (14), Faith (7) &amp; Amber (3)</td>
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</table>
November 15, 2001

Dear [Name]:

My name is Linda Rio. The court your parents are using to help them with their divorce has asked me to help you. I am a lawyer, and in your case I am called the Children’s Representative. I am volunteering my time to do this so that you have someone who can speak on your behalf on the matters that deal with you. I am sorry if the names I have used are not the names you go by—I am taking them from the court papers.

I will be meeting soon with both your mother and father to hear from them, but I wanted to send you this letter so you would know who I was. Soon after I meet with your mother and father, I will meet with each of you so that we can get to know each other and I can learn more about what is important to you. But if there are any questions you would like to ask me before we get together, I would be happy for you to call me. My telephone number is 312-988-5805. I am sending you one of my cards as well.

Very Truly Yours,

Linda Rio
November 12, 2001

Dear Counsel:

Enclosed is the Appearance I filed as Child Representative for

Just to clarify, I am taking this appointment as a volunteer attorney on behalf of Loyola's Child Law Clinic. Although I run a national child custody project housed at the American Bar Association which focuses on representing children in custody cases, I am not handling this case as part of my ABA work. You may also see a law student with me on the case at some point, as part of the training provided at the Clinic.

I will be interviewing both of your clients, each child, and any other relevant persons. Thank you both for agreeing to allow me to contact and meet with your client outside of your presence. If you believe there are additional persons I should interview please let me know. I do ask that from now on you do not have contact with any of the children without my prior knowledge.

I have asked Danielle to provide me with copies of all relevant documents in the case thus far. If Andy has any documents he wants to make sure I receive, please feel free to forward those to me.

Please feel free to contact me at any time if you wish to convey any additional information about the case or about your client's positions.

Sincerely,

Linda M. Rio

Encl.
CONSENT TO RELEASE OF INFORMATION

I, [redacted], am the mother of [redacted]. I have custody and possession of [redacted]. Linda Rio is an attorney who has been appointed to represent [redacted] in a divorce proceeding between myself and [redacted] father.

I consent to Walter Peyton High School (1) providing Linda Rio with written records regarding [redacted], and (2) allowing teachers and other school personnel to speak with Linda Rio.

I have been advised that I have the right to inspect and copy any records obtained under this Consent.

[Signature] [Date]
A PARENTAL GUIDE TO
MAKING CHILD-FOCUSED
PARENTING TIME DECISIONS
Prepared by the Minnesota Supreme Court
Advisory Task Force on Parenting Time and Child Support Enforcement

Approved by the
Minnesota Conference of Chief Judges
January 1999

Updated January 2001

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For further information, contact:

Court Services Division
State Court Administration
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St. Paul, MN 55155
651-297-7587
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PURPOSE

Unless special circumstances exist, children generally fare best when they have the emotional support and ongoing involvement of both parents. Ongoing parental involvement fosters positive parent-child relationships and healthy emotional and social development. It is also beneficial to parents because it makes it more likely that the parents will have positive relationships with their children when the children become adults.

For parents who do not live together, it is important to cooperate with each other for the benefit of the children. Children adjust more easily to crisis and loss if their parents work together to develop healthy ways of communicating, resolving problems, and reducing conflict. It is important for parents to remember that formation of a positive parent-child relationship is a lifelong process. The key to a successful parent-child relationship is the quality of time, rather than the quantity of time, spent together.

Establishing a parenting time schedule is an area where parents may experience conflict. This pamphlet is designed to assist parents in creating parenting time schedules that focus on their children’s developmental needs from infancy through adolescence. It identifies key tasks that children normally accomplish at each stage of development, and then identifies suggestions for parenting time practices aimed at promoting healthy development at each developmental stage. Emphasis is placed on the importance of parents accommodating their children's changing needs by creating parenting time schedules that are routine and predictable, and yet flexible enough to change in frequency and duration to accommodate their children’s needs as they grow older.

Parents are encouraged to recognize that a parenting time schedule that is best for one child may not be best for the child's brothers and sisters. Parents are also encouraged to understand that parenting time schedules that are best for their children may not be best for the parents. For the best interests of their children, parents may need to tolerate disruption of their own schedules and more or less parenting time than they might otherwise choose. Many parents may also need to address their own feelings of loss, envy, anger, or disappointment when setting parenting time schedules that are best for their children.

ASSUMPTIONS

The information in this pamphlet is based upon the following assumptions:
- The child will benefit from ongoing and active contact with both parents.
- One parent has sole or primary physical custody of the child.
- One parent has primary responsibility for the day-to-day care of the child.
- Both parents are fit to parent the child.
- Both parents are willing and able to parent the child.
- Child abuse, domestic violence, and chemical dependency issues do not exist.
LIMITATIONS

The information in this pamphlet:

- **DOES NOT** replace or change any parenting time schedule agreed upon by the parents or set forth in a court order.
- **DOES NOT** prohibit or limit parents or judges from establishing parenting time schedules that differ from those recommended in this pamphlet.
- **DOES NOT** mandate minimum or maximum parenting time times.
- **DOES NOT** apply to all families or to all children in all circumstances.
- **IS NOT** "the law" and, while they are encouraged to do so, parents are not required to follow the parenting time suggestions in this pamphlet.

SPECIAL SITUATIONS

The parenting time suggestions in this pamphlet may not be appropriate if there is genuine concern about a child's emotional or physical safety when with a parent. The parenting time suggestions in this pamphlet may not apply, or may need to be adjusted, if any of the following special situations exist:

- Physical, sexual, or emotional child abuse has occurred.
- Domestic violence has occurred between the parents or between a parent and child.
- Drug or alcohol abuse has occurred.

Child Abuse, Domestic Violence, and Chemical Dependency

Parents who have valid concerns for the safety of their children should seek help from an attorney, mediator, court services, child psychologist, domestic abuse office, or the local county social services agency.

When a Parent Has Been Absent

When a parent, for whatever reason, has never been a part of the child's life or has not had any contact with the child for an extended period of time either in person, by phone, or in writing, both parents should consider the possible problems the child may have if lengthy or overnight parenting time were to start right away. Instead, the parenting time schedule should gradually re-introduce parent and child, taking into consideration the child's stage of development and the child's ability to transition well to parenting time with the parent.
WHAT PARENTS CAN DO TO HELP

Keep Children Out of the Middle

- Parents can keep their children out of the middle of adult issues by not using the children as messengers. Sometimes the message is something as innocent as a reminder that the child must take her medication before bedtime. Other times, the message may be that the child support payment will be late. Unfortunately, we all know what happens to the bearer of bad news. If the message was difficult for one parent to say directly to the other parent, just imagine how difficult it will be for the child to relay that message. Instead of using their children as messengers, parents should either deal directly with each other or through a mutually agreed upon adult.

- Parents can keep their children out of the middle of adult issues by not asking them to report about what is going on in the life of the other parent. Any time children are asked to divide their loyalty, or to betray one parent to another, the children feel guilty or as if they are being asked to stop loving one parent. It is certainly appropriate for parents to show interest in the lives of their children by asking "how was your weekend visit?" But, if the interest is not in the child or in how the child feels, the child will pick up on this and may eventually feel angry and used.

- Parents can keep their children out of the middle of adult issues by not attacking or putting down the other parent. Some parents find themselves so angry with the other parent that they vent their anger in front of their children. Other parents may say things to try to make themselves look good and the other parent look bad. Children identify with both parents. If one parent puts down the other parent, in the eyes of the child it is as if that parent is also putting down the child.

Establish a Workable Means of Communication

Parents can help their children by establishing a workable means of communicating with each other about their children. At first, some parents may find it difficult to separate their feelings about the relationship or the other parent from their need to give and receive information about the children. Parents can overcome this problem by communicating with each other about their children in a "business-like" manner. This may include agreeing about the time, place, and manner of their communication. It may also include establishing a list of topics and sticking to it. Parents who are unable to talk to each other because of ongoing conflict, hostility, or issues of domestic violence, may find it easier to communicate by putting the information in writing or by communicating through a mutually-agreed upon adult. Except in cases where there is an Order For Protection or other court order prohibiting contact, parents should keep each other or a mutually agreed-upon third person advised of their home and work addresses and telephone numbers. In cases where there is an Order for Protection or other court order prohibiting contact, the parent must follow the order or ask the court to modify the order to permit communication regarding the children.
Resolve Conflict Quickly
Parents can help their children by cooperating with each other and by quickly resolving their conflict. Children whose parents are involved in ongoing conflict over parenting time, child support, or other issues may experience anger, anxiety, depression, or developmental delays. Parents may resolve conflict in a variety of ways, including consulting family members, religious leaders, mediators, parenting time expeditors, county child support officers, attorneys, or others. Parents may also wish to seek help for their children by consulting a child psychologist or by seeking services from the local social service agency. Court administrators maintain lists of local mediators and parenting time expeditors. The local association of attorneys maintains a list of attorneys.

Separate Parenting Time and Child Support
Parents can help their children by not withholding child support or parenting time. Children generally fare best when they have the emotional and financial support and ongoing involvement of both parents. A parent does not have a right to withhold parenting time or child support because of the other parent's failure to comply with court-ordered parenting time or support. In other words:
- The custodial parent cannot withhold parenting time if the noncustodial parent fails to provide child support.
- The noncustodial parent cannot withhold child support if the custodial parent fails to allow parenting time.

Rather than withholding parenting time or support, there are more productive, effective and, if need be, legal ways for parents to resolve support and parenting time issues. Parents experiencing conflict over parenting time or child support may wish to consult a mediator, attorney, parenting time expeditor, or county child support office.

Respect Parent-Child Relationships
Parents can help their children by respecting and supporting each child's relationship with the other parent. Unless agreed upon by both parents, parents should not plan activities for children that conflict with the other parent's scheduled time with the children. The time a parent is scheduled to spend with the children belongs to that parent and the children. The other parent should not interfere with this time. Parents can also help their children by adjusting the schedule to permit their children to participate in reasonable extracurricular activities.

Facilitate Transition from One Parent to the Other
Parents can help their children transition from one home to the other by understanding their children's anxieties and by assuring them that both parents will continue to love them and to be involved in their lives. Children commonly experience separation anxiety. This does not necessarily mean that the child has a poor relationship with either parent. For the child, it may be just like the divorce or separation is happening all over again. Children under age five generally do not understand the concept of time, such as hours, days, or weekends. Parents of young children can help them understand when the child will spend time with each parent by creating a calendar with different colors for each parent.
Encourage Telephone and Other Contact
Parents can help their children by calling and writing to them and by reasonably encouraging and assisting them to call and write to the other parent. Children do best when they are able to maintain contact with both parents. While parenting time is one way to maintain that contact, other ways include telephone calls, letters, e-mail, and other forms of communication. Telephone calls between parent and child should be permitted at reasonable hours and at the expense of the calling parent. Unless restricted by court order, parents have a right to send cards, letters, packages, e-mail, audiotapes, and videocassettes to their children. Children have the same right to send items to their parents. Parents should not interfere with these rights.

Establish Similar Household Routines
Parents can help their children by following similar routines for mealtime, bedtime, and homework time. Parents can also help their children by accepting that they have limited control over what happens in the other parent’s home and by respecting the authority of the other parent. From a very young age, children learn that their parents have different parenting styles. Children can adjust to some differences in routines between their parents' homes. Developmentally, though, children cope better when there is general consistency between their parents' homes because it helps them have a sense of order.

Provide Child’s Belongings
Parents can help their children transition between their parents’ homes by sending along the children's important belongings, such as clothing, medicine, and equipment. Parents can also help their children by sending along personal objects, such as blankets, stuffed animals, photos, or memorabilia of the other parent.

Support Contact with Grandparents and Other Extended Family
Parents can help their children maintain important family ties by arranging for the children to visit their father's family when they are with their father, and by arranging for the children to visit their mother's family when they are with their mother. Children who have had loving relationships with their grandparents and other extended family members need to maintain those ties, otherwise they may experience a sense of loss.

Facilitate Temporary Schedule Adjustments
Parents can help their children by giving as much advance notice as possible when requesting a temporary adjustment to the parenting time schedule. Family emergencies, illness of a parent or child, or special events of a parent or child may require temporary adjustment to the parenting time schedule. Parents can help their children by scheduling an alternate parenting time to take place as soon as possible.
Accommodate Vacation Plans
Parents can help their children by understanding that it is important for each parent to vacation with their children. Parents can help their children by scheduling their vacation times so that they do not interfere with the other parent's time with the children or with the children's schedules. Vacation, whether during school breaks or during the summer, can be a time for parents and children to expand their relationship. Vacation is also important because it gives the other parent time off from the demands of parenting. Vacation time takes precedence over regular parenting time unless a court order or an agreement of the parents provides otherwise.

Establish a Routine for Picking Up and Dropping Off Child
Parents can help their children by agreeing on who will pick up and drop off the children and where this will take place. Parents can also help their children by having the children ready and by being on time. When picking up and dropping off children, it is important to avoid communication that may lead to conflict. Neither parent should enter the home of the other parent without permission. Parents should take all necessary safety precautions when transporting, picking up, and dropping off their children.
PARENTING TIME SUGGESTIONS

Generally
Children generally fare best when they have the emotional and financial support and ongoing involvement of both parents. Establishing a parenting time schedule is one way to ensure and foster that contact. The child's needs are the key factors for parents to consider when establishing a parenting time schedule. These needs change as the child grows older and moves from one developmental stage to the next. The developmental needs of an infant, for example, are different from those of a toddler or a teenager.

This section identifies key tasks that children normally accomplish at each stage of development before moving on to the next developmental stage. In considering these developmental tasks, it is important to always keep in mind that each child is unique, that all children do not progress at the same rate, and that "normal" development has a tremendous range at each age. Thus, some six-year-old children progress quickly and do what might be typical of an eight-year-old child, while other six-year-old children progress more slowly and do what might be typical of a five-year-old child.

This section also identifies parenting time suggestions that promote healthy development at each stage. Rather than rigidly applying these parenting time suggestions, parents are strongly encouraged to apply them in a way that best meets the specific developmental needs of each child. This may mean that parents establish different parenting time schedules for each of their children.

The child's developmental stage is only one factor parents should consider when deciding which parenting time arrangement is best for each child. Other factors parents need to consider when establishing a parenting time schedule include:
- Any special needs of the child and parents.
- The routines and schedules of the child and parents.
- Any mental health issues relating to the child or parents.
- Each parent's past caregiving history.
- The child's relationship with each parent.
- The child's relationship with grandparents and extended family members.
- The child's relationship with and any step-family members.
- The distance between parental homes.
- Whether the child's brothers and sisters will participate in the child's parenting time.
- The child's temperament and ability to make a calm transition between homes.
- The length of time that has passed since the separation or divorce.
- The ability of the parents to cooperate.
- The child's and parents' cultural and religious differences.
- Transportation and other costs related to parenting time.
- Any other factor(s) that will enable the child and noncustodial parent to maintain a child to parent relationship that is in the best interests of the child.
INFANTS AND TODDLERS (BIRTH - 2 1/2 YEARS)

Developmental Tasks
The primary developmental tasks of infants include establishing a sense of trust in their environment and the people around them, forming an effective attachment with at least one primary parent who consistently and promptly responds to their needs, becoming comfortable with others who interact with them, and making their needs known through crying or other signals. Infants and toddlers need frequent contact with both parents and they do not cope well with numerous changes to their schedules or routines. At approximately six months, a child begins to make strong distinctions between primary caregivers and others, which may result in the beginnings of separation anxiety. Parents of infants begin to bond with their children and to recognize their children's signals regarding their need for food, comfort, sleep, and nurturance.

As children grow from infants to toddlers, their developmental tasks include: an increasing sense of self-awareness, the beginnings of a sense of independence, the beginnings of speech development, and an increasing ability to provide self-comfort and self-regulation in sleeping, feeding, and toileting. In addition, the parent’s process of bonding with the child continues as children grow into toddlers.

Parenting Time Considerations
Parents of infants should establish a parenting time schedule that is consistent, predictable, and routine in nature. Depending upon the noncustodial parent’s availability and caregiving history, the noncustodial parent of an infant should have short (one to three hour) but frequent (two to three times per week) parenting time during the day or early evening. As the child grows from infant to toddler and becomes more comfortable with separation from the custodial parent, the duration of parenting time should increase. For parents who live far apart, the noncustodial parent of an infant or toddler should travel to the residential area of the custodial parent. This may mean that parenting time takes place in the home of the custodial parent or in a nearby location where the child feels comfortable. It is important for parents of infants and toddlers to establish one nighttime caregiver. Overnight and extended parenting time may not be appropriate for infants and toddlers. However, children who are able to make smooth transitions between homes, or who have older sisters or brothers to accompany them on parenting time, may be comfortable with overnight and extended parenting time.

What Parents Can Do to Help
Parents can help their infants and toddlers by:
- Establishing a consistent, predictable, and routine parenting time schedule.
- Interacting with the child in a location where the child feels secure and comfortable.
- Gradually increasing the duration of parenting time.
- Moving to overnight and extended parenting time only when the child is able to make a smooth transition between parental homes.
- Sending along personal objects, such as blankets, stuffed animals, and photos of the parent.
PRESCHOOLERS (2½ - 5 YEARS)

Developmental Tasks
Preschoolers continue to increase their sense of individuality. They make significant gains in their verbal skills and become more likely to express their feelings. Preschoolers also develop a greater sense of curiosity and exploration, and increase their abilities to imagine and fantasize. Children at this developmental stage may think they are responsible for their parents' divorce or for their parents not living together. They fear abandonment and may fantasize that their parents will reunite. Their sense of security is affected by predictable and consistent routines.

Parenting Time Considerations
Routine and consistent parenting time schedules are very important. For parents who live far apart, it is usually best for the child if the noncustodial parent travels to the residential area of the other parent. This may mean that parenting time takes place in the home of the custodial parent or in a nearby location where the child feels comfortable. During this stage, children may be comfortable with longer parenting time periods, including overnights. For younger children, overnights should be limited to no more than one night per week. Older preschoolers may be able to have additional overnights and lengthier parenting time. Assuming the child has an ongoing relationship with the noncustodial parent, vacation time may be appropriate. Weekend parenting time that is increased gradually may help preschoolers to make the transition to an extended vacation time. Transitions are easier if children bring with them personal objects, such as blankets, stuffed animals, photos, or memorabilia of the parent. Because preschoolers have improved verbal and comprehension skills, it is important for parents to avoid speaking disrespectfully about the other parent or about others in the home.

What Parents Can Do to Help
Parents can help their preschoolers by:
- Establishing a consistent, predictable, and routine parenting time schedule.
- Gradually increasing the length of parenting time, working up to overnights.
- Sending along personal objects, such as blankets, stuffed animals, and photos of the parent.
- Avoiding criticism about the other parent and others in the home.
ELEMENTARY SCHOOL (5 - 12 YEARS)

Developmental Tasks
Elementary school age children are learning to develop relationships and cooperate with peers and adults. At this age, children establish foundations for academic and athletic skills. Self-esteem, self-worth, moral development, and personal security are issues for this age group. Elementary school age children identify with and model the activities of the parent who is the same sex as the child. Children also become aware of their parents as individuals, often fear the loss of parents, and feel sadness and anger because of their parents' divorce or separation. Self-blame, depression, and attempts to reunite parents are not uncommon in this age group. Children need parental assistance in learning organizational skills.

Parenting Time Considerations
While many elementary school age children benefit from a primary home base, children at this stage of development can also benefit from spending longer periods of time with their noncustodial parent, assuming that they have developed and maintained a close relationship with that parent. Children of this age may be comfortable being away from their custodial parent on a regular basis for parenting time lasting two to three days and for longer periods during school breaks and summer vacation. The more time a child has spent with the noncustodial parent, the more comfortable the child will be spending time away from the child’s home base. For younger children of this age group, frequent parenting time (at least once per week) with their noncustodial parent is desirable. As a child matures, longer parenting time with fewer transitions may be preferred.

What Parents Can Do to Help
Parents can help their elementary school age children by:
- Establishing and following a predictable parenting time routine.
- Gradually changing the frequency and increasing the duration of parenting time.
- Encouraging and assisting in phone and letter contact with the other parent.
- Avoiding criticism about the other parent and others in the home.
- Informing teachers of any stress the child is experiencing and getting help for school-related problems.
- Encouraging and assisting the child to maintain contact with school, friends, and extracurricular and community activities.
ADOLESCENTS (12 - 18 YEARS)

Developmental Tasks
During the early stage of adolescence, children continue the process of establishing their identity and self-worth. Through this process, and with guidance from their parents, they establish a sense of self in relationship to the rules and regulations of society. Adolescents also begin the process of separating from their parents, during which they may mourn the loss of childhood, dependency, and protection within the family. During this stage, adolescents gain academic and/or athletic prowess, make and sustain friendships, continue the process of gender identification, and begin to explore intimate relationships.

During the later stages of adolescence, young adults continue the process of establishing their independence. They continue the development of loyal friendships, begin to develop a work ethic, and begin to develop aspirations. Young adults also continue the process of gender identification and management of sexual impulses. Adolescents need the support and involvement of both parents. Adolescents may be embarrassed or angry about their parents' relationship. They may begin to have doubts about their own relationships with family members and peers, causing them either to focus too much on relationships or to withdraw from relationships. Adolescents may also inappropriately act out by using drugs or by engaging in sex or other unhealthy behaviors to attain a sense of belonging.

Parenting Time Considerations
It is important for parents of adolescents to maintain the child's accessibility to school, peers, extracurricular and community activities from both homes. It is also important for each parent to consistently apply the family rules of their own household.

Adolescents may need to be with friends more than with their family and, therefore, may resist a rigid parenting time schedule. Parents will need to exercise greater flexibility, adapted to the increasing ability of the child to take care of his or her own needs. There will also need to be greater flexibility adapted to the child's preferences -- an adolescent should not be forced to comply with a parenting time schedule about which the child had no input. To accomplish this, parents should consider the child's wishes and decide parenting time issues with the child.

Many adolescents benefit from a primary home base, with specific evenings, weekends, and activities at the other home scheduled on a regular and predictable basis. Other adolescents, however, may be comfortable spending equal time with each parent, including up to two weeks at each residence. Adolescents may be comfortable with one to three weekends of parenting time per month, depending upon the child's schedule, distance, and capacity to travel. The noncustodial parent should maintain contact with the child's teachers and attend the child's performances and other important events. Parents who live far apart should establish, with input from the child, a permanent schedule with some built-in flexibility.

What Parents Can Do to Help
Parents of adolescents can help by:
- Developing a parenting time schedule by working with the child;
- Establishing a predictable schedule that is flexible enough to allow for the child's activities;
- Consistently applying family rules and expectations; and
- Avoiding the assumption that a child's mood swings or behavioral acting out is caused by the other parent.
CONCLUSIONS

Unless special circumstances exist, children generally fare best when they have the emotional and financial support and ongoing involvement of both parents. The lack of involvement of one or both parents may lead to developmental problems later on in the child's life. Children adjust much better to crisis and loss if their parents work together to develop healthy ways of communicating, reducing conflict, and resolving problems. Parents can help their children adjust to separation from a parent by establishing a parenting time schedule that focuses on the needs of their children. Children's needs change as they grow older and move from one developmental phase to the next. For this reason, each parenting time schedule must be flexible, changing in duration and frequency as the child gets older and moves from one stage of development to the next. It is important for parents to remember that formation of a positive parent-child relationship is a life-long process, and that the key to a successful relationship is the quality of time, rather than quantity of time, spent together.
Toward a Multicultural Family Law

ANN LAQUER ESTIN*

I. Introduction

As the United States becomes a more diverse and multicultural society, law and legal institutions face new challenges. In the criminal law, there is the complicated question of when a defendant's conduct may be excused on the basis of a "cultural defense." For family law, there are issues posed for courts when disputes involve unfamiliar ethnic, religious, and legal traditions. Over the past two decades, courts around the country have encountered Islamic and Hindu wedding celebrations, Muslim and Jewish premarital agreements, and divorce arbitration in rabbinic tribunals. In these cases, courts have struggled to understand and accommodate the tremendous cultural and religious diversity of America today within a legal framework established long ago.

The project of building a multicultural family law is complicated by the fact that American family law is based on specifically Christian norms. In England, before the colonization of North America, family law was ecclesiastical law, and it remained within the jurisdiction of the church until the mid-nineteenth century. Although jurisdiction over family matters in the American colonies was in secular courts, the content of our early family

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2. Courts in England, France, Canada and other western, industrialized nations face similar questions. See, e.g., SEBASTIAN POUILLET, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS (1986).

law was firmly rooted in English ecclesiastical law. Beyond the specific legal rules governing marriage, annulment, and divorce, American marriage policies grew from a set of religious and political ideas that were directly enforced through governmental policies over more than a century. Family law rules appear to be secular and neutral to the contemporary observer, but they still reflect this religious heritage. As a result, our rules do not always fit well with practices drawn from different traditions, and it can be difficult to determine to what extent accommodation is appropriate.

This article reviews a number of areas in which cultural and religious accommodation has become an issue in private family law disputes. Part I considers the circumstances in which courts extend recognition and respect to marriages, divorces, and custody decrees which originate within a particular tradition and which differ in significant respects from the model that is more familiar in our legal culture. Part II describes courts' responses to cases that raise questions of religious law or practice in the context of marriage and divorce. Part III offers some reflections on the process of accommodation, arguing that the courts' decisions in these cases demonstrate the importance of incorporating this diversity within a larger framework of fundamental values established in American and international law.

I. Recognition and Respect: Marriage, Divorce, and Custody

As people and families move across geographic and cultural boundaries, their legal circumstances become complicated by the variation in laws and customs governing marriage, divorce, and parental status. Over generations, the principles of conflict of laws or "private international law" have evolved to help coordinate this diversity. As patterns of movement around the globe have shifted, however, individuals are more likely to maintain their connections within multiple social and legal frames.

A. Marriage

Traditional conflict of laws principles applied in the United States hold that a marriage valid in the place of celebration is valid everywhere. This rule is based on a policy judgment that the state where a marriage is solemnized is best able to guarantee that it was based on the free consent of the parties, and on a broader policy in favor of sustaining the validity of marriages. Marriage validation policies apply most strongly when parties have relied on the validity of their marriage over time, when the challenge to the marriage is made by a third party, or when the defects relate to formalization rather than substantive marriage restrictions. The policy is traditionally subject to narrow exceptions, "when a claimed incident of the marriage is sought to be enjoyed in a state where such enjoyment violates strong public policy," such as the policies against incestuous or polygamous marriages. Private international law principles on marriage recognition are similar to the ones established in the United States. The Convention on Celebration and Recognition of the Validity of Marriages, adopted by the Hague Conference on Private International Law in 1977, reflects a strong marriage validation policy with a provision permitting states to refuse recognition to marriages on grounds of public policy.

1. Solemnization and Consent

Laws in the United States permit marriages to be formalized by either civil or religious authorities, after the parties have obtained a marriage license. State laws vary in terms of requirements for marriage ceremonies, with some listing specific clergy who may officiate and others providing broadly for solemnization in accordance with the traditions of "any religious denomination, Indian Nation or Tribe, or Native Group." Statutes that appear to deny to some religious groups the right to celebrate marriages within their own traditions present an obvious constitutional problem, and a court may choose to interpret such a statute broadly to avoid this result.
Case law in many states sustains the validity of marriages even when the statutory formalities were not properly followed. A marriage may be upheld despite a failure to obtain or properly record a license, or despite the fact that the official or clergy member who celebrated the marriage was not legally qualified to perform marriages.\textsuperscript{15} This approach is easily extended to marriages celebrated with different customs or traditions. Thus, in Aghili v. Saadatnejadi,\textsuperscript{16} the parties obtained a marriage license in Tennessee and had an Islamic wedding blessing performed by an imam. Several weeks later, they had a formal wedding reception and began living together as husband and wife. Although the husband later disputed the validity of the marriage, arguing that the license had not been properly returned after the ceremony and that the imam was not authorized to perform marriages, the court upheld the validity of the marriage. In Persad v. Balram,\textsuperscript{17} the wedding celebration was a two-hour “Hindu marriage or ‘prayer’ ceremony” conducted by a Hindu priest, or pandit, before 100 to 150 guests at the bride’s home. When the husband challenged the validity of the marriage seven years later, the court rejected his arguments despite evidence that the parties had not complied with the New York marriage statutes.

Sometimes, however, the gap between traditions is harder to bridge. In Farah v. Farah,\textsuperscript{18} the court had a more difficult time assimilating unfamiliar marriage customs within the traditional conflict of laws norms. After the couple signed a marriage contract described as a “proxy marriage form,” or nikah, in Virginia, their marriage was concluded by their representatives in an Islamic ceremony in England. A month later, the couple traveled briefly from Virginia to Pakistan for a formal wedding reception, or rukhsati, which “symbolizes the sending away of the bride with her husband.” When the husband challenged the validity of the marriage a year later, the appellate court looked to the law of England, and concluded that the marriage was not valid because the proxy ceremony did not conform with the requirements of English law.\textsuperscript{19} Although this analysis was based on the traditional conflict of laws rule, the court’s ruling contradicts the marriage validation policy and was not a necessary result. In other cases American courts have extended the presumption favoring marriage to religious or traditional marriages solemnized in other countries, despite evidence of defects in the formalization process. For example, in Xiong v. Xiong,\textsuperscript{20} the court sustained the validity of a marriage celebrated in a traditional Hmong ceremony in Laos in 1975 by a couple about to flee from the country. Acknowledging that the couple had not complied with the formalities required by the Laotian government, the court determined that the marriage should be upheld as a putative marriage, based on their good faith belief in its validity.

Beyond the question of formalities, the question of marital consent may arise in different cultural contexts. In some traditions, marriages may be arranged by relatives, a practice that does not present difficulties so long as both the bride and groom give their consent. Traditions in which a father or guardian has the authority and the right to consent to marriage on behalf of his child or ward are more problematic. Norms of both domestic and international law mandate that marriage be based on the free and full consent of the parties,\textsuperscript{21} and in this context the court’s obligation is to support an individual’s right to make this decision in the face of pressures to conform to traditional roles. When consent has not been freely given, courts have the power to grant an annulment. In Singh v. Singh,\textsuperscript{22} a New York court inquired carefully into the circumstances of a Hindu marriage celebrated in India, and granted an annulment because the bride had refused to perform an essential part of the ritual known as the “seven steps” or saptapadi. This type of careful determination of consent is particularly important in cases involving youthful marriages, notwithstanding the fact that some states permit the marriage of young teenagers with their parents’ approval.\textsuperscript{23}

Expanded marriage recognition rules, which uphold the validity of marriages celebrated in diverse cultural settings, are an easy first step toward a multicultural family law. This approach honors the choices and expectations of individuals and their communities, and frequently serves

\textsuperscript{16} Aghili v. Saadatnejadi, 958 S.W.2d 784 (Tenn. Ct. App. 1997).
\textsuperscript{17} Persad v. Balram, 724 N.Y.S.2d 560 (Sup. Ct. 2001).
\textsuperscript{19} The court rejected the possibility that the marriage could be held valid by application of Islamic law, since the marriage was not “performed” in Pakistan.
\textsuperscript{20} Xiong ex rel., Edmondson v. Xiong, 648 N.W.2d 900 (Wis. Ct. App. 2002). See also Amsellem v. Amsellem, 730 N.Y.S.2d 212 (Sup. Ct. 2001) (extending recognition to religious marriage concluded in France without civil ceremony).
\textsuperscript{22} Singh v. Singh, 325 N.Y.S.2d 590 (Sup. Ct. 1971). See also In the Marriage of S, 5 Fam. LR 831 (Family Court 1980) (Australia); Hirani v. Hirani, (1983) 4 FLR 232 (Court of Appeal – Civil Division) (England).
\textsuperscript{23} See infra notes 29-34 and accompanying text.
to protect a financially vulnerable spouse who might otherwise be left without the legal remedies available to a legal spouse.

2. MARITAL CAPACITY

Questions of marital capacity present a more difficule case for accommodation. In conflict of laws, substantive marriage prohibitions have been a basis for denying recognition to marriages as a matter of public policy, particularly if a marriage is one that violates the law of the state in which the parties are domiciled.24 Historically, these conflicts have sometimes concerned the variations in degree of family relationship permitted between spouses.25 These differences, many of which trace to ecclesiastical law, seem relatively minor until our field of vision widens to include a broader range of religious and cultural traditions. Enforcement of the stricter limitations may have a significant impact on individuals and families from within these traditions.26 Recognizing this possibility, some marriage statutes include exceptions that acknowledge these differences.27 In addition, courts may have discretion to uphold such a marriage if it was valid where celebrated, particularly when the parties have relied on its validity for a significant period of time.28

Another set of questions concerns the minimum age for marriage. In international law, the betrothal or marriage of children is discouraged.29 Most

24. SCHOLES et al., supra note 7, § 13.8. Most legal systems outside the U.S. assess the formal validity of a marriage based on the law of the place of celebration, and its substantive validity based on the personal law of the parties, which may be either the law of their domicile or nationality. Id. at 547-48.

25. State laws vary as to whether first cousins marry or uncle-niece and aunt-nephew marriages are allowed. See CLARK, supra note 3, § 2.9. See also MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE (1996); Denise Grady, No Genetic Reason to Discourage Cousin Marriage, Study Finds, N.Y. TIMES, Apr. 3, 2002.

26. See id. at 82-84; see generally POULTER, supra note 2, at 8-16.


28. E.g., In re May’s Estate, 114 N.E.2d 4 (N.Y. 1953) (extending recognition to uncle-niece marriage concluded in Rhode Island; although marriage would not have been permitted in NY, where parties were domiciled, it was not “within the prohibition of natural law”); Lezinsky v. Poole, 798 P.2d 1049 (N.M. 1990). Cf. Catalano v. Catalano, 170 A.2d 726 (Conn. 1961) (holding that uncle-niece marriage in Italy was invalid where uncle was domiciled in Connecticut). See generally SCHOLES et al., supra note 7, § 13.11.

29. See U.N. Marriage Convention, supra note 21, art. 2 (states “shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses”); and CEDAW, supra note 21, art. 16(2) (“The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”).

state statutes today set eighteen as the age of consent for marriage, and provide that somewhat younger individuals may be married with parental consent or court approval.30 Some states allow older teenagers to marry without parental consent, and a few permit marriages of children as young as twelve or thirteen.31 Within this legal framework, there is room for substantial cultural variation, although there are also reported cases in which attempted marriages of young teenagers have been held to violate the criminal law.32 These differences generate significant conflict of laws questions, but marriages of minors who travel across state lines to avoid the limitations of local laws have generally been upheld, unless challenged in an annulment proceeding brought by one of the parties or their parents.33 Questions of marital age are closely related to the question of marital consent, and when there are indications that a youthful spouse has not freely agreed to a marriage it can and should be annulled.34

Prohibitions against polygamous marriage have been more strenuously enforced, most notably in the national conflict over Mormon polygamy that reached the Supreme Court in 1879 in REYNOLDS v. UNITED STATES.35 Rules barring polygamous marriages reflect a cultural and religious tradition, discussed in the Court’s opinion in Reynolds, which justified monogamy in civil and political terms but also noted that it had been an offense under the ecclesiastical law in England. Challenges to polygamy laws might be easier to frame under the contemporary First Amendment doctrine,36 but courts continue to understand these statutes in secular terms.37 Even in this setting, marriage validation principles have considerable force, and American courts have been willing to recognize polygamous foreign or Native American marriages for purposes such as determining legitimacy or inheritance rights.38

30. See CLARK, supra note 3, § 2.10.

31. See Chris Burritt, N.C. May Raise Minimum Age for Marriages, ATLANTA CONSTITUTION, Apr. 26, 2001 (reporting that more than 200 thirteen year olds were married in North Carolina in 1998); Amy Argestinger, Assembly Votes to Ban Some Teen Marriages, WASH. POST, Apr. 11, 1999, at CO4 (debating new minimum age for marriage in Maryland).


33. See CLARK, supra note 3, § 2.10; SCHOLES et al., supra note 7, § 13.12.

34. E.g., B. v. L., 168 A.2d 90 (N.J. Super. Ct. 1961) (granting annulment to sixteen-year-old girl who was taken to Italy to be married; marriage was not consummated and plaintiff-bride returned to the U.S. five weeks later). This is supported by the Marriage Convention, see supra note 29; see generally Egon Schewbel, Marriage and Human Rights, 12 AM. J. COMP. L. 337 (1963).


36. See infra note 84 and accompanying text.

37. Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985) (describing monogamy as “inextricably woven into the fabric of our society . . . the bedrock upon which our culture is built”).

38. SCHOLES et al., supra note 7, § 13.16, 13.17, 13.18. See In re Dalip Singh Bir’s Estate,
Because marriage restrictions are culturally based and widely variable, it is difficult to find a sufficiently neutral perspective from which to evaluate them. There is a broad international consensus to support a minimum age for marriage, but no agreement on what that age should be. Proscriptions against the marriage of siblings or parents and children are widely shared across cultures, but marriages between cousins are favored in some traditions and discouraged in others. Polygamy, although generally in decline around the world, is subject to different constraints in different cultural settings. Courts and legislatures, responding to this diversity, should carefully consider whether particular marriage restrictions are still based on a strong and secular policy foundation. Norms of international law may be useful to this inquiry, along with constitutional principles of equal protection and religious liberty.

B. Divorce

In contrast to the marriage validation policy, which reflects a widely shared agreement about the importance of marriage, public policy concerning divorce has been more divided. Divorce was impossible under the English ecclesiastical law, and this legacy had an influence on American law. Grounds for divorce have varied widely among the states, with some taking more liberal approaches and others narrowly limiting access or refusing to authorize divorce until recent years. In comparison to this restrictive approach based on Christian tradition, Jewish and Islamic law have permitted divorce for millennia.

Historically, the varying grounds for divorce in different states and the strong public policy interests behind these grounds have complicated interstate recognition of divorce decrees. Since the 1940s, however, courts in the United States have been obligated to extend full faith and credit to a divorce decree entered in a state in which either spouse was domiciled. Since the 1970s, with the shift toward no-fault divorce grounds across the country and around the world, the older public policy concerns have almost entirely disappeared. In place of the concern to restrict divorce, conflict and recognition rules are now driven primarily by concerns for procedural fairness and the protective policies embodied in statutes governing the incidents of divorce. Similar developments have broadened the grounds for international recognition of divorce decrees, reflected in the Hague Convention on the Recognition of Divorces and Legal Separations (“Divorce Recognition Convention”).

1. Comity

Although full faith and credit rules do not apply in the international context, American courts may give effect to foreign court judgments on grounds of comity. The classic statement of the doctrine of international comity comes from the Supreme Court’s opinion in Hilton v. Guyot, which included a list of factors federal courts were to apply in determining whether to extend respect to a foreign court judgment. For the most part, these are procedural, including the requirements that there be a “full and fair trial . . . before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant.” The Hilton factors have been applied in international divorce cases, such as the Michigan decision in Dart v. Dart, which concluded that an English divorce judgment should be enforced on grounds of comity and res judicata despite the substantive differences between the law applied and Michigan law. Until the era of divorce reform, some foreign divorces were procured by American citizens or domiciliaries seeking to avoid the stringent divorce laws of their home states. States varied in their willingness to recognize these decrees, even when based on personal jurisdiction over

41. See Scolles, supra note 7, § 15.3 (“[W]hen the propriety of a dissolution is at issue in a state other than the state of rendition, the case will often be viewed in due process terms, very much similar to those obtaining with respect to all civil litigation.”). See generally RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 98 (1971) (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”).


44. Id. at 202-03.


46. In the Dart case, the husband had renounced his U.S. citizenship in order to inherit from a large family trust, and the parties had resided together in England with their children for more than a year at the time he began divorce proceedings in England. The wife filed a action in Michigan several days after she was served with process in the English proceeding. The dispute in Dart was not over the granting of the divorce, but on the substantive difference between the property division rules applied in England and Michigan.
both parties, but with the advent of no-fault divorce there is no longer much reason to object to a foreign divorce.47 From a due process perspective, applying the test from Hilton, consensual foreign divorces do not present serious concerns. From this perspective, an ex parte foreign divorce is far more problematic, particularly if it affects the property, support, or custody rights of a party not present before the court.48

Although many other countries base jurisdiction for divorce on nationality or citizenship, American courts have generally refused to recognize foreign divorce decrees obtained by parties domiciled in the United States, even when that divorce might be valid under the law of the foreign country.49 By contrast, under the Divorce Recognition Convention, member states are required to recognize divorce decrees obtained in “judicial or other proceedings” in another contracting state that are legally effective there, when there is jurisdiction based on one of a variety of grounds, including both nationality and habitual residence.50 The convention includes a procedural dimension: contracting states may refuse to recognize a divorce if, “in light of all the circumstances, adequate steps were not taken to give notice of the proceedings . . . to the respondent, or if he was not afforded a sufficient opportunity to present his case.”51

Applying these principles, American courts can readily extend recognition to divorce decrees entered by foreign courts in proceedings that look similar to our own. As with recognition of divorce decrees across state lines, the primary concern is with familiar questions of procedural fairness. Courts have a more difficult time applying principles of comity to foreign divorces that come from different cultural and legal frameworks, such as Jewish and Islamic personal law.

48. In U.S. domestic law, a divorce decree entered without personal jurisdiction over both spouses is generally not effective to resolve these questions. See Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).
49. See, e.g., Atassi v. Atassi, 451 S.E.2d 371 (N.C. Ct. App. 1995) (denying recognition to Syrian divorce obtained by U.S. citizen domiciled in North Carolina); Ahmad v. Ahmad, 2001 WL 1518116 (Ohio Ct. App. 2001) (denying recognition to Jordanian divorce where parties were domiciled in Ohio); Tal v. Tal, 601 N.Y.S.2d 530 (Sup. Ct. 1993) (denying recognition to Israeli religious divorce where parties were Israeli citizens but had not lived in Israel for more than five years). Cf. Sherif v. Sherif, 352 N.Y.S.2d 781 (Fam. Ct. 1974) (extending recognition to Egyptian divorce where both parties were domiciled in Egypt “at all crucial points in their marital history”).
50. Divorce Recognition Convention, supra note 42, art. 2. According to the treaty, the expression “habitual residence” is deemed to include domicile where that concept is used as a basis for divorce jurisdiction. Id. at art. 3. Note that the convention does not apply to findings of fault or “ancillary orders” including specifically orders relating to pecuniary obligations or to the custody of children.” Id. at art. 1.
51. Id. at art. 8. Contracting states are also permitted to refuse recognition to a divorce or legal separation if recognition is “manifestly incompatible with their public policy.” Id. at art. 10.

2. Talaq and Get

Divorce in the Jewish tradition is effected through a process in which the husband delivers a document known as a get to his wife.52 The process is conducted with rabbinic supervision, before a religious tribunal or bet din because the rules for writing and delivering the get are quite complicated. In Islam, divorce is effected by a pronouncement made by the husband known as a talaq. Within the United States, a divorce concluded by get or talaq has no secular legal effect, but in those countries in which marriage and divorce are matters of personal law, subject to the jurisdiction of religious authorities, a divorce by get or talaq may be given full legal effect with no additional court proceeding.

American courts have extended comity to divorces by get or talaq in foreign countries, but only when certain procedural requirements are satisfied. The case law suggests that the most important of these are that the court have jurisdiction based on the domicile of at least one of the parties,53 and that the respondent have notice and some opportunity for a hearing before the divorce is granted.54 In practice, this approach has meant that courts in the U.S. have not recognized nonjudicial divorces unless there are subsequent judicial proceedings.55

Historically, the suspicion of divorce by get or talaq in our legal tradition seems tied to our highly restrictive attitudes toward divorce based on different religious values. In an era of unilateral no-fault divorce, the more important questions concern substantive and procedural fairness, particularly when a unilateral foreign divorce might deprive a spouse or children of the various protections extended by U.S. divorce and custody laws. This issue is particularly sharp when foreign laws discriminate on the basis of gender, or deny remedies such as spousal support or property division that would be available in proceedings here. Thus, in Chaudry v. Chaudry,56 the
court determined that husband’s divorce by talaq, made at the Pakistani consulate in New York, could be given respect as a matter of comity because it was later confirmed by trial and appellate courts in Pakistan in a proceeding for which the wife had notice and an opportunity to be heard. In Chaudry, the husband was domiciled in New Jersey and the wife in Pakistan. The court also decided, however, that wife should have the opportunity to relitigate issues of custody and child support in the court in New Jersey.57

For courts, it may prove difficult to address the question of comity in purely procedural terms. Substantive differences in the divorce laws of different countries, particularly where these differences suggest important problems of gender equality, may also factor into this decision. These questions are less important where the issue is whether to recognize a change in the parties’ marital status, which could be readily achieved in a no-fault ex parte divorce proceeding in the United States, and more important where the issue involves property, support, and other consequences of a divorce decree.

C. International Custody Disputes

Questions of cultural and religious tradition also play a role in child custody disputes, and courts have regularly struggled with the dilemma presented when two parents with different religious practices have different ideas about how their children should be raised.58 In some international custody disputes, cultural issues overlay questions of recognition and comity. As with divorce decrees, courts begin by considering jurisdictional and procedural matters. With custody disputes, this is followed by an inquiry into the substantive problem of determining the “best interests of the child” in a cross-cultural context.

1. JURISDICTION AND PROCEDURE

With the advent of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),59 now in effect in thirty-nine states and the District of Columbia, international custody cases are addressed within the same jurisdictional framework that applies to interstate cases. Under the UCCJEA, a foreign country may be the “home state” of a child for jurisdictional purposes, and custody orders entered in another country under circumstances that satisfy the requirements of the statute are entitled to recognition and enforcement.60 The statute provides, however, that these principles need not be applied “if the child custody law of a foreign country violates fundamental principles of human rights.”61 Beyond the UCCJEA, courts may also enforce foreign custody orders on the basis of comity.62

In international law, the Hague Conference has approved two important conventions addressing international custody disputes. The Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention),63 which applies in the United States and seventy-four other contracting states,64 is designed to remedy the wrongful removal or retention of a child outside the child’s habitual residence with a summary return mechanism that can be invoked by a person with rights of custody. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention),65 which has been signed, ratified, or acceded to by twenty-eight countries,66 addresses more traditional conflict of laws issues. The Child Protection Convention supports and extends the Child Abduction Convention, placing primary

57. Chaudry, 388 A.2d at 1006-07. The court did not permit the wife to reopen issues of spousal support and property division.
60. UCCJEA § 105. E.g., In re Marriage of Medill, 40 P.3d 1087, 1095-96 (Or. Ct. App. 2002). Under the previous uniform statute, this approach was optional. Some courts recognized foreign countries as a child’s home state; e.g., Diner v. Diner, 701 A.2d 210 (Pa. 1997) (Belgium), but others did not; e.g., In re Marriage of Horiba, 950 P.2d 340, 344-46 (Ore. Ct. App. 1997) (Japan). See generally Ivaldi v. Ivaldi, 685 A.2d 1319, 1323-25 (N.J. 1996).
61. UCCJEA § 105(c). Although the statute does not elaborate what is meant by this provision, there are a variety of human rights norms applicable to family law matters, including the child’s right to a hearing, the child’s right to have decisions based on the child’s best interests, and rights against discrimination based on gender in matters relating to marriage and family relations. See infra notes 69-80 and accompanying text; see generally Estin, supra note 6, at 287-95.
jurisdiction for matters such as custody and visitation with the authorities of the child’s habitual residence. Both conventions provide a system for cooperative efforts between the governments of contracting states. The Child Abduction Convention allows a state to refuse to return a child to his or her habitual residence if “this would not be permitted by fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”67 Similarly, the Child Protection Convention allows a state to refuse to recognize custody or visitation orders if a child or parent was not given an opportunity to be heard or if recognition “is manifestly contrary to public policy of the requested State, taking into account the best interests of the child.”68

In making a determination whether to enforce a foreign custody decree under the UCCJEA or on the basis of comity, and in applying the Child Abduction Convention, courts look beyond the grounds for jurisdiction and whether the respondent had notice and an opportunity for a hearing. The references to principles of human rights in both the UCCJEA and the Child Abduction Convention authorize courts to inquire into whether the foreign decree was based on a consideration of the best interests of the child. This determination presents some difficulty, however, when a decree was issued by a court working in a different religious or cultural context.

2. CUSTODY AND HUMAN RIGHTS

The United Nations Convention on the Rights of the Child provides that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”69 As this language suggests, there is broad international agreement that a “best interests” standard is appropriate. Unfortunately, there is no international consensus on what this standard means or how it should be applied in custody cases.70 This means that individual courts face the responsibility of translating between cultures in particular cases.

American courts are prepared to recognize that religious and cultural

67. Child Abduction Convention, supra note 63, art. 20.

factors are a legitimate part of a best interests analysis. For example, in In re the Marriage of Malak, the California Court of Appeal required enforcement of a decree entered by an Islamic court in Lebanon awarding custody to the father.71 The decree recited that the court had considered the children’s environmental, traditional, moral and cultural links to Lebanon, the fact that Arabic was their native language and that they had been raised in the Islamic religion, the difficulties of moving to a place with radically different customs and traditions, and their father’s material prospects in Lebanon as compared to their mother’s uncertain situation in the United States.72 Courts are more wary, however, where a foreign custody decree appears to be based solely on religious principle. In Ali v. Ali, the New Jersey Superior Court refused to enforce a custody decree of the Sharia Court of Gaza based on due process concerns and evidence that under the law applicable in that court, “a father is automatically entitled to custody when a boy is seven . . . the mother can apply to prolong custody until the boy is nine . . . however, at that time, the father or the paternal grandfather are irrefutably entitled to custody.”73 In a sharply divided opinion, the Maryland Court of Special Appeals extended recognition to a Pakistani custody order in Hosain v. Malik.74 Experts testifying for both the mother and the father agreed that the applicable statute—a British colonial enactment known as the Guardians and Wards Act of 1890—required the Pakistani court to consider the welfare of the minor child. They disagreed on whether the court had in fact applied a

71. In re Marriage of Malak, 227 Cal. Rptr. 841 (Ct. App. 1986). Both parties were Lebanese nationals and they maintained a home there; the wife was notified of the proceeding in Lebanon and did not appear. The parties had lived together for five years in the United Arab Emirates before the wife removed the children to California. The husband unsuccessfully attempted to have the California courts enforce a custody decree entered by the Abu Dhabi Sharia Court in the United Arab Emirates (UAE); there was evidence forwarded from the American Embassy in Abu Dhabi that in a Sharia divorce in the UAE, “custody of minor children would almost always be given to their Muslim father.” Id. at 848 n.2.
72. Id. (noting that mother was unemployed, constantly moving from one place to another, and that she might not be able to remain legally in the U.S.).
73. Ali v. Ali, 652 A.2d 253, 259 (N.J. Super Ct. 1994). The New Jersey court ruled that such presumptions “cannot be said by any stretch of the imagination” to comport with a best interests of the child analysis, and that because the decree was “diametrically opposed” to the law of New Jersey, the court would not recognize it on the basis of comity. Id. at 260. See also Amin v. Bakhtry, 798 So. 2d 75 (La. 2001) (court need not defer to Egyptian court that would not apply a best interests test); Tatargasi v. Tatargasi, 477 S.E.2d 239, 246 (N.C. Ct. App. 1996) (Turkish decree did not address best interests); Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. Ct. App. 1988) (remanding for consideration of law applied in custody proceeding before Sharia court in Israel).
best-interests test, or if instead it had based its decision on the Islamic doctrine of hazanit, applicable under the statute as part of the personal law of the parties.75 The court noted that hazanit was in some respects similar to “the traditional maternal preference” once applicable in Maryland. Acknowledging that such preferences “are based on very old notions and assumptions (which are widely considered outdated, discriminatory, and outright false in today’s modern society),” the court nevertheless sustained enforcement of the Pakistani decree, writing:

we are simply unprepared to hold that this longstanding doctrine of one of the world’s oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy.76

Another human rights question in these custody cases concerns gender equality. Laws that do not give men and women “the same rights and responsibilities as parents” violate the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)77 and other human rights treaties that prohibit discrimination on the basis of sex. Hosain, like many other difficult international custody cases, involved a mother who fled to the U.S. and invoked the jurisdiction of its courts in order to avoid litigating custody under laws likely to favor the father.78

The argument can be made that requiring mothers and children to litigate custody under such laws would violate fundamental principles of human rights.79 By making explicit reference to principles of human rights, both the UCCJEA and the Child Abduction Convention allow courts to consider this problem. This is uncharted territory, however, with few landmarks to assist courts in developing a course.80

Taken collectively, the marriage, divorce and custody cases discussed here suggest both policies that support multicultural accommodation and several important constraints on that process. There is the policy of supporting and validating marriages in a wide range of cultural contexts, subject to the requirement that the spouses give their free consent to the marriage. There is the policy of extending recognition to foreign divorce or custody decrees, subject to norms of procedural fairness. The cases also suggest the importance of additional constraints on the process of accommodation, arising from norms of gender equality and from the protective policies embedded in our family law, such as the commitment to furthering the best interests of a child.

II. Religion and Neutral Principles

Principles of religious law, important to marriage and divorce practices in Judaism and Islam, create serious complications in some secular divorce disputes. Courts and legislatures have made attempts to accommodate these practices, but the tangle of religious and legal principles has been difficult to resolve. In this context, the principal dilemma for courts is not how to understand and apply foreign law, but whether and to what extent these disputes can be addressed within the secular jurisdiction of state courts.

A. First Amendment Issues

With its 1879 decision in Reynolds, the Supreme Court concluded that the First Amendment protection for free exercise of religion extended to

and disqualified for custody on that basis, id. at 1004, and that she could have been arrested for adultery if she had returned to Pakistan to participate in the hearing, id. at 1006. See also Amin v. Bakhate, 798 So.2d 75 (Fla. 2001). In Amin, an Egyptian woman married to U.S. citizen domiciled in New Jersey brought their child to visit her family in the U.S. Her husband returned to Egypt, secured an ex parte divorce, filed for a “declaratory judgment of permanent custody,” and had his wife prosecuted and convicted for removing the child from Egypt without his permission. Under the circumstances, the court in Amin declined to defer to the jurisdiction of the Egyptian courts.

79. See Bruch, supra note 64.

80. The human rights principle articulated in the UCCJEA is very recent, and litigants have not yet had much success in using this provision of the Child Abduction Convention. For courts’ treatment of analogous language in the Child Abduction Convention, See PAUL R. BEAUMONT & PETER E. MCLEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 174-75 (1999).
matters of religious belief or opinion but not to religious practices. In its opinion, the Court described marriage legislation including the rule of monogamy, as serving an important secular purpose, and rejected defendant's claim to constitutional protection for religious polygamy. Although the distinction was eventually discarded, it is still difficult to argue under contemporary doctrine that a law appearing to be neutral and generally applicable is a violation of the right to free exercise of religion because of its effects on some religious practice. This suggests that while it may be good policy to broaden the range of religious practices and family traditions recognized and accommodated in state law, courts are not likely to conclude that such accommodation is constitutionally required.

With notable exceptions, such as polygamy and child marriage, accommodation of diverse religious and cultural traditions in the family setting is relatively easy when it is clear that individual family members have chosen to participate in a particular institution or practice. Typically, there will be no occasion for the law to intervene. Accommodation becomes much more difficult when family members disagree about religious matters. This is sometimes a problem in custody cases, when one parent's claim for free exercise and accommodation of religious practices is met by the other parent's argument against government endorsement of religion. Courts cannot decide these cases on religious grounds, and therefore search for a neutral basis on which they may be resolved. There are analogues of this problem in court cases concerning internal church disputes. The Supreme Court has concluded that civil courts may resolve church disputes using "neutral prin-

ciples" of contract, property, or trust law, but may not make decisions "on the basis of religious doctrine and practice." When possible, courts faced with religious family disputes may take the same approach. Therefore, to the extent that family members have used the tools of contract, property and trust law, their marriage and divorce issues may come before the courts as private law disputes.

B. Religious Marriage Law

Issues of marriage and marital status are important in a number of systems of religious law. For Roman Catholics, marriages within the church can be dissolved only by an annulment, available either to husband or wife, which must be granted by ecclesiastical authorities. In Judaism, marriages are terminated by the husband's delivery of a get document to the wife in a proceeding before a rabbinic tribunal. Within Islam, a husband may terminate a marriage by a repudiation or talaq for any reason. Within each of these traditions, the grounds for terminating a marriage and the consequences of a divorce or annulment are legal questions with important implications for individuals. While religious law is not within the expertise of most divorce practitioners, aspects of these questions may have an important influence on civil divorce litigation.

In Judaism and in Islam, the legal rights of husbands and wives are distinct. Historically, in both traditions, men were permitted to take multiple wives and to divorce their wives freely. For wives, the primary legal protection was in the form of an agreement, signed at the time of the marriage, imposing obligations on the husband in the event he exercised his right to divorce. This agreement is known as a ketuba in Jewish tradition, and a nikahnama in Islam. In the Islamic tradition, this payment owed by the husband to the wife is known as a mahr or sadaqa, and sometimes described as a marriage gift. In the Jewish tradition, there is some additional protection for the wife from the fact that a rabbinic tribunal supervises the get process.

Although clearly understood to be binding as a matter of religious law, it is not always apparent in contemporary circumstances whether these marriage agreements should be enforceable in secular courts. Disputes over Jewish and Islamic marriage agreements litigated in civil courts have drawn on two sets of neutral principles. In one group of cases, these contracts are tested for enforceability under the rules applied to civil contracts

81. Reynolds, 98 U.S. 145 at 166; See id. at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order").
82. Id. at 165. ("Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal").
87. See generally POULTER, supra note 2; DAVID PEARL & WERNER MENSEKI, MUSLIM FAMILY LAW (3d ed. 1998); Breitowitz, supra note 52.
or prenuptial agreements. In another group of cases, which result from the get requirement in Jewish law, courts apply both contract principles and the law governing arbitration agreements. These neutral principles have provided a framework that allows for some recognition of religious marriage commitments in the context of secular divorce proceedings.

1. Premarital Agreements

Historically, agreements contemplating divorce were not enforceable in the United States as a matter of public policy. Since 1970, courts and legislatures have articulated principles that permit enforcement of premarital agreements, but impose requirements on the process that are not found in ordinary commercial cases. When confronted with Jewish or Islamic marital agreements, courts begin with the general principles governing prenuptial agreements. In a number of cases, courts have ordered a husband to make the promised payments, finding that the secular terms of the agreement gave rise to an enforceable contract. In others, however, courts have struggled with problems of cultural and legal context, eventually concluding that agreements should not be enforced.

Three published California decisions have addressed this question, illuminating some of the difficulties of this process. In the first, In re the Marriage of Noghrey, a wife sought enforcement of a written promise made by her husband immediately before their marriage, to settle on her in the event of a divorce, his house in Sunnyvale and "$500,000 or one-half my assets, whichever is greater." The wife filed for divorce after seven and a half months of marriage. The court refused to enforce the agreement, based on the principle that an agreement that encourages divorce violates public policy. Noting the wife's testimony that neither she nor her parents possessed great wealth, the court concluded that "[t]he prospect of receiving a house and a minimum of $500,000 by obtaining the no-fault divorce available in California would menage the marriage of the best intentioned spouse."

In a second case, In re the Marriage of Dajani, the court considered a contract providing for payment to the wife of a deferred dower with a value of 5,000 Jordanian dinars, equivalent to about $1,700. The husband offered testimony of an expert in Islam, who testified that a wife who initiated divorce proceedings forfeited the right to her dower. The court accepted this view, concluding that the wife was not entitled to enforce the agreement in this situation, and noting in dicta that such an agreement was unenforceable under Noghrey as an inducement to divorce.

In a third case, In re the Marriage of Shaban, the court considered a mahtr agreement entered into at the time of the parties' marriage in Egypt in 1974. When the parties divorced in California in 1998, the husband argued that the wife's remedies were limited by the agreement to a recovery of her dowry payment of 500 Egyptian pounds, worth about $30. Under California community property law, the wife was otherwise entitled to share community property worth $3 million. The opinion in the case included an English translation of the mahtr agreement, which recited the dower amount but had no substantive terms addressing other remedies or community property rights. The court rejected the husband's argument that the agreement reflected the parties' intention to have their marriage and property relations governed by Islamic law.

Taken out of their original cultural and legal context, these agreements present a dilemma. These agreements are grounded in a context in which husband and wife have vastly different rights than what is specified in the New Jersey or California divorce laws, and they may not be written in terms that are familiar to American courts. Courts evaluate them using the principles that govern more familiar premarital agreements. Understandably, civil courts hesitate to interpret or apply religious law, and in our system there is no authoritative source of guidance on provisions of religious law. Responding to these circumstances, some advocates have begun to develop marital agreements that adapt their traditions to the American legal environment.

The most important issues for the courts concern the specific intentions of the parties rather than the general provisions of religious law, because these cases turn on the law of contract. Expert testimony about the cultural context or meaning of a practice may be useful, but it serves in this setting


91. In re Marriage of Dajani, 251 Cal. Rptr. 871 (Clt. App. 1988). But see In re Marriage of Bellio, 129 Cal. Rptr. 2d 556 (Clt. App. 2003), which enforced a provision in a premarital agreement providing for payment to wife of $100,000 in the event of a divorce. The court in Bellio noted its agreement with the result in Noghrey, and disagreed with Dajani on the basis that "[a] dowry worth only $1,700, payable upon dissolution, is insufficient to seriously jeopardize a viable marriage."


93. Id. ("An agreement whose only substantive term is that the marriage has been made in accordance with 'Islamic law' is hopelessly uncertain as to its terms and conditions"). The court noted that the term "Islamic law" is uncertain given the different Islamic nations.

only as an aid to interpretation of the parties' meaning. Because these cases must be decided on the basis of secular contract law, individuals who intend that their religious marital agreements be enforceable in civil courts should consider utilizing contract law principles to make this result more certain.

2. Divorce Jurisdiction

Similar problems of context and interpretation arise in the cases involving the Jewish get. A centuries-old tradition requires a husband seeking divorce to appear before a rabbinic court or bet din to deliver the get to his wife. Jewish law requires that the get be given and received freely, and when either spouse refuses to cooperate, there are few sanctions the bet din can impose. Without completion of this process, neither party is free to marry under Jewish law, although the practical and religious consequences of this are significantly more serious for women.

In countries like the United States, where divorce lies within the jurisdiction of the civil courts, rabbinic tribunals play at most a secondary role. For observant Jews, divorce requires both a civil proceeding and an appearance before the bet din. In one common scenario, however, a husband refuses to provide a get in order to coerce his wife into making significant financial concessions in the civil divorce proceeding. This presents a dilemma for civil divorce courts, which cannot take jurisdiction over the religious dimension of the proceeding.

Civil divorce courts sometimes rely on contract theories as a basis for ordering a recalcitrant spouse to appear before the bet din. Where there is no express promise in a separation agreement to deliver a get, courts have ordered specific performance of the agreement. Alternatively, several courts have concluded that the execution at the time of the marriage of a ketuba which included the words "according to the law of Moses and Israel" gave rise to an implied promise to grant or receive a get in the event of a civil divorce. But there are troubling First Amendment issues with this approach, and other courts have refused to grant this sort of relief. Moreover, because of the rule in religious law that the get must not be coerced, civil sanctions designed to enforce a premarital or separation agreement may be counterproductive.

Given these difficulties, some of the ketubot now signed by Jewish couples take a different approach. In Avitzur v. Avitzur, after the husband refused to provide the wife with a get, she sought specific performance of his agreement in their ketuba to submit marital disputes to the jurisdiction of the bet din. While the husband objected to enforcement of this provision, on the ground that it would "violate the constitutional prohibition against excessive entanglement between church and State," the New York Court of Appeals disagreed. Concluding that the case could be decided "solely upon the application of neutral principles of contract law, without any reference to religious principle," the court drew an analogy between enforcing this provision and enforcing an agreement to arbitrate a dispute in any other nonjudicial forum.

Since Avitzur, observant Jews have begun to utilize arbitration agreements to shift jurisdiction over their divorce proceedings from civil to rabbinic court. Once proceedings before the bet din are concluded, the parties present the tribunal's orders to the civil court for confirmation as an arbitration award and incorporation into the civil divorce decree. Civil courts retain some control of these cases: proceedings are subject to the require-

100. E.g., Mayer-Kolker, supra at note 99; Afalo v. Afalo, 685 A.2d 523 (N.J. Super. Ct. 1996) (holding that order compelling get would violate husband's right to the free exercise of religion); In re Marriage of Victor, 866 P.2d 899 (Ariz. Ct. App. 1993) ("If this court were to rule on whether the ketubah, given its indefinite language, includes an unwritten mandate that a husband under these circumstances is required to grant his wife a get, we would be overstepping our authority and assuming the role of a religious court"). See also Goldman, 554 N.E.2d at 1025 (Johnson, J., dissenting).
101. See Avitzur, supra note 52, at 61 ("The key problem in the prenuptial agreement, therefore, is halachic rather than secular in nature, and there is little the current legal system can do to resolve it"). The preferred solution within the Orthodox community is legislation that requires an individual married in a religious ceremony must take steps to remove any religious barriers to the other party's remarriage before being granted a divorce. E.g., N.Y. Dom. Rel. L. § 253 (1999). The New York "get law" is only a partial solution, however, and raises a different set of First Amendment concerns. See Breitowitz, supra note 52, at 385-93, and Zornberg, supra note 96, at 749-52.
103. Id. at 138.
ments of state arbitration laws, and to certain minimum requirements of due process and fairness. In addition, courts generally will not confirm arbitration awards concerning child support or custody without an independent consideration of the best interests of the children.

Shifting proceedings to the bet din may help wives to procure a get from an unwilling husband, but there are also cases suggesting that wives may face significant procedural or substantive disadvantages in the religious forum. It is very important within the Jewish community that divorced women receive a get, and because the bet din cannot force the husband to provide one, a wife may be pressured to agree to her husband’s terms. Traditional gender roles and expectations undoubtedly play a powerful role in this setting as well. Courts have noted the problem of duress in this context, refusing to enforce arbitration or separation agreements signed under various types of pressure.

In comparison with the questions of recognition and respect for marriages and divorces discussed in Part I, disputes at the boundary of religion and law present a different set of challenges. This is reflected by the divergent approaches taken by courts and by an ongoing debate within different religious communities over these questions. While the tools of contract and arbitration law may prove to be some help in defining and mediating these conflicts, there are significant limits to how far such “neutral principles” will go.


108. On the attempt to develop contemporary Islamic marriage contracts see supra note 94. Scholars looking for ways to resolve the problem of the agunah from within Jewish tradition include Breitowitz, supra note 52, and David Novak, Jewish Marriage and Civil Law: A Two Way Street?, 68 GEO. WASH. L. REV. 1059, 1075 (2000) (“Traditional Jews . . . should be even more concerned with this non-Jewish, secular remedy to a Jewish moral problem when they . . . could largely solve the problem by the exercise of their own authority within their community”).

109. However these issues are resolved, women who seek to remain within their tradition and exercise the rights available in the larger society will sometimes face difficult choices beyond the ability of courts to address. A married Jewish woman who believes she needs a get may not be able to secure a divorce and remarriage within her tradition. A Muslim wife may not be able to collect her mahri if she institutes no-fault divorce proceedings in circumstances in which she would not be entitled to divorce under Islamic law.


113. E.g., CEDAW, supra note 21, and CRC, supra note 69.


115. Art. 2, Universal Declaration of Human Rights, supra note 21; art. 2(2); ICCPR, supra

III. Accommodation and Change

The growing body of multicultural family law in the United States demonstrates that our legal tradition is capacious enough to embrace greater cultural and religious diversity, and defines some of the principles that constrain the process of multicultural accommodation. For courts and legislators, the challenge of pluralism lies in getting this balance right: making space for a broader range of legal principles, social relationships, and groups, without discarding our most important values. Within the United States, the argument for cultural and religious pluralism can be grounded in the constitutional protections for religious freedom under the First Amendment and the prohibitions on racial or religious discrimination under the Fifth and Fourteenth Amendments. At the same time, family law is also surrounded by important legal and constitutional norms of due process, and protections against gender discrimination in state and federal law.

Courts encountering unfamiliar practices and traditions today respond pragmatically, in the best common law tradition. Judges evaluate the parties’ dispute, attempting to understand the place and importance of unfamiliar cultural and religious practices. They reevaluate familiar legal principles in order to determine whether they may be extended to or harmonized with a different set of traditions. When the correspondence is relatively close, courts have not hesitated to make accommodations. When the claims of pluralism come into conflict with the core values of our own legal tradition, however, accommodation requires a more cautious approach.

International human rights laws reflect some of the same conflicting norms that characterize these family law cases. International treaties protect individual rights, including rights of women and children that may not be recognized in particular countries or cultures. These agreements also protect cultural rights, including specifically, the right of members of ethnic, religious and linguistic minority groups, “in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” In addition, international conventions prohibit discrimination on grounds such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” and protect the freedom of “thought,
practices into the mainstream legal tradition, the courts operate within a larger political and social context, defined by fundamental values including principles of due process, nondiscrimination, gender equality, and religious freedom. Part of this context is an understanding of the courts’ role in family law matters that includes what Carl Schneider has called a “protective function.”

In the working out of this process, courts face particularly important questions in relation to traditional practices that are heavily gendered. For reasons described by Ayelet Shachar, women have been particularly vulnerable to oppression within traditional family law systems. Courts also face difficult questions concerning individual religious freedom and the claims of religious groups. Legal rules that prohibited divorce for Catholics or Hindus, or restricted Jewish or Islamic women to the traditional divorce practices of their religion, would clearly violate nondiscrimination and religious freedom principles. It is less clear whether a private agreement to the same effect could be enforced, particularly in light of the possibility that an individual’s religious beliefs may change over time. In addition, since cultures and tradition are complex, variable, and changing, courts should be especially alert to the ongoing debate within many communities about adapting traditions to new circumstances and defining the appropriate boundaries between civil and religious law.

125. Carl E. Schneider, The Channelling Function in Family Law, 20 Hofstra L. Rev. 495, 497 (1992). Schneider writes: “One of law’s most basic duties is to protect citizens against harms done by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries.”

126. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS, 36, 55-56 (2001). To the extent that jurisdiction over family law matters is assumed by religious authorities, there is a risk that women will remain particularly vulnerable, and secular courts need to be sensitive to these circumstances.
Guardian Ad Litem Best Practices Manual

Manual Home Page  
Standards and Rules  
Health Insurance  
Government Assistance  
Parenting Resources  
Domestic Violence  
Mental Health Services  
Education  
Role of Guardians  
Poverty and Culture  
Investigations and Reports

Serving as a Guardian ad litem in a contested family law proceeding is a challenging job. In addition to fulfilling your obligations to the court in making recommendations about the best interest of the child, research has shown that you may have a unique opportunity to assist a child and family in crisis by referring them to needed resources. This is particularly true for low-income and working poor families that may be struggling to keep their family afloat. Because of the importance of social services for poor children, the following best practices manual attempts to assist you in both the nuts and bolts of GAL work while also focusing your attention on possible resources not previously identified that could significantly improve a child’s situation.

As lawyers, very few of us have been forced to make the impossible choice between missing work to stay home with a sick child and losing a day’s pay that is needed to feed the children dinner or pay the heat bill. Most of us are fortunate to take for granted sick time, vacation and health care benefits, choices in child care, reliable transportation and the flexibility to meet life’s demands. Low-income families cannot take these kinds of supports for granted. When working with low-income and working poor families, we urge you to consider that access to government benefits may be the difference between having a home and being homeless, whether a parent can care for a disabled or special needs child or whether a single parent can have access to day care so that he can return to work. These benefits can make all the difference in a child’s life.

We recommend that you download and print this “check-list” and keep it at the front of every file to assist you in conducting a comprehensive investigation that produces a thorough report for the court and may connect poor families to much needed social services.

VLP Home  
Developed with a grant from the ABA Child Custody Pro Bono Project

http://www.ptla.org/vlp/gal.htm  
9/7/2004
10 things to always think about when representing low-income children in family law matters:

1. Have you complied with standards and rules for GALs?
2. Is the child eligible for state funded health insurance?
3. Does the family qualify for government assistance?
   1. TANF/ASPIRE
   2. Food Stamps
   3. Earned Income Tax Credit
   4. General Assistance
   5. Fuel Assistance
   6. Subsidized Housing
   7. SSI/SSDI
4. Have the parents attended parenting education courses?
5. Are there allegations of domestic violence?
6. Do the parents or children need mental health services?
7. Are the children having trouble in school?
8. Are you able to work with the parents to reduce the conflict in the family?
9. Are you being sensitive to issues of poverty and culture?
10. Are you focused on the best interest of the child?
Working with Families in Poverty

For many attorneys, serving as a GAL to a poor child may be their first direct and personal experience with a family living in poverty. To faithfully carry out your obligations as a GAL, it is important that you consider your biases, conscious or unconscious, about poverty and the type of family that finds itself in poverty. Children you represent may not have a level of comfort that you would expect for your own child, but this may have little to do with the quality of parenting or best interests of the child. Be careful not to impose your own standards when evaluating the needs of the child.

While the risks created by poverty are something the GAL must be aware of, these risks are not dispositive of the case or the recommendation that the GAL should make. Likewise, the fact that one parent makes more money than the other parent or one parent exhibits values characteristic of the middle class and another exhibits values of someone living in poverty, should not be the deciding factor in the case. It is important to remember that each recommendation be based on the facts of the individual case.

Indeed, one of the most important roles that a GAL can play is to connect families with needed services. A Voice for Low-Income Children, p. 11-12. It is thus critical that the GAL be aware of available community resources, which can assist the parent in better meeting the needs of his or her children.

In cases involving a disparity of income between the parents it is often in the long-term best interest of the children that, wherever possible, the GAL apply the best-interest standard found at 19-A M.R.S.A. § 1653 after the parents have been connected to and given an opportunity to participate in needed services which are intended to benefit both the parent and the child.
Culture

Although Maine is a predominantly homogeneous state, many communities, particularly those in Southern Maine are experiencing an influx of immigrant families. Their addition to our community brings tremendous resources and opportunities to the state. When these families interact with the legal system, however, misunderstandings and unfortunately prejudice can sometimes influence the process. As a GAL working with a family from another culture, you must be sensitive to the differences in cultural norms and expectations.

The following information is adapted from the National Court Appointed Special Advocates Training. You can find more information at http://www.nationalcasa.org/.

The Cultural Sensitivity Lens

Another lens that you need to use when you look at a family is the lens of cultural sensitivity. Family structure, rules, roles, customs, boundaries, communication styles, problem-solving approaches, and values may be based on cultural norms and/or accepted community standards. “Cultural norms” are behavioral expectations that are based on cultural beliefs and practice. “Community standards” are the shared values and expectations of a group of people living in geographical proximity.

It is important to understand the role of the extended family in raising children. In many cultures extended family may be expected to play an extensive role.

As a GAL, your assessment of a family’s situation will be affected by whether you focus on strengths or deficits and by your awareness of how cultural issues can impact your ability to see the situation objectively.

Your ability as a GAL to identify strengths in families depends partially on which lens—the resource lens or the deficit lens—you use in your work with families. The lens you choose will also influence your work with others involved in the case. The resource lens can be understood dynamically by asking the following questions as you assess the family:

- How has this family solved problems?
- What activities have family members completed?
- How are family members coping with their present circumstances?

Resource Lens vs. Deficit Lens

The following details differences between a focus on family strengths and family deficits.
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<td>Avoid labeling</td>
<td>Label</td>
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<td>Inspire with hope</td>
<td>Deflate family's hope</td>
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**Tips for Family Practice in a Multicultural Environment**

1. Assume nothing
2. Ask questions regarding specific behaviors, values, attitudes and perspectives.
3. Pay attention to any signs of spirituality or religiosity and respect the family's beliefs.
4. Do not insist on eye-to-eye contact. In many cultures this is considered a sign of disrespect.
5. If you do not speak the family's language, find an interpreter who is not related to any party.
6. See personal experiences with members from the various cultural groups you might serve. (Keep in mind that if your only contact with a particular cultural group is through your work as a SACA/GAL volunteer, then your exposure to that culture is rather limited.)
7. Set specific goals for achieving cultural awareness with respect to the various cultural groups your agency or practice might serve.
8. Acknowledge the legacy and presence of cultural and racial bigotry and prejudice in the United States.
9. Appreciate the difficulties and problems individuals and families encounter trying to live and thrive in a cultural setting that is, at best, different from their indigenous culture and, at worst, antagonistic toward their specific cultural orientation.
10. Explain the need for any and all information requested and, if possible, delay asking the most personal questions until the family has had the time to understand the need for information.

**A Positive Approach to Dealing With Differences**

http://www.ptla.org/vlp/culture.htm  
9/7/2004
1. **Communicate Respect**  
Transmit positive regard, encouragement and sincere  
interest. All people like to know that others respect them.

2. **Be Nonjudgmental**  
Avoid moralistic, value-laden, evaluative statements, and  
listen so that others can fully share and explain themselves  
and their situations.

3. **Personalize Knowledge & Perceptions**  
Recognize the influence of your own values, perceptions,  
opinions and knowledge on your interactions with others.  
Your perception are valid only for you and not for the rest of  
the world.

4. **Display Sympathy**  
Attempt to put yourself into the other person’s life space and  
to understand how he/she feels about the matter under  
consideration.

5. **Practice Role Flexibility**  
Be able to accomplish a task but also value the ability to do  
so in such a way that people feel positive about being part of  
the process. Encourage shared interaction.

6. **Demonstrate Reciprocal Concern**  
Interact equally, taking turns talking, promoting  
communication.

7. **Tolerate Ambiguity**  
Be able to react to new, different and unpredictable  
situations with greater ease. Too much discomfort can lead  
to frustration and hostility. Learning to manage the feelings of  
uncertainty that accompany ambiguity is necessary for  
dealing with differences.

8. **Be Persistent**  
Keep communication lines open despite ambiguity and  
possible misunderstanding. Be willing to stay with the  
situation until you get a clear picture instead of giving up. If  
you do not understand something, ask that it be explained  
again.
A woman walks into your office for a divorce consultation. You begin by asking her to describe her family and living situation, income, and marriage. Her story is not unusual: a six-year marriage; two young children; a house, two cars, and a middle-income marital estate. The woman stayed at home with her children for a few years while her husband provided their main source of income, but now she works part-time.

You probe further and ask where they got married. She tells you they were married on a reservation in Northern Wisconsin where they lived until early this year. Upon further questioning, the woman explains that she is a member of the Lac Du Flambeau Tribe of Chippewa Indians as are her children, but that her husband is not Native American. She describes herself as a “traditional Indian” who is very religious and devoted to her cultural heritage, which her husband rejects. She wants custody of her children so that she may raise them to embrace their tribal traditions and knows that her husband will not agree.

You decide to take the case, but realize there may be Native American cultural issues that will affect its outcome. After some cursory research, you find that not only does jurisdiction come into question, but that Native American cultural traditions may conflict with mainstream “American” norms built into the family law judicial system. It is your job to educate the judge as to tribal law as it affects jurisdiction and any relevant cultural heritage issues.

Cases that contain cultural issues, particularly those unfamiliar to mainstream courts, can be challenging for lawyers, judges, and clients. You may one day, for example, represent a Native American such as in the scenario above, an Arab, Chinese-American, or impoverished Appalachian client with whom you and the judge may not share traditions or cultural values. To represent your client fully, you must educate yourself, the judge, and your client on issues of law and culture that are germane to the case. In so doing, your role may shift from advocate to educator and back several times during the course of the case.

Depending on your client’s heritage and the circumstances of the case, many tools are available to you in educating the court, such as written memorandum, treatises, and expert witnesses. However, the most important tool in your arsenal is you. Immerse yourself in your client’s culture and heritage and any relevant laws. You must make yourself sufficiently knowledgeable on the subject of your client’s heritage and the relevant law to present and maintain your client’s case.

**Where to begin**

Your case is only as good as the quality of your resources. As a lawyer juggling a busy caseload and high service expectations, it becomes exceedingly important to narrow your focus to the best possible sources.

Legal sources, such as those found in the law library or on an Internet legal research site, are the most obvious and accessible places to begin. Look first to familiar sources, such as state and federal law digests, treatises, and journals, and then expand your scope as your knowledge grows.

Culturally relevant research information may be found in tribal court or international law digests, treatises, and jour-
nals. If you are unable to find relevant law there, ask for help from other lawyers or law groups specializing in the client’s heritage. For example, several legal organizations around the country cater specifically to Native Americans, such as Michigan Indian Legal Services (814 A. Garfield Ave., Traverse City, MI 49686-34301; (800) 968-6877; www.mils.org).

Upon contacting their office, you will find that part of their work focuses on Michigan family law. You also may find that they have had family law cases from other states, such as Wisconsin (the state of your client’s reservation). Or perhaps one of their lawyers could direct you to a helpful specialized legal resource.

Another way to find relevant case law is to locate rules in your jurisdiction that allow courts to rely on experts for matters that are not common knowledge. Then seek expert assistance from reliable legal or non-legal sources with knowledge of your client’s culture.

Why go through all this trouble to deal with what appears to be an uncomplicated issue? Because issues that you don’t presently understand fully may deeply influence or in some instances turn the case for or against your client. For example, in the scenario above, the issue of jurisdiction will arise because your client and her husband were married and lived (with their children) on an Indian reservation for a significant part of their marriage. How crucial the question of jurisdiction is to your client’s case will depend on the law of the jurisdiction for that particular Indian tribe as well as the law in your circuit.

Although your state may require only six-months’ residency to attain jurisdiction over the marriage and children, the tribal court on the reservation may have conflicting long-arm jurisdiction. You also may find that the tribal laws concerning marriage and child custody are beneficial to your case. Conversely, as opposing counsel, you may find that your client will unexpectedly be haled into tribal court. Therefore, knowing and finding the correct law on the subject of jurisdiction and possibly that of conflicts of law is essential to your case.

Your search, however, should not be limited to legal resources. Do not be fooled into thinking that because you cannot find case law relevant to the cultural issues, important resources, such as anthropological, social, or psychological studies, do not exist. Many successful attorneys have made judges more comfortable looking beyond traditional case law by showing directly or by implication that courts can and do rely on nonlegal professional journals and studies in resolving family law matters. In particular, public or university libraries and educational facilities may have excellent materials. Likewise, cultural community members and/or organizations may provide additional invaluable tools.

The cultural group

The cultural issues in your client’s case may not be strictly legal or may be a combination of legal and cultural. Either way, it is important to educate yourself with sources that come directly from the cultural group. This may be a departure from your traditional research methods. For many years, cultures in and outside the United States were studied and recorded, primarily by Caucasian men with an Anglo Saxon education. Although their many contributions cannot be deemphasized, their research and conclusions cannot replace the “inside” information that comes directly from the cultural group. As almost any member of a cultural group will tell you, no one knows them like they know themselves.

Many bar associations are composed of lawyers who are members of or work with specific cultural groups. These associations may be part of a larger organization, such as the American Bar Association (Commission on Racial & Ethnic Diversity in the Profession or Council on Racial & Ethnic Justice, 321 N. Clark St., Chicago, IL 60610; (312) 988-5000; www.abanet.org) or the Hispanic National Bar Association (815 Connecticut Ave., N.W., Ste. 500, Washington, DC 20006; (202) 223-4777; www.hnba.com) or may be independent and state-specific, such as the Illinois Native American Bar Association (P.O. Box 2319, Chicago, IL 60690-2319; (847) 622-4192). For complete listings of bar associations, contact the American Bar Association or do an Internet search. Once you find the bar association, contact its leaders or spokespersons and query them on the subject of your research. Although they may be unable to answer your inquiries directly, they may put you in contact with a member or other helpful resource.

In addition to bar associations, most states have other organizations that represent or cater to particular cultures. You can do an Internet or telephone listing search to find community centers or social service organizations with cultural affiliations, such as the American Indian Center in Chicago (1630 W. Wilson Ave., Chicago, IL 60623; (773) 878-9700; www.indiancenter.org).
Chicago, IL 60640; (773) 275-587; www.uc-chicago.org) or the Chinese Cultural Center in San Francisco (750 Kearney St., 3rd Floor, San Francisco, CA 94108-1809; (415) 986-1822; www.c-c-c.org). However, don't expect to call one of these organizations and get the answers to your legal dilemma. What you can expect is a rich source of cultural history and information about current norms and practices. This may require you to interview several community members to get a full view of the culture and its nuances.

You might call, for instance, the American Indian Center and speak to its director regarding your questions on marriage practices for the Lac Du Flambeau Tribe in Wisconsin. Because it is traditional for Native Americans to be taught by elders in their community, he or she may direct you to one of these valuable sources. You also may be referred to several other community members who are Lac Du Flambeau tribal members or to the tribe itself in Wisconsin.

If you decide to take this step, please remember to inquire about how best to interview or speak with community members in a respectful manner relative to their traditions. For example, if you need to interview an immigrant Arab woman and you are a male lawyer, it is important to know that you may not interview her without speaking first to her husband. Although no law in the United States forbids such contact, Arab cultural practices do. Although other sources of information may be available, you will have wasted your client's time and money because you were insensitive to Arab custom.

If you cannot find resources regarding your client's cultural heritage using the previous suggestions, seek the recordings of historians, anthropologists, and/or other scholars who have contributed to a study of the cultural group. This option might seem easy because you need only search a public or university library for books, periodicals, or texts on the culture. However, take into account that many of the traditional scholarly works may not be wholly accurate portrayals of a culture. Rather, they may be only an outsider's perspective. Although such resources may not be the best choice for legal purposes, they may be a helpful starting point. Read a book about the culture for a cursory overview, and then follow up with other culturally appropriate sources.

**Share your knowledge**

Now that you've completed your studies, you are ready to share your knowledge with the judge. First, tell the court about the cultural issues in the case. Do so in a formal or informal way, whichever best suits the cultural issues, the law, your case, and the judge.
Many issues can be brought before a judge in an informal way, depending on local law. You may inform the judge verbally that your client is of a certain cultural heritage, which requires special consideration during the case. Many judges will ask what considerations would be necessary and will direct you accordingly. Others may not be familiar with the issues and may ask for a formal education on the subject, such as a memorandum. Still others may respond that no special considerations will be given, whereupon you must be prepared to educate the judge further or make a formal motion.

In all cases, you will need a working knowledge of the law surrounding the cultural issue before bringing the issue before the judge. Most judges will be receptive to preparedness at the outset and may allow you to proceed without further formal motions. Please note, however, that an informal introduction may not work when the law requires a written motion or otherwise.

A settlement conference is another informal way to introduce cultural issues. You may work quickly with your client and opposing counsel to find issues that can be stipulated to and flesh out aspects in controversy, including issues of cultural significance. Then, sit down in conference with the judge, giving an informal, easy-to-understand overview and discussing issues in controversy. If you choose this method, be sure to bring copies of the legal and cultural sources for both the judge and opposing counsel.

Use a similar process—mediation—to bring cultural issues into the open by filing a request for mediation. During mediation, educate the mediator with optimal resources so as to obtain a beneficial result for your client. If the mediation doesn't end with a settlement agreement, you will, at the very least, have "practiced" your cultural education on the mediator before presenting it to the judge.

Do not be surprised if the judge asks for a written memorandum of law on your client's culture or the law as it affects your case. This is an excellent opportunity to educate the judge in a manner that is beneficial to your client. Keep your memorandum concise and to the point. Carefully scrutinize it to avoid giving cultural misinformation, a common mistake. Finally, provide the judge with a complete listing of your resources in case he or she opts to do further study.

Written motions
Some cultural issues are best brought by written motion. For example, the issue of jurisdiction in the scenario above requires a written motion for lack of jurisdiction to proceed. Similarly, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C.A. § 1901-1963, P.L. 95-608, 92 Stat. 3069 (1978), which occasionally appears in custody, abuse/neglect, and/or adoption cases, requires the court to file written documentation with a child or parent's Indian tribe before the case can proceed. However, the type and content of the written motion depends on the issue, the requirements of law, and the particularities of your client's culture. You might, for instance, find that bringing a written motion for mediation on behalf of your client would be better if she was Navajo, as the tribe employs a mediation program called the Peacemaker Court, which is more progressive and successful than many nontribal programs. In so doing, you would research and write a motion that "fits" within the framework of a Navajo Peacemaker Court (Office of the Chief Justice, P.O. Box 520, Window Rock, AZ 86515; (520) 871-6385; see www.navajo.org).

On the other hand, your client might be from a tribe that doesn't sanction divorce and, therefore, doesn't have a divorce mediation program. You would then consider alternatives to mediation or, if the tribe has jurisdiction over the case, fit your motions within the framework of the tribe's rules and regulations.

Other cultural issues may be presented by written motion at your own judgment. For example, in divorce/custody cases, issues of cultural background or heritage, parental homeland, and/or sexual preference can be introduced under most state best-interest-of-the-child standards.

In Jones v. Jones, 542 N.W.2d 119 (S.D. 1996), the trial court awarded primary physical custody to the father, who was a member of the Sisseton-Wahpeton Dakota Nation, under the state's best-interest-of-the-child standard. The court reasoned that because the children were part Native American and had Native American features, the father would be better able to deal with any discrimination that might occur and the children's subsequent needs.

On appeal, the South Dakota Supreme Court upheld the trial court's decision, finding that it was proper for the court, when determining the best interests of a child to "consider the matter of race as it relates to a child's ethnic heritage and which parent is
more prepared to expose the child to it.” Id. at 123.

As in the case above, your client might benefit from consideration of the effect of discrimination on the children. Therefore, you could include this as a point of argument in your motion for custody, along with other issues, such as exposure to cultural heritage, the unwillingness of one parent to honor the child’s heritage, etc.

**Proving the case**

In addition to making formal or informal motions, you will need to decide whether to provide evidence to support and/or prove up your client’s case. This depends on the content of your case and requirements of law. In considering how best to provide evidence, remember this principle: evidence should give your client a voice regarding his or her cultural heritage that will persuade the judge to decide in your favor.

Occasionally, tangible evidence will be necessary, such as written materials (for example, a tribal membership card or ID), cultural items, photos, etc. Although these items may not seem important, they may give the judge a firsthand view into the culture. For example, in ICWA cases, a child’s Indian heritage may not come into question if documentation is not immediately available. For some judges, a child might not look or “seem” Native American, until a photo showing him or her dressed in ceremonial regalia or participating in other cultural activities is produced in court. Suddenly, the issue of the child’s cultural heritage becomes more concrete and important.

A useful way to give your client a voice regarding his or her cultural heritage is to provide a voice for the judge to hear. Oral testimony from a good witness gives valuable “hands-on” or “inside” information for the judge’s consideration. Many kinds of witnesses may be called in a family law case. The trick is to narrow your scope to those witnesses who are most relevant to your client’s heritage as well as plausible and persuasive.

The cultural issues that arise in civil cases often are specific or unique enough to point you toward the kind of witness you’ll need. A good example is in termination-of-parental-rights cases where the child is of Native American heritage. The Indian Child Welfare Act requires a qualified expert witness to testify in the case. (Indian Child Welfare Act of 1978, 25 U.S.C.A. § 1912(f).) The guidelines set forth by the BIA for ICWA further specify that the expert witness must be (a) a member of the child’s tribe or (b) an expert who has worked with the tribe and has knowledge of social and cultural standards as well as child-rearing practices and so on. (“Bureau of Indian Affairs Guidelines for State Courts: Indian Custody Proceedings,” *Federal Register*, Vol. 44, No. 70, Monday, April 23, 1979.)
This example is, perhaps, more clear-cut than one might find in other cases involving cultural issues due to requirements of law. But finding and using a cultural expert witness needn't be difficult. Your research into the cultural heritage of your client likely lead you to a person qualified to testify. If not, search for an expert witness in a fashion similar to that described above: use your legal resources and then additional resources within your client's cultural group.

**Interpreters/Translators**

You may find that your client or witness doesn't speak English as a first language and/or does not speak or read English fluently enough to understand court proceedings. A language barrier often makes people feel intimidated by and/or distrustful of the court system, particularly in adversarial proceedings such as in family law.

The American legal system relies heavily on the spoken word, and lawyers often use their legal training to argue detailed distinctions between the meanings of words and phrases or the intent behind the use of a word.


Where cultural issues are a consideration in family law cases, provide your client and/or witnesses with a well-trained and experienced interpreter and/or translator.

Having an interpreter who truly speaks the same language and dialect as the witness is crucial. In one case a Cuban battered woman tried to tell the judge that she had been “stabbed” with a knife. The interpreter, who was from Uruguay and spoke a different form of Spanish, said that she had been “scratched” with a knife.


It also is important that the interpreter/translator be sensitive to the type of case and prevent his or her personal feelings from becoming part of the interpretation/translation. Although some easily accessible people may appear to be great resources, avoid their use in family law cases if they may be biased. These people may include children, other family members, and/or friends of the parties or family.

**Conclusion**

Your case involving a client with a cultural background unfamiliar to you need not be intimidating. Instead, important educational tools, cultural resources, and expert witnesses are at your disposal. The case will challenge you and the court to learn about other laws or traditions that could provide a fascinating insight into the lives of a culture not your own. **FA**

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The Contribution of Ethnographic Interviewing to Culturally Competent Practice

Esther Wattenberg and Annette Semanchin

 Culturally competent practice is generally recognized as indispensable for child welfare practitioners, yet skills and techniques are somewhat elusive. The issues are urgent and complex. Cultures have differing views and standards for acceptable parenting practices. The stakes are high in assessing risk of harm to vulnerable children.

How can you interpret, assess, and then address the problems of families whose lives and experiences are so different from your own? What questions do you ask? What do you focus on? How do you construct a serviceable plan?

Ethnography provides a framework for delivering culturally competent services. The field of anthropology, which pioneered the ethnographic interview, leads the way in helping us understand a life in a context unfamiliar to us. Two principles stand out: Active listening is required to understand the narrative of a family’s life, and respect for the cultural knowledge of families requires us to learn from clients.

This article provides an introduction to ethnographic interviewing.

What is Ethnographic Interviewing?
The goal of ethnographic interviewing is to understand and appreciate experiences and worldviews of people who are different from us. We do this by asking the client to be a cultural guide. You, the interviewer, are no longer the expert, but a learner. You assume a position of “informed not-knowing,” in which the clients educate you about their lives. This information ‘would come from the clients’ own words, since they can offer the most accurate description of their experiences.

The ethnographic stance is respectful, collaborative, and less hierarchical. It seeks to build on clients’ strengths, rather than blaming them or pathologizing their experiences. You seek to create the space where the voices of the clients can emerge, by asking global questions and listening intently. You are slow to assess and cautious to generalize.

Ethnography is a means to culturally competent delivery of social services. Effective and culturally appropriate communication is necessary to engage clients. Ethnographic interviewing incorporates techniques that take into account the context of ethnically diverse clients and seek to understand their experiences and perceptions.

The culturally competent interviewer values and respects the uniqueness of cultures, and is cognizant of the fact that cultural differences have an impact on service delivery—particularly when there is a conflict between the values of the minority group and dominant culture.

The ethnographic interview is where you and the client begin to share information with each other. You need to understand the client’s position as an outsider, as someone who is looking for information that the client can provide about his or her own experiences and the meaning they have within his own culture.

Stages of the Interview

Setting the Stage
■ Set the tone with friendly conversation.

■ State the explicit purpose and goal of the interview.

Expressing Ignorance
■ State your lack of knowledge about the client’s culture. This establishes the client as expert on her experiences, as well as that of a cultural guide during the conversation. Your

(Continued next page)

Defining Terms

Ethnographic interviewing: Method of interviewing which began in the field of anthropology, and is currently widely practiced by social science researchers in all fields. The interviewer assumes the role of a “learner” rather than the expert. The interview is generally semi-structured, with the interviewer preparing a few broad questions in advance. The client guides the interview with his or her answers. This is also referred to as narrative.

Open-ended questions: General, broad questions about some aspect of the client’s life and possibly related to the presenting issues that the client brings.

Cover terms: Words and phrases used by the client that identify an important aspect of their life experience.

Descriptors: Words used to describe the cover terms, which are used to build a portrait of the experiences of the client within their cultural context.

One of the best illustrations of the narrative process is the style of interviewing used by social workers at the Center for Victims of Torture.*

The following are some observations by Eva Spranger, MSW, a staff member of the Center.

Our families have suffered unimaginable horrors as survivors of brutal treatment of clan-based, civil and invasive wars. While they have survived and reached a safer place in the United States, they are still not free from the terror that torture leaves in its wake.

To develop a case plan, our assessment begins with the difficult task of establishing a trust relationship. I begin with small talk and then explore the issue they bring up in conversation. For example, the client may have said, “I was a journalist back home.” The interviewer could follow up with a question such as, “What was that like, being a journalist in your country?”

An important guideline is to keep the exchange as natural as possible. Keep in mind that the client may have experienced interrogation as an extremely negative, painful and traumatic event. It is important to allow the narrative of a life to unfold: past war, violence, the experiences of their tribe within the country; their first language; the loss of family and extended family; the emotional turmoil of loss of status and culture.

It takes time to establish a relationship of trust. Part of this development is to recognize differences in how one views authority, political structures, personal relationships, and status, but it is also important to share similarities.

How can you tell you have understood your clients’ situations? They keep appointments and continue to share parts of their story.

In this evolving exchange, a central feature is to find and recognize the client’s strengths and resources and build on these for the case plan.

“Within a trusting relationship, the worker can ask difficult questions . . . the case plan is a result of the human connection—bridging the guilt of experiences that separate us . . .”

A Case Example

willfulness to express ignorance may also encourage the client to talk more freely.

Open-ended Questions

- Prepare a few questions before the interview.
- At this stage of the interview, work to develop empathy and understanding for the client’s experiences and story.
- Even if you are familiar with people of a certain culture, during this stage of the interview each person is treated as a stranger, with unique experiences to be discovered.
- Two types of open-ended questions:
  - a) questions regarding the client’s perception of how her community views the definition of problems, group role norms, rituals, help seeking and problem resolution styles.
  - b) questions regarding how the person relates to community cultural values and norms of behavior.

Cover Terms

- Cover terms, words used frequently by the client should be explored. You and clients may both use jargon, which widens the cultural gap between you. By seeking to learn cover terms and understand their meaning, you can narrow this gap.
- Recognize the power and significance of language. Language can be used to label and limit ethnic minorities and other marginalized groups. Language can also bring about understanding of other cultures.

Descriptors

Learn what meaning the client gives to cover terms by asking descriptive questions:

Space questions: The objective of global space questions is to learn about the physical setting of the cultural scene.

Time questions: Provides the sequence of activities for social relationships.

Actor questions: Important to learn who the people are in relationship to each other and the titles used to describe each role.

Evaluation questions: Asks for evaluations of people or things. These should be linked to factual questions.

Example questions: These are very specific. They ask the client for an example of a single act or event.

Experience questions: Asks the client for any experiences he has had in a specific setting.

Language questions:

- Hypothetical questions: Places the client in an interactive situation, in which you ask her to speak as if talking to a member of the cultural group.
- Typical sentence questions: Asks the client to take a cover term and

Example: "You and clients may both use jargon..."
Interviewing

Limitations

- Be flexible and invite the client to talk about what is important to him.
- Learn about clients both as individuals and as members of their culture or ethnic community.
- Clients are in a better position to offer suggestions and solutions to meet their needs and make sense within their cultural context.
- Think of yourself as a learner of the clients' culture, and an “expert” on the problem-solving process.
- Look for important themes within the client’s story, and then facilitate the client’s understanding of these themes.

Limitations of Ethnographic Interviewing

- It is important that ethnographic interviewing not replace the need to learn about the communities with whom you work.
- Ethnography and field research is a time-intensive process. In applying these interviewing techniques to child welfare, the ethnographic model may need to be adapted to fit the timeframe of current policies regarding children in out-of-home placement.
- Using the services of a qualified interpreter is very important. The interpreter can translate both words and their cultural meaning. The interpreter can answer questions about what is culturally appropriate in an interview. However, using interpreters presents the following limitations:
  a) It takes much longer to do an interview with an interpreter, so it is important to be prepared when planning time for an interview.
  b) An interpreter changes the dynamic of the interview by adding an additional person to the room.
- Be very cautious in using children as interpreters. This may change the power dynamics within a family, and the children may assume a heavy burden within the family.

Recommendations

- Training on ethnographic interviewing techniques should be offered to practitioners who interview clients in the child welfare system—both social work and court personnel.
- Staff, at all levels, should be encouraged to assume a stance as collaborator and learner with clients. This will allow for a more trusting relationship.
- Based on the individual stories practitioners hear while using an ethnographic approach, advocacy should occur for groups of clients to make their voices heard in larger systems.
- Information should be disseminated on state guidelines for appropriate discipline in different languages representing all communities in your jurisdiction.
- Using ethnographic techniques should be explored as part of the risk assessment process with families.

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Sources:

Establishing Permanent Futures for Children: Future Care and Custody Planning for Families Affected by Life-Threatening Illness

September 10-11, 2001 New Orleans, LA

Sponsored by: the Abandoned Infants Assistance Resource Center

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For more information:
Contact Margot Broaddus, 510/643-7018; margottb@uclink4.berkeley.edu
Web site: http://socrates.berkeley.edu/~aiarc/2001aiaconference.htm
52 Activities for Exploring Values Differences

Donna M. Stringer and Patricia A. Cassidy
Cultural Values

Time Required
35 minutes (5 minutes to brief, 10 minutes for the activity, 20 minutes to debrief)

Objectives
1. To clarify the differences between universal, cultural, and personal values
2. To illustrate that values fall across a continuum, with cultural values as the midpoint between the poles of universal and personal values
3. To prove that those who say “people are all alike” (universal values) and those who say we are “all unique individuals” (personal values) are denying that culture is an important influence on the values we hold
4. To provide information regarding the dangers of overgeneralizing cultural values

Materials
• The Cultural Values Worksheet

Process
1. Define the different values:
   • People everywhere share global values, for example, respect.
   • People within a specific cultural group share cultural values that are not necessarily shared by all cultural groups; for example, competition.
   • Individuals hold personal values that are unique to each individual; for example, artistic skill development. A personal value may be shared by a number of people in a culture, but it would not be considered a cultural value unless most people in the culture shared that value.
2. Inform participants that values may fit into one, two, or all three categories.
3. Ask participants to complete the “Cultural Values” worksheet.
4. After everyone has completed the worksheet, review the items together as a large group. Focus discussion on those items that people did not agree on and ask participants to explain their choices.

Debriefing Questions
1. What happened? What was easiest to do? Hardest? Why?
2. How did you feel about completing this sheet? Why?
3. What would you conclude about values from this experience?
4. What did you learn?
5. How can you apply what you’ve learned?

Debriefing Conclusions
1. While some values are global, there are also many cultural and individual differences in values.
2. We all belong to the global human race and to specific cultural groups, and we each have individual personalities; our values come from all three.
3. While some behavior may be more prevalent within certain cultures, personal preferences and differences exist in every culture.

Based on information from *Figuring Foreigners Out* by Craig Storti.*

* For this book and others cited herein, please refer to the Resource Bibliography for complete publishing information.
Cultural Values Worksheet

Write a G for those items that illustrate global values. Write a C for those items that exemplify cultural values, and write a P for those items indicating personal values.

_______ 1. Sleeping with a bedroom window open
_______ 2. Running from a dangerous animal
_______ 3. Considering snakes to be "evil"
_______ 4. Assigning a higher value to male children than to female children
_______ 5. Respecting elders and seeking their counsel
_______ 6. Learning one's native language
_______ 7. Developing artistic skills
_______ 8. Seeing family as important
_______ 9. Eating at certain times
_______ 10. Considering competing and winning important
_______ 11. Enjoying the poetry of Rainer Maria Rilke
_______ 12. Calling a waiter with a hissing sound
_______ 13. Surrounding oneself with the color blue
_______ 14. Seeking harmony in everything one does
_______ 15. Feeling sad at the death of one's mother
_______ 16. Seeking physical safety
_______ 17. Choosing a religion or form of spirituality to practice
_______ 18. Being calm and self-controlled at all times
_______ 19. Eating no dairy products

Adapted from an activity in Figuring Foreigners Out by Craig Storti.
Cultural Values Answer Sheet

_____ 1. Sleeping with a bedroom window open
____ 2. Running from a dangerous animal
____ 3. Considering snakes to be "evil"
____ 4. Assigning a higher value to male children than to female children
____ 5. Respecting elders and seeking their counsel
____ 6. Learning one's native language
____ 7. Developing artistic skills
____ 8. Seeing family as important
____ 9. Eating at certain times
____ 10. Considering competing and winning important
____ 11. Enjoying the poetry of Rainer Maria Rilke
____ 12. Calling a waiter with a hissing sound
____ 13. Surrounding oneself with the color blue
____ 14. Seeking harmony in everything one does
____ 15. Feeling sad at the death of one's mother
____ 16. Seeking physical safety
____ 17. Choosing a religion or form of spirituality to practice
____ 18. Being calm and self-controlled at all times
____ 19. Eating no dairy products

Adapted from an activity in Figuring Foreigners Out by Craig Storti.
A "Jolt" of Reality

Time Required
8–15 minutes (3–5 minutes for the activity, 5–10 minutes to debrief)

Objectives
1. To illustrate how we filter information and form assumptions based on experience and cultural values
2. To encourage participants to reexamine their assumptions and to avoid automatic (knee-jerk) reactions
3. To demonstrate how our behaviors (action/reaction) are often influenced by cultural values or filters

Materials
  ○ None

Process
1. Ask the participants to stand and find a partner. Direct partners to face each other, place their feet firmly on the floor, and then raise both hands and place them palm to palm at shoulder height.
2. Now tell participants that to win at this activity, they must make the other person move his or her feet—within 30 seconds. Start the timing. (Note: Most participants will use brute force to push each other. Some may try to negotiate or bribe the other person to move. A few may stop pushing and let the other person’s momentum propel him or her forward.)
3. After 30 seconds stop the activity and ask a few participants to share some of the strategies they used to get the other person to move.
4. Ask for a volunteer. Assume the face-to-face, palm-to-palm position. Whisper to the other person, “Let’s dance.” Hum a tune and move your feet together.
5. The participants will probably protest that this is cheating. Remind them that the directions were simply to get the other person to move his or her feet within the 30-second time frame. There were no restrictions on moving your own feet or on communicating. Ask participants who won.
Debriefing Questions

1. Describe what happened. (When you hear interpretations, such as “She tried to bribe me,” rather than descriptions like “She offered me something,” ask the participants to describe behaviors only.)
2. How did you feel about how you behaved? Your partner’s behaviors? The outcome?
3. What values were behind the different strategies people used?
4. What did you learn from the activity itself and from the “dance” strategy?
5. How can this learning be applied?

Debriefing Conclusions

1. We tend to filter information, form assumptions based on our own experience and values, and then act according to these assumptions. Cultural values such as cooperation, competition, individualism, and collectivism are demonstrated in this kind of activity.
2. Assumptions and knee-jerk reactions can prevent us from exploring alternative behaviors.
3. Cultural values such as individualism and competition may result in conflict and block win-win solutions.
4. Meeting force with force is almost always futile.

Adapted from an activity presented by Sivasailam Thiagarajan at The Summer Institute for Intercultural Communication, 2000.
Saying It Makes It So

Time Required
60–75 minutes (30 minutes for small groups; 15 minutes to report; 15–30 minutes for debriefing)

Objectives
1. To identify values that are implied by common expressions
2. To explore the tacit ways that culture is transferred from generation to generation

Materials
- Saying It Makes It So Handout
- Paper, pencils
- Flipchart (optional)

Process
1. Place participants in groups of 4–6 people. Provide each person with the “Saying It Makes It So” handout. Give the groups approximately 30 minutes to do the following:
   - Add any expressions that group members remember from their childhood.
   - Identify where people learned these expressions.
   - Identify the implicit values being taught by each expression.
   - Discuss whether there are differences within the group based on cultural experiences including geography, gender, race/ethnicity, and so on.

2. Returning to the larger group, ask small groups to share the values they identified for each expression and any differences they might have identified within their group. If time allows, record these values on a flipchart so the group can see the similarities and differences.

Debriefing Questions
1. Were there differences in the expressions people knew or remembered? What do you think these differences are based on? From whom did you learn these expressions? How early in life?
2. How do you feel about these expressions and the implicit or explicit values they express?
3. What values did your group members demonstrate as they participated? Which values were most commonly held? Why do you think that is?
4. Were there expressions you had never heard before? Why do you think that is?
5. How could you apply information from this experience to your everyday life?

**Debriefing Conclusions**
1. The values of a culture are often passed on by the implicit and explicit use of common expressions.
2. Expressions can serve as a tool to better understand tacit cultural values.

**Additional Process**

*Note: This process could be very helpful in preparing people to visit or work internationally.*

3. Following Step 2 (reporting back to the larger group regarding U.S. cultural sayings), provide participants with sayings common to the country they are preparing to study or visit and have them identify the values implicit in the sayings.
4. Ask participants to identify differences in the values represented in U.S. expressions and those in the expressions of the chosen country, as represented in the sayings provided.
5. Ask participants to identify behavioral modifications they might want to make to be most effective in the chosen country based on the identified value differences.

**Optional Process**

*Note: This process is likely to take longer because people are being asked to generate their own lists of expressions. This will be a much richer process, however, if there is a mix of cultures represented in the group.*

1. Ask each person to write down any expressions or idioms they remember from their own experiences—both past and current.
2. Place participants in groups of 4–6. Have the small groups identify common expressions and unique expressions, identifying the source of the latter (e.g., nationality, geography, gender, race/ethnicity, etc.). Have the group identify the values implicit in each saying. Ask one person in each group to write this information down.
3. After participants return to the larger group, ask each small group to report the expressions that were shared by most people in their group and those that were unique, including the values implicit in each saying and the source of the expression. If time allows, record the values on a flipchart for comparison.

Adapted from activities in *Developing Intercultural Awareness: A Cross-Cultural Training Handbook* by L. Robert Kohls and John M. Knight.
Saying It Makes It So Handout

1. Make hay while the sun shines.
2. Keep your ear to the ground.
3. Fly by the seat of your pants.
4. Easy as rolling off a log.
5. Dot your i’s and cross your t’s.
6. The early bird catches the worm.
7. Wrong side of the tracks.
8. Roll with the punches.
9. Can’t see the forest for the trees.
10. Throw your hat into the ring.
11. Don’t make waves.
12. There is more than one way to skin a cat.
13. Dyed in the wool.
14. Shape up or ship out.
15. Don’t take any wooden nickels.
16. Save for a rainy day.
17. Right off the bat.
18. Don’t cry over spilt milk.
19. Cleanliness is next to godliness.
20. A penny saved is a penny earned.
21. Waste not; want not.
22. It’s not whether you win or lose; it’s how you play the game.
23. God helps those who help themselves.
24. You’ve made your bed; now lie in it.
25. Early to bed, early to rise, makes a man healthy, wealthy and wise.
26. Time is money.
27. Children should be seen but not heard.
28. A woman’s place is in the home.
29. Fish or cut bait.
30. Go along for the ride.
Visible and Invisible Values

Time Required
60 minutes (15 minutes for lecturette; 20 minutes for activity; 25 minutes for debriefing)

Objectives
1. To examine the relationship between values and behaviors
2. To identify how unconscious assumptions regarding behavior can contribute to cross-cultural misunderstanding
3. To discuss how behavior might be misinterpreted in both positive and negative ways
4. To illustrate the importance of suspending interpretation or judgment until the significance of the behavior within the context of a given culture is understood

Materials
- Visible and Invisible Values Worksheet
- Visible and Invisible Values Alternative Interpretation Worksheet
- Flipchart and marking pens

Process
1. Conduct a brief lecturette (15 minutes) or discussion regarding the visible and invisible aspects of culture (see "Culture and Values Narrative," Appendix A, page 231). Focus on values as an invisible aspect of culture that determine how we act. Differentiate between terminal values (the ultimate goal) and instrumental values (the behaviors that help achieve the goal).
2. Provide all participants with a "Visible and Invisible Values" worksheet and give them approximately 5 minutes to complete it.
3. Put participants in pairs or groups of 3 and give them the "Visible and Invisible Values Alternative Interpretation" worksheet. Ask each group to generate alternative explanations for each behavior. Give them approximately 15 minutes for this process.
4. Bring the groups back together and ask for their alternative explanations for several behaviors.
5. List these on a flipchart.
Debriefing Questions
1. What happened? What was easiest to do? What was hardest? Why?
2. How did you feel as you were matching the values and behaviors? As you were thinking of alternative explanations for each behavior?
3. How did your own values affect your ability to come up with alternative explanations?
4. What have you learned?
5. How would you apply this to your everyday life?

Debriefing Conclusions
1. There are multiple interpretations of behavior. Misinterpretation can cause misunderstanding and/or conflict. The more possible explanations you can think of for a behavior, the more likely you are to identify the accurate one.
2. The stronger one’s own values on a subject are, the more difficult it may be to see alternatives.
3. To interpret behavior correctly, it is important to suspend judgment until one has more clarity on the significance of the behavior for the other person.
4. Understanding the cultural context of a behavior will contribute to understanding its meaning.

Adapted from an activity in Figuring Foreigners Out: A Practical Guide by Craig Storti.
Appendix

Culture and Values Narrative

I. Definition of Culture
That whole which includes knowledge, beliefs, art, laws, morals, customs, and any capabilities or habits acquired by one as a member of a certain group. Culture is shared by all or almost all members of a group. It is passed on from generation to generation, and it shapes our behavior and structures our perceptions.

II. Components of Culture
Culture has both visible and invisible components. Visible culture includes those things we use our senses for, what we can see, taste, feel, or hear; for example, art, food, music, architecture, clothing, and so forth.

Invisible culture includes those things we do not see either because they are not visible (values) or because we don't think to look for them (communication styles and nonverbal behaviors) or they are outside our consciousness (assumptions).

III. “Invisible” Aspects of Culture
It is the invisible aspects of culture that create the greatest challenges, because we consider our own assumptions, values, behaviors, communication styles, and nonverbal behaviors to be “normal.” When someone acts differently from us, we often judge them negatively. Conversely, when they act like us, we either don't pay much attention or we think they are okay. Either conclusion can be incorrect.

IV. Two Types of Values
A. Terminal values represent the goal we want to achieve.
B. Instrumental values are the behaviors we use to get to the goal.
C. We can have similar terminal values and act differently, for example, family may be a value for two people—one person demonstrates that value through the nuclear family; another demonstrates it through the extended family.
D. We can have different terminal values but act the same; for example, two people work hard to make a lot of money. For one individual, the money is used to support a terminal value of long-

52 ACTIVITIES FOR EXPLORING VALUES DIFFERENCES
term security for one's family, while another person may be using the money to support a terminal value of material success for oneself.

V. Intent and Impact Are Not the Same!

We might exhibit a behavior with very good intentions, but it may have a negative impact on another person. If we call someone by her or his first name with the intent of being friendly and inclusive, and if that person has a different cultural perspective, our friendly gesture may be experienced as an insult or as disrespect because he or she expects to be addressed formally (Mr., Dr., Ms., Professor).

Similarly, someone may behave in a manner that has a negative impact on us. An Arab might ask, for example, “Why don’t you have children?” Our “natural” inclination is to be offended and to want to say, “It’s none of your business.” The safest assumption, however, is that the person’s intention is good. Effective intercultural skills include (a) sharing with others the impact their behavior has had on us and asking them to help us understand their intent, (b) asking about their intent without sharing the impact—which allows us to revise the impact, (c) stating our own intent before acting when behaviors can have multiple interpretations, and/or (d) seeking a wide range of interpretations for the behavior before negatively interpreting it—in other words, avoiding premature judgment.

Activity 27: Seeking Alternative Explanations

Effective cross-cultural behavior includes the ability to seek as many alternative explanations for a person’s behavior as possible before evaluating or judging it. In Activity 27, “Visible and Invisible Values” (see page 95), participants will practice first matching behaviors with values and then taking those same behaviors and identifying a range of alternative value explanations for them.

Activity 39: Matching Personal, Team, and Organizational Values

The alignment of personal values with the team and/or organizational values influences performance and job satisfaction. It can also affect customer service, productivity, and profitability. In Activity 39, “Your Values Meet the Team’s Values” (see page 157), participants are asked to identify their personal values, then identify team values in small groups in order to determine any barriers to effectiveness based on values differences, and finally to design ways to remove those barriers.
Visible and Invisible Values Worksheet

Understanding the relationship between values and behaviors is the basis for cross-cultural understanding. Below is a list of values or beliefs on the left and behaviors on the right. Match each value or belief with a behavior that someone holding that value is likely to exhibit.

<table>
<thead>
<tr>
<th>Values</th>
<th>Behaviors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Being direct</td>
<td>Use of understatement</td>
</tr>
<tr>
<td>2. Centrality of family</td>
<td>Asking people to call you by your first name</td>
</tr>
<tr>
<td>3. Progress and change</td>
<td>Someone stops at your desk and chats with you every morning but not about work</td>
</tr>
<tr>
<td>4. Fatalism</td>
<td>Taking off work to attend the funeral of a cousin</td>
</tr>
<tr>
<td>5. Saving face</td>
<td>Not asking for help from the person next to you on an exam</td>
</tr>
<tr>
<td>6. Respect for age</td>
<td>Disagreeing openly with someone at a meeting</td>
</tr>
<tr>
<td>7. Informality</td>
<td>Not terminating an older worker whose performance is weak</td>
</tr>
<tr>
<td>8. Deference to authority</td>
<td>At a meeting, agreeing with a suggestion you think is wrong</td>
</tr>
<tr>
<td>9. Present time orientation</td>
<td>Insisting on following rules even when they do not make sense in the situation</td>
</tr>
<tr>
<td>10. Being indirect</td>
<td>Inviting the tea boy to eat lunch with you in your office</td>
</tr>
<tr>
<td>11. Relationship oriented</td>
<td>Insisting on trying new ways of doing things even though the old way is working perfectly well</td>
</tr>
<tr>
<td>12. Self-reliance</td>
<td>Asking the boss’ opinion on something you are an expert on</td>
</tr>
<tr>
<td>13. Egalitarianism</td>
<td>Accepting, without question, that something cannot be changed</td>
</tr>
<tr>
<td>14. Fixed rules</td>
<td>Consistently being late to meetings because of conversations in the hallway on the way to the meeting</td>
</tr>
</tbody>
</table>

Adapted from an activity in *Figuring Foreigners Out: A Practical Guide* by Craig Storti.
Visible and Invisible Values Alternative Interpretation Worksheet

Any behavior can have multiple explanations—especially when viewed across cultural differences. Below is the list of behaviors you have already examined. On this page you are asked to work with your partner or group to identify at least one explanation for each behavior that is different from the one identified on the Visible and Invisible Values Worksheet.

<table>
<thead>
<tr>
<th>Behaviors</th>
<th>Possible Alternative Explanations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of understatement</td>
<td></td>
</tr>
<tr>
<td>Asking people to call you by your first name</td>
<td></td>
</tr>
<tr>
<td>Someone stops at your desk and chats with you every morning but not about work</td>
<td></td>
</tr>
<tr>
<td>Taking off work to attend the funeral of a cousin</td>
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</tr>
<tr>
<td>Not asking for help from the person next to you on an exam</td>
<td></td>
</tr>
<tr>
<td>Disagreeing openly with someone at a meeting</td>
<td></td>
</tr>
<tr>
<td>Not terminating an older worker whose performance is weak</td>
<td></td>
</tr>
<tr>
<td>Activity</td>
<td>Description</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>At a meeting, agreeing with a suggestion you think is wrong</td>
<td></td>
</tr>
<tr>
<td>Insisting on following rules even when they do not make sense in the situation</td>
<td></td>
</tr>
<tr>
<td>Inviting the tea boy to eat lunch with you in your office</td>
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</tr>
<tr>
<td>Insisting on trying new ways of doing things even though the old way is working perfectly well</td>
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</tr>
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<td></td>
</tr>
<tr>
<td>Consistently being late to meetings because of conversations in the hallway on the way to the meeting</td>
<td></td>
</tr>
</tbody>
</table>

Adapted from an activity in *Figuring Foreigners Out: A Practical Guide* by Craig Storti.
EXPLORING WORLD VIEWS

"Each bird thinks its nest is best."
"If you live in the world differently, you live in different worlds."

Suzette L. Speight, Ph.D.
Loyola University Chicago

Unexamined, one's own sense of reality is frequently perceived as universal and just (Tyler, Sussewell, & Williams-McCoy, 1985).

World view has been defined by Sue (1978) as an individual's perception of his or her relationship with the world (e.g., nature, institutions, people, things). According to Saranson (1984) each one of us possesses and is possessed by a worldview as a result of the socialization process. Therefore, it should come as no surprise that world view's are correlated with an individuals' cultural upbringing and experiences.

Closely related to the construct of world view is Frank's (1971) concept of assumptive world. An individual's assumptive world is his or her implicit assumptions, developed from personal experience, about self and the nature of the world. Each person's assumptive world enables her or him to predict the behavior of others and the outcomes of her or his own actions.

TURN OVER TO DRAW THE FIGURE!

The figure provides a holistic way of viewing individuals. Every person is like all persons, like some persons, and like no other persons (Kluckhohn & Murray, 1953). To understand the complex blending of influences on an individual's world view one must explore the simultaneous influences of cultural specificity, individual uniqueness, and human universality (Speight, Myers, Cox, & Highlen, 1991).

World views are composed of our attitudes, values, opinions, and emotions. Therefore, they influence how we think, make decisions, behave, and interpret events. World view has been identified as a critical variable that may either ease or obstruct the communication process.

Self-knowledge is critical to one's ability to understand and appreciate the world view of others.

SELECTED
2002 MODEL RULES OF PROFESSIONAL CONDUCT
AND
ABA STANDARDS OF PRACTICE FOR
LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES

FOR USE WITH ETHICS TRAINING
(Emphasis added in selections)
Duty of Competence Section

Model Rule 1.1: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Standards

VI. COURTS

B. Training
Training for lawyers representing children in custody cases should cover:
1. Relevant state and federal laws, agency regulations, court decisions and court rules;
2. Legal standards applicable in each kind of case… including child custody and visitation law;
3. Applicable representation guidelines and standards;
4. Court process and key personnel in child-related litigation, including custody evaluations and mediation;
5. Children’s development, needs and abilities at different ages;
6. Communication with children;
7. Preparing and presenting a child’s viewpoints, including child testimony and alternatives to direct testimony;
8. Recognizing, evaluating and understanding evidence of child abuse and neglect;
9. Family dynamics and dysfunction, domestic violence and substance abuse;
10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;
11. Available services for child welfare, family preservation, medical, mental health, educational and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;
12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.
Identity of Client Section

ABA Standards

II. SCOPE AND DEFINITIONS

B. Definitions

1. "Child's Attorney": A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

2. “Best Interests Attorney”: A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

III. DUTIES FOR ALL ATTORNEYS FOR CHILDREN

C. Independence

The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.

V. BEST INTERESTS ATTORNEYS

F. Advocating the Child’s Best Interests

1. Any assessment of, or argument on, the child’s best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.
Lawyer’s Role Section

Model Rule 3.7: Lawyer as Witness
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
   (1) the testimony relates to an uncontested issue;
...(remainder unrelated)

ABA Standards

III. DUTIES OF ALL LAWYERS FOR CHILDREN

In addition to their general ethical duties as lawyers, and the specific duties, and the specific duties set out in Parts IV and V, Child’s Attorneys and Best Interest Attorneys also have the duties outlined in this section.

A. Accepting Appointment
   The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order incompatible with his or her ethical duties, the lawyer should (1) decline the appointment or (2) inform the court of the conflict and ask it to clarify or change the terms of the order, or (3) both.

B. Lawyers’ Role
   A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play another role in the case, and should not testify, file a report, or make recommendations.
Child’s Wishes Section

Model Rules

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
(a)... a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Rule 1.14: Client With Diminished Capacity
(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Rule 2.1: Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

ABA Standards

IV. CHILD’S ATTORNEY

B. Informing and Counseling the Client

In a developmentally appropriate manner, the Child’s Attorney should:
1. Meet with the child upon appointment...
2. Explain to the child what is expected to happen...
3. Advise the child and provide guidance, communicating in a way that maximizes the child’s ability to direct the representation.
4. Discuss each substantive order, and its consequences with the child.

C. Client Decisions

The Child’s Attorney should abide by the client’s decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child’s Attorney should pursue the child’s expressed objectives unless the child requests otherwise, and follow the child’s direction, throughout the case.
1. The Child’s Attorney should make a separate determination whether the child has “diminished capacity” pursuant to Model Rule 1.14
(2000) with respect to each issue in which the child is called upon to direct the representation.

2. If the child does not express objectives of representation, the Child’s Attorney should make a good faith effort to determine the child’s wishes, and advocate according to those wishes if they are expressed. If a child does not or will not express objectives regarding a particular issue or issues, the Child’s Attorney should determine and advocate the child’s legal interests or request the appointment of a Best Interest Attorney.

3. If the Child’s Attorney determines that pursuing the child’s expressed objective would put the child at risk of substantial physical, financial or other harm and is, not merely contrary to the lawyer’s opinion of the child’s interest, the lawyer may request appointment of a separate Best Interest Attorney and continue to represent the child’s expressed position, unless the child’s position is prohibited by law or without any factual foundation. The Child’s Attorney should not reveal the reason for the request for a Best Interest Attorney, which would compromise the child’s position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.

V. BEST INTERESTS ATTORNEY

D. Explaining Role to Child

In a developmentally appropriate manner, the Best Interest Attorney should explain to the child that the Best Interest Attorney will (1) investigate and advocate the child’s best interest, (2) will investigate the child’s view relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.

F. Advocating the Child’s Best Interest

1. Any assessment of, or argument on, the child’s best interest should be based on objective criteria as set forth in the law related to the purposes of the proceedings.

2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement of the suit.

4. At hearings on custody or parenting time, Best Interests Attorneys should report the child’s expressed desires (if any) to the court, except for those that the child expressly does not want reported.
Conflict Section

Model Rule 1.7: Conflict of Interest
(a) A lawyer shall not represent a client if the representation will be directly adverse to another client, unless:
   (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and
   (2) each client consents. (paraphrased)

ABA Standard

IV. CHILD’S ATTORNEY

A. Ethics and Confidentiality

1. Child’s Attorneys are bound by their states’ ethics rules in all matters.

2. A Child’s Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all the children.
Conflict/Confidentiality Section

Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal...to the extent the lawyer reasonably believes necessary:

(4) to comply with other law or court order.

ABA Standards

IV. CHILD’S ATTORNEY

A. Ethics and Confidentiality

1. Child’s Attorney’s are bound by their states’ ethics rules in all matters.

2. A Child’s Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all the children.

V. BEST INTERESTS ATTORNEY

A. Ethics

Best Interests Attorneys are bound by their states’ ethics rules in all matters except as dictated by the absences of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.

B. Confidentiality

A child’s communications with the Best Interest Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child’s confidences for the purpose of the representation.
Communication Section

Model Rules

Rule 4.2: Communication with Person Represented by Counsel
A lawyer shall not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer, unless the lawyer has consent of the other lawyer or is authorized by law to do so.

Rule 4.3: Dealing with Unrepresented Person
In dealing with a person not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know the unrepresented person misunderstands the lawyer’s role, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel, if the lawyer knows of reasonable should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Standard

V. BEST INTERESTS ATTORNEY

E. Investigations
The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:

1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case related records of any social service agency and other services providers;

2. Reviewing child’s social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;

3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);

4. Contacting and meeting with the parties, with permission of their lawyers;

5. Interviewing individuals significantly involved with the child, who may in the lawyer’s discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

6. Reviewing the relevant evidence personally, rather than relying on other parties’ or counsel’s descriptions and characterizations of it;

7. Staying apprised of other proceedings affecting the child, the parties and other household members.
American Bar Association Section of Family Law
Standards of Practice for Lawyers Representing
Children in Custody Cases

Approved by the American Bar Association House of Delegates
August 2003

I. INTRODUCTION

Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. By adopting these Standards, the American Bar Association sets a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases.

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do. Too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or children’s lawyers themselves understand children’s lawyers’ roles, duties and powers. Children’s lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. These Standards distinguish two distinct types of lawyers for children: (1) The Child’s Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) The Best Interests Attorney, who independently investigates, assesses and advocates the child’s best interests as a lawyer. While some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child’s best interests and/or related information, this is not a lawyer’s role under these Standards.

These Standards seek to keep the best interests of children at the center of courts’ attention, and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity and predictability. They require that: (1) all participants in a case know the duties, powers and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions. The American Bar Association commends these Standards to all jurisdictions, and to individual lawyers, courts, and child representation programs.
II. SCOPE AND DEFINITIONS

A. Scope

These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).

B. Definitions

1. "Child’s Attorney": A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

2. "Best Interests Attorney": A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

Commentary

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child’s Attorney or a Best Interests Attorney. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child’s Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

These Standards do not use the term “Guardian Ad Litem.” The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving
as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.

III. DUTIES OF ALL LAWYERS FOR CHILDREN

In addition to their general ethical duties as lawyers, and the specific duties set out in Parts IV and V, Child’s Attorneys and Best Interests Attorneys also have the duties outlined in this section.

A. Accepting Appointment

The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.

B. Lawyer’s Roles

A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.

Commentary

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child’s Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child’s Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

C. Independence

The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.
Commentary

The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

D. Initial Tasks

Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment, and that as counsel of record he or she should receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.

E. Meeting With the Child

The lawyer should meet with the child, adapting all communications to the child’s age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer’s responsibilities. The lawyer should elicit and assess the child’s views.

Commentary

Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child’s circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child’s interest.

The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child’s developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, non-suggestive questions and how to interpret the child’s responses. The lawyer may work with social workers or other professionals to assess a child’s developmental abilities and to facilitate communication.

While the lawyer should always take the child’s point of view into account, caution should be used because the child’s stated views and desires may vary over time or may be the result of fear, intimidation and manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child’s needs and wishes.
F. Pretrial Responsibilities

The lawyer should:

1. Conduct thorough, continuing, and independent discovery and investigations.

2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.

3. Stay apprised of other court proceedings affecting the child, the parties and other household members.

4. Attend meetings involving issues within the scope of the appointment.

5. Take any necessary and appropriate action to expedite the proceedings.

6. Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.

7. Participate in depositions, pretrial conferences, and hearings.

8. File or make petitions, motions, responses or objections when necessary.

9. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.

Commentary

The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. This is necessary even for a Child’s Attorney, whose ultimate task is to seek the client’s objectives. Best Interests Attorneys have additional investigation duties described in Standard V-E.

By attending relevant meetings, the lawyer can present the child’s perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child’s perspective, or when the meeting will not be materially relevant to any issues in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of
domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available to litigants under state laws or court rules or by permission of the court, relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings; or third parties, (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

G. Hearings

The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:

1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney at the beginning of any hearing.

2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.

3. Present and cross-examine witnesses and offer exhibits as necessary.

4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.

5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.
6. Where appropriate, introduce evidence and make arguments on the child’s competency to testify, or the reliability of the child’s testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children’s competency, memory, and suggestibility.

7. Make a closing argument, proposing specific findings of fact and conclusions of law.

8. Ensure that a written order is made, and that it conforms to the court’s oral rulings and statutorily required findings and notices.

**Commentary**

Although the lawyer’s position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child’s interests, describe the issues from the child’s perspective, keep the case focused on the child’s needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer’s exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing. If there is a jury, a brief explanation of the role will be needed.

The lawyer’s preparation of the child should include attention to the child’s developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child’s wishes, explaining that such a result would not be the child’s fault.

If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness, or seek a protective order from the court. The lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by law so that the child’s views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally, in chambers, without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

Questions to the child should be phrased consistently with the law and research regarding children’s testimony, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child’s developmental limitations. It may be appropriate to present expert testimony on the issue, or have an expert present when a young child is directly
involved in the litigation, to point out any developmentally inappropriate phrasing of questions.

The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child’s input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Many jurisdictions have abolished presumptive ages of competency and replaced them with more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

H. Appeals

1. If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to Standard IV-D or V-G that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

2. The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.

3. When the appeals court’s decision is received, the lawyer should explain it to the child.

Commentary

The lawyer should take a position in any appeal filed by a party or agency. In some jurisdictions, the lawyer’s appointment does not include representation on appeal, but if the child’s interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court’s decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

I. Enforcement

The lawyer should monitor the implementation of the court’s orders and address any non-compliance.

J. End of Representation

When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.
IV. CHILD’S ATTORNEYS

A. Ethics and Confidentiality

1. Child’s Attorneys are bound by their states’ ethics rules in all matters.

2. A Child’s Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.

Commentary

The child is an individual with independent views. To ensure that the child’s independent voice is heard, the Child’s Attorney should advocate the child’s articulated position, and owes traditional duties to the child as client, subject to Rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct (2002).

The Model Rules of Professional Conduct (2002) (which in their amended form may not yet have been adopted in a particular state) impose a broad duty of confidentiality concerning all “information relating to the representation of a client”, but they also modify the traditional exceptions to confidentiality. Under Model Rule 1.6 (2002), a lawyer may reveal information without the client’s informed consent “to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm”, or “to comply with other law or a court order”, or when “the disclosure is impliedly authorized in order to carry out the representation”. Also, according to Model Rule 1.14(c) (2002), “the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests” when acting under Rule 1.14 to protect a client with “diminished capacity” who “is at risk of substantial physical, financial or other harm.”

Model Rule 1.7 (1)(1) (2002) provides that “a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client ... .” Some diversity between siblings’ views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are “directly adverse.” Comment [8] to Model Rule 1.7 (2002) states: “... a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited ... a lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. ... The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”
B. Informing and Counseling the Client

In a developmentally appropriate manner, the Child’s Attorney should:

1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed.

2. Explain to the child what is expected to happen before, during and after each hearing.

3. Advise the child and provide guidance, communicating in a way that maximizes the child’s ability to direct the representation.

4. Discuss each substantive order, and its consequences, with the child.

Commentary

Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

The Child’s Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client’s choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert’s recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child knows, and what factors are influencing the child’s decision. The lawyer should attempt to determine from the child’s opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On the one hand, the lawyer has a duty to ensure that the client is given the information necessary to make an informed decision, including advice and guidance. On the other hand,
the lawyer has a duty not to overbear the will of the client. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child’s expressed position except as provided by the applicable ethical standards.

Consistent with the rules of confidentiality and with sensitivity to the child’s privacy, the lawyer should consult with the child’s therapist and other experts and obtain appropriate records. For example, a child’s therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child’s best interests. The therapist might also assist the lawyer in understanding the child’s perspective, priorities, and individual needs. Similarly, significant persons in the child’s life may educate the lawyer about the child’s needs, priorities, and previous experiences.

As developmentally appropriate, the Child’s Attorney should consult the child prior to any settlement becoming binding.

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

C. Client Decisions

The Child’s Attorney should abide by the client’s decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child’s Attorney should pursue the child’s expressed objectives, unless the child requests otherwise, and follow the child’s direction, throughout the case.

Commentary

The child is entitled to determine the overall objectives to be pursued. The Child’s Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult’s lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child’s developmental limitations make it not feasible to obtain the child’s direction, as with an infant or preverbal child.

1. The Child’s Attorney should make a separate determination whether the child has “diminished capacity” pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.

Commentary

These Standards do not presume that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation. Disability is
contextual, incremental, and may be intermittent. The child’s ability to contribute to a
determination of his or her position is functional, depending upon the particular position and
the circumstances prevailing at the time the position must be determined. Therefore, a child
may be able to determine some positions in the case but not others. Similarly, a child may be
able to direct the lawyer with respect to a particular issue at one time but not at another.

2. If the child does not express objectives of representation, the Child’s Attorney
should make a good faith effort to determine the child’s wishes, and advocate
according to those wishes if they are expressed. If a child does not or will not
express objectives regarding a particular issue or issues, the Child’s Attorney
should determine and advocate the child’s legal interests or request the
appointment of a Best Interests Attorney.

Commentary

There are circumstances in which a child is unable to express any positions, as in the case
of a preverbal child. Under such circumstances, the Child’s Attorney should represent the
child’s legal interests or request appointment of a Best Interests Attorney. “Legal interests”
are distinct from “best interests” and from the child’s objectives. Legal interests are interests
of the child that are specifically recognized in law and that can be protected through the
courts. A child’s legal interests could include, for example, depending on the nature of the
case, a special needs child’s right to appropriate educational, medical, or mental health
services; helping assure that children needing residential placement are placed in the least
restrictive setting consistent with their needs; a child’s child support, governmental and other
financial benefits; visitation with siblings, family members, or others the child wishes to
maintain contact with; and a child’s due process or other procedural rights.

The child’s failure to express a position is different from being unable to do so, and from
directing the lawyer not to take a position on certain issues. The child may have no opinion
with respect to a particular issue, or may delegate the decision-making authority. The child
may not want to assume the responsibility of expressing a position because of loyalty
conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue
the objective that appears to be in the client’s legal interests based on information the lawyer
has, and positions the child has already expressed. A position chosen by the lawyer should
not contradict or undermine other issues about which the child has expressed a viewpoint.
However, before reaching that point the lawyer should clarify with the child whether the
child wants the lawyer to take a position, or to remain silent with respect to that issue, or
wants the point of view expressed only if the party is out of the room. The lawyer is then
bound by the child’s directive.

3. If the Child’s Attorney determines that pursuing the child’s expressed objective
would put the child at risk of substantial physical, financial or other harm, and is
not merely contrary to the lawyer’s opinion of the child’s interests, the lawyer
may request appointment of a separate Best Interests Attorney and continue to
represent the child’s expressed position, unless the child’s position is prohibited
by law or without any factual foundation. The Child’s Attorney should not reveal
the reason for the request for a Best Interests Attorney, which would compromise
the child’s position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.

Commentary

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

It should be remembered in this context that the lawyer is bound to pursue the client’s objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer’s counseling function, if the lawyer has taken the time to establish rapport with the child and gain that child’s trust. While the lawyer should be careful not to apply undue pressure to a child, the lawyer’s advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child’s first choice.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child’s interests by requesting appointment of a Best Interests Attorney. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Best Interests Attorney may never learn of the disclosed danger.

Model Rule 1.14 (2002) provides that “when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action ... the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be necessary to ensure the child’s safety, respecting and following the child’s direction to the greatest extent possible consistent with the child’s safety and ethical rules. States that do not abrogate the lawyer-client privilege or confidentiality, or mandate reporting in cases of child abuse, may permit reports notwithstanding privilege.
4. The Child’s Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child’s needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in case, the necessity of the child’s direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child’s developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child’s Attorney is bound by the child’s direction concerning testifying.

**Commentary**

Decisions about the child’s testifying should be made individually, based on the circumstances. If the child has a therapist, the attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

D. Appeals

Where appeals on behalf of the child are permitted by state law, the Child’s Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child’s Attorney should appeal. If the Child’s Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she should notify the court and seek to be discharged or replaced.

**Commentary**

The lawyer should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

E. Obligations after Initial Disposition

The Child’s Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child’s placement or services, so long as the court maintains its jurisdiction.

**Commentary**

Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The bulk of the Child’s Attorney’s work often
comes after the initial hearing. The Child’s Attorney should stay in touch with the child, with the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child’s needs are met and that the case moves quickly to an appropriate resolution.

F. End of Representation

The Child’s Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child’s Attorney and the child will continue to have, and how the child can obtain assistance in the future, if necessary.

V. BEST INTERESTS ATTORNEYS

A. Ethics

Best Interests Attorneys are be bound by their states’ ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.

Commentary

Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client’s objective. A Best Interests Attorney in such a case should report the relevant views of all the children in accordance with Standard V-F-3, and advocate the children’s best interests in accordance with Standard V-F-1.

B. Confidentiality

A child’s communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child’s confidences for the purposes of the representation without disclosing them.

Commentary

ABA Model Rule 1.6(a) bars any release of information “except for disclosures that are impliedly authorized in order to carry out the representation.” Under DR 4-101(C)(2), a lawyer may reveal confidences when “required by law or court order”. As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child’s best interests, without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV-A.
C. Limited Appointments

If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney’s tasks may be reduced as the court may direct.

D. Explaining Role to the Child

In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the Best Interests Attorney will (1) investigate and advocate the child’s best interests, (2) will investigate the child’s views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.

E. Investigations

The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:

1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;

2. Reviewing child’s social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;

3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);

4. Contacting and meeting with the parties, with permission of their lawyers;

5. Interviewing individuals significantly involved with the child, who may in the lawyer’s discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

6. Reviewing the relevant evidence personally, rather than relying on other parties’ or counsel’s descriptions and characterizations of it;

7. Staying apprised of other court proceedings affecting the child, the parties and other household members.

Commentary
Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party’s lawyer will not allow the Best-Interests Attorney to communicate with the party. Model Rule 4.2 prohibits such contact without consent of the party’s lawyer. In some such cases, the Best-Interests Attorney may be able to obtain permission for a meeting with the party’s lawyer present. When the party has no lawyer, Model Rule 4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests Attorney’s role.

The parties’ lawyers may have information not included in any of the available records. They can provide information on their clients’ perspectives.

Volunteer CASAs can often provide a great deal of information. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and reporting on the child’s best interests. Where there appears to be role conflict or confusion over the involvement of both a lawyer and a CASA in the same case, there should be joint efforts to clarify and define the responsibilities of both.

F. Advocating the Child’s Best Interests

1. Any assessment of, or argument on, the child’s best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.

2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

3. At hearings on custody or parenting time, Best Interests Attorneys should present the child’s expressed desires (if any) to the court, except for those that the child expressly does not want presented.

Commentary

Determining a child’s best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child’s interests will generally be stated in a state’s statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child’s desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.
A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including his or her sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court's attention. This should not be done by ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.

G. Appeals

Where appeals on behalf of the child are permitted by state law, the Best Interests Attorney should appeal when he or she believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.

VI. COURTS

A. Appointment of Lawyers

A court should appoint a lawyer as a Child's Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case.

1. Mandatory Appointment

A court should appoint a lawyer whenever such an appointment is mandated by state law. A court should also appoint a lawyer in accordance with the A.B.A. Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996)
when considering allegations of child abuse or neglect that warrant state intervention.

Commentary

Whether in a divorce, custody or child protection case, issues such as abuse, neglect or other dangers to the child create an especially compelling need for lawyers to protect the interests of children. Lawyers in these cases must take appropriate steps to ensure that harm to the child is minimized while the custody case is being litigated. Appointing a lawyer is no substitute for a child protective services investigation or other law enforcement investigation, where appropriate. The situation may call for referrals to or joinder of child protection officials, transfer of the case to the juvenile dependency court, or steps to coordinate the case with a related ongoing child protection proceeding, which may be in a different court. Any question of child maltreatment should be a critical factor in the court’s resolution of custody and parenting time proceedings, and should be factually resolved before permanent custody and parenting time are addressed. A serious forensic investigation to find out what happened should come before, and not be diluted by, a more general investigation into the best interests of the child.

2. Discretionary Appointment

In deciding whether to appoint a lawyer, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:

a. Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;

b. Relocation that could substantially reduce the child’s time with a parent or sibling;

c. The child’s concerns or views;

d. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;

e. Disputed paternity;

f. Past or present child abduction or risk of future abduction;

g. Past or present family violence;

h. Past or present mental health problems of the child or a party;

i. Special physical, educational, or mental health needs of a child that require investigation or advocacy;

j. A high level of acrimony;

k. Inappropriate adult influence or manipulation;

l. Interference with custody or parenting time;

m. A need for more evidence relevant to the best interests of the child;

n. A need to minimize the harm to the child from the processes of family separation and litigation; or
Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.

Commentary

In some cases the court’s capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child’s best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child’s case, or a case for the child’s best interests, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner — that which is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child’s best interests. A decision not to appoint should not be regarded as actionably denying a child’s procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

3. Appointment Orders

Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties as well as to counsel. Orders should specify the lawyer’s role as either Child’s Attorney or Best Interests Attorney, and the reasons for and duration of the appointment.

Commentary
Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-2(o), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child’s interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

4. Information Access Orders

An accompanying, separate order should authorize the lawyer’s reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.

Commentary

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term “privileged” in this Standard does not include the attorney-client privilege, which is not affected by it.

5. Independence

The court must assure that the lawyer is independent of the court, court services, the parties, and the state.

6. Duration of Appointments

Appointments should last, and require active representation, as long as the issues for which the lawyer was appointed are pending.

Commentary

The Child’s Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and
institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

7. Whom to Appoint

Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.

Commentary

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney, or only as Best Interests Attorney.

8. Privately-Retained Attorneys

An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) should have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) should be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) should vigilantly guard the client-lawyer relationship from interference as provided in Model Rule 1.8(f).

B. Training

Training for lawyers representing children in custody cases should cover:

1. Relevant state and federal laws, agency regulations, court decisions and court rules;

2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;

3. Applicable representation guidelines and standards;

4. The court process and key personnel in child-related litigation, including custody evaluations and mediation;

5. Children's development, needs and abilities at different ages;

6. Communicating with children;

7. Preparing and presenting a child's viewpoints, including child testimony and alternatives to direct testimony;
8. Recognizing, evaluating and understanding evidence of child abuse and neglect;

9. Family dynamics and dysfunction, domestic violence and substance abuse;

10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;

11. Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;

12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.

Commentary

Courts, bar associations, and other organizations should sponsor, fund and participate in training. They should also offer advanced and new-developments training, and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed, and the different legal standards to be applied.

Training should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.

C. Compensation

Lawyers for children are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness of privately-retained lawyers' hourly fees in family law cases.

1. Compensation Aspects of Appointment Orders

The court should make clear to all parties, orally and in writing, how fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work will be paid for; and how and by whom the fees and expenses are to be paid, in what shares. If the parties are to pay for the lawyer's services, then at the time of appointment the court should order the parties to deposit specific amounts of money for fees and costs.

2. Sources of Payment
Courts should look to the following sources, in the following order, to pay for the lawyer’s services: (a) The incomes and assets of the parties; (b) Targeted filing fees assessed against litigants in similar cases, and reserved in a fund for child representation; (c) Government funding; (d) Voluntary pro bono service. States and localities should provide sufficient funding to reimburse private attorneys, to contract with lawyers or firms specializing in children’s law, and to support pro bono and legal aid programs. Courts should eliminate involuntary “pro bono” appointments, and should not expect all or most representation to be pro bono.

3. Timeliness of Claims and Payment

Lawyers should regularly bill for their time and receive adequate and timely compensation. Periodically and after certain events, such as hearings or orders, they should be allowed to request payment. States should set a maximum number of days for any required court review of these bills, and for any governmental payment process to be completed.

4. Costs

Attorneys should have reasonable and necessary access to, or reimbursement for, experts, investigative services, paralegals, research, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings.

5. Enforcement

Courts should vigorously enforce orders for payment by all available means.

Commentary

These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers’ fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.

Lawyers and parties need to understand how the lawyer will be paid. The requirement to state the lawyer’s hourly rate in the appointment order will help make litigants aware of the costs being incurred. It is not meant to set a uniform rate, nor to pre-empt a court’s determination of the overall reasonableness of fees. The court should keep information on eligible lawyers’ hourly rates and pro bono availability on file, or ascertain it when making the appointment order. Judges should not arbitrarily reduce properly requested compensation, except in accordance with legal standards of reasonableness.

Many children go unrepresented because of a lack of resources. A three-fold solution is appropriate: hold more parents responsible for the costs of representation, increase public
funding, and increase the number of qualified pro bono and legal service attorneys. All of these steps will increase the professionalism of children's lawyers generally.

As much as possible, those whose decisions impose costs on others and on society should bear such costs at the time that they make the decisions, so that the decisions will be more fully informed and socially conscious. Thus direct payment of lawyer's fees by litigants is best, where possible. Nonetheless, states and localities ultimately have the obligation to protect children in their court systems whose needs cannot otherwise be met.

Courts are encouraged to seek high-quality child representation through contracting with special children's law offices, law firms, and other programs. However, the motive should not be a lower level of compensation. Courts should assure that payment is commensurate with the fees paid to equivalently experienced individual lawyers who have similar qualifications and responsibilities.

Courts and bar associations should establish or cooperate with voluntary pro bono and legal services programs to adequately train and support pro bono and legal services lawyers in representing children in custody cases.

In jurisdictions where more than one court system deals with child custody, the availability, continuity and payment of lawyers should not vary depending on which court is used, nor on the type of appointment.

D. Caseloads

Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.

E. Physical accommodations

Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.

F. Immunity

Courts should take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their
appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child should have any right of action against a Child’s Attorney or Best Interests Attorney.

Commentary

Lawyers and Guardians Ad Litem for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children’s lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers’ ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their state bars’ rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.
APPENDIX A

IN THE ___________________ COURT OF ____________________________

__________________________________________

Petitioner,                                          Case No. ____________

v.                                         

__________________________________________

Respondent.

In Re: ___________________________________________, D.O.B. ________

CHILD REPRESENTATION APPOINTMENT ORDER

I. REASONS FOR APPOINTMENT

This case came on this __________, 20____, and it appearing to the Court that appointing a Child’s Attorney or Best Interests Attorney is necessary to help the Court decide the case properly, because of the following factors or allegations:

A. Mandatory appointment grounds:

☐ The Court is considering child abuse or neglect allegations that warrant state intervention.
☐ Appointment is mandated by state law.

B. Discretionary grounds warranting appointment:

☐ Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
☐ Relocation that could substantially reduce the child’s time with a parent or sibling
☐ The child’s concerns or views
☐ Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
☐ Disputed paternity
☐ Past or present child abduction, or risk of future abduction
☐ Past or present family violence
☐ Past or present mental health problems of the child or a party
☐ Special physical, educational, or mental health needs requiring investigation or advocacy
☐ A high level of acrimony
☐ Inappropriate adult influence or manipulation
☐ Interference with custody or parenting time
☐ A need for more evidence relevant to the best interests of the child
☐ A need to minimize the harm to the child from family separation and litigation
☐ Specific issue(s) to be addressed: ________________________________
II. NATURE OF APPOINTMENT

, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as ( ) Child’s Attorney ( ) Best Interests Attorney, for the ( ) the child or children named above ( ) the child(ren) , to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which ( ) is attached ( ) has been furnished to the appointee. A Child’s Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child’s best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

III. FEES AND COSTS

The hourly rate of the lawyer appointed is $ , for both in-court and out-of-court work.

( ) The parties shall be responsible for paying the fees and costs. The parties shall deposit $ with ( ) the Court, ( ) the appointed lawyer. ( ) shall deposit $ , and ( ) shall deposit $ . The parties’ individual shares of the responsibility for the fees and costs as between the parties ( ) are to be determined later ( ) are as follows: ( ) to pay %; ( ) to pay %.

( ) The State shall be responsible for paying the fees and costs.

( ) The lawyer has agreed to serve without payment. However, the lawyer’s expenses will be reimbursed by ( ) the parties ( ) the state.

IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer appointed shall have access to confidential information about the child as provided in the Standards of Practice for Lawyers Representing Children in Custody Cases and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _______________, 20__  

_________________________ JUDGE
APPENDIX B

IN THE ___________________ COURT OF ___________________

__________________________________________

Petitioner,

v. Case No. __________

__________________________________________

Respondent.

In Re: ________________________________, D.O.B. ________________

ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION

__________________________ has been appointed as ( ) Best Interests Attorney ( ) Child’s Attorney for ( ) the child or children named above ( ) the child ____________________, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child’s Attorney or Best Interests Attorney only in accordance with such laws.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: __________, 20__

______________________________

JUDGE
American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases
Standards distinguish between:

- **The Child’s Attorney:** who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings.

- **The Best Interests Attorney:** who independently investigates, assesses and advocates the child’s best interests as a lawyer.
Keeping Children’s Interests at the Center of Attention

• These standards require that:
  – All participants in a case know the duties, power, and limitations of the appointed role; and
  – Lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions.
Scope of the ABA Standards in Defining:

• Child’s Attorney: Lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

• Best Interests Attorney: Lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directive or objectives.
Duties of Lawyers to all Children
Accepting Appointment

- The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed.
- If the appointed lawyer considers parts of the appointment order confusing or incompatible with his/her legal duties, the lawyer should:
  - Decline the appointment, or
  - Inform the court of the conflict and ask the court to clarify or change the term of the order, or
  - Both.
Lawyer’s Role

• A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.
Independence

- The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action.
- The lawyers has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.
Initial Tasks:

• The lawyer should review the file, and
• Inform other parties or counsel of the appointment:
  – As counsel of record he or she should receive copies of pleadings and discovery exchanges, and
  – Should receive reasonable notification of hearings and of major changes of circumstances affecting the child.
Meeting with the Child

• The lawyer should meet with the child, adapting all communication to the child’s age level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary.

• The lawyer should inform the child about the court system, the proceedings, and the lawyer’s responsibilities.

• The lawyer should elicit and assess the child’s views.
Pretrial Responsibilities:

• The Lawyer should:
  – 1) Conduct thorough, continuing, and independent discovery and investigations.
  – 2) Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.
  – 3) Stay apprised of other court proceedings affecting the child, the parties and other household members.
  – 4) Attend meeting involving issues within the scope of appointment.
  – 5) Take any necessary and appropriate action to expedite the proceedings.
Pretrial Responsibilities (continued):

- 6) Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.

- 7) Participate in depositions, pretrial conferences, and hearings.

- 8) File or make petitions, motions, responses or objections when necessary.

- 9) Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.
Hearings

• The lawyer should:
  – 1) Introduce herself or himself to the court as the Child’s Attorney or Best Interests Attorney at the beginning of any hearing.
  – 2) Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.
  – 3) Present and cross-examine witnesses and offer exhibits as necessary.
  – 4) If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.
Hearings (continued):

– 5) Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.

– 6) Where appropriate, introduce evidence and make arguments on the child’s competency to testify, or the reliability of the child’s testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children’s competency, memory, and suggestibility.

– 7) Make a closing argument, proposing specific findings of fact and conclusions of law.

– 8) Ensure that a written order is made, and that it conforms to the court’s oral rulings and statutorily required and notices.
Appeals

• 1-If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to IV-D (involving Child’s Attorney section) or V-G:
  – If the Best Interests Attorney believes that:
    • 1-The trial court’s decision is significantly detrimental to the child’s welfare,
    • 2-An appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and
    • 3-The probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.

• The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.

• When the appeals court’s decision is received, the lawyer should explain it to the child.
Best Interests Attorneys

Children are one third of our population and all of our future.
~Select Panel for the Promotion of Child Health, 1981
• Best Interests Attorneys are bound by their states’ ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.
A child’s communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child’s confidences for the purposes of the representation without disclosing them.
Limited Appointments

• If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney’s tasks may be reduced as the court may direct.
Explaining the Role to the Child

• In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that they will:
  – investigate and advocate the child’s best interests,
  – investigate the child’s views relating to the case and will report them to the court unless the child requests that they not be reported, and
  – use the information from the child for those purposes, but
  – will not necessarily advocate what the child wants as a lawyer for a client would.
The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:

1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and care-related records of any social service agency and other service providers;
2. Reviewing the child’s records, such as: social services, mental health, drug-alcohol, medical, law enforcement, school, and other relevant records;
3. Contacting lawyers for the parties, and non-lawyer representative or court-appointed special advocates (CASAs);
4. Contacting and meeting with the parties, with permission of their lawyers;
5. Interviewing individuals significantly involved with the child, who may in the lawyer’s discretion include: case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
6. Reviewing the relevant evidence personally, rather than relying on other parties’ or counsel descriptions and characterizations of it;
7. Staying apprised of other court proceedings affecting the child, the parties and other household members.
Advocating the Child’s Best Interests

• Any assessment of, or argument on, the child’s best interests should be based on **objective criteria** as set forth in the law related to the purposes of the proceeding.

• Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

• At hearings on custody or parenting time, Best Interests Attorneys should present the child’s expressed desires (if any) to the court, except for those that the child expressly does not want expressed.
MODELS OF CHILD ADVOCACY:

ACHIEVING A BALANCE OF BENEFICENCE AND AUTONOMY

by

Marv Ventrell, JD
MODELS OF CHILD ADVOCACY:
ACHIEVING A BALANCE OF BENEFICENCE AND AUTONOMY

by Marv Ventrell

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INTRODUCTION

Nearly thirty years after the United States Supreme Court *Gault* decision in which a child's right to legal counsel in delinquency proceedings was established, the role of the child's attorney, particularly in civil proceedings, remains unclear. The last three decades of children's law have seen the emergence of various models of child representation ranging from a *parens patriae* model to a model of traditional zealous advocacy. Central to the various models of representation are the existence of the two principles, in varying degrees, of beneficence and autonomy. Beneficence in the representation of children is that quality which results in the care and protection of the child; whereas autonomy is the quality of serving the child's legal rights by following her expressed wishes. I believe that a robotic allegiance to either beneficence or autonomy is harmful to the child client and that ideal legal representation of children has a balance of both principles.

An analysis of existing and emerging models of child representation which considers the degrees of beneficence and autonomy present may reveal the model or models of representation most appropriate for the child client. The following is an attempt to identify established and emerging jurisprudential models and the role of the child's attorney in each. It should be noted that a jurisprudential model which provides any type of representation for children is not a given. In a sense, the first model could be a model which does not consider the interests of the child, and in fact assumes children are not possessed of interests. Children would

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3The *Gault* decision applies specifically to delinquency proceedings (proceedings in which a minor is charged with a violation of the law which would be criminal but for the child's minority). No similar decision establishing a child's right to counsel in civil proceedings exists.

4*Parens patriae* - literally "parent of the country" refers to the role of the state as guardian or ultimate parent of the child.

5The identification of the themes beneficence and autonomy in this context was made by Donald C. Bross, JD/PhD, Legal Counsel and Education Director of the University of Colorado Health Sciences Department Kempe National Center. Dr. Bross is currently finishing his book on Pediatric Law in which these concepts are discussed more fully.

6Attorney and author Ann M. Haralambie uses the term "robotic mouthpiece" to describe blind allegiance to a client's directive at the cost of counseling the client on her options.
be merely the chattel of the state or their caretakers and there would be no need to consider interests other
than those of the non-child-litigants. This was in fact the model of children's law prior to the 19th century.

MODELS OF JURISPRUDENCE

1. PARENTS PATRIAE

The parents patriae model reflects the recognition that children are the legitimate interest of the state
and that it is in the state's interest to protect children. This model formed the basis for the early juvenile
courts which existed to save children from societal harm and their own incorrigibility. Intervention is not
based on a child's independent legal rights, because they have none in this model, but rather society's interest
in protecting its children. The system works to fashion a remedy which best serves society and family and
perhaps incidentally, the child. The child's representative functions likewise as the ultimate parent doing what
she perceives is best for the child. The representative's duty runs to the system's interests in the child's
welfare. The child has no autonomy. The system and the representative are beneficent to the child to the
extent the child's interest coincides with the system's interest.

2. DUE PROCESS / DELINQUENCY

The due process / delinquency model is a reaction to the Gault decision which made the 14th
Amendment applicable to juvenile delinquency proceedings. The model mirrors the adult criminal justice
system and includes the right to notice of charges, the right to confrontation and cross examination, the
prohibition against self incrimination and the right to counsel. The focus is adjudication - a finding of guilty
or not guilty. The attorney functions in the role of traditional zealous advocate and protects the independent
legal rights of the child-client. The attorney focuses on the child-client's expressed wishes. The system and
counsel provide the child with full autonomy with little attention to beneficence. Post adjudication
disposition may consider the child's rehabilitation or treatment, but the attorney is clearly bound in the
traditional role.

3. CIVIL CHILD LAW / BEST INTERESTS

Civil child law proceedings encompass all abuse, neglect, dependency, custody and visitation
proceedings. The initial considerations may involve findings of parental unfitness or other jurisdictional
criteria, but once met, the system focus is the child's best interests. The system recognizes at that point that
the child has her own interest in health and safety. Absent issues of abuse, neglect or dependency, many
jurisdictions allow for but do not require or typically employ independent counsel for the child. In civil
proceedings where a representative of the child is used, the representation takes one of the following
forms.

a. Lay Guardian ad Litem (GAL)

The lay GAL is a non-attorney who "stands" in the proceeding for the presumptively
incompetent child. The focus is the protection of the child by an adult who presumes to know and then
articulates the child's best interests. The child's autonomy is unprotected and the focus is beneficence. The
child's interests may only be served if the GAL does correctly assess the child's interests and the system sees
fit to protect those interests absent legal advocacy.
b. Attorney for the Guardian ad Litem

In recognition that the lay GAL does not have the legal training nor skills to advocate effectively for what she perceives to be the child's best interests, this model provides an attorney to do so. Again, beneficence is the focus and the child has little autonomy. Should the GAL correctly assess the child's interests, the system is more likely to provide the child relief with legal advocacy.

c. Attorney and Guardian ad Litem

This model provides an attorney to represent the expressed wishes of the child and a GAL to represent the best interests. Ideally, the attorney and GAL both advocate the same outcome in which case a significant degree of autonomy and beneficence are found and a good result is likely. This model is rare, however, and is usually found where an attorney has been given a directive by the child which the attorney believes to be contrary to the child's interests and has asked for a GAL. In this case, beneficence is the focus and the court is sent the message that the child incorrectly assesses her best interests. The situation is also found where a child has asked for an attorney because the GAL will not advocate her wishes. The same kind of mixed message is sent to the court.

d. Attorney Guardian ad Litem/Law Guardian

This "hybrid"7 model provides an attorney to represent a child, presumptively bound by the law and ethics of attorney and client, and instructs the attorney to represent the child's best interests. So long as, in the attorney's view, best interests and expressed wishes coincide, which they commonly do, this model can be an effective blend of beneficence and autonomy. It is likened to the role of an adult domestic relations lawyer who, while bound to follow the directives of the client as to the objectives of representation, frequently utilizes her skills as counsel to persuade the client to a more appropriate position. Critics, however, point out that children, unlike adults, are easily manipulated away from what may be a sound directive, by an attorney who may simply disagree with the client and/or who is not equipped to determine the child's best interests. Additionally, the phenomenon of "relaxed representation" where an attorney presumes the requirements of zealous advocacy do not apply seems to appear when attorneys are appointed to the GAL function. In the final analysis, this model can deprive the child of sufficient autonomy.

e. Traditional Attorney

The role of the traditional attorney is supported by the new ABA Abuse & Neglect Standards8 and the Fordham Conference9. The ABA Standards define the child's attorney in the traditional role as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due an adult client."10 The traditional attorney


9 The Fordham Conference refers to the recommendations found in the special children's issue of the Fordham Law Review which was produced as a byproduct of the Conference on Ethical Issues in the Legal Representation of Children hosted by Fordham Law School in December, 1995. 64 Fordham L. Rev. 1279 (1996).

10 *Abuse & Neglect Standard A-1.*
is specifically not a GAL although this model does not prohibit the attorney from acting in her capacity as
counselor for the client. The focus of this model is autonomy over beneficence although if the child's wishes
and interests coincide, as they often do, an appropriate blend seems to exist. Typically, should the attorney
believe that the child's wishes are seriously injurious to her, the appropriate response is to advocate the
client's wishes but also request the appointment of a GAL. Here again a mixed message is sent to the
court.

4. THERAPEUTIC JURISPRUDENCE

Therapeutic Jurisprudence (TJ) is the study of the role of law as a therapeutic agent. It brings
mental health insights into the law and suggests that the law can and should function therapeutically. In the
application of law, TJ proposes that we consider the law's therapeutic or antitherapeutic consequences. For
example, a more therapeutic outcome for gays in the military would be "don't ask - tell if you want." A
children's law system of TJ would place special focus on beneficence. Its supporters believe this could be
accomplished within the rule of law without sacrificing due process. In its ideal it would be a full blend of
beneficence and autonomy, which while maintaining basic adversarial structures, would remove many of the
barriers to problem solving currently found in the adversary system. The child's attorney within this context
would presumably be a zealous advocate very much in the traditional role, who would likewise not be
constrained by limited outcomes and who would be free to engage in interdisciplinary problem solving to
arrive at the best holistic outcome, based on the particular culture. In its ideal, the child would receive the
benefits of both beneficence and autonomy.

SYNTHESIS OF MODELS OF REPRESENTATION

While therapeutic jurisprudence remains an ideal, achieving an appropriate blend of beneficence and
autonomy in the representation of children is possible through a synthesis of the various models. Model "2"
-Due Process / Delinquency remains the appropriate model of representation in the delinquency setting. Its
components are constitutionally proscribed and to the extent courts recognize this attorney role and to the
extent that attorneys perform competently, it is functional. Admittedly, it places autonomy at a premium
and works better with mature children, but without a significant overhaul of the criminal justice system, it
is the appropriate model.

In the civil representation of children, a review of the Civil Child Law / Best Interests model reveals
that models "3 - d" - Attorney/GAL and "3 - e" - Traditional Attorney, come closest to blending necessary
elements of beneficence and autonomy. The Attorney/GAL model, however, sacrifices necessary client
autonomy in its subjective judgment substitution of the child's best interests. It also tends to result in
"relaxed" advocacy. Conversely, the Traditional Attorney model frequently fails to provide for the child's
interests and is subject to robotic allegiance to a child's autonomy. A synthesis of these models, however,
may result in a better model of practice for the civil child attorney.

11Abuse & Neglect Standard B-4.


13For a discussion of the quality of representation in delinquency proceedings, see A Call for Justice: Access
to Counsel and Quality of Representation in Delinquency Proceedings, ABA Criminal Justice Section Juvenile Justice
Center (1996).
The synthesis is found in the Traditional Attorney / Peters Model. Yale Clinical Law Professor Jean Koh Peters advocates this model of child representation which places the attorney in the traditional role of zealous advocate but provides for an infusion of beneficence through the application of an objective best interests evaluation in limited situations. The Peters Model requires that the attorney assume the traditional role of zealous advocate and not GAL to avoid any propensity toward relaxed advocacy. Peters then suggests that the role of the child's best interests is an applicable theme within traditional advocacy first as a "looming standard" throughout the case, second as the "ultimate concern of most professionals involved" and third as a guide to making "micro" choices in the case.

Peters then describes the macro best interests determination, recognizing that with children capable of being counseled, the attorney and client should engage in the type of objective counseling of options and interests which occurs with adult clients. In practice, this should include the majority of cases. As to those clients incapable of being counseled, such as a non-verbal client, or presumably a client who's directive is clearly contrary to her interests, Peters invokes a six-step objective best interests test which can be summarized as follows:

1. Determine the child's unique circumstances through a full and efficient investigation;
2. Assess the child at the moment of determination;
3. Determine the actual alternative options for the client;
4. Examine each option in light of the 2 child welfare paradigms: psychological parent and family network;
5. Utilize mental health and social work experts if the analysis becomes too complex; and
6. If a single best option has not been identified at this point, the lawyer should present the best options. If this is not possible, the lawyer should exercise her discretion, using additional objective criteria.

This model, particularly in its application of the objective best interests test, will require further development and refinement. In my view, however, it represents the best combination of beneficence and autonomy available under the current law and ethics of the practice of civil law for children.

\[\text{Peters, Jean Koh, "The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings" 64 Fordham L. Rev. 1505 (1996).}\]
Conference on Ethical Issues in the Legal Representation of Children in Illinois

Foreword

Ethical Issues in the Legal Representation of Children in Illinois: Roles, Rules and Reforms

Diane Geraghty*

I. INTRODUCTION

Each year Illinois attorneys represent thousands of child clients in legal proceedings.¹ This representation is a marked change from thirty years ago when it was assumed that parents, other adults, or the State could adequately safeguard children’s legal interests.² The Supreme Court’s decision in In re Gault³ challenged this longstanding assumption, holding that in delinquency cases, a child respondent “requires the guiding hand of counsel at every step in the proceedings against him.”⁴ In the three decades since Gault, the volume and complexity of issues in child-related proceedings has increased the need for skilled legal advocacy for children.⁵ Illinois statutes reflect

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1. Children’s legal interests arise in a wide range of cases, including tort litigation, criminal prosecutions, contract disputes, mental health commitments, immigration matters and constitutional litigation. The most common cases in which children’s interest are at issue include child protection, delinquency, and status offense proceedings, ordinance violations, education cases, and adoption, paternity, dissolution, and probate matters. See generally Martha Matthews, Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases, 64 Fordham L. Rev. 1435, 1436 (1996) (discussing reform litigation involving children).


4. Id. at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

this need by either requiring or permitting the appointment of independent counsel for children in a variety of judicial and administrative settings. For example, children who are the subjects of proceedings under the Juvenile Court Act⁶ and the Mental Health Code⁷ must be represented by an attorney. In contrast, a court may appoint an attorney for a child in other types of cases, such as paternity actions,⁸ and support, custody and visitation matters.⁹

Despite statutory recognition of the importance of legal representation for children, Illinois attorneys often represent child clients without clear guidance as to the nature and scope of their professional duties. State statutes generally fail to define the role of a child’s legal representative, common law guidance is sparse, and existing rules of professional conduct are largely silent on the relationship between an attorney and a child client. The purpose of this Foreword is to describe the often uncharted ethical waters in which Illinois attorneys for children must operate, identify national and local initiatives aimed at responding to this situation, and introduce the important contributions that Professor Martin Guggenheim and Professor William Kell make to this discussion in the articles that appear in this volume.

II. ILLINOIS STATUTES, RULES, AND CASE LAW

One of the clearest examples of the challenges faced by attorneys who represent child clients in Illinois occurs in child protection

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7. See 405 ILL. COMP. STAT. ANN. 5/1-100 to 55/9 (West 1997) (amended). The Mental Health Code states that “[i]n upon receipt of the petition, . . . the court shall appoint counsel for the minor . . . .” Id. at 5/3-509.

8. See 750 ILL. COMP. STAT. ANN. 45/18 (a) (West 1993) (permitting that “[i]n the best interests of the child, the court may appoint counsel to represent a child whose parentage is at issue”), amended by Family Law— Determination of Parentage—DNA Testing and Counsel, P.A. No. 90-23; § 5, 1997 Ill. Legis. Serv. 1719 (West).

9. The Illinois Marriage and Dissolution of Marriage Act provides that “[t]he court may appoint an attorney to represent the best interests of a minor or dependent child with respect to his support, custody, visitation, and property. The court may also appoint an attorney as the guardian-ad-litem for the child.” 750 ILL. COMP. STAT. ANN. 5/506 (West 1993 & West Supp. 1997), amended by Family Law—Marriage and Dissolution—Property Interests of Minors, P.A. 90-309, § 5, 1997 Ill. Legis. Serv. 3188-89 (West). See also ILL. COMP. STAT. at 35/12(a) (1994) (stating that “[f]or the protection of the child’s best interests, the court may appoint counsel for the child”).
proceedings under the Juvenile Court Act (the “Act”).\textsuperscript{10} The Act contemplates three possible representatives for a child in an abuse or neglect case. First, all child respondents under the Act must be independently represented by counsel.\textsuperscript{11} Second, a court is authorized, and in some instances required, to appoint a guardian \textit{ad litem} for a child without regard to the child’s age or capacity.\textsuperscript{12} The guardian \textit{ad litem} is not required to be an attorney; however, if the guardian \textit{ad litem} is not an attorney, the court must appoint an attorney to represent the guardian \textit{ad litem}.\textsuperscript{13} Finally, the Act permits the appointment of a “court appointed special advocate” or “CASA,” which is a community volunteer who normally is not legally trained.\textsuperscript{14}

While this statutory scheme allows three different individuals to serve in each of these roles, the most common practice in Illinois is to appoint one person to simultaneously act as a child’s attorney and guardian \textit{ad litem}. Although grounded in financial and functional considerations, this practice creates an ethical dilemma for attorneys required to perform both roles because there are inherent differences between the customary duties of attorneys and guardians \textit{ad litem}. In a traditional attorney-client relationship, a lawyer is ethically obligated to permit a client to determine the objectives of representation.\textsuperscript{15} This obligation continues even if an attorney is persuaded that a client’s reasoning is flawed, or that a client’s decisions concerning the

\begin{footnotesize}
\textsuperscript{10} See 705 ILL. COMP. STAT. 405/1-i to 405/7-1.
\textsuperscript{11} See id. at 405/1-5(1).
\textsuperscript{12} See id. at 405/2-17 (West 1992 & West Supp. 1997), amended by Family Law—Interstate Compact on Adoption Act and Children Generally, P.A. No. 90-28, § 10-20, 1997 ILL. LEGIS. SERV. 1836-37 (West), and Family Law—Children—Definitions, P.A. No. 90-27, § 30, 1997 ILL. LEGIS. SERV. 1770-71 (West). Appointment of a guardian \textit{ad litem} is mandatory in all cases in which a child is alleged to be abused, neglected, or the victim of a sexual offense. See id. at 405/2-17(1)(a), (b). Appointment is also required under other circumstances, such as where a parent or legal guardian does not appear in court, or the petition seeks appointment of a guardian with power to consent to an adoption. See id. at 405/2-17(2)(a), (b). However, a court may appoint a guardian \textit{ad litem} in any case in which such appointment is deemed to be in a child’s interest. See id. at 405/2-17(3).
\textsuperscript{13} See id. at 405/2-17(4).
\textsuperscript{14} See id. at 405/2-17.1 (West Supp. 1997), amended by Family Law—Interstate Compact on Adoption Act and Children Generally, P.A. No. 90-28, § 10-20, 1997 ILL. LEGIS. SERV. 1837-38 (West). A CASA’s responsibilities typically include monitoring the implementation of court orders relating to service, helping an individual child adjust to the litigation process and, where appropriate, testifying in court on matters relating to a child’s well-being. In all counties except Cook County, a CASA may also be appointed as the child’s guardian \textit{ad litem}. See id. at 405/2-17.1.
\textsuperscript{15} See Illinois Rules of Professional Conduct Rule 1.2(a) (requiring that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued”).
\end{footnotesize}
objectives of representation will not produce the desired results. Similarly, where a client’s ability to make reasoned decisions is impaired, an attorney is duty-bound to maintain a normal attorney-client relationship to the greatest extent possible under the circumstances. In contrast to the professional standards governing attorney behavior and practice, the traditional duty of a non-attorney guardian ad litem is to act in an individual’s best interests. This duty is consistent with the fact that a guardian ad litem typically is appointed in circumstances where an individual lacks the capacity to engage in reasoned decision-making on matters affecting the individual’s well-being.

Given the inherently different roles traditionally played by attorneys and guardians ad litem, what are the ethical duties of an Illinois attorney appointed to act both as attorney and guardian ad litem for a child client? Although this question theoretically arises in all cases of dual representation, it has no practical significance in many cases. Oftentimes, there exists no actual conflict between the client’s wishes and the guardian ad litem’s judgment as to the client’s best interests. If, for example, a sixteen year old child client is strongly attached to his grandmother and wishes to remain living in her home despite its dilapidated condition and exposed wiring, the attorney/guardian ad litem, in most cases, may reasonably conclude that there is no incompatibility between the client’s wishes and his best interests, and will advocate for the child’s placement with his grandmother. There are, however, cases in which a child’s objectives are at odds with an attorney/guardian ad litem’s assessment of a client’s best interests. Assume, for example, that an articulate and truthful twelve year old

16. See id. Rule 1.14 expressly includes minors among clients who may be under a disability “whether because of minority, mental disability, or some other reason . . . .” Id. Thus, the Rule appears to provide that a child’s attorney is bound by the traditional obligations of an attorney-child relationship except to the extent that the child’s capacity (for example, in the case of an infant), precludes maintenance of the normal requirements of the relationship.


reveals to his attorney that his grandmother drinks heavily and, on a recent occasion, punished him by locking him in a darkened closet for a day. The child insists that he wishes to remain living with his grandmother, but his attorney/guardian ad litem concludes that the risks associated with leaving him in the home are too great. If the attorney and child share a traditional attorney-client relationship, then the attorney is ethically bound to advocate vigorously for the child's position, and must maintain her client's confidences about his grandmother's alcohol use and disciplinary techniques. If, on the other hand, the attorney's conduct is controlled by her appointment as guardian ad litem, she must argue for the removal of the child from the home, despite her client's contrary wishes. In addition, because a guardian ad litem is not required to maintain a client's confidences, she may disclose the fact of the grandmother's behavior if such a disclosure would be consistent with the child's best interests.

Faced with the dilemma that dual appointment creates, an Illinois attorney might reasonably be expected to turn to statutory or case law to resolve questions concerning the lawyer's proper role and corresponding duties. Unfortunately, in its present state, Illinois law provides minimal, and arguably conflicting, guidance on the attorney's proper role in child protection proceedings. For example, although the Juvenile Court Act requires appointment of counsel for all children in neglect and abuse proceedings, the statute is silent on the nature and scope of an attorney's duties with respect to the child client. A strong argument can be made that the Act's language, history and context support a conclusion that the Act envisions the creation of a traditional attorney-client relationship. Some Illinois courts,

21. See Roy T. Stuckey, Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality, 64 FORDHAM L. REV. 1785, 1792 (1996) (suggesting that in most jurisdictions a guardian ad litem could be compelled to disclose a ward's confidences even if the guardian believed that such a disclosure is contrary to the child's best interests).
22. See 705 ILL. COMP. STAT. ANN. 405/1-5(1).
23. Section 405/1-5(1) sets forth the rights of all parties (adults and minors) under the Act. See id. One of those rights is the right to counsel. See id. The only distinction the Act draws between an adult party's right and that of a child is that a child must be represented by an attorney, whereas an adult is entitled to representation. See id. Further, the Act does not distinguish between a delinquent minor's right to counsel, constitutionally mandated by In re Gault, and other child parties' right to counsel (i.e. children who are abused, neglected, dependent, addicted or in need of authoritative
however, appear to take a contrary view. For example, in *In re K.M.B.*, the appellate court rejected a thirteen year old delinquent’s argument that her constitutional right to counsel was violated when, after informing the court that her client wished to return home, her court-appointed attorney/guardian *ad litem* expressed agreement with the State’s position that her client should be placed outside the home. In language that creates a perplexing ethical challenge for children’s attorneys in Illinois, the court held that a court-appointed juvenile counsel is obligated simultaneously to protect a child client’s “legal rights” and “best interests.” Despite the questionable reasoning of the court’s opinion in *K.M.B.*, subsequent opinions cite the case as precedent, holding that there is no inherent conflict between the roles of an attorney and a guardian *ad litem* for a minor. In one such case, *In re R.D.*, the appellate court opined that a child’s attorney and guardian *ad litem* “have essentially the same obligations to the minor and to society.”

A more recent opinion, however, calls into question the meaning of these earlier cases. In *In re A.W.*, a conflict arose between a thirteen year old client and her attorney/guardian *ad litem* over the issue of accelerated unsupervised visits. Although the child expressed a clear

intervention). *See id.* These facts, in combination, suggest that all parties to a Juvenile Court proceeding have a right to competent counsel, including the right to zealous advocacy of a party’s position as to the objectives of representation. *See id.*

25. *See id.* at 1272.
26. *Id.* at 1272-73. Under the Juvenile Court Act, a minor has both procedural and substantive “legal rights.” Among a child’s procedural rights is the right to be represented by counsel. *See 705 ILL. COMP. STAT. ANN. 405/1-3(1) (West 1992 & West Supp 1997), amended by Family Law—Termination of Parental Rights—Adoption, P.A. No. 90-443, § 10, 1997 Ill. Legis. Serv. 4614-15 (West), and Family Law—Interstate Compact on Adoption Act and Children Generally, P.A. No. 90-28, § 10-20, 1997 Ill. Legis. Serv. 1820-21 (West), and Family Law—Children—Definitions, P.A. No. 90-27, § 30, 1997 Ill. Legis. Serv. 1764-66 (West). Exercise of this right is incompatible with a requirement that an attorney also protect a client’s best interests because an attorney *qua* attorney is not ethically permitted to substitute his or her judgment as to a client’s best interests for the expressed wishes of a client. Arguably, a minor who is subject to proceedings under the Act also has a substantive right to remain in his or her own home if the minor’s safety and well-being can be safeguarded. *See id.*

28. *In re R.D.*, 499 N.E.2d at 482.
30. *See id.* at 730-32.
desire to have such visits (a position endorsed by a family therapist), the child's lawyer opposed the visits because she believed that unsupervised contact with the family was not in the child's best interests. Unhappy with the position taken by her court-appointed attorney/guardian ad litem, the child moved to substitute a private attorney to act as her counsel. The trial court granted her motion for substitution, allowing the appointment of a new attorney for the child, but kept the original guardian ad litem. On review, the appellate court held that a minor has a statutory right to be represented by private counsel of her own choosing in a Juvenile Court proceeding. The court characterized a minor's right to representation as "almost coextensive to that afforded to adults." However, with seeming approval, the A.W. court cited the language in In re R.D. that juvenile counsel and guardians ad litem "have essentially the same obligations to the minor and to society."

The A.W. court's holding and its reliance on the language in R.D. offers insight into how these seemingly inconsistent positions can be harmonized. The A.W. court appears to read the Juvenile Court Act as creating a traditional attorney-client relationship between a lawyer and a child client, but does so in the context of a proceeding in which the ultimate goal of all participants is to advance the child's best interests. If this analysis is correct, then under Illinois law, a child's attorney is ethically obligated to argue a child client's position, a child's guardian ad litem is required to make recommendations consistent with a child's best interests, and a trial court is charged with the ultimate responsibility of deciding what course of action best advances a child's well-being. Whether or not this interpretation of

31. See id.
32. See id. at 731.
33. See id. at 730, 732.
34. See id. at 732-34.
35. Id. at 732. Presumably, a minor's right to substitute requires a hearing on the issues of capacity and coercion, inquiries that would not be made in the case of an adult party seeking to substitute counsel.
36. Id. at 733 (citing In re R.D., 499 N.E.2d 478, 482 (Ill. App. Ct. 1st Dist. 1986)); see also supra text accompanying note 28.
37. The need to harmonize these two aspects of the court's opinion flows from the fact that the court's holding cannot logically be read as saying that an attorney and a guardian ad litem perform identical functions, namely to advise the court as to a child respondent's best interests. It does not stand to reason that the court recognized a minor's right to substituted counsel in an abuse case for the sole purpose of securing a second representative's opinion on the question of the child's best interests.
38. This interpretation of the court's opinion in A.W. reconciles the language of the Juvenile Court Act, the requirements of the Illinois Rules of Professional Conduct, and the traditional understanding of the roles of an attorney and a guardian ad litem. See
A.W. is consistent with the court’s intent, at a minimum, the case and its antecedents underscore the pressing need to develop a clear and coherent set of standards to guide Illinois attorneys in their representation of child clients.

III. REFORM EFFORTS

Illinois is not unique in its failure to clearly articulate the duties of legal representatives for children. In recent years, one response to this failure has been an outpouring of discussion and scholarship aimed at clarifying the professional responsibilities of children’s attorneys. An important outgrowth of these efforts is the adoption of formal guidelines for use by lawyers who represent child clients. For example, in 1996, the American Bar Association adopted the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. These Standards represent a fundamental agreement on the part of the organized bar as to the proper role and practice for lawyers and judges in child protection proceedings. Similarly, in 1995, the American Academy of Matrimonial Lawyers promulgated the Standards for Representing Children in Custody and Visitation Proceedings. In addition, the 1995 conference at Fordham Law School that brought together many of the leading academicians and practitioners in the field of children’s legal advocacy evidences another milestone in the effort to clarify the professional responsibilities of children’s attorneys. A volume of the Fordham

supra text accompanying notes 10-21.


42. If Illinois were to adopt these Standards in some formalized way, an attorney who faced the challenges of dual representation described earlier would have clear direction on the question of what role to assume. This is because the ABA Standards adopt a position that a child’s attorney “owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.” See Elrod et al., supra note 41.


44. Fordham University School of Law, Conference on Ethical Issues in the Legal
Law Review memorialized and expanded upon the work of the conference, serving as an essential reference for any attorney who represents child clients.\textsuperscript{43}

In addition, some states are considering statutory changes that will provide clearer guidance to attorneys who represent child clients. Under a proposal pending in the Michigan legislature, for example, a child’s representative in abuse or neglect cases would be mandated to serve in the traditional role of a guardian \textit{ad litem}, thereby eliminating confusion about whether an attorney’s duty to a child client requires maintenance of a normal attorney-client relationship.\textsuperscript{46} Similarly, Minnesota law has been amended to eliminate the confusion caused by dual appointment by eliminating the possibility of appointing a child’s attorney to serve simultaneously as a child’s guardian \textit{ad litem}.\textsuperscript{47} Finally, California recently amended its child protection laws to include explicit guidelines for attorneys for children.\textsuperscript{48}

In an effort to stimulate similar initiatives in Illinois, in 1997, Loyola University Chicago School of Law’s ChildLaw Center hosted a statewide conference modeled on the highly successful Fordham Conference.\textsuperscript{49} The Conference sought to begin a formal discussion of the standards of professional conduct for attorneys who represent children in Illinois. Attorneys, judges, academicians, ethicists and child welfare professionals from throughout Illinois participated in the Conference. Over the course of two and one-half days, these individuals discussed a range of topics relating to attorneys’ ethical duties to child clients. At the conclusion of the Conference, attendees formally adopted a set of recommendations for consideration by bar associations and other Illinois groups committed to advancing the quality of justice for children in this State. In furtherance of this objective, this volume of the \textit{Loyola University Chicago Law Journal} includes the Conference Recommendations.\textsuperscript{50} Also included in this volume are articles by two individuals who attended the Loyola


46. \textit{See supra} note 39.


Conference, Professor Martin Guggenheim\footnote{See Martin Guggenheim, Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protective Proceedings, 29 Loy. U. Chi. L.J. 299 (1998).} and Professor William Kell.\footnote{See William Kell, Ties That Bind?: Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation, 29 Loy. U. Chi. L.J. 353 (1998).} These articles represent significant new contributions to an increasing body of literature on the legal representation of child clients. In his article, Professor Guggenheim observes that the adoption of rules regarding the appointment of attorneys in child-related proceedings often preceded both the systematic thinking about the appropriateness of such rules and the levels of complexity and ambiguity created by their adoption in a conceptual vacuum. Consistent with this observation, Professor Guggenheim’s article urges judges and policymakers to move with caution and precision in deciding whether to appoint counsel for children in custody, visitation and child protection cases. In contrast, Professor Kell brings an interdisciplinary perspective to the question of how familial relationships between families and children affect a client’s decision-making process in child-related proceedings. He concludes that these relationships play an important role in supporting the position advocated by the ABA Standards and a majority of child advocates that an attorney is ethically obligated to respect a competent child client’s judgment as to his or her own best interests. These articles help frame the debate that has now begun in earnest on ethical issues in the legal representation of children in Illinois. They also serve as part of Loyola University Chicago’s response to the American Bar Association’s call for law schools to take a leadership role in meeting the legal needs of child clients.\footnote{See Presidential Working Group on the Unmet Legal Needs of Children and Their Families, American Bar Association, America’s Children at Risk, A National Agenda for Legal Action 1-8 (1993). In addition to publication of relevant articles in the Loyola Law Journal, the Law School also has established a comprehensive pediatric law curriculum for law students and lawyers who seek specialized training in the representation of child clients. See Diane Geraghty, The Role of Legal Education in the Emerging Legal Specialty of Pediatric Law, 26 Loy. U. Chi. L.J. 131 (1995) (describing Loyola’s ChildLaw Program and curriculum).}
I. RECOMMENDATIONS REGARDING ADVOCACY FOR THE BEST INTERESTS OF A CHILD

When an attorney is called upon to represent the best interests of a child, the following principles shall apply:

A. Decision making on behalf of a child must be made in a contextual, self-aware, deliberate and principled manner. The decision-making process is on-going throughout the course of the representation.

B. A best interests determination is not a legal issue. It is a factual issue addressed in a legal setting. Therefore, the child’s attorney must obtain substantive information from outside the legal arena. The attorney’s own life history, philosophies and biases should not form the basis for the substantive best interests determination. Multi-disciplinary training, cultural awareness, and expert consultations should be used to form the best interests determination.

C. The attorney should be aware of and responsive to the changing needs and interests of the child client. The attorney should generally obtain this information through ongoing contact with the child client, preferably in the child’s environment.

D. As circumstances change and new information becomes available the attorney should consider how that information impacts the child and thereby affects the best interest determination.

E. In order to make meaningful best interests determinations, attorneys should carry reasonable caseloads and have access to expert assistance sufficient to allow a considered determination of best interests.

F. The attorney should address the child’s legal best interest needs in the matter over which the court has jurisdiction.

G. It is the lawyer’s responsibility to focus on the child in context
through a full, efficient and speedy factual investigation. The lawyer should work from a thickly detailed view of the child client as an unique individual. The investigation may include discussions with the child's parents, teachers and other significant persons in the child's life.

H. The determination of best interests should include all legally available options, including good faith options for seeking modification of the law. These options must also include all options available in the community. The lawyer should understand these options concretely and understand as specifically as possible how an option will be experienced by the child.

I. If and when the analysis becomes too complex, attorneys should consult experts for guidance.

J. The best interests determination must always include the child's expressed wishes as one factor.

K. The best interests determination should avoid all or nothing solutions but should include a range of options and contingencies for the child client.

L. The best interests determinations should look at short-term best interests, including services in placement, as well as the long-term case plan.

M. It is generally preferable for there to be continuity of representation to ensure maximum understanding of the child in context.

N. Lawyers for children should receive specialized training in child development, cultural awareness, interviewing skills, and multidisciplinary substantive information relevant to the child's legal proceeding (such as psychological, educational, or social work information).

O. To implement these recommendations, more practical guidelines should be developed, including strategies for obtaining adequate resources.

II. RECOMMENDATIONS REGARDING CONFIDENTIALITY

A. When a lawyer is acting as an attorney for a child (in an attorney-only role), the lawyer shall comply with the Illinois Rules of Professional Conduct governing client confidentiality.
Lawyers should explain at the outset of their relationships with clients the extent to which their conversations are confidential and under which circumstances they are allowed to disclose confidential information.

B. A new section should be added to Rule 1.6 of the Illinois Rules of Professional Conduct, which would read substantially as follows:

In addition to any disclosure required under Rule 1.6(6), a lawyer who represents a minor may reveal information necessary to prevent the client from engaging in conduct or pursuing a course of action which is likely to result in death or serious bodily harm to the client. The lawyer may reveal only the minimum information needed to prevent the harm and shall do so only to the people who reasonably need to know such information.

C. In special education cases, the parent(s), the child, or both may be viewed as the client. Appropriate retainer agreements (specifying who is the client, for example) should be used to avoid problems connected with confidentiality in these cases.

III. RECOMMENDATIONS REGARDING CONFLICTS OF INTERESTS

A. General Recommendations Regarding Conflicts in Legal Matters Involving Children

1. At the outset of the representation, an attorney should determine and communicate to all interested parties who the is the client the attorney represents.

2. An attorney should determine what role(s) he or she serves and what are the duties associated with that role.

3. An attorney should determine who will direct the objectives of the representation at the outset of the relationship.

4. An attorney should seek to resolve uncertainties concerning his or her role, the identity of the client(s), and the allocation of decision making authority. If appointed by a court, the attorney should ask the court to clarify his or her role and responsibility if they are unclear.

5. Throughout the course of representation, an attorney should be alert to possible conflicts of interest and when a possible conflict arises, the attorney should address the situation in a manner consistent with professional standards of conduct and applicable laws.
B. Specific Recommendations

1. Attorneys should support efforts to ensure that courts have sufficient resources to avoid conflicts of interest, e.g. when representation of multiple clients cannot ethically be undertaken by the same attorney.

2. Judges should respond liberally to attorneys' requests to withdraw from representation when an attorney articulates the existence of a conflict that makes ongoing representation impossible.

3. Attorneys and judges should be provided training opportunities to acquaint them with the range of ethical issues, including conflicts issues, in child-related proceedings.

IV. RECOMMENDATIONS REGARDING THE ROLE OF JUDGES

A. Judicial Involvement in Cases Involving Children

Because of the unique cognitive, emotional, and developmental characteristics of children, as well as the serious consequences for the child and society of decisions in cases involving children, judges have a unique responsibility to ensure that the court has all facts necessary to make an informed decision. However, a judge must not become an advocate. (All recommendations which follow should be read consistent with this initial recommendation.)

B. Appointing Advocates for Children in:

1. Delinquency Cases

   Beyond appointing attorneys (see Recommendations Regarding the Role of Counsel), judges may also appoint guardians \textit{ad litem} for the minors in appropriate circumstances.

2. Child Custody Cases

   A judge should not appoint a representative for a child unless the judge concludes that one of the following factors applies:

   a. The failure to make such an appointment would impede the judge's capacity to decide the case properly;

   b. The failure to make such an appointment would risk harm to the child; or

   c. The child's voice should become a more prominent part of the case.
C. Structural and Legal Reform

A court's appointment of a lawyer for a child should be made within a system with the following characteristics:

1. The lawyers are selected in an impartial manner and are free of judicial influence in their representation.
2. The lawyers are compensated reasonably, i.e., commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.
3. The lawyers are given access to services and to information needed for effective representation of the child, and are reimbursed for associated supporting costs.
4. Appointments provide for continuity of representation, i.e., the lawyer stays with a case for as long as it is within the court's jurisdiction.
5. Caseloads are appropriate for competent and effective representation of each client.
6. Appointments are based upon objective criteria that promote high quality representation.
7. The lawyers are familiar with standards of practice that promote high quality representation.
8. The system engages in ongoing evaluation of the effectiveness of its delivery of legal services.
9. The lawyer recruitment process includes an aggressive campaign to increase the racial, ethnic, gender, and cultural diversity of the lawyer pool.

D. Other Responsibilities Relative to the Representation of Children

Judges have a responsibility to children that is not satisfied solely by appointing counsel for the child. Their additional responsibilities include the following:

1. Judges must recognize their own responsibility for the speedy resolution of cases involving children, and should demonstrate it by effective case management, the minimization of delays and encouraging appropriate judicial caseloads.
2. Judges should impress upon lawyers and all parties the priority that should be afforded each child's case.
3. Judges should advocate the creation of specialized child advocacy programs, law school clinical child advocacy programs, and specialized child advocacy units within legal
services and public defender agencies.

4. Judges should advocate the adoption and funding of systems for the appointment, training, and evaluation of lawyers for children.

5. Judges have a unique responsibility in cases involving children to monitor the competent and effective representation of the child.

6. Judges should engage in continuing education to enable them effectively to appoint and utilize counsel for children.

7. Juvenile and family court judges must be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families.

8. Judges should also be encouraged to share their knowledge of children's issues to assist in the prevention of child abuse, neglect, delinquency and dependency.

9. Judicial circuits should adopt standards of training and/or experience for all attorneys appointed in cases involving children.

E. Judicial Training

In order to ensure the effective representation and best interests of children and families, judges must have training and knowledge about the unique legal and interdisciplinary issues which may arise in cases involving children. They must also have training and knowledge about the resources available to remedy these issues.

V. RECOMMENDATIONS REGARDING THE ROLE OF COUNSEL

A. In all proceedings involving children, the attorney for the child should not function in more than one role.

B. Basic standards of practice for attorneys representing children and for guardians ad litem should be articulated.

C. Counsel in delinquency proceedings should assume the role of the traditional attorney when representing the client.

D. (Questions relating to the role of counsel for children and, particularly, the manner by which the objectives of the representation are determined in domestic relations and child protective proceedings were referred to a committee consisting of two individuals representing children in child protective
proceedings, two judges, two individuals representing children in domestic relations proceedings, one ethicist, and three others, with the members selected to ensure geographic diversity.)
FOREWORD: CHILDREN AND THE ETHICAL PRACTICE OF LAW

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and Bernardine Dohrn **

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SUMMARY: ... IN her recent book Guide My Feet, Marion Wright Edelman exhorted, "As we face a new century and a new millennium, the overarching challenge for America is to rebuild a sense of community and hope and civility and caring and safety for all our children." ... The questions addressed at the Conference included: Who should determine when a child is a client with authority to set the goals of the representation? When should the lawyer decide the goals of the representation rather than deferring to the child's decision? How should the lawyer determine whether the child has the capacity to direct the representation? How should the lawyer conduct the representation when the child does not or cannot direct the representation? How should the lawyer interview and counsel the child and address issues of confidentiality and conflicts of interest? And, how should courts and other legal institutions facilitate the provision of effective and appropriate legal services to children? The Recommendations developed in response to these questions are meant to guide the work not only of individual lawyers, but also of the organized bar, the judiciary, lawmakers, and law schools. ... By their involvement in this Conference, the cosponsors and participants demonstrated their conviction that improving professional representation will matter to the lives of children. ...

TEXT: [*1281] Introduction

IN her recent book Guide My Feet, Marion Wright Edelman exhorted, "As we face a new century and a new millennium, the overarching challenge for America is to rebuild a sense of community and hope and civility and caring and safety for all our children." This challenge comes at a time when - in the wealthiest nation in the world - almost 25% of children under age six live below the poverty level, fifteen children a day are killed by handguns, and the number of children in foster care has doubled in the course of a decade. One consequence of this national crisis has been and will continue to be an increasing number of children appearing in courts and legal proceedings, while, at the same time, drastic cuts in legal services for the poor reduce the opportunity for children to receive zealous and competent lawyering.

Against this background, child advocates have engaged in a dialogue, captured in this book, which seeks to make sense of lawyering for children. The accelerating crisis for children both informs and gives added urgency to this effort to define the rights, power, and authority of children as clients and the terms of accountability of their lawyers.

Lack of adequate legal resources merely compounds the difficulties that children's lawyers face when they try to make sense of their role and responsibilities in even the most common cases. Imagine, for example, the lawyer assigned to serve in a child welfare case on behalf of an eight-year-old child. The child welfare administration has removed the child from his mother's home because she physically abused him on occasion. What is the proper course when the lawyer believes that the child would be better off living with his grandmother, but the child has expressed a definite

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In the two years leading up to this publication, the organizers and cosponsors have frequently been asked whether there is really a need for additional writings addressing the professional practices of lawyers who serve children, and by what process the Conference was responding to this need. This Foreword addresses these questions in turn.

I. The Need to Study the Legal Representation of Children

By their involvement in this Conference, the cosponsors and participants demonstrated their conviction that improving professional representation will matter to the lives of children. What happens in court shapes children’s futures. Whether or not children have lawyers and how their lawyers serve them, for better or worse, influences the quality of judicial decisions. The quality of lawyers’ work, in turn, is profoundly affected by the laws, judicial decisions, and professional standards that guide and support their professional conduct. Lawyers serving children, however, presently receive inadequate guidance and support.

Each year, courts determine the basic needs and future prospects of millions of children. Lawyers represent hundreds of thousands of these children. Only twenty-nine years ago, the Supreme Court held in In re Gault that children have constitutional rights - including a right to counsel in delinquency cases where their liberty is at stake. This decision constitutes a historical milestone recognizing the legal, [*1285] civil, constitutional, and human dignity of children. In the ensuing three decades, the domain of children’s law has exploded.

Children are the silent presence in courtrooms adjudicating hundreds of thousands of cases of domestic violence each year, [*=10>] n9 and are the subjects of increasing judicial attention in family law matters of divorce, custody, visitation, and adoption. Children appear in legal settings involving grave issues of termination of parental rights and adoption, involuntary civil commitment, and health decisions ranging from surgery and abortion to the right to die and organ donation. Children live in prison including on death row. They are expelled from school, and need or are inappropriately forced into special education or home schooling. Children are the raison d’etre but not participants in child support, parentage, and social security disability proceedings. Children have First Amendment speech, association, and religious rights which spill into litigation, as well as search-and-seizure and privacy concerns. They are parties to deportation proceedings. They are parties to class actions. They are witnesses in judicial proceedings. In short, except in large-scale commercial litigation, children are frequent petitioners or defendants, or the primary nonparty subjects in a huge array of legal matters involving lawyers and judges.

The worsening economic condition of American children suggests that increasing numbers of children will be thrown into courts for the determination of their basic needs. The chronic crises of foster care and child protection, the prosecution of children as adults in criminal court, and the reduction of financial support for Medicaid, public housing, and public schools will undoubtedly give rise to additional crises, any of which will be addressed within the legal system.

Judicial decisions shape the lives of children of all ages as well as all races, religions, classes, and cultures. But, disproportionately, the courts’ decisions address the lives of children of color and the poor. In most cases, judges making these decisions are of a different racial or ethnic group, class, and culture from the children whose lives are at stake. This divide can only compound the challenge confronting judges who seek to make appropriate decisions in difficult and, often, heart-wrenching cases.

Lawyers matter in this process. Our legal system rightly assumes that individuals whose interests are at stake in a judicial proceeding will be better off with legal assistance. No one would imagine that children can adequately fend for themselves in judicial proceedings - certainly not our own children. Few would presume that judges will make decisions that best serve the interest of children without benefitting from the perspective of representatives who speak on the children’s behalf. That is especially true given the enormity of decisions judges must make. If anyone needs legal assistance, children do.

Yet, the legal needs of children are vastly underserved. [*=11>] n10 Outside the context of delinquency proceedings, where children have a constitutional right to counsel, the availability of assistance is a function of statutory law or judicial discretion. The legal system does not automatically assign children legal representation whenever courts
reports, present evidence, and assess the demeanor and conduct of the parents, disagree about how the child had been harmed? Should the lawyer present the one expert who supports the conclusion that the lawyer finds most convincing? Should she choose the alternative that poses the least short-term or long-term risk to the child, and, if so, how should she determine what that alternative is?

It is understandable that prevailing professional norms, as reflected, for example, in the Model Rules of Professional Conduct ("Model Rules"), may not provide any answers, or, if they do, may provide incomplete or inappropriate answers to important questions about how lawyers properly should serve children. By design, the Model Rules state principles broadly applicable to wide-ranging areas of practice, but rarely provide detailed or context-specific guidelines. [*1289] They assume that lawyers will be able to apply the general principles in particular practice settings.

For example, rules of professional conduct instruct lawyers to represent clients competently. But they do not elaborate on what lawyers must learn to qualify them to represent children or what lawyers must do to entitle them to say that they have served a child adequately. Similarly, the rules provide that, when clients' interests may conflict, a lawyer sometimes may not represent multiple clients and sometimes may do so with the clients' informed consent. The rules are often implicated in cases involving children. Children typically live with their families. May a lawyer represent a child and a parent or a group of siblings? Children act with cohorts and so, when arrested, are far more likely than adults to be arrested in groups. May a lawyer represent a group of unrelated children? Government agencies often purport to act in a child's interest. May a lawyer represent a child and a government agency? Existing conflict-of-interest rules do not explicitly answer these questions.

One difficulty in applying the general principles is that representing children differs from representing other clients. For example, the rules instruct lawyers to consult with their clients, to keep their clients informed, and to preserve their clients' confidences. But they do not explain how to perform this counseling function for children who have not sought or selected the lawyer but have had the lawyer thrust upon them; who do not understand the lawyer's function and for whom the legal process is unfamiliar; who, based on sad experience, have learned to distrust adults; and for whom access to the lawyer, by telephone or in person, is restricted. The rules do not explain how to respond to a child client's age, dependency, lack of verbal ability, or severe medical needs. In short, the rules do not begin to address how children's lawyers should overcome the numerous, seemingly insurmountable, barriers to the creation of anything resembling the traditional attorney-client relationship.

An added difficulty is that, in representing children, the ordinary expectations of the attorney-client relationship may not even apply. Thus, Rule 1.14 of the Model Rules describes minority as a potential disability, acknowledging that a child's minority may affect the lawyer-client relationship. It implies that a lawyer's ordinary relationship with a client - including for example, the duty to serve the client loyally and to preserve the client's confidences, the duty to serve the client zealously and competently, and the duty to defer to the client's decisions about the goals of the representation - may sometimes differ when the client is a child. Yet, neither the rule nor the accompanying commentary provide meaningful guidance about how and when the child's minority will affect the lawyer's ordinary professional obligations. If the child's "capacity" is the factor determining whether the client sets the goals of the representation, then how does the lawyer [*1290] determine the child's "capacity"? If the child cannot set the goals of the representation - as is clearly the case when the client is an infant - what responsibilities does the lawyer assume on behalf of that child client?

Making decisions on behalf of a nonverbal child presents an even more daunting lawyering challenge than doing so on behalf of an incapacitated adult client. For example, the lawyer confronts more difficult issues in representing a six-month-old neglected infant whose mother is drug-addicted and obviously loves her infant than in determining how to manage the assets of an incapacitated older client who had a lifetime of experience with money matters and family relationships. With a young child, no lifetime footprints guide the lawyer about the person's intent or wishes or nature. Consequently, the discretion accorded the lawyer or guardian ad litem for a preverbal child is unparalleled in scope. The opportunity, indeed inevitability, of bias and personal value-determined judgments in such a situation, including the class, race, ethnic, and religious assumptions that underlie notions of child rearing and family life, is vast and undisclosed.

The attorney-client relationship is a principal-agent relationship. It is difficult, however, to think of children as "principals" in any meaningful sense, given their relative, if not utter, powerlessness to control or fire the lawyers who act in their name. In relationships with child clients, only professional norms guide lawyers' conduct. Thus, while in other attorney-client relationships clear standards may be desirable but unnecessary, here they are essential. This
have extensive experience relating to children. The lawyers at the Conference included many with years of experience representing children. They served children in different practice settings, in different geographical locales, and on both an assigned and privately retained basis. Other lawyers at the Conference brought legal [1293] experiences, backgrounds, and expertise in other relevant areas, including legal ethics generally.

For the first two days of the Conference, participants worked intensively in seven assigned "Working Groups" to propose recommendations relating to different, but often interrelated, issues bearing on the legal representation of children. Those seven areas were: (1) allocation of decision-making authority; (2) determining the child's capacity to make decisions in the representation; (3) the lawyer's role as decision maker when the child cannot direct the representation; (4) interviewing and counseling; (5) confidentiality; (6) conflicts of interest; and (7) the judicial role and responsibility with respect to the child's representation.

Each Working Group included a discussion leader and eight to ten additional participants, including one responsible for recording the substance of the discussion. The participants were urged to proceed systematically - first raising questions and identifying issues relating to the broad subject matter of the Working Group, then identifying the options available for resolving these issues, next considering the relative merits of these options, and, finally, attempting to reach a consensus with respect to a body of recommendations. Essential to the success of the Working Groups was that everyone participate fully in discussions, drawing on his or her background and experience, that participants open themselves to each others' insights and experience, and that participants work together in a disinterested manner to achieve common ground, keeping in mind that the process would focus on how best to serve real children with real needs. By all accounts, each Working Group proceeded successfully in this manner, ultimately producing an array of proposed recommendations. The Reports of the Working Groups contained in this book summarize the discussions leading to the initial proposals.

On the third day of the Conference, participants came together in a plenary session chaired by Professor Morgan to consider, discuss, and vote on the substance of the proposed recommendations. Participants adopted many of the Working Group's proposals, adopted amended versions of some, were unable to address many due to time, and rejected others. In some cases, when a significant number of participants had uncertainties that could not be resolved in the limited time available, the Conference declined to adopt the proposal but agreed to identify it as one meriting further study. Following the Conference, proposals that had been adopted by the plenary session were compiled, organized and edited, then circulated among the organizers, discussion leaders, and designated members of the Working Groups to ensure that the final product fairly captured the spirit of the Conference as well as the substance of what it had decided. The Recommendations contained in this book represent the culmination of this effort.

Finally, at the close of the Conference, participants were invited to prepare articles in response to the proceedings in order to underscore, expand upon or criticize particular recommendations, or to address issues meriting further study. Ten additional authors accepted the invitation. Their contributions are included in this book as Responses to the Conference.

B. Recommendations of the Conference

The Conference adopted Recommendations concerning the panoply of issues addressed by the individual Working Groups. Some endorsed changes in the law, including structural reform; others provided practical guidance to lawyers serving within the framework of existing laws and institutions; others identified subjects on which lawyers for children should be trained and educated; others suggested issues on which further study should be undertaken.

The Recommendations deserve to be read closely by lawyers, judges, policy makers, and others who are concerned about children and the law. One cannot summarize the Recommendations without doing them an injustice. Nonetheless, at least ten broad themes deserve to be highlighted.

First, children need lawyers. The Conference recommended the appointment of lawyers to children not only in delinquency proceedings, where children have a constitutional right to counsel, but also in all dependency (abuse and neglect) proceedings, termination of parental rights proceedings, foster care proceedings, juvenile court proceedings involving status offenses, and mental health commitment cases, as well as in other individual cases where appropriate. It
Ninth, the ethical and competent representation of children requires the support of an appropriate framework of laws, legal structures, and judicial decision making. Accordingly, the Conference recommended structural and legal reform to ensure, among other things, that children's lawyers be appointed by independent agencies based on objective criteria conducive to high-quality representation and that such lawyers receive reasonable compensation, have access to necessary services and information, and carry manageable caseloads. It recognized that judges' responsibility to children is not satisfied solely by the assignment of an attorney. Additional judicial responsibilities include advocating for the creation of children's law programs in law schools, legal services offices, and public defender agencies; establishing responsibilities and monitoring lawyers to ensure that they represent children competently and effectively; and, generally, taking the lead to improve the administration of justice for children and families.

Finally, there is much more work to be done. The Conference identified more than two dozen areas in which further study should be undertaken to enable lawyers to serve children effectively and appropriately. Many involved questions that can be answered only after empirical research. Others involved questions that the participants would have attempted to resolve had time permitted. For example, several proposals were made concerning the representation of children in class actions - the subject of Martha Matthews' article and Christopher Dunn's response - but there was not enough time in the plenary session to discuss them. Similarly, a proposal was made concerning the Model Rule relating to fee payments by third parties - a problem addressed in Nancy Moore's article - but there was inadequate time to address some participants' concerns about the proposal.

Although the time allotted to discuss the Recommendations at the plenary session was limited, participants engaged in spirited discussion. For example, questions of confidentiality sparked considerable disagreement at the plenary session - as the Responses to the Conference prepared by Judith Larsen, Randi Mandelbaurn, and Kevin M. Ryan may suggest. In particular, the proposed exception to Model Rule 1.6 for cases in which children place themselves in serious physical danger enjoyed the support of a plurality, but not majority of participants. Some criticized the proposal as unduly paternalistic - ultimately, making life easier for lawyers, but not better for children - and a significant minority opposed the proposal. Ultimately, the Conference agreed to recommend this as an additional question meriting further consideration.

Conference participants expressed overwhelming support for many, if not most, of the final Recommendations, but this did not place the Recommendations beyond criticism. For example, several participants expressed concerns about the basic proposition that lawyers should serve unimpaired children as they would serve adults. They were reluctant to say that children should have full authority to direct attorneys without intervention of a parent or other adult who has the child's best interest at heart. One participant underscored that children under eighteen are not fully empowered. Another suggested that more attention should be given to the important role not only of parents, but also of nonlawyer guardians ad litem and Court Appointed Special Advocates.

The set of proposals addressing the determination of whether a child has capacity to direct the representation engendered particular discussion during the plenary session. The initial proposals underwent various revisions before a final set was approved. The participants debated whether the framework should include presumptions that children of various ages are or are not capable of directing the representation. They also questioned whether the framework should include an explicit presumption that all verbal children have the capacity to direct the representation. Participants made arguments on both sides of these questions. They discussed a third question regarding the extent to which the lawyer's determination of the child's capacity should turn on the nature and wisdom of the decision that the child wishes to make. Conference participants reached agreement that a lawyer should not conclude that a child lacks decision-making capacity solely because the lawyer disagrees with the child's decision, but that the nature and finality of the decision present relevant considerations. [*1298]

No doubt, given additional time, these Recommendations could have been improved and expanded. They are not meant to be the last word, but rather, to give guidance to lawyers, to advance debate within the legal profession, to encourage further study, and to spur bar associations, judges, and legal institutions to improve children's access to ethical, qualified counsel.

Conclusion
n11. See, e.g., Report of the ABA Juvenile Justice Center, Juvenile Law Center, and Youth Law Center, A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 6-7 (Dec. 1995) (finding that attorneys do not vigorously represent child clients and stating that "the interests of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless").

n12. The most comprehensive program is the Civitas Childlaw Center and Clinic at Loyola University School of Law (three-year law clinical curriculum designed to educate lawyers to represent children in abuse and neglect proceedings). Innovative programs at our own institutions are the Children and Family Justice Center at Northwestern Legal Clinic, Northwestern University School of Law (multidisciplinary clinical representation of children and families in child welfare, adoption, delinquency, domestic violence, and education-related cases) and the Child Advocacy Project at Fordham University (offering interdisciplinary courses and externships to graduate students in law and social work and emphasizing ethical issues raised when professionals work together in the context of child abuse and neglect proceedings). Other pioneering programs include: the Child Advocacy Clinic at the University of Michigan Law School; the Children's Advocacy Institute at the University of San Diego School of Law; the Tulane Juvenile Law Clinic; the University of Maryland Law School Clinic; the Juvenile Law Clinic at the District of Columbia School of Law; the Juvenile Justice Clinic at Georgetown University School of Law; the Children's Law Project at Sheppard Broad Law Center, Nova Southeastern University; the Mandel Legal Aid Clinic at the University of Chicago Law School; and the Juvenile Law Center and Family Law Center at New York University School of Law. For a complete listing, see ABA Section of Litigation: Task Force on Children, A Directory of Pro Bono Children's Law Programs (2d ed. July, 1994) (on file with Fordham Law Review).


n14. The Conference on Ethical Issues in Representing Older Clients, conducted at Fordham in December 1993, led to the development of Recommendations and other writings contained in a special issue of the Fordham Law Review. The organization of the earlier Conference, the considerations leading up to it, and the writings it produced, are described in Bruce A. Green & Nancy Coleman, Foreword, 62 Fordham L. Rev. 961 (1994). Since 1994, the work of that Conference has had considerable impact within the legal profession. It has been the subject of conferences and educational programs conducted throughout the country for the benefit of elder law practitioners, legal services lawyers, and trusts and estates lawyers, among others. Additionally, Recommendations concerning Model Rule 1.14, dealing with the representation of incapacitated clients, have inspired proposed additions to the Commentary to that rule and other proposals for clarifying the application of the rule that are now under consideration within the ABA.

n15. We are grateful to Professor Katherine Hunt Federle who, on behalf of the ABA Section of Family Law, worked closely with the two of us as a principal organizer of the Conference.

n16. The cosponsors were represented by: Howard Davidson (ABA Center on Children and the Law); Susan Mischmerheizen and Joanne Pitulla (ABA Center for Professional Responsibility); Robert G. Schwartz (ABA Section of Criminal Justice and Juvenile Law Center) Professor Katherine Hunt Federle and Ira Lurvy (ABA Section of Family Law); Professor Sanford Fox (ABA Section of Individual Rights and Responsibilities); Bernardine Dohrn (ABA Section of Litigation, Task Force on Children); Professor Catherine J. Ross (ABA Steering Committee on the Unmet Legal Needs of Children); Cecilia Sudia (Administration for Children, Youth and Families, Department of Health and Human Services); Marvin Ventrell (National Association of Counsel for Children); Professor Martha Matthews (National Center for Youth Law); Krista Johns (National Council of Juvenile and Family Court Judges); and Professor Bruce A. Green (Stein Center for Ethics and Public Interest Law).

n17. Among the prior writings by participants are: Janet R. Fink, Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation, in Ethical Problems Facing the Criminal Defense Lawyer (Rodney J. Uphoof ed.,
A Brief Outline of Theories of Child Development

➢ Cognitive Development (Piaget)
  ▪ Sensorimotor Period (0-2 years)
    object permanence (18 months)
    recognition memory vs. evocative memory
  ▪ Pre-operational Thought (2-7 years)
    “The Magic Years” (Fraiberg)
    egocentrism
    animism
    size, shape, time
    contiguity confused with causality
  ▪ Concrete Operations (7-12 years)
  ▪ Abstract Thinking (13 years and up)

➢ Emotional Development; Development of Relationships with Others
  ▪ Object Relations (Mahler: “Separation-Individuation”)
    Symbiotic Phase (0-4 months)
    Differentiation (4-10 months)
    Stranger reaction (6-9 months)
    Practicing (10-16 months)
    Rapprochement (16-25 months)
    “On the Way to Object Constancy” (2-3 years)

  ▪ Attachment
    Ainsworth, Bowlby

  ▪ Psychosexual Development
    Freud
Developmental Tasks for Children of Various Ages
(Adapted from Baris and Garrity)

➢ Infants
  ▪ Form attachment to primary caretakers
  ▪ Develop trust

➢ Toddlers
  ▪ Begin to develop a sense of independence
  ▪ Develop self-awareness
  ▪ Learn to use language and locomotion
  ▪ Develop capacity to use “transitional objects” for comfort

➢ Three to Five-Year-Olds
  ▪ Grow in independence and individuality
  ▪ Develop the capacity to hold absent parent in mind to comfort self for extended periods
  ▪ Develop verbal skills to express of feelings and needs
  ▪ Regulate and master emotions and bodily functions
  ▪ Develop identification with the same-sex parent

➢ Six to Eight-Year-Olds
  ▪ Begin to develop peer relationships
  ▪ Develop a sense of morality
  ▪ Develop empathy and greater internal regulation of impulses
  ▪ Continue to develop a self-concept around competence and mastery

➢ Nine to Twelve-Year-Olds
  ▪ Develop proficiency in skill areas: academic, athletic, artistic
  ▪ Develop an increased awareness of self, evaluating own strengths and weaknesses as compared to others
  ▪ Find a place within the peer group

➢ Adolescents
  ▪ Continue to solidify identity
  ▪ Separate from parents, prepare for independent living, and mourn the loss of childhood and its comfortable dependency and protection within the family
  ▪ Negotiate and solidify peer relationships
  ▪ Learn to handle sexual feelings
  ▪ Establish a sense of self with respect to the rules and regulation of society
What Children Need From Parents at Various Developmental Levels

➤ All Children
  • Love
  • Empathy
  • Firmness and consistency
  • Stability and control of own emotions
  • Low levels of conflict between parents

➤ Infants
  • Nurturing attitude
  • Availability
  • Attunement to child’s needs in absence of verbal communication

➤ Toddlers
  • Ability to let child go to explore and return for “emotional refueling”
  • Ability to monitor child’s activities closely
  • Patience

➤ Six-to-Twelve Year Olds
  • Ability to foster peer relationships and community activities
  • Ability to provide for fostering of proficiencies

➤ Adolescents
  • Flexibility
  • Ability to tolerate challenging and questioning of parental authority
  • Ability to tolerate the child’s independence
Application of Developmental Issues in Divorce/Custody Situations
(Adapted from "Sandcastles" and from Baris and Garrity)

➢ Understanding of and Reactions to Divorce

- Infants & Toddlers

  ✓ Infants have no understanding of divorce
  ✓ Toddlers understand one parent no longer lives in the home but do not understand why
  ✓ Feel loss of contact with primary, care-taking parent
  ✓ Feel loss of familiar and comfortable environment
  ✓ Experience confusion
  ✓ Experience unidentified sadness

- Three to Five-Year-Olds

  ✓ Understand parents are angry, upset, and live apart, but do not understand why
  ✓ Magical thinking results in sense of responsibility/guilt for divorce
  ✓ Experience anxiety around basic needs being met, e.g., feeding, shelter, visitation logistics, and abandonment
  ✓ Fantasize intact family and denies divorce
  ✓ Have fantasies and actions relating to reuniting of parents
  ✓ Difficulties in moving between households can be expected

- Six to Eight-Year-Olds

  ✓ Begin to understand what divorce means (e.g., may understand that parents no longer love each other and will not live together)
  ✓ Prevailing sadness
  ✓ Feel rejected
  ✓ Long for the absent parent
  ✓ Show direct expression of pain and anger
  ✓ Fears around money, food, and a place to live
  ✓ Fear of losing both parents
  ✓ Self-blame manifested by feelings of responsibility/guilt and attempts to reunite parents

- Nine to Twelve-Year-Olds

  ✓ Empathic understanding of one or both parents with possible intense condemnation of one parent
Demanding adequate adult-level explanations
Aware of own rejection and vulnerability; obvious and sustained feelings of sadness, anger and hurt
Feel possible sense of shame in community
Experience hopelessness
Feel out of control
Demonstrate indifference

- Adolescents

Take responsible role in helping run household
Show accelerated emancipation because of lack of intact family from which to emancipate
De-idealize one or both parents
Embarrassment about family
Distress over parents’ more obvious sexuality (generally seen as “gross”)
Indifference
Will place peer needs ahead of family and therefore may not want to visit

Brief Notes on Talking to Kids at Various Ages

- Children less than 3 years of age should be interviewed with a parent.
- Children 3-8 may feel more comfortable and will give an interviewer more information if they can draw or play with dolls and other toys in order to express their feelings.
- Children in the “magic years” cannot place events into a time frame. They can reference accompanying events, e.g. “It was at Christmastime.”
- Children, especially younger ones, may be coached or may feel and express loyalty to the parent who brought them to the interview.
- Children of all ages, but especially younger ones, may express preferences based on many issues other than who is the “best parent,” including ambivalent attachment, the “Disneyland” approach, and the “parentified” child.
Suggested Visitation Schedule
(Adapted from "Sandcastles" and Baris & Garrity)

- Birth to 8 months
  Two or more weekly visits for 2 hours each

- 9 - 12 months
  Two or three weekly visits for 2-4 hours each

- 1 - 3 years
  One or two weekly visits for 4-6 hours each
  One 24-hour weekend visit per week
  Children need an identified home.

- 4 - 5 years
  Same as 1-3 years
  with the addition of 2 or 3 short (2-day) vacations per year

- 6 - 8 years
  One weeknight visit
  Every other weekend for 48 hours
  Vacation: 3 weeks in the summer and split school holidays

- 9 - 12 years
  Same as 6-8 years with longer weekend visit or split week possible
  Peers and activities need to be maintained.

- 13 - 17 years
  Same as 9-12 years, but adolescents should have a role in deciding on visitation arrangements, and parents should be sensitive to the importance of peer relationships in making these decisions
References and Resources


Parenting Considerations

The previous chapter addressed parenting considerations specifically related to each stage of development. The discussion below, however, focuses more generally on how to assess the parent-child relationship, the impact of potential parenting impairments, and co-parenting skills. In doing so, we avoid the use of the terms such as “fit” or “unfit,” or even reference to potential “custodian.” This type of language serves to polarize the custody proceeding as a contest resulting in a clear winner and loser, when in fact both parents may play important roles in their child’s future development. As the discussion of co-parenting below demonstrates, in most cases, children are best served through the development of meaningful relationships with both parents. As also noted in the previous chapter, where issues of domestic violence are involved in a custody case, you might need to consider additional safeguards and the use of experts in domestic violence to best serve the needs of the child.

Assessing the Parent-Child Relationship

The Parent’s Grief Process
Following a separation, divorcing parents experience a grief cycle of emotions ranging from love, anger, sadness, fear, and guilt. Many have described the divorce as akin to a death in the family. They may feel a loss of their identity or the roles that they assumed as an intimate partner, provider, and nurturer. It can be very unsettling for a parent to now be referred to as “the former spouse,” or for many, “the absent parent.” The adversarial court process compounds their sense of loss because it appears that there can only be one “winner.”

When people are in crisis or have experienced a traumatic event, they are usually counseled not to make any decisions about major aspects of their life. The divorce process, however, requires parents to make a host of critical life decisions. As their attorneys rattle off a list of legal considerations, the client-parent may be in a state
of psychological numbness or a state of rage, depending on the corresponding stage of the grief process. Neither of these emotional states is conducive to decision making, particularly when the decisions affect their children.

How parents handle emotions inevitably impacts on their parenting abilities during this family transition. Many parents are forced to shift to “survival mode.” Distracted and overwhelmed, a parent may not be able to meet all of the multiple tasks related to the developmental needs of their children during this time. It is critical therefore that you consider the parent’s grief process and the stress of this family transition when assessing “parental fitness.” Once parents have a sufficient support system, including referrals for professional help, and have some time to deal with their grief, a more accurate assessment of parenting skills can be made. It is important to determine the parent’s stage of grief. You may want to allow mental health professionals to make these preliminary determinations as to how a parent is coping. One parent’s coping skills may be poor immediately following their separation. However, that same parent may return to the court for assistance with a modification in a custody arrangement with much improved coping and parenting skills.

At the same time, you may need to take preventative measures to ensure that the parent’s grief process does not put the child at risk. A parent “stuck” in the anger stage, for example, may negatively impact the child’s self-concept and perhaps even the child’s sense of safety and security. Parents who resort to alcohol or drugs in order to “numb” their emotions during this time also may be endangering their children. Similarly, a parent whose sense of profound loss leads to clinical depression may need professional help in order to parent effectively. For more information regarding substance abuse and mental health issues, see Potential Parenting impairments below.

Courts must also be sensitive to the recovery process of an abused parent. Prolonged anger can help heal the wounds of domestic violence. Efforts to curb or minimize this anger can interfere with healing and encourage continual abusive behavior.

**Attachment**

Judges often ask how they can assess the level of “attachment” within a parent-child relationship. Attachment theory, as it is called, grew out of the recognition that infants have an innate ability to form enduring emotional bonds or “attachments” to caregivers who consistently respond to their needs. While mothers are often the infant’s first primary attachment figure, infants and young children who are given sufficient time to interact with both parents usually form equally strong attachments to both.
Although a somewhat fancy term, assessment of “attachment” involves the same parenting considerations described in Chapter 2. That is, how consistently does the parent respond to the child’s various developmental needs? As children grow, their attachments to certain adults may alternatively strengthen or dissipate, depending on the nature of their contacts and their developmental needs. The process usually takes time; a parent or other caregiver, for example, with whom the child has not previously formed an attachment cannot expect to have an instantaneous relationship. Sometimes it may be traumatic for a child to separate from a parent who is primarily responsible for the child’s emotional and physical needs. At other times, however, the child may actively seek other attachment figures because of certain developmental needs.

The child’s attachment to siblings also must play a role in the court’s determination of what is in a child’s best interests. Research indicates that courts very rarely grant custody of one child to one parent while granting custody of another child to the other parent. This reluctance to separate siblings is due to legitimate concerns that the children will suffer the additional loss of attachment to their siblings. Children benefit from stability and continuity at all stages of development.

Changes in the Parent-Child Relationship
Separation and divorce can have a dramatic effect on the nature of the parent-child relationship. As noted in Chapter 2, the stresses of the divorce process can make parents less accessible to their children, both mentally and physically, and may result in less quality time together. Conversely, some parents experience a relief from the conflict that plagued their married life and are finally able to focus on improving their relationship with their child or perhaps forming a relationship for the first time.

As discussed in Chapter 2, there is a risk, particularly in certain age groups, for an unhealthy parent-child dynamic to develop following a separation and divorce. For example, a younger “parental child” may worry excessively about the parent and attempt to take care of him or her. An older adolescent may also assume many of the responsibilities of the former spouse, including being a close confidante to the parent. Unless the parent prevents these unhealthy dynamics from occurring, the child’s development may be harmed.

Another unhealthy parent-child interaction that may occur after a divorce is when one parent attempts to control a rather suggestible child’s feelings toward the other parent. Again, the adversarial process tends to promote this kind of manipulation of the parent-child relationship.

Stepparents and Significant Others
Many parents become involved with a new partner following separation and divorce, creating another factor in the decision-making process. Specifically, what impact does this significant other or stepparent have on the child’s development?
PARENTING CONSIDERATIONS

Does the new relationship tend to promote or hinder the child’s self-concept and sense of security following the separation and divorce?

While children often express happiness for their parents, they can experience a complex range of emotions that are based on divorce-related losses, such as the fear of losing the sense of closeness to a parent. Instead of acknowledging these feelings, many parents set up unrealistic expectations for the relationship between the child and stepparent or significant other in an effort to create a new sense of family. Again, the child’s reaction depends in large part on the child’s stage of development and what impact the divorce has had on the child. The following are important questions to consider:

- How long has it been since the divorce?
- How many prior relationships has the parent had and how involved was the child in each relationship?
- What opportunities has the child had to develop a relationship with the new partner?
- Have the parent and new partner been able to accept the child’s feelings of loss that have been rekindled by the new relationship?
- Does the child’s other parent support the child having a relationship with the significant other or stepparent?

Parenting Considerations
Chapter 2 presented age-specific parenting considerations in order to make clear the relationship between parenting responsibilities and the child’s developmental needs. These considerations represent a neutral and child-focused way to assess parenting ability. The child is an individual with particular needs and the parents must demonstrate to the court how best they can meet those needs.

Historically, of course, custody determinations have not been particularly neutral or child focused. The judicial process does not take place in a vacuum. Rather, certain presumptions, biases, and prejudices have come into play and often control the outcome of the proceeding. Even our fairly evolved concept of the “best interests of the child” is susceptible to these societal influences. It may be that the lack of “bright line” rules in this area of law makes judges uncomfortable and therefore more likely to reach for prevailing societal assumptions of what makes a good parent. In any case, you need to be especially aware of your own values, attitudes, and beliefs and how those views may consciously or unconsciously impact the custody determination. See Chapter 1, Addressing Bias.
CHILD DEVELOPMENT: GUIDELINES AND IMPLICATIONS FOR VISITATION

BIRTH TO 6 MONTHS

Child's Agenda:
- Physiological and emotional regulation (experience stabilization, positive emotions and control of negative emotions)
- Form special and specific relationships

Adult's Agenda:
- Reduce stress signals and enhance stabilization (be responsive to cues)
- Emotional availability, sensitivity, turn-taking, and consistency
- Recognize and control own anxiety and anger

Implications for Visitation:
- Learn what stabilizes infant
- Short and consistent visits
- Support for adult anxiety

SIX TO 18 MONTHS

Child's Agenda:
- Attachment to and trust in primary caregivers
- Experience with a wide range of emotions
- Explore the world
- Begin to develop self control

Adult's Agenda
- Provide emotional caring, consistency and time together
- Share positive and negative emotions (encourage partnership, i.e., provide alternatives, turns; share wonder and disappointments)
- Provide opportunities for exploration of objects, places
- Set clear limits (accompany increase in limits with more positive engagement)
- Control own emotions (avoid under, over control, power struggles--be firm, but fair

Implications for Visitation:
- Support for adult's relationship with child
- Short predictable visits (longer or over-night only if there is a special relationship)
- Learn what child's joys are and what limit work (bring special object from home)
- Support for adults anger
Frances Stott, Ph.D.

**EIGHTEEN MONTHS TO 3 YEARS**

*Child's Agenda:*
- Feel safe in an intimate relationship
- Seek and use adult as a secure base for exploration
- Development of autonomy (self-reliance)
- Experience and survive tantrums (learn that anger and despair need not lead to lasting collapse)
- Development of self-awareness and language
- Impulse control

*Adult's Agenda:*
- Provide emotional caring, consistency, and time together
- Provide safety (protect from danger and empathize with fears; share delight in objects and experiences)
- Promote self-reliance (locomotion, choices, exploration)
- Remain emotionally available while firm in position; modulate emotions and stimulation
- Point out others' point of view; communicate often and honestly (don't say one thing and mean another)
- Control own impulses; structure environment, help child

**Implications for Visitation:**
- Support for adult's relationship with child
- Longer visits, overnight stay by age 3 (earlier if indicated)
- Learn what child's routines, joys are (bring special objects from home)
- Learn what rules at home are and what limits work
- Support for adult's frustration and anger

**THREE TO 6 YEARS**

*Child's Agenda:*
- Regulate fears and anxieties, jealousies and rivalries
- Take initiative and experience genuine mastery
- Play with peers, adults
- Construct a positive view of self as valued and competent
- Moral development (assume responsibility, conform to social rules, identify with caregivers)

*Adult's Agenda:*
- Provide predictable and regular routines
- Accept, describe child's feelings
- Play, joint problem-solving with child
- Genuine approval
- Provide and model guidelines, expectations, consequences, and respect
Implications for Visitation:
- Support adult's relationship with child
- Provide honest explanation (e.g., what happened to other parent)
- Longer over-night visits (2-3 days unless otherwise indicated)
- Plan activities; know what child's routine and rules are
- Support for adult's frustration, etc.

**SIX TO 12 YEARS**

**Child's Agenda:**
- Learning in school (and in other settings)
- Friendship with peers
- Gaining an identity through genuine accomplishment
- Moral development (knowledge of formal rules; increased responsibility)

**Adult's Agenda:**
- Maintain consistency, fairness
- Arrange and structure experiences to promote success in school and other arenas
- Arrange and structure experiences to promote friendships
- Affirm genuine efforts and accomplishments
- Provide rules, responsibilities; model moral behavior

Implications for Visitation:
- Support adult's relationship with child
- Support school and activity schedule and need for homework, practice, etc.
- Longer visits (1-2 weeks if logistically possible)
- Support adult in terms of planning for visit

**TWELVE TO 18 YEARS**

**Child's Agenda:**
- Development of a healthy and consistent identity
- Success in school (and other arenas)
- Friendships with peers

**Adult's Agenda:**
- Maintain fairness, consistency of values
- Allow child to separate, become increasingly independent
- Support friendships
- Control own emotions

Implications for Visitation:
- Support adult's relationship with child
- Respect child's desires, schedule, need to be with friends
- Support for adult's fears, anxieties, anger, misunderstandings
- Length of time works best when mutually determined
# Kids In The Middle

## WHAT TO EXPECT

### Expected Age Level Reactions for Children of Divorce

#### Preschool

<table>
<thead>
<tr>
<th>Thoughts</th>
<th>Feelings</th>
<th>Behaviors</th>
<th>Needs</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Mom/Dad left me.&quot;</td>
<td>&quot;Fear/Insecurity&quot;</td>
<td>Bedwetting</td>
<td>Firm limits and support.</td>
</tr>
<tr>
<td>&quot;My family is gone.&quot;</td>
<td>&quot;Sadness&quot;</td>
<td>Clinging</td>
<td>Secure, patient caretakers.</td>
</tr>
<tr>
<td>&quot;Mom's going to leave me too.&quot;</td>
<td>&quot;Abandonment&quot;</td>
<td>Crying/Whining</td>
<td>Repeated re-assurances.</td>
</tr>
<tr>
<td>&quot;I won't ever see Dad again.&quot;</td>
<td>&quot;Confusion&quot;</td>
<td>Tantrums</td>
<td>Consistent and frequent parental contact.</td>
</tr>
<tr>
<td>&quot;Who will take care of me now?&quot;</td>
<td>&quot;Helplessness&quot;</td>
<td>Aggression</td>
<td>Routines.</td>
</tr>
<tr>
<td></td>
<td>&quot;Anxiety&quot;</td>
<td>Regression</td>
<td>Help in expressing feelings.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Low levels of parental conflict.</td>
</tr>
</tbody>
</table>

#### 5-7 Years

<table>
<thead>
<tr>
<th>Thoughts</th>
<th>Feelings</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;I'm to blame.&quot;</td>
<td>Sadness</td>
</tr>
<tr>
<td>&quot;I'll get them back together.&quot;</td>
<td>Self-blame &amp; Guilt</td>
</tr>
<tr>
<td>&quot;I have to choose one parent.&quot;</td>
<td>Denial</td>
</tr>
<tr>
<td>&quot;If I don't talk about it, it will be O.K.&quot;</td>
<td>Confusion</td>
</tr>
</tbody>
</table>

### Other Resources

- Kids In The Middle, Inc.
  - 121 West Monroe
  - St. Louis, MO 63122
  - (314) 909-9922
  - kitm@kidsinthemiddle.org

[http://www.kidsinthemiddle.org/reactions.htm](http://www.kidsinthemiddle.org/reactions.htm)
### Kids In The Middle - Reactions to Expect

#### Behaviors

<table>
<thead>
<tr>
<th>Threats/tantrums</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crying</td>
</tr>
<tr>
<td>Bedwetting</td>
</tr>
<tr>
<td>Attempts to get parents back together</td>
</tr>
<tr>
<td>School problems</td>
</tr>
</tbody>
</table>

#### Needs

<table>
<thead>
<tr>
<th>Clear parental expectations.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parental cooperation.</td>
</tr>
<tr>
<td>Frequent, continuing contact with both parents.</td>
</tr>
<tr>
<td>Predictable visits.</td>
</tr>
<tr>
<td>Reassurance of love and that they are not to blame.</td>
</tr>
<tr>
<td>Low levels of parental conflict.</td>
</tr>
</tbody>
</table>

#### 8-12 Years

#### Thoughts

<table>
<thead>
<tr>
<th>&quot;I blame Mom/Dad.&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Who am I now, without one home &amp; family?&quot;</td>
</tr>
<tr>
<td>&quot;Who is in charge here?&quot;</td>
</tr>
<tr>
<td>&quot;I have to be more responsible now.&quot;</td>
</tr>
<tr>
<td>&quot;Can I love both parents?&quot;</td>
</tr>
<tr>
<td>&quot;No one understands how I feel.&quot;</td>
</tr>
</tbody>
</table>

#### Feelings

<table>
<thead>
<tr>
<th>Shame</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anger/Hostility</td>
</tr>
<tr>
<td>Insecurity/Fear</td>
</tr>
<tr>
<td>Sadness</td>
</tr>
<tr>
<td>Conflicting feelings over who to love</td>
</tr>
<tr>
<td>Powerlessness</td>
</tr>
<tr>
<td>Denial - &quot;It's No Big Deal&quot;</td>
</tr>
</tbody>
</table>

#### Behaviors

<table>
<thead>
<tr>
<th>Rejection of one parent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apathy</td>
</tr>
<tr>
<td>Acting out/Fighting with peers or brothers and sisters</td>
</tr>
<tr>
<td>Defiance/Opposition</td>
</tr>
<tr>
<td>Eating disturbances</td>
</tr>
<tr>
<td>Somatic complaints</td>
</tr>
<tr>
<td>Desire to be &quot;little man/woman&quot;</td>
</tr>
</tbody>
</table>

#### Needs

<table>
<thead>
<tr>
<th>Stability/security at home.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flexibility with visitation to allow for social time.</td>
</tr>
<tr>
<td>Age appropriate, honest explanations.</td>
</tr>
<tr>
<td>Clear parental expectations.</td>
</tr>
<tr>
<td>Low levels of parental conflicts.</td>
</tr>
</tbody>
</table>

#### 13-18 Years

#### Thoughts

<table>
<thead>
<tr>
<th>&quot;I'll act mature to cope.&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Why can't my parents get it together?&quot;</td>
</tr>
<tr>
<td>&quot;My parent's divorce is no big deal.&quot;</td>
</tr>
<tr>
<td>&quot;If I accept stepmom, Mom will be hurt.&quot;</td>
</tr>
<tr>
<td>&quot;I'm angry about Dad's girlfriend&quot;</td>
</tr>
<tr>
<td>&quot;Mom's/Dad's dating is gross.&quot;</td>
</tr>
<tr>
<td>&quot;Am I lovable?&quot;</td>
</tr>
<tr>
<td>&quot;Will I get divorced someday?&quot;</td>
</tr>
<tr>
<td>&quot;I don't care. I'm out of here.&quot;</td>
</tr>
</tbody>
</table>

#### Feelings

<table>
<thead>
<tr>
<th>Powerlessness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anger/Hostility</td>
</tr>
<tr>
<td>Denial - &quot;It's No Big Deal&quot;</td>
</tr>
<tr>
<td>Conflicting feelings</td>
</tr>
<tr>
<td>Sadness</td>
</tr>
<tr>
<td>Confusion</td>
</tr>
<tr>
<td>Loneliness</td>
</tr>
<tr>
<td>Apathy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Acting too grown up</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mood swings</td>
</tr>
</tbody>
</table>

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http://www.kidsinthemiddle.org/reactions.htm

2/14/02
<table>
<thead>
<tr>
<th>Behaviors</th>
<th>Needs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug/alcohol abuse</td>
<td>Treated with respect.</td>
</tr>
<tr>
<td>Violence</td>
<td>Emotional stability from parents.</td>
</tr>
<tr>
<td>Competition with parents</td>
<td>Flexible roles.</td>
</tr>
<tr>
<td>May reject one parent</td>
<td>Adequate parenting.</td>
</tr>
<tr>
<td>Promiscuity</td>
<td>Healthy contact with both parents.</td>
</tr>
<tr>
<td>Withdrawing</td>
<td></td>
</tr>
<tr>
<td>Accident prone, suicidal</td>
<td></td>
</tr>
<tr>
<td>Eating disturbances</td>
<td></td>
</tr>
</tbody>
</table>
Information on “Never Married Parent” Cases

Materials prepared by
Joan K. Raisner
Marriage & Family Counseling Service Mediator
Circuit Court of Cook County
Chicago, Illinois
TOP TEN REASONS WHY NEVER-MARRIED PARENTS COME TO COURT ON CHILD VISITATION & CUSTODY ISSUES.

1. Child Support: initiated by custodial parent or State’s Attorney (Public Aid cases).

2. Changes in prior, informal access to the child.

3. Changes, fears about an adult’s capacity to parent.

4. Changes in adult relationships:
   --new partners
   --conflicts, rivalries
   --extended family realignments.

5. Changes in child’s needs:
   --at infancy
   --child starts school
   --child reaches teen years.

6. Non-custodial parent seeks to re-enter a child’s life.

7. Child initiates changes.


9. One parent is relocating out of the area.

10. Parent incarcerated or released from prison. Parent entering or released from drug/alcohol rehab program.
POSSIBLE CHARACTERISTICS OF NEVER-MARRIED FAMILIES

IF A SEPARATE FAMILY UNIT WAS NOT ESTABLISHED:

1. Did the parents have prior experiences in communicating, planning, or making decisions together?

2. Did the child have contact with the non-custodial parent? Is the child adjusting to many other new relationships at the same time.

3. Child may be reluctant to give up “junior adult” status to a new parent figure.

4. Family members, generational patterns, may exert greater influence on the parents.

5. Parents’ information about each other may be very out-of-date.

IF A SEPARATE FAMILY UNIT WAS ESTABLISHED:

1. Assume parents ended the relationship for good reasons.

2. Assume the parents now feel resentful of being forced by the court to continue the relationship.

3. Assume the parents may feel angry, suspicious of each other and the court.

4. Assume that some specific circumstances changed any prior cooperation about parenting arrangements.

5. Assume the child is reacting emotionally as if it were a divorce.

6. Access plans may need to include half-siblings, “step” relationships.
THE CHILD'S PERSPECTIVE:

For children, the crucial difference may be whether or not they experienced the parents living together.

**Considerations for child access arrangements when parents DID NOT live together.**

1. Did parents ever discuss, make any decisions together in the past?
2. Did child have any pattern of contact with non-residential parent?
3. Can the parents articulate the child’s needs in this process?
4. How will the age of the child enter into the process?
5. How will the child’s preferences enter into the process?
6. What was the involvement of extended family members? Who were the “psychological parents?” The decision-makers?
7. What support does the child need to adjust to a new person in the parent role?
8. What other helpers may these parents need to be successful?

**EXAMPLE: a gradual plan for an infant:**
- Brief, frequent visits in the child’s home with a trusted person present.
- Brief visits away from the child’s home.
- Learn infant’s routine/needs; longer visits away from child’s home while maintaining the routine.
- Complete flexibility in response to child’s mood.
- Presence of the absent parent, with photos, recordings of that parent’s voice, articles of clothing.

**EXAMPLE: for a pre-teen:**
- Brief visits to the child’s home.
- Telephone calls, cards, small gifts, e-mails, attending events, participating at school events; parental civility.
- Child-selected activities; longer visits, socializing with extended family/significant others; trial over-nights.
- Avoid the pitfalls of being an instant disciplinarian or non-stop entertainer.
Considerations for child access arrangements if a separate family unit WAS established, and changed.

1. Assume there were compelling reasons for the breakup, just as for a divorce—addictions, abuse, financial problems, infidelity, and mental illness. Maybe the child isn’t too surprised.

2. Since they didn’t have a formal contract, the parents may feel they are done with each other, and have solved their problems by breaking up. Some issue brought them into court, and now they are “in the system.” The court is forcing them back into a relationship.

3. Their information about each other went out of date quickly.

4. The parents may become suspicious of each other’s motives: “It’s all about the money.” “This is a power play.” “This is because I’m dating again.” “This visitation is for the grandmother!”

5. The children may have ties to half-siblings, or “step”siblings, or a non-biological parent figure, and the access plan needs to provide for those important bonds.

6. These children may perceive—correctly—that there is a stigma about their parent’s informal contract, or at least little societal recognition. If either parent should marry someone else, the child may be under strong pressure to drop ties to the non-custodial parent in order to fit the ideal of an intact nuclear family.

This can look very similar to your work with divorcing families.
WHAT CAN THE CHILD REPRESENTATIVE DO TO HELP THE CHILDREN OF PARENTAGE FAMILIES?

1. Add a strong educational component to your interactions with the parents: child development issues, effective communication, how to turn a complaint into a request, how to access resources.

2. Have a strategy for dealing with power imbalances between the parents, and power imbalances between the parents and yourself.

3. Increase the “case-management” aspect of your involvement with the family: make referrals to other helpers, strengthen your referral networks and resources. Follow up on treatment plans, access plans,

4. Slow down the process; try out temporary access plans.

5. Spend more time with the children’s interviews: children’s statements may vary from day to day; it does not necessarily mean they are being coached.

   “What else are you supposed to tell me?”

6. Monitor the child’s developmental milestones.

7. Screen for witnessing violence, abuse.

8. The difference between whether parental discipline is just strict or is abusive is whether the parental discipline makes sense to the child.

    ASK: “Do you know why you get into trouble?"
    "Do you know how to stay out of trouble?"

Pat yourself on the back every day.
Beyond Grief: The Long-term Impact on Children of Divorce

Children Lose Their Sense of Childhood Innocence

• They no longer feel safe and secure
• They no longer feel protected by their parent(s)
• They become "scanners" - avoid what is going on with their lives to take care of parent(s); avoid conflict
• Children don't have their feelings validated and begin to separate from their emotions
• Children feel lonely and isolated; their self-concept may be negative when their events are ignored or laden with conflict; they may seek substitute love in unhealthy relationships
• Children lack adult models to learn and practice socialization skills, gender role acceptance and validation, and respectful adult communication
• Children lose a sense of competency that is age appropriate and becomes cumulative
• Children are fearful of getting close to people because of multiple losses they have experienced
A Guide For Attorneys
How Are Parents Helping Their Children Cope?

<table>
<thead>
<tr>
<th>Phase I</th>
<th>Phase II</th>
<th>Phase III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Grief Stage</td>
<td>Building and Maintaining a Single Parent Family</td>
<td>How do parents continue to co-parent?</td>
</tr>
<tr>
<td>How was the divorce explained:</td>
<td>How is parent disciplining child:</td>
<td>How do parents continue to communicate about divorce when children ask for additional explanations or bring up related issues?</td>
</tr>
<tr>
<td>--both parents present</td>
<td>--what rules/consequences are there</td>
<td>Discuss history of relationship to help child understand family history; parental relationship.</td>
</tr>
<tr>
<td>--speak for self without</td>
<td>--how is the discipline age-appropriate</td>
<td>Explain changes parents have made in order to have healthier, more satisfying relationships.</td>
</tr>
<tr>
<td>badmouthing other parent</td>
<td>--how similar are both parents</td>
<td></td>
</tr>
<tr>
<td>--reassure child not responsible</td>
<td>philosophy/method of discipline</td>
<td></td>
</tr>
<tr>
<td>--reassure child of his/her lovability</td>
<td>How does parent spend time with child:</td>
<td></td>
</tr>
<tr>
<td>--define what will be</td>
<td>--age-appropriate activities</td>
<td>--introduced to child</td>
</tr>
<tr>
<td>happening to the child and</td>
<td>--talking</td>
<td>--relate to child in terms of:</td>
</tr>
<tr>
<td>each parent in terms of housing, time</td>
<td>--time with other family members</td>
<td>time</td>
</tr>
<tr>
<td>with each parent, school</td>
<td>--demonstrates love and concern;</td>
<td>discipline</td>
</tr>
<tr>
<td>Are family members allowed to have different</td>
<td>remembers events significant to child</td>
<td></td>
</tr>
<tr>
<td>emotions?</td>
<td>How do parents communicate about</td>
<td></td>
</tr>
<tr>
<td></td>
<td>significant aspects of child's development?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>--frequency</td>
<td></td>
</tr>
<tr>
<td></td>
<td>--content</td>
<td></td>
</tr>
<tr>
<td>Do adults count on self and other adults for</td>
<td>How does each parent alter response to child as child's needs change?</td>
<td></td>
</tr>
<tr>
<td>support rather than the child?</td>
<td>How do parents separate adult concerns; prevent role reversal?</td>
<td></td>
</tr>
</tbody>
</table>

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The Child and Family Focused Decision Making Model

The Children of Separation and Divorce Center (COSD) staff developed a model, *The Child and Family Focused Model of Decision Making*, to better meet the needs of children experiencing a major family transition. Based on extensive clinical and educational work with more than 11,000 family members since 1983, and work with attorneys and judges, the COSD staff developed *The Child and Family Focused Model of Decision Making* to further define the "Best Interests of the Child Doctrine." This model provides a process of decision making for parents, attorneys, mediators and judges that assists them in making decisions in order to meet children's current and future needs.

*The Child and Family Focused Model of Decision Making* model looks at critical dimensions of child development in four generic areas, the possible impact of divorce on development, parenting considerations and the degree of conflict in co-parent relationships. While not dictating what a decision about a child should be, the model directs the parent or professional to focus on development, particularly self concept, intellectual and interpersonal functioning and safety and security needs. Contrasted with the custody or adversarial model, which focuses on what parents want, this model is based on children's current and future needs.

While research indicates that children of divorce don't have to become disturbed, they experience stress during the trauma of change. However, if parents are knowledgeable about what fosters feelings of self esteem, successful intellectual achievement, socialization skills and safe rules and consequences for each age group, children stand a much better chance of being parented in an appropriate way with resolution of loss that may not occur when decisions are based on what parents want. When parents understand what losses children experience and how their development may be impacted by a family change, parents and helping professionals can be prepared to intervene in helpful ways that are supportive to the child. This model identifies how each parent can contribute to each area of the child's development in a responsible, healthy way.

The greatest harm for children is when they are kept in the middle of parents' ongoing conflict. When children are in the middle of arguments or asked to keep secrets from one parent or deliver messages, they lose their feeling of being protected by parents, become very guarded and lose focus of who they are and what goals they have for themselves. Understanding development and the impact of divorce on children can assist parents in conflict to permit the children to disengage from the conflict or disengage from it themselves. The degree of conflict between parents may range from mild to moderate to severe. This continuum can be of value to judges in determining how to make a decision about custody and visitation that keeps children out of conflict as much as possible and protects their safety.

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C:\My Documents\Trainings\ABA June 2002\ABA Handouts 0602.DOC
Components of the Child and Family Focused Model

I. Developmental Considerations
   - Self-Concept
   - Intellectual Functioning
   - Interpersonal Functioning
   - Safety and Security

II. Impact of Divorce on Each Area of Development

III. Responsible Parenting

IV. Degree of Conflict Between Parents
Child and Family Focused Model

DEVELOPMENTAL CHARACTERISTICS

Self Concept
- Self esteem
- Self worth
- Self competency
- Gender identity

Intellectual Functioning
- Acquisition of knowledge
- Mastery of language
- Ability to label/express emotions
- Ability to develop higher order thinking skills
- Ability to formulate and exercise moral judgment
- Ability to make/evaluate decisions

Interpersonal Functioning
- Ability to trust another person
- Ability to make and keep friends
- Socialization skills
  - communication
  - problem solving
  - anger management
- Ability to empathize
- Ability to get close to
- Gender identity, validation

Safety and Security
- Child’s feelings of being protected by external and internal threats
- Internal control
- Predictability and consistency in care giving, guidance
- Awareness of safety rules
- Awareness of rules and consequences
IMPACT OF DIVORCE

Self Concept
- Blames self
- Worrier
- Limited access to outside activities
- Care giving role
- Rejection; abandonment
- Ongoing parental conflict
- Lack of understanding about divorce

Intellectual Functioning
- "Freezes" - can’t work
- Lack of opportunity or limited opportunity for formal/informal learning experience
- Inability to label/express emotions
- Distorted view of right/wrong
- Lack of parenting/parental guidance to make decisions; evaluate them
- Undiagnosed and/or untreated learning disabilities

Interpersonal Functioning
- Lack of focused constructive parent-child communication
- Lack of healthy gender model
- Distorted view of relationships
- Lack of gender validation
- Lack of time with peers
- Lack of trust in self and others to have loving relationship

Safety and Security
- Anxiety, fears, worries about parents; when will see parent; child’s routine
- Acting out, anxious and regressive behavior
- Diminished parenting; rules/consequences not adhered to consistently
FACTORS TO ASSESS RESPONSIBLE PARENTING

Self Concept
- How has divorce been explained
  - child reassured not fault
  - loving relationship with each parent
  - knows when will be with each parent
- Pleasurable time between child and parent
- Opportunity for involvement with each parent
- Demonstrates unconditional love
- How do parents cooperate with each other to meet child’s needs

Intellectual Functioning
- Has parent informed school about divorce
- How involved is parent
  - overall education
  - report cards
  - conferences
- How does parent supervise attendance; homework
- How does parent handle special needs
- How does parent model and provide opportunities for decision making
- What kinds of learning opportunities does parent create for child
- How is child reinforced for academic success

Interpersonal Functioning
- How does parent discuss other parent, marriage and other relationships with child in age appropriate manner
- Does parent allow age appropriate time with peers
- Does parent know child’s friends; parents of friends
- How does parent validate child’s gender identity
- How does parent demonstrate caring, concern and empathetic communication
- How does parent handle new adult relationships with child

Safety and Security
- What are age appropriate rules; does parent have consequences for child
- How are the rules and consequences enforced
- How does parent provide appropriate consistency
- How does parent explain, teach and reinforce age appropriate safety concerns
- What kinds of age appropriate supervision does parent provide
- How does parent reassure child about loving, consistent relationships
### Comparison of “Best Interests” Standard and Child and Family Focused Model

<table>
<thead>
<tr>
<th>BEST INTERESTS</th>
<th>CHILD AND FAMILY FOCUSED MODEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>• focus on parents; win-lose model</td>
<td>• focus on children's needs and parental responsibility</td>
</tr>
<tr>
<td>• describes parent &quot;character&quot;</td>
<td>• defines parent behavior</td>
</tr>
<tr>
<td>• static</td>
<td>• dynamic, changing</td>
</tr>
<tr>
<td>• decision making responsibility rests with judge</td>
<td>• prescribes parental responsibility/ accountability</td>
</tr>
<tr>
<td>• professionals &quot;prove&quot; their client's (parent) worth by being negative about the other</td>
<td>• parents and professionals speak the same language of child development</td>
</tr>
</tbody>
</table>
Interviewing Children

I. Build a Trusting Relationship
   A. Introduce yourself
   B. Discuss role of children’s attorney
   D. Explain confidentiality
   E. Engage in “Social talk”

II. Structure of Interview
    A. How to talk to children
    B. Listening skills
       Nonverbal
       Verbal
    C. Responding skills
    D. Precautions – time, “legalese,” double negatives, multiple concepts
    F. Provide snack and play materials

III. Use of the Child and Family Focused Model to Gather and Assess Information

   Self Concept: Who is there to love and support the child? How?

   Intellectual Functioning: How is the child learning?
      Formal
      Informal learning opportunities

   Interpersonal Functioning: How does the child relate to peers in age appropriate ways?

   Safety and Security: How secure is the child; does she or he feel protected by significant adults?

   Safety and Security: What rules and consequences does child have? How are rules, monitored?

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Guidelines For Viewing Simulated Interviews Between Attorneys and Children

I. What is characteristic of each stage of development?
   - self-concept
   - intellectual
   - interpersonal
   - safety and security

II. How did the attorney establish a relationship with the child?

III. What skills did the attorney use in communicating with the child?

IV. How did the attorney take into consideration the child’s stage of development and impact of divorce?

V. How did the attorney influence the parents to assess their relationship with the child and with each other?

VI. What roles did the attorney play in advocating for the child and assessing the child’s best interests?

VII. What further information would the attorney need from the child, parents and significant others?

VIII. Would information obtained from attorney assist judge in decision making?
How Attorneys Can Support Healthy Families

1. Understand the short and long term impact of zealously advocating for your client.

2. Practice a family resilient philosophy:

   Inform clients when you initially see them about the impact of divorce on children and the importance of addressing children’s needs.

   Understand the different stages of child development and the possible impact of divorce on each stage.

3. Collaborate with other professionals and respect the relationship that they have with their client:

   Respect confidentiality between child and therapist.

   Model a collaborative approach with other professionals.

4. Understand the grief process and how your client is adjusting:

   Be empathic and realistic:

   - What will happen if this case goes to court?

   - How do you know that you will win?

   - Are you aware of the costs of an adversarial process?

   - How do you want your child to remember his/her childhood years with you?

5. All children and parents benefit from support. Prevention is a major goal for children of divorce.

6. Provide resources for parents and children.
Tools to Assist Professionals

- Parent Education
- Mediation
- Neutral Evaluation
- Training for Children’s Court-Appointed Attorneys
- Standardized Process to Assess Each Child and Parenting Behaviors (child development based)
- Family Resiliency Program
- Needs Assessments
- Parenting Plans
- Family Focused Coordinator
- Parent Conflict Counseling
- Multidisciplinary Collaboration
- Educational Materials Available in Court for Parents and Children
- Professional Journals and Conferences (AFCC)
Needs Assessment:
A Tool to Assist Parents and Professionals

The Needs Assessment is a form used by each parent for each child in the family. The form is based on the Child and Family Focused Decision Making Model, which advocates decision making based on developmental considerations and healthy, responsible parenting. Since children's needs change over time, the assessment can be used to help parents focus on their children and renegotiate at appropriate times.

Developmental considerations include self-esteem, interpersonal and intellectual functioning and safety and security needs. Within each developmental focus, parents are asked to be as specific as possible so that they can identify their child's functioning in very specific ways. For example, in discussing peers, parents need to be informed about: How many friends does the child have; does the parent know the friends and their parents; what do the children do together; are they welcome in the child's home; what role does each parent play with their child's peers?

When used constructively, the Needs Assessment helps parents to see how many needs each child has and gives parents the opportunity to be involved in very specific ways. The Needs Assessment is also prescriptive in that it pinpoints areas of child development in which parents need to be better informed. Needs Assessments can appear to be very threatening to parents if they are discussed as weapons to be used against the other parent.

The Needs Assessment helps parents begin to identify their strengths in parenting each area of their child's development. Seeing how many needs their children have, parents can be more specific about how they can meet different needs. For example, when a younger child is participating in a sport, transportation, coordinating schedules, buying uniforms, attending games and team social functions are all activities in which parents need to be involved. One parent may have more flexible working hours and be able to provide transportation; the other may be well organized and helpful in coordinating sports with homework and other activities.

The use of the Needs Assessment can demonstrate the opportunities each parent has to maintain and enhance a loving parent-child relationship. At the same time, it highlights the critical importance of co-parent communication about various aspects of the child's development. The Needs Assessment directs the parents to address specific areas of child development. The Needs Assessment is also dynamic because it builds renegotiation based on need, not conflict. Using a child development model can be helpful in reducing tension between parents while providing a parenting model, which can help parents to be more accountable.

Parents, upon completion of the Needs Assessment, are then encouraged to use the information as a guide to discuss each child and to develop a parenting agreement. At a minimum, they may bring the forms to their attorney or mediator as a starting point for a child focused discussion.

Judges utilizing the Needs Assessment can use it as a practical tool to assess how actively each parent is involved in specific areas of their child's development and to determine what kind of educational or therapeutic program would be helpful to support their responsible parenting.
When parents make a decision to separate or divorce, they are often unaware of the options available to them with regard to the legal process they choose. Their mindset is to use the court process as the best vehicle to make decisions in their favor. Most parents aren’t aware of the psychological impact their decisions have on children’s developmental needs and ongoing stability and sense of security, and the time taken away from their jobs and stress placed upon them as they engage in an adversarial approach.

An interdisciplinary staff will work with each family at the time of separation. Parents will be included as partners in deciding upon the most appropriate services to meet their own and their children’s needs. Major emphasis will be placed on reaching non-litigious child focused decisions and retaining each parent’s active, loving role in their children’s lives. Recognizing that children’s needs change over time as well as the changes and crises that may occur in families, opportunities for continuous work, such as renegotiation of parent agreements, will be part of a family’s participation. This will save endless time re-litigating family and child issues.

The Family Resiliency Model educates parents as early in the separation as possible to the choices they have; the need to focus on their children; and the provision of multiple services designed to meet each family member’s needs. A public awareness campaign will inform parents about this model through free monthly orientation programs, school and community information programs, books and newspaper articles. Working as partners with COSD staff, parents decide what services are most appropriate for themselves and their children. All parents and children participate in parent and child educational programs as a way to empower them with knowledge, skills and understanding in a variety of areas they can utilize throughout the continuous process of divorce.

When they are ready, parents work with COSD child focused access planners and an interdisciplinary team of attorneys, mediators and child focused planners to make decisions about how much time will be spent with children and how time will be spent. To reach the decision making point about children, one or both parents might need individual or group therapy, and/or anger management programs; their children may benefit from a KidShare workshop program, individual or group therapy. Any specialists agreed upon by the parents (e.g., pediatricians) will work with the parents at The Children of Separation and Divorce Center.
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Checklist For Interviewing/Questioning Children
Developed by
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703-354-1796

I. Framing the Event

1. Did I tell the child my name and what my job is -- in non-technical words?
2. Did I help the child become familiar with the surroundings of the interview?
3. Did I tell the child the purpose of our talk, and why it is important, and what will happen afterward?
4. Did I give the child a chance to ask me questions about this talk? Did I try to establish a common vocabulary for the things we talk about? Was I listening to the kind of words and sentences that the child used?

II. Using Clear Language

5. Did I use easy words instead of hard ones? (Do I know what a "hard" word is?)
6. Did I avoid legal words and phrases?
7. Did I use words that mean one thing in everyday life, but another thing in law (such as "court")?
8. Did I assume that because a child uses a word, he or she understands the concept it represents?
9. Was I as redundant as possible? That is, did I use specific names and places instead of pronouns (like "he" and "we") and vague referents (like "it", "that", and "there")?

III. Asking the Questions

10. Did I keep my questions and sentences simple? Did I try for one main (new) thought per utterance?
11. Did I avoid asking "DUR-X" questions? [Questions that begin, "Do you remember", followed by one or more full propositions. Ex. with propositions underlined: Do you remember telling me that somebody hurt you?]
12. When I shifted topics, and when I moved from the present to the past or vice versa, did I alert the child that I was going to do so?
13. Did I give the child the necessary help in organizing his or her story by asking, for instance, "And then what happened?" or "What happened next?"
14. Did I avoid asking the child about abstract concepts, such as, "What is the difference between truth and lies?" Did I choose instead to give the child everyday, concrete examples and let him or her demonstrate, rather than articulate knowledge of truth and lies, right and wrong?
15. Did I use as few negatives as possible in the questions I asked?
Checklist For Interviewing/Questioning Children (cont’d)

IV. Listening to the Answers

16. Were the child's RESPONSES to my questions, ANSWERS to my questions? Am I sure?

17. If the child's answers were inconsistent, did I ask myself if:
   a. I had looked first at the language of the question, or the child's response, to find a possible reason for inconsistency?
   b. I, or someone else, had asked the same question repeatedly?
   c. I had changed the wording of a question I had asked before?
   d. I was forgetting that children can be very literal in their interpretation of language?
   e. The child's processing of language might not be as mature as mine?

V. Global Checks

18. Did I stay in the child's world by framing my questions in terms of the child's experience?

19. Did I take the child's understanding of language for granted?

20. Was I listening to my OWN language, my OWN questions?

21. [If applicable] Did I ask myself before I began: Am I gathering information, doing therapy, or perhaps conducting an interrogation?
"Give me your evidence and don't be nervous or I'll have you executed on the spot."

Lewis Carroll, *Alice's Adventures in Wonderland*, 1865

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**THE ART & SCIENCE OF INTERVIEWS WITH CHILDREN**

- Mindy F. Mitnick, Ed.M., M.A.
- 3948 W. 50th Street, Suite 207
- Edina, MN 55424
- (612) 927-5111

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**HOW CHILDREN THINK**

- **6 TO 11**

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**THINKING IS CONCRETE**

- Child interprets questions literally
- Child only answers question you ask

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**THINKING IS NOT HYPOTHETICAL**

- Child has limited ability to think about the future
- Child has limited ability to do "what if"

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**THINKING REMAINS SELF-FOCUSED**

- Children hear "why" as blame
- Children assume responsibility for events
HOW CHILDREN THINK

12 and Older

THINKING BECOMES PRINCIPLED

- May seek "fairness"
- May seek "justice"
- May focus on own needs exclusively
- May seek escape when feeling helpless

"ART" LESSONS

LISTENING FOR THEMES

- About parents
  - Attunement
  - Anger/control
  - Neglect
  - Emotional dependence
  - Boundary problems
  - Child's preference

LISTENING FOR THEMES

- About self
  - Attachment/trust
  - Power struggles
  - Assertiveness
  - Fear(s)
  - Enmeshment

SOME SCIENCE

MITNICK '02
Using a continuum of suggestiveness in questions

- Open-ended questions
- Focused questions
- Leading questions

OPEN-ENDED QUESTIONS

- Come from child's free recall memory
- Provide the most accurate but the least amount of information
- Responses range from one sentence to paragraphs

FREE RECALL QUESTIONS

- Ability to answer is limited by:
  - Age
  - Ability
  - Trauma

FIND THE OPEN-ENDED QUESTION

1. “Did someone tell you to tell me that?”
2. “Your dad said to talk about that. Tell me more about what he said.”
3. “What did he tell you to say?”

OPEN-ENDED PROMPTS

- “Tell me more about…”
- “And then what happened?”
- “You said he... Tell me more about that.”
- “I'm not sure I understood the part about... Tell me more about that.”

EXERCISE
INQUIRY
- Begin with open-ended question

  \textit{"Do you know why you're here today? \_
  Tell me about that.(Tell me more about that.)"}

SAMPLE INQUIRY
- "Tell me what you know about why mom and dad don't live together (anymore)/
  why mom and dad are getting a divorce."

  \textit{"Tell me what you do for fun with
  mom/dad."}

INQUIRY
- "Tell me what mom/dad/brother/
  sister/you do when he/she gets mad."
- "Who in the family gets the most mad?"

INQUIRY
- "Tell me what mom/dad does when you
  do something you're not supposed to."
- "What else does your mom/dad do?"
- "What's the worst punishment you ever got from mom/dad?"

FOLLOW-UP
- "I want to know more about
  \_
  Start at the beginning and
  tell me everything you can remember
  even if you don't think it's important."

FOLLOW-UP WITH
OPEN-ENDED QUESTIONS
Q: "And then what happened?"
A: "He told Mom she'd be sorry."
Q: "What happened next?"
A. "He pushed her into the wall."
Q: "You said he told Mom she'd be sorry. Just before he said that, what happened?"
A: "He told me to get in the car."
Q: "Tell me all about that."

- Which type of focused question is best?
- Why?

FOLLOW-UP WITH OPEN-ENDED QUESTIONS

FOCUSED QUESTIONS

- "Wh" questions
- Multiple choice questions
- Yes/No questions

INQUIRY

- "Now I want to ask about some things that other kids tell me happen when they do something they're not supposed to. Has your mom/dad ever...."

FOLLOW-UP WITH FOCUSED QUESTIONS

- Topics you may wish to cover:
  - Sleeping arrangements
  - Rules in each home
  - Responsibilities in each home
  - Child's view of parents' roles, involvement with them

- Conflict between parents
- Witnessing domestic abuse
- Use of alcohol by parents
- Relationship(s) with new partners
Focused Questions

**Purposes**

- Direct attention to topic
- Ask for details
- Elaborate on narrative

Direct Attention to Topic

**Alcohol**

"Sometimes when grown-ups drink they act different. Tell me how your dad acts when he drinks."

Direct Attention to Topic

**Other relationships**

"Tell me what you like about (mom/dad's new partner)."

Direct Attention to Topic

**Rules**

"Do you have a bedtime at Dad's house? Tell me about that."

Ask for Specific Details

- "What does Mom spank you with?"
- "What do you do when you have a bad dream?"
- "How did it feel when he said Mom was a liar?"

Multiple Choice Questions

**Avoid forced choice questions**

USE "Were you in the bedroom or another room?"

NOT "Were you in the bedroom or the living room?"
MULTIPLE CHOICE QUESTIONS

Avoid too many choices

USE: “Were you in the bedroom, the living room or somewhere else?”

NOT “Were you in the bedroom, the living room, mom’s room or somewhere else?”

MULTIPLE CHOICE QUESTIONS

There are always exceptions

→ “Were you living in the white house or the yellow house?”
→ “Did that happen one time or more than one time?”

YES/NO QUESTIONS

Use only when necessary

→ “Did you see him hit Mom?”
→ “Did he tell you to look at the court papers?”

COERCIVE QUESTIONS

NEVER use coercive questions

“Tell me more about that.”

- “You’re telling the truth today, aren’t you?”
- “You wouldn’t make up a story like this, would you?”
I need you to.
Can you help me.
If you don't talk to me.
I really want to help you.

Using Clear Language

- 12 rules about easy words

Other legal concepts
- Parties
- Charges
- Case
- Guardian
- Hearing

QUESTIONS TO AVOID

- "I need you to. . ."
- "Can you help me. . ."
- "If you don't talk to me. . ."
- "I really want to help you. . ."

CLOSURE

- Ask the child if there is anything she wants to tell you before you stop
- Ask the child if she has any questions
- Thank the child for talking with you today

 Avoid: "Is there anything else I should know?"

#1 Legal jargon

- "Do you understand that you're under oath in this deposition in the matter before us today?"

#2 Multisyllabic words

- Preceding, unintentional, accidental, demonstrate, deliberately, multiple, etc.
#3 Check out child’s meaning

“He tickled me.”

#4 Avoid relationship words

• Stepfather, foster mother, real mom, mom’s boyfriend, your grandpa

#5 Avoid abstract concepts

• Abuse
• Control
• Discipline
• Custody

#6 Avoid quantifiers

• A few, some, several, many, most

#7 Avoid time estimates

• “What grade were you in when you moved here?”
• NOT “Was it a long time ago?”

#8 Avoid asking how many

• Children can count objects not incidents
#9 Use the child’s words

- NEVER substitute your words for the child’s
  - “When ‘Mom was mean’, what did she do?”

ALLOW TIME TO ANSWER

Count to (at least) 10 before offering to rephrase the question or asking a new question

AVOID “DO YOU REMEMBER”

- “Do you remember telling your mom what Dad did when she went to work?”

ONE QUESTION AT A TIME

- “What did your mom tell you about coming here?”
- “What did your dad tell you about coming here?”

ASKing THE QUESTIONS

A few more pointers

Do you remember that when Ms. Genda asked you questions at the earlier hearing back in May, she asked what happened, and you said he came in and that time I was wearing Elmo underwear, and then he took my shoes off and then my socks and then my underwear, and then he touched me outside of my vagina and inside, too. Do you remember saying that?
### AVOID SHIFTING TOPICS

- Try not to move back and forth between topics
- Signal to the child if you are changing topics

### AVOID SHIFTING TIME FRAME

- Avoid moving back and forth in time
- Signal child if you are changing time frame

### NEVER ask the child to guess

- NOT “How many times do you think it happened?”

### REASSURE CHILD

- Reassure rather than bargain:
  - “Is this hard to talk about?”
  - “You’ve really been working hard. I’d like to ask a few more questions.”
  - “It’s OK to talk here.”

"My mom has a new boyfriend, my dad has a new girlfriend, and all I got was a new therapist."
“Two communication styles are inappropriate when interviewing children for forensic purposes: talking as if they were adults, and talking as if they were children.”

Poole & Lamb, 1998
"YOU'RE MY WHAT?"
THE PROBLEM OF CHILDREN'S
MISPERCEPTIONS OF THEIR LAWYERS' ROLES

Emily Buss*

A lawyer representing seven-year-old James discussed James' options with him at considerable length. She explained to him that he had a number of choices about where he would live, some with family, some in foster care, and she took pains to discuss the likely consequences of each of his choices. James participated actively in the conversation, and had no trouble following the substance of the discussion. At the end of their conversation, the lawyer asked James what option he would like her to pursue. His direction to counsel: "I think I'd like to live with you."

INTRODUCTION

ANY thinking lawyer who represents children has struggled with the question of what role to assume in that representation, a struggle that classically comes down to a choice between "best interest" and "expressed interest" representation. Most of us end up passionately committed to one model of representation or another, and try to live out that model in practice. In my practice, I have assumed the expressed interest, or "traditional attorney" role, and have sought to take direction from my clients about which objectives to pursue. In soliciting their direction, I repeatedly explain to my clients that they are in charge, that I will fight for what they want, as long as they tell me what to fight for.

What I have found, however, is that, for many of my clients, even the teenagers among them, the message does not sink in. They continue to assume that I will take whatever action I think is right, and that I stand united with the public child welfare agency in controlling their fate. For many of my clients, despite my frequent protestations to the contrary, I am a part of the all-powerful "you all" that gives and takes away placements, visits, and services as we see fit.

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1 The stories in this Article are based on the actual experiences of lawyers, including myself, who represent children, and of children who have been represented by lawyers. Names have been changed to protect the clients' privacy.
This role confusion plays out in a number of ways. A client may run away from a foster care placement without ever having called me to explain the problems he is having or to consult about his options. A client may withhold a critical piece of information under the false impression that I will support his position only if I agree with it. A child may simply not commit the time, energy, and heartache required for an effective client-lawyer consultation process.

At the same time, I observe the confusion running the opposite way for clients of lawyers who have assumed the "best interest" approach. There, too, I see children making false assumptions about their lawyers—this time assuming that they have advocates for their expressed positions when they do not; or assuming that information will be kept secret by their lawyers when it will not; or assuming that their lawyers are obligated to take action upon their request when they are not.

Under both of these scenarios of confusion, the role assumed is, at best, meaningless; at worst, fraudulent. Under both scenarios, we lawyers for children have failed to meet our most basic ethical obligations to the children we represent.

In this Article, I will explore the issue of a lawyer's duty to communicate her role to her child client. I will begin in Part I by briefly summarizing the role debate among lawyers representing children in dependency and custody proceedings. I will then go on, in Part II, to discuss how and why children misperceive their lawyers' roles and, in Part III, why this matters in both functional and ethical terms. My extensive discussion of the ethical issues implicated by children's role confusion in Part III will rely heavily on an analysis of the Model Rules of Professional Conduct—the most current codification of a lawyer's professional obligations. In Part IV, I will consider children's developing capacity for role comprehension, and finally, in Part V, I will draw on my own experience and learning theory to suggest that children's role confusion can be reduced by ensuring their presence in court.

I. THE UNDERLYING DISPUTE ABOUT THE ROLE OF A CHILD'S LAWYER

There is much ongoing disagreement among academics and practitioners about the proper role for a lawyer to assume in representing children in abuse and neglect and custody proceedings. The debate generally divides people into two camps: those favoring a "traditional attorney's" role (representing what the child client wants, or the child's "expressed interests"), and those favoring a guardian ad litem's ("GAL") role (representing what the lawyer determines to be in the child's "best interest"). There are, in addition, many who advocate


This Article focuses on the representation of children in the dependency system and in the related context of termination of parental rights proceedings, and includes discussion of representation in the custody context only to the extent the same analysis applies. In my view, the heart of the argument applies equally well in both contexts. The analysis, however, is most compelling for children in the dependency system who generally come into the legal system from a harsher history, face worse prospects at the bar of the court, are less likely to share their parents' legal interests, and remain involved in the court process for considerably longer.

In contrast to the disagreement and confusion about the role children's attorneys should assume in dependency and custody proceedings, the role to be assumed by attorneys representing minors in juvenile justice proceedings (namely, the traditional attorney role) has been clearly established and widely accepted. See Institute of Judicial Administration-American Bar Association, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties Standard 3.1 (1979) [hereinafter IJA-ABA Standards]. For a general review of the history and reasoning leading up to the adoption of these standards, see the introduction to the IJA-ABA Standards.

4. See, e.g., Lyon, supra note 3, at 693-94 (arguing that an attorney's duty to advocate for her client's wishes is no less significant when that client is a child); Wallace J. Mlyniec, The Child Advocate in Private Custody Disputes: A Role in Search of a Standard, 16 J. Fam. L. 1, 16-17 (1977-78) (arguing that following a traditional attorney role "can best preserve the principles of minimal outside intervention into the private family sphere while protecting the child's right ... to participate in legal matters affecting [his] life"); Shannan L. Wilber, Independent Counsel for Children, 27 Fam L.Q. 349, 349 (1993) (asserting that counsel should advocate the child client's interest if the child can articulate a preference); see generally Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76, 85-93 (1984) (endorsing child-directed representation where child is mature enough to be "deemed to be an autonomous individual"); see also Standards of the American Bar Association and Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases 29 Fam. L.Q. 375, § B-4 (1995) [hereinafter Proposed ABA Standards] (directing the child's attorney to advocate the child's expressed preference unless she believes that the position would be "seriously injurious" to the child's interests).


2. For purposes of clarity, I will use feminine pronouns in referring to the generic child's lawyer, and masculine pronouns in referring to the generic child throughout this Article.

cate lawyers' assuming one form or another of hybrid role—somehow representing both positions to the court, or representing what the child wants unless the child's preference fails to meet some standard of reasonableness, or asking the court to appoint a separate GAL or attorney where client wishes and perceived interests divide. I consider these hybrid models to be essentially variations on the GAL model, because they all allow for substitution of the lawyer's judgment for that of the client, and a communication of this substituted judgment to the court. A third and smaller camp calls for the child's lawyer to serve as a neutral fact finder presenting all relevant information to the court to ensure a full and comprehensive consideration of the child's actual circumstances. But, again, because the fact finder's determination of what information is relevant to the court will inevitably be controlled by her sense of the truth, and what should happen in the case, and because this model focuses on the child's interests rather than the child's preferences, I view this model as another version of the GAL/best interest model.

Those who advocate the GAL approach argue that children lack the maturity of judgment, even the cognitive capacity for decision making, necessary to assess appropriately their own interests, particularly their long-term interests. Even to the extent children's judgment is no worse than that of adults, proponents of the GAL approach would argue that society has a greater obligation to protect children from their own bad judgments. Moreover, children are under tremendous pressure to misidentify and/or misarticulate their own interests—pressure from their families, the court process, and from the circumstances leading to the court process. In part due to these pressures, proponents of the GAL model contend that asking children to take positions and make decisions about what should happen to them imposes too heavy a burden on them. And finally, the argument goes, the child protective system and the court process are so underfunded and poorly conducted that, unless the child's attorney ensures that all relevant information is presented to the judge (regardless of whether it serves the child's expressed interests), the judge will be in no position to make an appropriate best interest determination.

Those who advocate the traditional attorney role, on the other hand, point out that it is the judge, and not the child's lawyer, who is responsible for determining the child's best interests. The judge bases her decision on the evidence elicited through an adversarial process.

9. See Stanley S. Clawar, Why Children Say What They Say, Fam. Advoc., Fall 1983, at 25, 25, 45 (stating that among other factors, children are motivated by fear, guilt, desire to protect their parents, parental promises of change, and lack of experience with alternatives in determining what to say to lawyers, judges, and other professionals); Haralambie supra note 3, at 6 (noting that children's "wishes may be based on threats, bribes, and other questionable bases"); Nancy W. Perry & Larry L. Teplky, Interviewing, Counseling and In-Court Examination of Children: Practical Approaches for Attorneys, 18 Cleveighton L. Rev. 1369, 1375-86 (1984-85) (suggesting that children's statements to their lawyers are hampered by their difficulty in dealing with the emotional and social pressures connected with the proceeding, their feelings of guilt, their difficulty understanding and framing responses to lawyers' questions, and their lack of understanding of the court process); Ramsey, supra note 3, at 318 (observing that the emotional nature of proceedings may interfere with children's decision-making capacity); see also Joseph Goldstein et al., In the Interests of the Child 32-33 (1986) (suggesting that, because "children of all ages have a natural tendency to deceive themselves about their motivations . . . [and] feelings, especially where conflicts of loyalty come into question," a child's lawyer may need to seek the assistance of a child development expert to distinguish between the child's expressed preferences and real preferences (quoting Anna Freud, On the Difficulties of Communicating with Children, in The Family and the Law (Joseph Goldstein & J. Katz eds., 1965))].

Children, particularly preadolescents, define their moral universe in large part by determining what pleases the important adults in their lives. See Thomas Lekson, Raising Good Children: From Birth Through the Teenage Years 160 (1983). In determining what is "right" to say, therefore, a child will often look to what statements will please his parents, rather than what is objectively true, or what he might independently want a lawyer or judge to hear. See Perry & Teplky, supra, at 1374-75.

10. See Haralambie, supra note 3, at 6 (noting that the GAL role "serves to . . . buffer the child from responsibility for the decision ultimately made"); Mlyniec, supra note 4, at 13-14 (observing that asking children to choose between parents creates anxiety, which may, in turn, decrease the accuracy of what is said); Landman & Minow, supra note 1, at 1165 (asserting that "[p]sychology and moral theory both warn the attorney not to force participation on the child" who may have good reasons for choosing not to get directly involved in choosing between parents); see also Gary B. Melton, Decision-Making by Children: Psychological Risks and Benefits, in Children's Competence to Consent 21, 35 (Gary B. Melton et al. eds., 1983) (stating that the necessity of making choices can be anxiety-provoking for children).

11. See Ramsey, supra note 3, at 292.
sarial process, and the child has a right, along with his parents and the state, to have his position zealously advocated to the judge. Moreover, giving children a voice in the process that will determine their fate empowers children, the disempowered victims of the circumstances (whether abuse, neglect, or parental separation) leading to the court's involvement. Lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment. They also acknowledge children's power, as the subjects of the decision making.

12. Guggenheim, supra note 4, at 91-92 (noting that a child old enough to engage in meaningful decision making should be afforded the same rights as an adult to direct counsel and to make his views known to the court); see also Ramsey, supra note 3, at 297-98 (arguing that including the child's view in the adversarial process increases the chance of a good decision, not necessarily because the child's view is correct, but because it requires a response from the other parties).

13. Katherine Hunt Fedetke, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 Fordham L. Rev. 1655, 1695 (1996) (suggesting that client empowerment should be a central value of the lawyering role assumed); Haralambie, supra note 3, at 33 (noting that a "child may benefit emotionally from being heard"); Mlynarc, supra note 4, at 16 (stating that by serving as a traditional attorney, the lawyer for a child in a custody proceeding protects the child's right to participate in matters affecting his life); Ramsey, supra note 3, at 298 (arguing that a child has an interest in being respected and included as an autonomous individual); see also Janet A. Chapman, Youth Perspectives on Lawyers' Ethics: A Report of Seven Interviews 64 Fordham L. Rev. 1765, 1769 (1996) (quoting a statement by 18-year-old Jonah who grew up in foster care that foster children were given more chance to make their own decisions, it would make "them feel strong inside, feel like they can be confident").

Some scholars suggest that this emphasis on client empowerment fails to take account of the disempowering, silencing effect the legal process, and particularly legal representation, can have on clients who are (as children are) less powerful than their lawyers. See, e.g., Anthony V. Aller, Reconstricive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2111 (1991) (describing how client narratives, and the messages communicated by those narratives, are displaced by "professional, traditional interpretive practices of marginalization, subordination, and discipline"); Lucie E. White, Seeking . . . The Faces of otherness . . .: A Response to Professors Sarat, Fetsiner and Kahn, 77 Cornell L. Rev. 1499, 1507 (1992) (noting that "naming[ing] the feelings of [a] less powerful other [. . .] is also to silence her voice"); Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 Brook. L. Rev. 861, 861 (1990) (hereinafter White, The Paradox of Lawyering) ("Because advocacy is a practice of speaking for—of presuming and thereby prescribing the silence of the other—the advocate . . . inevitably replays the drama of subordination in her own work."). These and other scholars raise important questions about how, under the traditional attorney model, a child's lawyer can effectively give her client her own voice in the legal proceedings. While a thorough consideration of these questions goes beyond the scope of this Article, it is important to note that this criticism of how lawyers represent less powerful clients stresses the need for greater client direction and control. See, e.g., id. at 887. Rather than arguing against the traditional attorney model's emphasis on client control, these scholars challenge lawyers assuming the traditional attorney role to be truer to this role.

14. See Ramsey, supra note 3, at 297; see also Douglas J. Besharov, Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings, 20 Fam. L. 217, 234 (1981-82) (noting that a child's view that an abuse case against a parent should be dismissed may be the "right" decision).

15. See Haralambie, supra note 3, at 32; Perry & Teply, supra note 9, at 1425 (observing that decisions made by children are more likely to be stable and long-lasting).

16. See Guggenheim, supra note 4, at 99 (commenting that "it is unlikely that the attorney will be able to resolve effectively the often complex and value-laden issues of what is best for the child"); see also Haralambie, supra note 3, at 6, 29 (noting that lawyers gain no special expertise about what is in children's best interest through their legal training or experience).

17. See Haralambie, supra note 3, at 31-32 (suggesting that the age of the child should be a relevant factor in determining how involved the child should be in the decision-making process); Lyon, supra note 3, at 699 (noting that child's decision-making competency may vary with the issue); Ramsey, supra note 3, at 310 (same).

18. See, e.g., Guggenheim, supra note 4, at 93-94 (stating that a child must have, not only the linguistic ability to direct his lawyer, but also the capacity to make considered and intelligent choices); Lyon, supra note 3, at 693 (advocating individualized assessment of capacity by the judge, focused on whether the child can "comprehend the circumstances of the case, the crucial issues, and the probable consequences of the available positions on those issues"); Wilber, supra note 4, at 349 (advocating individualized assessment of capacity by the lawyer, focused on whether the particular child is able to "articulate a reasoned preference").

Many advocates of this model draw the line at seven years of age as a crude measure of decision-making capacity. See Guggenheim, supra note 4, at 78 n.4 (suggesting seven as a possible dividing line between those who can direct their counsel and those who cannot); Ramsey, supra note 3, at 316, 320 (suggesting rebuttable presumption that children seven and older have the capacity to make reasoned decisions). By seven years of age, most children have acquired the capacity for rational thinking. Thus, in Piagetian terms, have reached the stage of "concrete operations." See Jean Piaget & Barbel Inhelder, The Psychology of the Child 92 (1969).

For children who fall below a designated age or developmental status, most lawyers favoring the traditional attorney model adopt some form of GAL approach. See, e.g., Wilber, supra note 4, at 349 (advocating "substituted judgment" approach); Lyon, supra note 3, at 701-05 (same). But see Guggenheim, supra note 4, at 78 (calling into question whether children who are too young to guide counsel intelligently should be appointed counsel at all).

While both sides of the debate try to take some account of the child’s generalized capacity, they disregard how the lawyer’s role is interpreted by the individual child. Missing from the debate, and from the discussion of the role of children’s lawyers generally, is any consideration of children’s perceptions of their lawyers’ roles, and how these perceptions should shape the role assumed.20 Put simply, it is the thesis of this Article that children routinely misperceive their lawyers’ roles, and that this misperception not only makes a mockery of the entire role debate, but also raises serious ethical problems for lawyers representing children. In my view, it is this role confusion, as much as anything, that distinguishes representing children from representing adults, and that makes the ethical and coherent representation of children so difficult.

II. CHILDREN’S MISPERCEPTIONS OF THEIR LAWYERS’ ROLES

A colleague went to talk to her client at his foster home to discuss what position she should take on his behalf at the next court hearing. She explained to him that she would be seeing the judge soon, and that she wanted to tell the judge how he felt about his placement and whether he wanted to be adopted. After a lengthy discussion, she said her good-byes and joined her husband, who was waiting in the living room to give her a ride home. The client put two and two together and asked, “Is that the judge?”

Imagine how the appointment of counsel appears through the eyes of the child client. In many jurisdictions, children do not go to court for their own dependency or custody cases.21 Even where they do attend court regularly, they will rarely be involved in any significant way in the decision to appoint counsel for them. A child’s first introduction to his lawyer might be in his home, in a foster home, at school, or at the offices of an involved agency. A strange adult appears (in itself an intimidating experience for a child) and says “Hi, I’m your lawyer.”

A lawyer is not a normal figure in a child’s life. Children are familiar with teachers, with doctors and nurses, and sometimes with other professionals, like social workers and therapists, who are involved in their families’ lives. But lawyers are not a part of the lexicon. None of their friends have lawyers, at least as far as they know, nor do they think of themselves as in need of lawyers—lawyers are for adults, and particularly for those accused of crimes.24 Moreover, to the extent children have a sense of lawyers, through television, or through the experience of a family member, they know that lawyers are people who go with you to court. They don’t just show up at your school.

20. Many commentators advise children’s attorneys to consult with them in a child-friendly setting. See, e.g., Haralambie, supra note 3, at 68 (urging lawyers to take their clientele for ice cream rather than speaking to them in their offices). While these settings may serve the important function of putting the child client at ease, they will, if anything, make it harder for the child to discern the lawyer’s role. By distancing the child from the relevant context, the ice cream-buying lawyer may make it harder for the child to understand what else (other than treating him to ice cream) the lawyer does on his behalf.

21. See Chaplin, supra note 13, at 1771 (discussing an interview with a child who admitted that, when she first met her lawyer at the age of ten, she assumed the lawyer represented her mother).

22. The child’s lack of context and relevant knowledge that could be brought to bear in interpreting the appointment of counsel in a dependency or custody proceeding contrasts starkly with the information available to a child appointed counsel in the juvenile justice system. In that system, children are much more aware of the court process, both because they tend to be older, and because they are expected to appear at court proceedings. Moreover, if a child is charged with a crime, and brought before a tribunal that functions, in many respects, like an adult criminal court, see In re Gault, 387 U.S. 1 (1967), counsel for the accused is a widely familiar role. The counsel role is frequently reinforced in movies and on television. And, unlike children’s attorneys in custody and dependency proceedings, the attorney’s role in the juvenile justice system—that of defending the child client as zealously as if he were an adult—is well defined and understood. See supra note 3. This is not to say that children in the delinquency system are never confused about their lawyer’s role. In a study conducted by Thomas Grisso in 1981, children were found to be roughly three times as likely as adults to believe that their lawyer would stop advocating on their behalf if they admitted their guilt to the lawyer. See Thomas Grisso, Juveniles’ Content in Delinquency Proceedings, in Children’s Competence to Consent 131, 143 (Gary B. Melton et al. eds., 1983).

23. Cf. Perry & Tepley, supra note 9, at 1375-76 (attributing children’s reluctance to communicate effectively with their lawyers, in part, to the fact that children are involuntary participants in the legal process). Children are not only involuntary participants in the judicial system generally, but also in their relationship with their particular lawyer, who is assigned to them, and usually cannot be changed. This contrasts with adults’ selection of their lawyers. Even where lawyers are appointed by the court, adults generally can, under certain circumstances, request a different appointment.

L. 301, 306-07 (1986) (concluding that by age 14, children have developmental competence to take positions on their own behalf in legal proceedings, and suggesting a sliding scale of involvement for children between the ages of seven and 14).

21. A recent survey of children’s representatives (attorneys and lay volunteers) in 23 counties throughout the United States revealed that their clients rarely spoke in court. While the survey data does not indicate whether the children, who did not speak, were nevertheless present, it does suggest the limited involvement these children have in their own court proceedings. HHS Study, supra note 3, at 5-26. Cf. National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 33-35 (1995) [hereinafter NJFCJ Resource Guidelines] (listing parents, attorneys, relatives with custodial interests, and court personnel among those “who should always be present” at court hearings; but listing children, for most hearings, only among those “whose presence may also be needed”).
Conscientious lawyers for children in the dependency and custody context will try to allay children's confusion by explaining their role.\textsuperscript{26} But, as I will discuss in part V, learning theory suggests that children are unlikely to learn, through verbal explanations, information that runs counter to, or simply lacks support in, their own experience. Moreover, the lawyer's explanation requires reference to the most painful, private details of the child's life—abuse by a parent, placement in foster care, a parent’s mental health or drug problems, or parental discord. If the child learns anything from his lawyer's explanations, it is that the lawyer knows a lot of embarrassing things about his family, and that she has the power to get this information without talking to him first. This realization estranges the child from his lawyer; it reinforces the child's perception that the lawyer operates in an entirely different power class from the child, in pursuit of no one's interests but her own.

To bridge this gap, the conscientious lawyer will describe what she intends to do for the child. If the lawyer assumes the GAL role, she will explain that she is there to help the child and to help the judge determine what is best for the child. This limited explanation may be comforting to some children, but it will not distinguish the lawyer's role in any meaningful way from that of a parent, teacher, doctor, or counselor. Without a good sense of the court process, most children will have no idea what kind of help the GAL is providing.

To communicate the GAL role effectively, the lawyer must convey not only a picture of the court process, but also the message that her role in the process is to tell the judge what she thinks is best for the child. She needs to convey that she will do this even if the child disagrees with the position she is taking before the court, and even if, to be persuasive, she must tell the judge things the child does not wish to share.

Lawyers acting as GALs, however, understandably do not want to blur their relationships with children by warning off their trust. Instead, they seek to foster a trusting relationship with general promises of help, and silence on the details of what that help might actually entail.\textsuperscript{27} If anything, that quest for trust and the desire to give some

\textsuperscript{26} Needless to say, if lawyers are not conscientious, the problem of role confusion will be even worse. In its recent study, HHS found that children's representatives had no contact with their clients in 16.4% of the cases where they represented children ages 5-12, and in 11.5% of the cases where they represented teenagers. HHS Study, supra note 5, at 5-6; see also Chaplin, supra note 13, at 1775-77 (discussing an interview with a young adult who could not remember his dependency lawyer at all, although he remembered, with dissatisfaction, the lawyer who represented him in the juvenile justice system).

\textsuperscript{27} See Roy T. Stuckey, Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L. Rev. 1785, 1792 (1996) (noting that it is "natural and probably necessary for guardians ad litem to encourage children to confide in them," but "doubtful... that many guardians ad litem warn their wards that their secrets might be disclosed").
While the traditional attorney does not share the GAL’s reluctance to convey the full implications of her role to her client, words may not be enough to overcome her client’s incredulity. Clues the child picks up in the context of his contacts with his lawyer will add to his confusion about the traditional attorney role. Already bewildered about why and how he has a lawyer in the first place, a child is often introduced to his lawyer (or decribed after speaking to his lawyer) by an adult, such as a foster mother, social worker, therapist, or peer, who, herself, misperceives the lawyer’s role. Moreover, no matter how hard a lawyer strives to maintain the traditional attorney-client relationship, there will be times when a child’s “childish” behavior forces the lawyer to place her authority as a supervising adult ahead of her deference to client autonomy.

The traditional attorney’s explanation of her obligation to keep client confidences will also be hard for a child to swallow. While all clients—adults and children alike—may be somewhat skeptical of their attorneys’ commitment to keeping secrets, children have a decision-making authority than their low-income, minority counterparts, whose life experiences may have made them less inclined to believe that professional power shifts were, in fact, real. See Charles E. Lewis, Decision Making Related to Health: When Could Should Children Act Responsibly?, in Children’s Competence to Consent 75, 84 (Gary B. Melton et al., eds., 1983).

Perry and Teplcy point out that not only do children have difficulty assuming an “active ‘client’ role” (instead of remaining in the “natural ‘child’ role”) but also their lawyers have difficulty abandoning the “parent” role for that of counselor. Perry & Teplcy supra note 9, at 1379. As a result of these two combined tendencies, children remain passive, “listening and obeying” rather than retaining their independence, viewing the attorney as one who works for them, and considering themselves as “equals,” as would an adult.” Id. (footnote omitted).

31. I have found that most (though by no means all) of my clients have welcomed the idea of being “the boss.” Moreover, as discussed in part III, below, lawyers assuming the traditional attorney model cannot represent their child clients effectively absent the child’s understanding of that role.

32. In my experience, children often signal their incredulity by relating to their lawyers in a manner clearly designed to affect the lawyers’ judgments or by explicitly attributing their lawyers a best interest agenda. On occasion, a child will more directly attempt to call the lawyer’s bluff. One ten-year-old client of a colleague, upon being told that he was my colleague’s boss, told her to close her eyes while he left the room. He also helped himself to a cup of coffee to try to provoke in her an unwarily reaction.

33. On one occasion, a nine-year-old client repeatedly grabbed the steering wheel and gear shift of my car while I was driving. While taking control of my car and getting my client back and buckled in his seat was clearly the right choice for traffic safety, it did not help to instill in him a sense of his decision-making authority in our relationship.

34. See Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 383 (1989) (citing a study suggesting that even clients who believe that their lawyers are obligated to keep their confidences frequently disbelieve that the obligation will be fulfilled in practice); cf. Robert A. Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L.J. 1015 (1981) (discussing unacknowledged prevalence of distrust between clients and their lawyers and the failure of professional standards to address the problem).

1996] Misperceptions of Lawyers’ Roles strong foundation in experience for their skepticism: In general, confidentiality protections apply to everyone but them. The records of their school performance, mental health evaluations, and medical examinations are all routinely shared with their parents, who are free to disseminate the information as they please. More specifically, children who have told secrets to therapists, doctors, or teachers about parental abuse and neglect have often already seen those secrets divulged, first to the protective service agency (through mandatory reporting mechanisms) and then to the court and the very people they “betrayed.” Finally, their very introduction to their lawyers, who come armed with considerable “secret” information, alerts children to the lawyers’ willingness and ability to access and divulge information without their knowledge or consent.

Moreover, for children whose lives are entwined in the child welfare system, convincing them of the independence of their lawyer’s role—whether as a GAL or a traditional attorney—is extremely difficult. To do so, the lawyer must overcome children’s assumption that any strange adult who appears to discuss child welfare matters is just a part of that system. I have had many clients refer to the child welfare agency and myself as “you all,” despite frequent explanations, and actions, making it clear that we had distinct roles, and that I would oppose the agency’s action whenever so directed by my clients. In the single incident of this nature, a nine-year-old client once asked me, “When are you all going to let my mother out of jail?"

‘Taken together, the lack of context and relevant experience with the dependency or custody court process and lawyers in that process, the misinformation provided by other participants in the system, the tremendous power disparity between adults and children, and the invasion of privacy inherent in the lawyer’s appointment and knowledge of the case, all serve to confuse the child about the lawyer’s role, particularly the traditional attorney role. While the GAL’s role is more comprehensible in that it more closely parallels other adult roles known to children, its distinction from these other “helping adult” roles will only be clear to the child client if he has a basic sense of the court process and, more important, understands how “helping” plays out in the lawyer-client context.

35. See discussion infra at notes 95-98 and accompanying text.
36. Sandra, one of the young adults interviewed by Janet Chaplin, explains: I felt that I wanted to tell my lawyer certain stuff . . . but I just felt that I would get in trouble, you know. Maybe that’s just being in the system . . . someone [the lawyer] says “I’m not going to tell anyone” but you still have that feeling, because your trust has been broken so much before . . . .

Chaplin, supra note 13, at 1771.
III. The Importance of Correct Perceptions

So why does this matter? Who cares how well a child understands his lawyer’s role, so long as the lawyer does her job?

A. Effective Representation

For attorneys assuming the traditional attorney role, there are strong pragmatic reasons for ensuring that the child understands the role. Without that understanding, a traditional attorney cannot effectively represent her client. Unless the child client understands that his lawyer will zealously advocate his positions, he will have no incentive to invest the time in client-lawyer consultations necessary for good, informed decision making, let alone the incentive to turn to his lawyer for advice, including advice involving confidential matters. And in order to empower the child client—again, one of the objectives of this model of representation—surely the child must understand what the model is, for no child can be said to be empowered if he does not know what power he has.

But for all the same pragmatic reasons, a GAL’s ability to identify and advocate a client’s best interests may be enhanced by cultivating a child’s misperception that the GAL is functioning more like a traditional attorney. A child may be more candid and show a greater commitment to and trust in the client-lawyer relationship if he does not understand that the GAL may take positions opposed to those of the child, and may use statements the child has made, or other confidential information shared, against the child’s view of his interests. Indeed, as I noted in my discussion of the causes of children’s misperceptions, the potential value to the GAL of her client’s misperceiving the GAL’s loyalties creates a motive for encouraging that misperception.

1. Fostering the Client-Lawyer Relationship

The role debate concerning the representation of children often seems to rest on an assumption that “what a child wants” (and what he knows) is a prepackaged set of information ready to be delivered to whomever asks (so long as the asker uses age-appropriate language in a child-friendly setting). In fact, however, the shape and size of the package delivered, not to mention how frequently and aggressively the child will make deliveries, will be heavily influenced by the child’s perception of who is asking, and what that person intends to do with the goods.

As with adults, a child’s willingness to develop a relationship and share information within that relationship will depend largely on his understanding of the relationship and how the information will be used. As adults, we develop very different and distinct relationships with our grocer, our close friends, our therapist, and our divorce attorney. Our sense of these relationships determines how much time we spend in each, under what circumstances. Similarly, our sense of the relationships will dictate the scope of our conversations. That is why we do not share much information with the grocer, or focus only on particular family members during therapy, does not mean that we are lying to these questioners. We are simply choosing to limit the information we share to fit the relationship. Conversely, we may choose to be particularly expansive in our divorce attorney about spousal wrongdoing, giving details we would not even share with our close friends, in hopes of achieving a desired outcome in a custody proceeding.

Children, too, assess their relationships when determining what they want to say, when, and to whom about matters close to their hearts. If a child understands nothing about his lawyer to distinguish him from the grocer, he will be, most appropriately and understandably, reticent. He will want to put a good face on a bad situation, and get out of the conversation as quickly as possible. If, as is common, the child confuses his lawyer with the agency responsible for separating him from his family or sending his mother to jail, he will likely choose to emphasize information that will change those outcomes (such as information about the good things his mother does), or he will focus his discussion on important matters he understands to be within the lawyer’s expertise. (“When are you all going to let my mother out of jail?”)

If the child client understands (rightly or wrongly) that his lawyer’s role is to represent his best interests as the lawyer perceives them, he may choose to be quite strategic about when he speaks to his lawyer and what information he shares, in an attempt to shape his lawyer’s view to fit his own view of his best interests.38 Alternatively, he may

37. See Grasso, supra note 24, at 142 (noting that juveniles’ attitudes and expectations about their lawyers may influence the degree to which children will avail themselves of the protections and advice lawyers can provide); Perry & Teply, supra note 9, at 1379 (stating that where a child fails to retain his independence in his relationship with his lawyer, the child will not be motivated to participate, and the lawyer will make bad, lawyer-driven decisions); see also Kurt W. Fischer & Helen H. Hand et al., Putting the Child Into Socialisation: The Development of Social Categories in Preschool Children, in 5 Current Topics in Early Childhood Education 27 (Lillian G. Katz et al. eds., 1984) (noting that “without an understanding of social categories and rules, children cannot act competently as members of their society”).
deliberately "tell all" in the hope that his lawyer will figure out how to rescue him from a terrible situation he has lost the power or desire to control. In the absence of that desire for rescue, he may simply seek to have as little as possible to do with his lawyer, out of a view that he has nothing to gain from the relationship.

If, on the other hand, the child understands (again, rightly or wrongly) that the lawyer is acting in the traditional attorney role, he may choose to be considerably more candid, and less strategic, in the hope that the lawyer will assist him in developing a strategy, and with the understanding that the lawyer will not use any of the information he provides in a manner contrary to his stated interests. He will be more likely to invest time and attention in the client-lawyer relationship, for he will see a connection between his investment and his desired results. A child's perception of his lawyer as a powerful ally will also inspire him to seek out his counsel for advice about important matters as they arise, to share new information, or to raise new concerns, rather than simply responding passively to his lawyer's inquiries.

2. Keeping Secrets

An important piece of the child's assessment of context is his understanding of how much control he will have over information once he shares it with his lawyer. Children involved in dependency and custody proceedings are often guarding many relevant secrets—secrets about how their parents have behaved (Did they beat their children? How often? Are they still drinking? Do they really use their income for food?), how they feel about their parents (Do they trust them? Fear them? Want to live with them? To visit them?), and why they want what they want out of the court process (Do they want to live with their grandmother because their mother is abusive? In hopes of seeing their father? Because the grandmother has threatened them?). They may also be guarding personal secrets—such as secrets about their sexual or drug history—against discovery by their parents or the court.

Children's reasons for keeping secrets relevant to legal proceedings differ somewhat from adults'. Unlike adults, who tend to be concerned with revealing information that might implicate themselves in wrongdoing, children are more often concerned with keeping secrets to protect others (such as parents). This is particularly true in the context of abuse and neglect proceedings, where the focus is on the adults' behavior. In addition to fearing the legal consequences of the potential revelation (such as the arrest of their parents, their placement in foster care or their separation from siblings), children fear the emotional consequences as well. They fear that they may disappoint, anger, or lose the love of the most important people in their lives.

While children's reasons for secrecy may differ from adults', the value they attach to preserving their secrets is nevertheless strong. Their willingness to speak candidly to their lawyers about the matters in question will therefore be affected by their sense of whether secrets will be kept. When a child is convinced (rightly or wrongly) that his secrets are safe with his lawyer, he is likely to share information more candidly, and this greater candor, in turn, will enhance his lawyer's ability to assess the merits of his case, provide good legal advice, and broader interest a child has in controlling the actions a lawyer takes on his behalf, this section focuses on the more narrow interest of preventing publication of information. As I will discuss in section III.B.1.b.i.(f), below, both of these concerns are protected when confidentiality rules apply.

39. Junah, also interviewed by Chaplin, suggests that when a child demonstrates his trust in his lawyer by confiding in him about a bad situation, he is signaling that he wants help escaping the situation. See id. at 1768-69.

40. In my observation, it is not uncommon for children to refuse to speak to their lawyers at all. And in my own experience, I have often struggled to undo the effects of caseworkers' berating commands to children to "talk to your lawyer, because she came all this way, and it's her job to decide what you need."

41. Several years ago, I was appointed to represent a 12-year-old girl who was struggling with what to tell me about her long history of sexual abuse by her father. While, clearly, part of her concern was a straightforward confidentiality concern (would I keep what she told me a secret?), at least as big a concern was whether I would use the information she told me to seek objectives that she favored. Her biggest fear was that I would use the horrifying and extensive details of her history to argue that she should be placed in foster care where she had been badly mistreated in the past. Only after I assured her that I would press for her placement with a school employee (which required me to obtain a court order against the state agency's wishes) did she agree to share the history with me.

42. Children's concerns about keeping secrets, discussed in this section, can be distinguished from concerns about how information will be used as discussed in the previous section. See supra section III.A.1. As stated above, children may avoid sharing information, even information they do not consider secret, for fear that the lawyer will use the information to achieve ends that they oppose. Conversely, children will sometimes insist on keeping secrets (out of, for example, an interest in protecting the honor, privacy, or liberty of a family member) even if they would otherwise want the information to be used to help them. While the previous section focuses on the
advocate effectively on his behalf. On the other hand, when the child client believes (rightly or wrongly) that his lawyer is prepared to share his secrets at will, the child may take care to reveal only information he is willing to share with the world at large.

A lawyer is likely to get different information from her client about events and about the client’s viewpoints depending upon the child’s perceptions of his lawyer’s role. And the more fully and freely the information flows, the better the lawyer can advocate under either model. An attorney assuming the traditional role cannot do her job at all if she does not get an accurate picture of what her client really wants. Similarly, an attorney assuming the GAL role can do a better job of assessing and advocating the child’s best interests with full and candid information from her client. If our sole focus is on lawyer effectiveness, we might advise the traditional attorney to take pains to communicate her role, and the GAL to leave much unsaid. As I will discuss in the next section, however, ethical principles counsel against the GAL’s concealing her role.

B. Ethical Representation

For the lawyer serving in the traditional attorney role, the interests in accuracy and ethics merge. Unless a child client understands that his lawyer is serving as his spokesperson in court and is duty bound to keep client confidences, the child may not share the information the lawyer needs to advocate his true wishes zealously. Under this model, the attorney’s ethical obligation is to represent the client’s true viewpoint well and to take her direction from the client. The ethical problem presented to the lawyer assuming the traditional role, therefore, is determining how to communicate her role effectively to the client so that the client understands, and can benefit from, the relationship.

But for the attorney serving as a GAL, the interests in accuracy and ethics threaten to diverge. If a child client understands the GAL role—which includes a willingness to advocate a position different from her client’s and to disclose confidences if perceived to be in the child’s interest—the child may seek to withhold information, or even misrepresent information to his lawyer. Although misleading the client into misunderstanding (or exploiting the child’s misconceptions of) the lawyer’s role may facilitate good decision making about and advocacy of the child’s best interests by the lawyer, it raises seri-

47. For a discussion of a lawyer’s confidentiality obligations under the traditional attorney model, see infra section III.B.1.a.iii.
48. See Goldstein et al., supra note 9, at 32-33 (discussing the distinction between “real preferences” and “expressed preferences”).
49. For a discussion of a lawyer’s confidentiality obligations under the GAL model, see infra sections III.B.1.b.1(f), III.B.1.b.ii.(d).

ous ethical problems. Lawyers who assume the GAL model may be forced, therefore, to choose between honesty and effectiveness.

In my view, under either model, a lawyer is ethically compelled to put honesty before effectiveness. As I will discuss at the end of this part, a broader view of what makes a GAL effective suggests that honesty and effectiveness will not always be in tension under this model. But I do not premise my conclusion about what is ethically required on this opportunity to downplay the conflict. Rather, my conclusion is based on a conviction, borne of experience, that honesty is the ethical minimum that we lawyers owe to other parties in our professional relationships, particularly to those, such as children, from whom we demand involuntary participation in those relationships. We owe our greatest duty of honesty to those we have to act and speak in reliance upon their perceptions of who we are.

The importance of lawyers dealing honestly with children is in no way lessened by their diminished decision-making capacity. Indeed, the very limits of children’s understanding, and the limits on their ability to take action independent of the lawyer-client relationship, elevate the importance of honest dealings and fair play within the relationship.

In support of my thesis, I turn to the Model Rules of Professional Conduct. The Rules reflect current consensus, grounded in a long historical tradition, on matters of legal ethics applicable to the full range of a lawyer’s professional relationships. As such, they offer a set of principles against which to test my contention that a lawyer has an ethical obligation to ensure that her role is understood by her child client, regardless of which role is assumed. After a brief consideration of the Rules’ specific treatment of the representation of children, I will go on to consider what the broader structure of the Rules tells us about the importance of role understanding under both models of representation.

50. See infra text accompanying notes 152-155.
52. While the Model Rules have been adopted, as of 1994, in 37 states, the Model Code of Professional Responsibility (1981) [hereinafter Model Code] still governs legal conduct in a significant minority of states. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyerly A AP4:107, at 1269-70 (2d ed. 1990). Because of the Model Rules’ preeminence today, and the intention of the Rules’ drafter’s to give the Rules guidance more than that provided by the Model Code, my discussion of the specific principles governing the representation of children, and the general principles applying to all lawyers, will focus on the Rules, and will address the Code only to the extent it suggests an additional or significantly different approach to the problems at issue. See 1 id. at xiv (describing the Rules as the “new center of gravity of the law of lawyering”).
child’s decision-making capacity “impaired” by minority? When is a normal client-lawyer relationship “reasonably possible”? What does it mean for a child “adequately to act in his own interest”? How and by whom should his interests be measured? And what is the relationship between the client’s ability to act in his own interest, and the lawyer’s ability to maintain a normal client-lawyer relationship?

In answering these questions, each lawyer will bring her own preconceptions to bear—preconceptions about children’s needs and abilities, about the legal process, and about the lawyer’s place in the process. And it is these preconceptions, rather than the Rule itself, that will determine what model of representation the lawyer will assume. A lawyer predisposed to depart from the normal client-lawyer relationship in the representation of children will conclude that the differences in children’s developmental and life experience make such a relationship impossible. A lawyer predisposed, on the other hand, to maintain the normal client-lawyer relationship in her representation of children will conclude that, despite some differences in children’s development and experience, the relationship can nevertheless reasonably be maintained. Similarly, a lawyer predisposed to depart from the normal client-lawyer relationship will judge a child’s ability to act in his own interest by assessing the quality of the decisions the child makes; whereas a lawyer predisposed to maintain the normal client-lawyer relationship will equate a child’s ability to act in his own interest with an ability to engage in the process and to articulate some view of his own interests.

While Rule 1.14 does not tell a lawyer which role to assume, it does suggest a framework for analyzing a lawyer’s ethical duties once a role is chosen. The Rule focuses the inquiry on the nature of the relationship between the lawyer and the child, and it is from this relationship that a lawyer’s ethical obligations flow. Once the nature of the lawyer-child relationship is identified—whether it be the relationship created under the traditional attorney model or the GAL model—we can turn to the full body of the Rules to determine what ethical obligations are associated with that relationship. In assessing a lawyer’s ethical obligation to communicate her role to her child client under each model, I will therefore begin by examining that model’s interpretation of the relationship.

a. Ethical Obligations under the Traditional Attorney Model

i. Defining the Relationship

In essence, the assumption of the traditional attorney role reflects a lawyer’s determination that maintaining a normal client-lawyer rela-
tionship is "reasonably possible" with the particular client in question.57 While the language, "reasonably possible" suggests that there are limits to when such a relationship should and can be maintained (limits a GAL would construe more broadly than a traditional attorney58), the phrase also invites accommodation within those limits to compensate for the impairment of minority. Where accommodations can be made reasonably, Rule 1.14 directs us to make them where needed to maintain a normal client-lawyer relationship. Paradoxically, it is the attorney's obligation to depart from her traditional activities to the extent necessary to create and maintain the normal relationship. While somewhat artificial, the distinction between the attorney's actions and the client-lawyer relationship is a useful one: Lawyers can and should act very differently from the norm of lawyering where necessary to establish the normal relationship with their clients.

This emphasis on relationships, as opposed to actions, is consistent with the general tenor of the Rules, which call for lawyer flexibility and responsiveness to ensure meaningful client participation in the decision-making process.59 Read in this spirit, the phrase "as far as reasonably possible" directs lawyers to make "reasonably possible" accommodations of action to normalize the client-lawyer relationship.60 So long as an accommodation can be said to enhance rather than displace the normal client-lawyer relationship, it can and should be embraced by a child's attorney assuming the traditional role.

57. Model Rules, supra note 51, Rule 1.14(a).
58. Under the traditional attorney model, the only circumstances under which a normal client-lawyer relationship would be deemed to be impossible would be where a child is entirely incapable of engaging in communication or rational decision making. See supra note 17 and accompanying text.
59. See, e.g., Model Rules, supra note 51, Rule 1.4(b) (requiring communication of information adequate to ensure informed client decision making); 1 Hazard & Hodes, supra note 52, § 1.4:201, at 85 (noting that the communication required by the Rules necessarily depends on the context of representation and the parties involved); cf. Lee A. Fizzamenti, The Lawyer's Duty to Warn Clients About Limits on Confidentiality, 39 Cath. U. L. Rev. 441, 475-76 (1990) (arguing that basing a determination about what information should be shared with the client on an assessment of what the client would consider relevant to his decision making rather than on a rigid means/ends dichotomy "helps to assure that the lawyer treats her client as another human being engaged in a cooperative endeavor . . . rather than simply as a means by which to exercise her professional skill").
60. Another reading of the "reasonably possible" language would be that, rather than requiring reasonable accommodation to maintain the normal client-lawyer relationship, it allows accommodations which depart from the normal client-lawyer relationship. This reading would suggest that the normal client-lawyer relationship consists of a prescribed set of actions and any departure from those actions would mark the end of what was reasonably possible within that relationship. Such a confutation of the conduct and relationship, however, rests on false assumptions about the monolithic nature of the representation of "normal" adult clients, and is inconsistent with the Rules' emphasis on achieving meaningful client participation.

61. In its recent study of lawyers who represent children, HIES found that a considerable majority of these lawyers received some amount of training about how to interview and communicate with children and their families. HIES Study, supra note 5, at tbl. 4.3-5.
63. See, e.g., Model Rules, supra note 51, Rule 1.2(a), (c) (requiring consultation over trial tactics and before limiting the objectives of representation); id. Rule 1.6(a) (requiring consultation regarding client confidences); id. Rules 1.7-1.9 (requiring consultation regarding conflict of interest issues); id. Rule 2.2 (requiring consultation before a lawyer can act as an intermediary).
64. Id. pmbl.
65. Wolfram, supra note 62, § 4.5, at 164 (contrasting the Model Code's "offhand" treatment of the communication obligation, with the Model Rules which "explicitly require a lawyer to maintain communications with a client"); 1 Hazard & Hodes, supra note 52, § 1.4:101, at 82 (noting that no express duty of communication exists in the Model Code).

ii. Ethical Principles Applicable to the Traditional Attorney Role

In representing children, lawyers automatically make some accommodations to establish a normal relationship with their clients: They do not correspond with children who cannot read, for example, and they adjust their language in an attempt to enhance children's understanding of the matters under discussion.61 Moreover, conscientious lawyers make considerable efforts to put their child clients at ease (by talking to them about sports, or walking with them to the water fountain). But lawyers for children do little, if anything, to accommodate their clients' limitations in understanding their lawyers' role. To assess whether a client's accurate understanding of his lawyer's role is part of a normal client-lawyer relationship and, more particularly, whether a lawyer is ethically obligated to make every effort to facilitate her client's understanding of that role, I turn to the full body of the Rules.

The Rule governing communications breaks the obligation into two parts. First, a lawyer has an obligation under Rule 1.4(a) to keep her client "informed about the status of a matter" and promptly to furnish
requested information.66 Second, a lawyer has an obligation under Rule 1.4(b) to “explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.”67 The comment to Rule 1.4 further notes that communication must be sufficient to ensure “intelligent participation” by the client.68

The comment to Rule 1.4 also expressly qualifies a lawyer’s obligation to communicate where the client is disabled, noting that while the normal standard for determining what information is to be provided is that “appropriate for a client who is a comprehending or responsible adult . . . fully informing the client according to this standard may be impracticable . . . where the client is a child or suffers from mental disability.”69 Presumably, this limitation merely intends to clarify that the Rules do not bind lawyers to do the impossible, to communicate at a level above that which their clients can comprehend.70 Far from suggesting that a lawyer’s communication obligations are limited to those sufficient to educate a “comprehending and responsible adult,” however, this comment, like the “reasonably possible” language of Rule 1.14, calls on lawyers to make “practicable” accommodations in the substance of their communications to ensure that client-lawyer communication is actually achieved.71 This reading is in keeping with the spirit of Rule 1.4, which ties the effectiveness of communication, not to any particular words or frequency of conversations, but to the achievement of informed client decision making.72

67. Model Rules, supra note 51, Rule 1.4(b) (emphasis added). Rule 1.4 provides in full:
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
68. Id. Rule 1.4.
69. Id. Rule 1.4 cmt.
70. Clearly where, as with an infant, the client has no ability to comprehend communications, the lawyer is freed from any obligation to communicate.
71. 1 Hazard & Hodes, supra note 52, § 1.4:103, at 84, explain that, “What is required to keep a client ‘reasonably informed’ will differ from client to client. If the client is a child or under another disability, the burden of communication is obviously heightened.”
72. As Wolfram explains:
The subjects covered in the consultative communication cannot be cataloged in advance. In part, the scope of the conversation depends on the existing state of knowledge and sophistication of the client, the stage of the representation at which the conversation occurs, the importance of the subject to the client’s objectives in the case. . . .

Under the traditional attorney model, a lawyer’s duty to communicate to her child client clearly obligates her, at a minimum, to tailor her communications to ensure that the child understands the issues at hand so that he can make clear his views about these issues and how they should be resolved. But, as discussed above, issue discussion alone may not be enough to put a child in a position to understand how the views he articulates will translate into attorney action. Indeed, the hardest concept for the child to understand will not be that his lawyer wants to hear his views, but that these views amount to a direction of that lawyer’s actions. Unless the lawyer’s communications also explain why and how the views expressed by the child will affect what the lawyer does, the child cannot be said to be “participating,” let alone intelligently.

More telling than the obligation to communicate set out in Rule 1.4 and elsewhere, which focuses on information sharing about the subject of, rather than the nature of, the representation,73 is the assumption upon which all the rules are built—that clients hire lawyers to do their bidding within the limits of the law.74 Because children do not get their lawyers in the “normal way,” they do not bring to the client-lawyer relationship an understanding of what the “normal” relationship is about. Only by ensuring that a child understands what a normal client-lawyer relationship is (and how it applies to him) can a lawyer make the normal relationship possible.

This understanding is necessary to make any of a lawyer’s ethical obligations to her client make sense in the context of representing children. Put simply, every ethical obligation between a lawyer and her client is premised on the concept of client control within the limits of lawful behavior. Without a clear understanding of this premise, a
child client will not and cannot take control. In order for a lawyer to ensure that she can function as a traditional attorney for a child client, and meet all of her ethical obligations flowing from that relationship, she must first create the relationship by ensuring that the child in fact knows to assume control.

Where the child lacks this understanding, the lawyer's representation is incoherent. At best, she may have an informed consultant, but not an engaged decision-making client. At worst, she will have an inattentive subject—confused about the purpose of their conversations, angry about being called upon to recite, once again, his private thoughts, or simply uninvested in the client-lawyer relationship and the judicial process. Moreover, unless the child understands that he controls decision making, his lawyer can easily manipulate their discussions to glean whatever "direction" she wants from the client.

75. Cf. Spiegel, supra note 72, at 1005 (noting that giving a lay person decision-making authority "without placing a corresponding duty of communicating information on the professional results in many instances in undermining the strength of the right to make decisions").

76. The client who asked me when I was going to let his mother out of jail, and his older brother, both have demonstrated this mix of confusion, resentment, and lack of investment in the lawyer-client consultative process. In part because of the slow pace of court proceedings in their case (tangible evidence of the limits of my powers and the powers of the court system in general), both boys, in their own ways, signaled their uncertainty about what role I played. The older boy interpreted my questions about his feelings about adoption, not as opportunities to control his fate (to others he fought to keep his mother and his desire to be adopted), but as challenges to his loyalty to his imprisoned mother. To him, I was not someone who could help him work through what he wanted and make it happen, but rather a strange adult who was asking him how much he loved his mother. His brother, much less of a brooder, became neither defensive nor sad in response to my questions. He simply shrugged and turned to more comfortable subjects of conversation, like sports and toys. Neither of these boys were too young to form or articulate positions, nor were they reluctant to do so. They just didn't know what to do with me. I, in turn, had no clear direction about how to represent them.

Another very different sort of example of a child's failure to invest in the lawyer-client relationship is offered by a colleague: She represented a 17-year-old girl who was having trouble fitting in at her group home. Despite my colleagues' efforts to explain her role and offer her assistance, she later learned from authorities that her client had run away. The child had not seen my colleague as a resource for improving or changing her circumstances. As a result, my colleague was powerless to represent her.

77. Children may, in general, be more suggestible than adults. See Perry & Teply, supra note 9, at 1393. Such tendencies are exacerbated by a lack of understanding about the purpose of the lawyer's questioning. Imagine if the man we thought was our grocer turned out to be our divorce attorney. Our nods to his friendly pleasantries about our family could lead to the dismissal of our divorce petition or alarming misreadings about our view of custody issues. Similarly, a child's conversation with his lawyer about how he likes a foster home, or his mother's boyfriend, can easily turn into a lawyer-led discussion, where the child must directly contradict his lawyer in order to take over "direction" of the representation. The lawyer will leave the conversation convinced that the child's position is in accord with her own, when, in fact, the child was unaware of taking any position at all. All he thought he was doing was politely hearing the lawyer out.

While tying the creation of the client-lawyer relationship to a client's understanding of that relationship may feel circular, the analysis is really quite straightforward. Client control (the basis of the traditional attorney model) demands client awareness of that control, and therefore ethical lawyering under this model includes the obligation to create the awareness. For the lawyer assuming the traditional attorney role, the difficulty lies not in parsing the ethical duty to communicate her role to her client, but in effectively gaining the client's understanding of that role in practice.

iii. The Special Question of Confidentiality

To a great extent, once (and if) a child's understanding of the lawyer's role is achieved, the application of an attorney's ethical obligations falls neatly into place as the obligations flowing from any "normal" client-lawyer relationship. One of the most controversial obligations, however, the obligation to keep information confidential, bears specific consideration because of its centrality to the client-lawyer relationship and the child's understanding of that relationship.

Model Rule 1.6 significantly expanded the reach of an attorney's obligation to maintain client confidences beyond the obligation imposed by the Code. Unlike the Code, which limits the confidentiality protection to information "gained in" the professional relationship that "the client has requested be held inioivate or the disclosure of..."
which would be embarrassing or would likely to be detrimental to the client.\textsuperscript{80} Rule 1.6 prevents an attorney from disclosing any information “relating to representation,” absent the client’s informed consent.\textsuperscript{81} The confidentiality principles articulated in the Code and the Rules are, of course, limited by other legal requirements that mandate the disclosure of certain information.\textsuperscript{82}

Where a lawyer assumes the traditional attorney role in representing a child, the duty of confidentiality that is so central to the “normal client-lawyer relationship” surely applies.\textsuperscript{83} This means that, except to the extent other laws require disclosure, everything a child tells her lawyer about her own history of abuse or other parental misdeeds, as well as all information gained from other sources, cannot be revealed unless the child client has consented, after a full discussion of the risks, to the disclosure.\textsuperscript{84}

As discussed earlier, however, children generally have no reason to expect that adults will keep their secrets. Indeed, many children have become involved in the court system precisely because they shared secret information about their parents’ misdeeds with doctors, teachers, or social workers who passed on that information to courts, other social workers, and their parents themselves. Given this life experience, children will be slow to understand (and, more importantly, believe) this dimension of their lawyers’ role. Without that understanding, they will be disinclined to trust their lawyers enough to share information as freely as is contemplated in the normal client-lawyer relationship; that is, as freely as necessary to ensure high quality representation and effective client-lawyer consultation.\textsuperscript{85}

\textsuperscript{80} Model Code, supra note 52, DR 4-101(A).
\textsuperscript{81} Model Rules, supra note 51, Rule 1.6(a).
\textsuperscript{82} See Hazard & Hodes, supra note 52, § 1.6:105, at 158.1 (explaining that a lawyer cannot keep information confidential where required by “other law” to disclose).
\textsuperscript{83} Cf. In re Maraziti, 559 A.2d 447, 450 (N.J. Super. Ct. App. Div. 1989) (holding that communication between a minor and his attorney in a dependency case was entitled to attorney-client privilege); see also Haralambie, supra note 3, at 35 (“Where the attorney is appointed as legal counsel, communication should remain privileged.”). While case law focuses on the more narrow protection of the attorney-client privilege, the analysis supporting inclusion of children within this protection is equally applicable in the broader context of the confidentiality protection afforded by Rule 1.6.
\textsuperscript{84} See Wolfram, supra note 62, at 306 (noting that a lawyer is prevented by the confidentiality obligation from revealing information gained from the client unless the client gives knowing and intelligent consent after being warned by his lawyer of the risks of disclosure).
\textsuperscript{85} Hazard and Hodes note that while there is “little empirical evidence of the precise degree to which clients rely on the principle of confidentiality” in determining what to say to their lawyers, “it is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of at least some clients.” Hazard & Hodes, supra note 52, § 1.6:101, at 128; see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”). But see Zacharias, supra note 34, at 352-56 (discussing a study of lawyers and laymen that suggests that there is some link between confidentiality protection and the use of and candor with lawyers, but that the link is not as strong as might be expected); Connors & Fig, supra note 76.

But the importance of a child’s understanding of the confidentiality obligation goes well beyond the traditional connection between the client’s understanding and his willingness to talk freely with his lawyer. A child’s understanding of his lawyer’s duty to keep his secrets is key to his true understanding of the lawyer’s entire role. By pledging to maintain a child client’s secrets, a lawyer sends the child the most powerful, comprehensible message about client control.\textsuperscript{86}

As discussed above, one of the central reasons children have such difficulty understanding and accepting the traditional attorney’s role is that, despite what they are told, their experience tells them to disbelieve and to distrust. Informing children that they, their adult attorney, are required as part of your job to keep all their secrets will strike them as extraordinary. In my experience, this information causes children to sit up and take notice in a way that the time-worn “I’m here to help you,” or “to tell the judge what you want,” never will. This is, in part, because a pledge of secrecy is unusually comprehensible to a child. Unlike general discussions of client control, the specifics of the confidentiality obligation can easily be put into language a child can understand.\textsuperscript{87} Children understand the concept of keeping secrets very well, and the concept of a lawyer “getting in trouble” if she tells the observance of law and administration of justice”). But see Zacharias, supra note 34, at 352-56 (discussing a study of lawyers and laymen that suggests that there is some link between confidentiality protection and the use of and candor with lawyers, but that the link is not as strong as might be expected); Connors & Fig, supra note 76.

\textsuperscript{86} See Wolfram, supra note 62, at 300 (noting that keeping client confidences signals a lawyer’s loyalty to her client and implies client trust); Robert P. Musteller, Child Abuse Reporting Laws and Attorneys’ Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203, 266 (1992) (arguing that maintaining client confidences honors client autonomy “by maintaining client control over private information”); Albert W. Alschuler, The Preservation of a Client’s Confidences: One Value Among Many or a Categorical Imperative?, 52 U. Chi. L. Rev. 349, 351-52 (1985) (asserting that the attorney-client privilege plays a central role in promoting a client’s sense that our legal system is fair and that someone is on his side). Alschuler also points out that, in the absence of the privilege’s protection, a client is forced to determine, for himself, what he should and should not share with his lawyer. Once the client must engage in this calculation, the lawyer becomes part of the system against which the client struggles, and control, as the client sees it, rests firmly with the lawyer. Id. at 352.

\textsuperscript{87} I am indebted to Gayle Hafner of the Maryland Legal Aid Bureau for this insight. It was through watching her speak with her new child clients in the simple language of keeping and telling secrets that I learned the power of this method of creating lawyer-client intimacy, and conveying the message of client control.
secrets, for these concepts are part of the ordinary social world of a child. 88

What makes the message extraordinary is not the concepts, themselves, but their application to the child's relationship with the strange, important adult. In pledging to keep secrets, the lawyer promises to follow the rules that children ordinarily can only impose on one another. In making the pledge, she signals her willingness to cross the power line between child and adult.

Far more important to a child's appreciation of his lawyer's role than the pledge of secrecy is the honoring of that pledge. When a lawyer demonstrates that she will keep her client's secrets, even the darkest family secrets, she will earn her client's trust and convince her client, if anything can, that he is, in fact, in control. 89 In part V, below, I will briefly discuss how a lawyer can demonstrate that commitment to keeping secrets to her child clients.

The more clear-cut and absolute the duty of confidentiality, the greater a child's ability to understand that duty and, consequently, the lawyer's role as a whole. Muddying the waters, however, are a number of qualifiers that exist only for children. First, state reporting laws mandate the reporting of child abuse by a broad range of professionals working with children. While lawyers are not in, most states, expressly included among the list of mandated reporters, many states' laws can be construed to include them in their more generic language describing the circumstances under which reporting is mandatory. 90 Where lawyers construe the law to require them to report abuse and neglect, the message to children will be more confusing than comforting. An explanation that says, "I am required to keep everything you tell me secret, except things you say that make me think that you are in danger," tells a child what he will already expect, namely that if he tells his secrets to his lawyer, he will lose control over them. 91 While

88. See Janet W. Astington, The Child's Discovery of the Mind 180 (1993) (summarizing studies that suggest that, by five years of age, children are capable of keeping secrets); Luckona, supra note 9, at 114, 119 (noting that whether conduct gets the actor in trouble serves as one of children's first means of determining moral culpability).

89. See 1 Hazard & Hodes, supra note 52, § 1.6:101, at 130.1 (stating that "lawyers demonstrate the moral values of trust and loyalty when they say they will keep quiet and do so, even when they are compelling reasons to speak out" (citation omitted)).

90. See Mosteller, supra note 86, at 208; cf. Haraslambe, supra note 3, at 36 (noting that unless a state's child abuse statute expressly Brigham the attorney-client privilege, the privilege remains, though it is not clear whether it applies to an attorney assuming the GAL role).

91. See Wolfram, supra note 62, at 245 (observing that one of the purposes of confidentiality protections is to assure clients that they can maintain control over their own private information). In his essay on the confidentiality protection, Professor Aalschuler points to another potential problem with explaining the limits of the protection to the client—namely, that it carries a veiled warning to the client "not to say precisely those things that the lawyer would be required to disclose. Aalschuler, supra

the client will gain something by having the duty and the limitation explained, the information is unlikely to foster the relationship of trust intended by the confidentiality principle, particularly in the early phase of the proceedings when parental mistreatment is most relevant. 94

Even in states where lawyers are not mandated reporters, the significance of the confidentiality duty is undermined by the fact that, lawyer aside, the child is not in control of his own private information. In most cases, parents, even those whose children have been removed from their care, have a right to access a child's mental health records, school reports, and child welfare records (which may in

footnote 86, at 355. In our context, the concern would be that a child, informed of his lawyer's obligation to report abuse, would carefully avoid any discussion of matters that would suggest he might be in danger.

92. See, for example, the comments of Chaplan's interviewee, Neil, who suggests that lawyers should warn child clients of the lawyer's reporting obligation before children reveal the relevant information so that children can decide what to tell their lawyers with a full understanding of the consequences. Chaplan, supra note 13, at 1780.

93. Aalschuler, supra note 86, at 353 & n.10 (stating that "giving each client [a] list of exceptions to the obligation of confidentiality before asking for his story [ ] would almost certainly destroy any significant sense of confidentiality within the attorney-client relationship." If such a list is even understood by the client). But see W. William Hodes, The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod, 33 U. Miami. L Rev. 739, 766, 813 (1981) (warning a client about the limits of the confidentiality protection may inspire the "false reassurance of the trusting relationship, rather than its destruction.

94. Puzimmenti, supra note 59, at 476-81 (suggesting that disclosing the limits of the confidentiality protection enhances client autonomy and the client's trust in the client-lawyer relationship).

Without addressing whether an explanation of the duty or intention to report child abuse would undermine their trust in their lawyers, the six children interviewed by Chaplans concluded that their lawyers should report suspected abuse and neglect, even when the confidentiality principles counseled otherwise. Chaplan, supra note 13, at 1778.

95. Reporting laws require only the reporting of information suggesting that a child has been abused or neglected, as defined by state law. Reporting obligations generally are most relevant in the early phases of dependency representation, particularly prior to the adjudicatory hearing, where the parent's conduct is directly at issue. Later in the proceedings, particularly when the child has been removed from the home, many other issues, including the appropriateness of a child's placement, the parents' compliance with the terms of case plan agreements, and the quality of visits, among other things, are more likely to be at issue. Children's confidences about their feelings toward adults, their objectives in the litigation, and their own conduct are not subject to reporting requirements. This does not mean, of course, that abuse and neglect issues cannot reemerge. The conduct of the child's new caretakers, as well as parental conduct during visits or once the child is returned to the home, can all introduce the issue of child maltreatment, and the lawyer's interest in ensuring that the protective services are effective to report.


97. See Federal Educational Rights and Privacy Act (the Buckley Amendment), 20 U.S.C. §§ 1232g, 1232i (1994) (requiring educational agencies and institutions to make school records accessible to parents and students as a condition of receipt of federal funds).
clude information about a child’s fear of his parents, his desire to be adopted, or other private information only indirectly related to the court procedure, such as his drug use and sexual activity. Moreover, no confidentiality rule confines disclosure by the parents, so they are free to share this information, as well as any secrets told to them by their children, with anyone they please.98

More frequently in the lawyer’s control, however, is the lawyer’s own access to confidential information such as medical, psychiatric, and educational reports. Statutes providing for the representation of children, and orders appointing counsel for children, generally authorize the lawyer to review all relevant information about the child, including health, mental health, and educational information, and to release this information to others, both without client consent.99 Even the most committed “traditional” attorneys for children will be loathe to encumber their access to this information by ensuring that they have their client’s consent before accessing each piece of information in question.

Although it is hard for any lawyer to put herself in a position of being less prepared by limiting her access to information, the traditional attorney role demands that the child client be treated as the adult client. It is essential to let the child control at least his lawyer’s access to his private information that has not already been disclosed to other parties in the course of the litigation if the confidentiality principle, and, more fundamentally, the principle of client control are to mean anything to the child.100 Until the child understands that his

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98. Cf. Riccardi v. Tampax, Inc., 493 N.Y.S.2d 798, 799 (App. Div. 1985) (illustrating parents’ authority to waive the doctor-patient privilege on behalf of their child). In rare instances, a lawyer can invoke the power of the court to block the release of private information to a parent. Such action sends a powerful message to the child about his strength in the process and the loyalty and respect shown to the child by his attorney. See, e.g., Daniel C.H. v. Daniel O.J., 269 Cal. Rptr. 624, 630-31 (Ct. App. 1990) (holding that a parent accused of child molestation should not be entitled to have access to communications made by the child to a therapist as part of treatment for abuse).
99. See HHS Study, supra note 5, at 2-2 (citing statutes giving children’s representatives “open access to various records and information concerning the child . . . including records from . . . public agencies, hospitals, . . . courts, law enforcement, social services, and schools”); see also Haralambe, supra note 3, at 7-9 (discussing a lawyer’s authority, by statute or court order, to access and disclose confidential information). Although both sources speak in terms of “GALs,” it appears that their discussions intend to encompass all lawyers charged under state law with the representation of children in dependency matters, and, in Haralambe’s discussion, lawyers representing children in private custody disputes, as well.
100. The commentary accompanying the Proposed ABA Standards calls on lawyers of older children to obtain the child’s consent before accessing the child’s records, even if the consent is not required. In his letter to Linda Elrod commenting on this requirement, Professor John J. Sampson argues that requiring the child’s consent to access materials that can be accessed by every other party in the litigation does little

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to protect the child’s confidentiality, and “authorize[s] the child to direct his or her own lawyer to commit malpractice,” by ensuring her that she is unaware of materials that may be “part and parcel of the litigation.” See Letter from Professor John J. Sampson to Linda Elrod (Oct. 6, 1995) (on file with the Fordham Law Review). Because I agree that information already disclosed to other parties in the litigation should be reviewed as part of the representation of any client, I narrow my recommendation regarding when consent should be required to information not already disclosed.
101. 1 Hazard & Hodges, supra note 52, ¶ 1.6:102, at 130.2 (suggesting that the confidentiality principle “often requires that victims of a client’s misdeeds be forsaken”). But see supra note 44 (qualifying my distinction between the confidences of adults and children).
102. Some commentators have suggested that the ethical rules authorizing a breach of confidentiality to prevent the client from committing criminal acts likely to lead to the death or serious bodily harm of a third party should also be construed to authorize disclosures to prevent the client from being seriously harmed by the criminal acts of an abuser. See Haralambe, supra note 3, at 36.
103. See id. at 27 (criticizing the traditional attorney model for ignoring “the dramatic and often dangerous fact that the wishes of the child may be driven by irrational forces and may even be self-destructive”).
pect of the client-lawyer relationship: They strip their clients of any decision-making control and assume responsibility for ascertaining the child’s best interests. What, then, is left of the client-lawyer relationship, and, consequently, the ethical principles that govern a lawyer’s conduct? More particularly, what ethical obligations, if any, does a lawyer acting as GAL have to ensure that her client understands that she will take whatever action she determines is in the child’s best interest, regardless of what the child thinks of that action?

Returning to the framework of Rule 1.14, we can analyze the GAL’s approach in two ways. First, the assumption of the GAL role may reflect a determination that the entire normal client-lawyer relationship is not “reasonably possible.” Under this reading, the GAL role replaces the lawyer-client relationship with a new relationship in which the lawyer does not act as a lawyer, the client is not really a client, or, perhaps, some combination of both. Second, the assumption of the GAL role may reflect a determination that client-driven decision making is not reasonably possible, but that the rest of a normal client-lawyer relationship (and hence the lawyer’s ethical obligations flowing from that relationship) remains the same as for adult clients. As the following discussion will establish, under both analyses, the GAL still has an ethical obligation to ensure that the child understands the GAL or “best interest” role, even if that understanding compromises the GAL’s ability to assess and advocate for the child’s best interests.

i. Constructing a New Relationship
(a) The GAL As Nonlawyer

If the GAL-child relationship is seen as a relationship entirely distinct from the “normal client-lawyer relationship,” we must look to how it functions in order to define it. It is tempting to suggest that, once lawyers abandon the traditional client-lawyer relationship, they are, in fact, not acting as lawyers at all, and therefore the ethical obligations unique to lawyers (as opposed to those applicable to all citizens) are inapposite. Before addressing the limitations of this analysis, it is worth giving it its due. Analyzing the GAL as a nonlawyer does suggest a rudimentary minimum: Where lawyers assume a role entirely disconnected from their ethical obligations as lawyers, the basic moral values of honesty and fair play (and, perhaps, the legal prohibitions against fraud) dictate that the children they “represent” must at least be warned that their lawyers really are not acting as lawyers at all. Better yet, in such circumstances, the child, the court, and the other parties should never even be informed that the person appointed to represent the child is a lawyer, for that fact is no more relevant to what she will or must do than if she were assigned to take over the teaching of a second grade class. Indeed, to the extent the GAL role is interpreted to allow a wholesale abandonment of the lawyer’s professional role, there is no reason GALs should be lawyers at all. Social workers, psychologists, neighbors, and community leaders may all be better judges of a child’s best interests than lawyers, who have neither formal nor experiential training in what is best for children.104

Many states mandate, however, that the child’s best interests be represented by none other than a lawyer, and lawyers assuming the GAL role still function in some contexts very much like lawyers. The GAL’s conduct in court, and in relating to the other lawyers and parties in the case, is not appreciably altered by her best interest mission.105 The assumption of the GAL role reflects a significant shift in her professional relationship with her client, but in no way signals an abandonment of her professional role in the system. To the extent she remains a player in that system, the relevant ethical rules of that system still apply.

(b) The Child As Nonclient

While a GAL lawyer maintains her professional obligations even outside the normal client-lawyer relationship, the child’s role as client changes dramatically. Far from establishing the objectives of representation and controlling decision making, as contemplated by the Rules,106 the child becomes an object whose interests are determined by the GAL, and whose views are taken as relevant, but not controlling. A child in this position is stripped of the status of client, and of the basic ethical protections that flow from that status.107

A GAL’s wholesale abandonment of the normal client-lawyer relationship presumably reflects her determination that the child “cannot adequately act in [his] own interest.”108 When such a determination is made, Rule 1.14(b) authorizes appointment of a guardian charged with identifying the named client’s interests for the lawyer.109

104. See Herzog, supra note 5, at 338–40.
105. In some states, the responsibilities of GALs for filing motions, issuing subpoenas, examining, and cross-examining witnesses, among other lawyerly functions, are expressly provided for by statute. See statutes cited in FTS Study, supra note 5, at 2-3 & nn.28-34.
106. See Model Rules, supra note 51, Rule 1.2(a); see also supra note 74 and accompanying text.
107. See 1 Hazard & Hodes, supra note 52, § 1.14:101, at 439 (positing that where a person’s impairments are so great that a normal client-lawyer relationship is not reasonably possible, “assigning that person the role of ‘client’ is a mere formality”).
108. Model Rules, supra note 51, Rule 1.14(b); see also 1 Hazard & Hodes, supra note 52, § 1.14:101, at 439 (suggesting that Rule 1.14(a) applies where a normal client-lawyer relationship is difficult, whereas Rule 1.14(b) applies where a normal client-lawyer relationship is impossible).
 guardian, then, takes over the client’s role of directing the lawyer’s actions.\(^{110}\)

As the commentary to Rule 1.14(b) acknowledges, however, appointment of a separate guardian may prove "expensive or traumatic to the client."\(^{111}\) In such cases, the lawyer is called upon to "act as de facto guardian."\(^{112}\) Where a lawyer appointed to represent a child assumes the role of guardian for that child, she relies on her own views (as the guardian), rather than those of the child, to determine what interests to advocate (as the lawyer). In shifting decision making from the child to herself, the lawyer has, in effect, changed clients: Her (as the guardian), rather than those of the child, to determine what duty of loyalty not to the child’s view of his protections owed to clients. most particularly the protections of loyalty if the nonclient appears to misunderstand. In short, it is the lawyer’s responsibility to protect the nonclient from misplaced reliance on the lawyer, even if that reliance would aid the lawyer’s service of her own client. Lawyers cannot exploit nonclients’ inaccurate belief that communications will be kept confidential, or unbiased advice given, to serve the interests of their true clients. While lawyers do not owe a duty of loyalty to nonclients, they are certainly obligated to prevent nonclients from mistakenly acting upon the belief that the lawyer does, in fact, owe them that duty.\(^{113}\)

The analogy to the best-interest representation of children is apparent: Where an attorney’s true client is not the child, in the traditional sense, but the child’s best interests as the GAL perceives them, at a minimum, the GAL must ensure that the child does not mistakenly conclude that the lawyer’s duties are owed to him. In other words, the GAL must inform the child that she may urge the court to take a position contrary to the child’s wishes, and is under no obligation to keep any information about the child or her family confidential.\(^{114}\) To fail to ensure that the child understands the limits of the GAL’s representation is to set the child up to rely inappropriately on the GAL. To rely on the child’s role confusion to extract family secrets or the child’s private views is no less exploitive than relying on the misplaced confessions of the classic unrepresented party.

(c) Ethical Principles Applicable Where the Child is Viewed As a Nonclient

Under the above analysis, children are divested of all the ethical protections owed to clients, most particularly the protections of loyalty and confidentiality, for they lack the status that entitles them to (indeed, justifies) those protections. Lacking the protections owed by attorneys to their clients, surely children are entitled, at a minimum, to the protections afforded to nonclients; for it seems the epitome of unfairness to deny the child the ethical protections due to the client and nonclient alike—all in the name of the child’s best interests.

Lawyers owe nonclients with whom they come in contact in the course of representation basic duties of honesty,\(^{115}\) respect,\(^{116}\) and, most significant for our discussion, the duty to ensure that the nonclient does not miscalculate the lawyer’s role.\(^{117}\) The Rules make special mention of the lawyer’s obligation to ensure that unrepresented

110. See id. Rule 1.14(b) cmt. 3 ("If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."); 1 Hazard & Hodges, supra note 52, ¶ 1.14:102, at 440.1 (suggesting that a guardian appointed to represent the interests of a severely disabled person be viewed as the lawyer’s primary client and the disabled person as the derivative client, or third party beneficiary); see also Noe v. True, 307 F.2d 9, 12 (6th Cir. 1974) (noting that a GAL is an officer of the court with authority to "engage counsel, file suit, and to prosecute, control and direct the litigation").

111. Model Rules, supra note 51, Rule 1.14 cmt.

112. Id.

113. See 1 Hazard & Hodges, supra note 52, ¶ 1.14:102, at 440 (suggesting that where the client is unable to communicate, the lawyer "does not really represent [the client] as such, but instead represents an abstraction: the best interests of that person.").

114. See Model Rules, supra note 51, Rule 4.1 ("Truthfulness in Statements to Others").

115. See id. Rule 4.4 ("Respect for Rights of Third Persons").

116. See id. Rule 4.3 ("Dealing with Unrepresented Persons"). Rule 4.3 provides: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented

individuals understand that the lawyer is not disinterested (that is, not free to assist the nonclient impartially) and to clarify the lawyer’s loyalties if the nonclient appears to misunderstand. In short, it is the lawyer’s responsibility to protect the nonclient from misplaced reliance on the lawyer, even if that reliance would aid the lawyer’s service of her own client. Lawyers cannot exploit nonclients’ inaccurate belief that communications will be kept confidential, or unbiased advice given, to serve the interests of their true clients. While lawyers do not owe a duty of loyalty to nonclients, they are certainly obligated to prevent nonclients from mistakenly acting upon the belief that the lawyer does, in fact, owe them that duty.\(^{117}\)

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(d) The Child As Entity Constituent

Another approach to analyzing the GAL’s obligation to ensure the child’s understanding of her role is suggested by Hazard and Hodes in their treatise The Law of Lawyering. Hazard and Hodes suggest that a lawyer for a disabled client can be analogized to the lawyer for an entity (most classically a corporation) whose ethical obligation is to represent that entity’s interests, even in the face of conflicts with that entity’s constituents or agents.\(^{118}\) By analogy, the GAL’s ultimate ethical duty is not to the child (the constituent) but to the entity equivalent—the child’s best interests. Just as entity lawyers will consult with entity constituents to shape the entity representation (and, indeed they will conduct their representation almost exclusively through these constituents) so, too, the GAL will consult with the child to help determine what will best serve

person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id. (emphasis added).

117. Id. Rule 4.3 cmt.

118. For a discussion of a lawyer’s confidentiality obligations under this analysis, see supra section III.B.1(b)(i)(f).

119. 1 Hazard & Hodges, supra note 52, ¶ 1.14:102, at 440.
the child's interests. And just like entity representation, absent a conflict, representation of the child's best interests will be indistinguishable from representation of the child in the traditional sense. But, in both contexts, the people are not the clients. In both contexts, the real clients, to which the lawyers owe their client-lawyer duties of loyalty and confidentiality, are the best interest abstractions.120

Hazard and Hodes stop their analogy, however, at the point of role description. They do not take the next step: exploring what obligations the analogy suggests the lawyer owes the "constituent" child.

(e) Ethical Principles Applicable Where Child is Viewed As Nonclient Entity Constituent

Rule 1.13, which sets out an attorney's ethical obligations in the context of entity (or organizational) representation, specifically addresses the duty owed to nonclient constituents: "In dealing with an organization's directors, officers . . . or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."121

Particularly because constituents are likely to be confused about whom the lawyer represents, it is essential that entity lawyers protect constituents from their own confusion. Absent the clarifying information, the constituents, who routinely consult with the lawyer about the entity representation, and who are, themselves, charged with serving the entity's interests, will be inclined to assume, wrongly, of course, that any damaging communications they share with the lawyer will be kept confidential, and that the lawyer is an appropriate source of advice about the constituent's potential legal problems.122 As Hazard and Hodes put it, fairness dictates that the lawyer "explain exactly who he represents, when dealing with constituents who might otherwise be misled."123

No other "constituent" is more vulnerable to being misled than a child whose lawyer talks about representing him, in fact she owes him no duty of loyalty. Like the entity constituent, the child provides the lawyer with material guidance in the course of the representation. Like the entity constituent, the child sees himself as the safeguarder of the abstract interests at stake. And, as in the entity context, the lawyer has a strong motive to encourage the child's confusion. Unlike constituents in the classic entity relationship, however, children represented by GALs generally do not have the option of retaining separate counsel.124 This means that the only person in a position to warn the child about the limits of his protections in the legal system is the GAL herself.

In discussing entity representation, Hazard and Hodes note that this representation is very difficult in practice:

Lawyer-client communication about the representation is particularly tricky, because an entity is a legal fiction and cannot literally 'consult' a lawyer or give her directions. Instead, communication in both directions is of necessity accomplished through human actors—the very individuals who are not to be considered clients. The matter is further complicated by the fact that although these individuals are not themselves clients, they generally are the trusted agents of the entity client and are generally presumed to be acting in its best interests. Paradoxically, therefore, a lawyer for an organization normally serves his client—the entity—by suspending the fiction and consulting with the available human actors after all.125

Hazard and Hodes go on to say that a lawyer best serves the entity by "keeping lines of communication open to those whose job it is to act for the entity, and being guided by their judgments, which she should normally assume are in the best interests of the entity."126

Of course, GALs generally make no such assumptions about the correctness of the child's views and judgments. Indeed, rather than assuming that children's judgments are normally in their best interests, GALs start from the assumption that children are prone to making bad decisions on their own behalf. Unlike entity representation, which is guided by the judgment and actions of constituents absent strong legal indications to the contrary, the GAL has no such anchor to tie her representation of the abstraction down to earth.127 Her liberty and willingness to detach her best interest judgments entirely from the judgments of the child suggest that her obligations to warn the child of her true allegiance are even greater than those of the entity representative.

120. Id.
121. Model Rules, supra note 51, Rule 1.13(d).
122. See 1 Hazard & Hodes, supra note 52, § 1.13:109, at 400.
123. Id. § 1.14:109, at 400 n.3.
124. Most children lack the sophistication and resources (financial and otherwise) to seek out separate counsel. Even when they successfully do so, however, there is no guarantee that the court or the guardian will authorize retention or appointment of the separate counsel. For a particularly extreme example of a child's difficulty obtaining separate counsel of her choice to represent her own views in opposition to those represented by her GAL, see In re A.W., 618 N.E.2d 729 (Ill. App. Ct. 1993).
125. 1 Hazard & Hodes, supra note 52, § 1.13:102, at 388-89.
126. Id. § 1.13:109, at 400.
127. Where the lawyer detaches her best interest inquiry from the views of her client, she creates a considerable risk that she will impose her own values upon the client, rather than determining, more objectively, what the best result would be for the child. See id § 1.14:301, at 447.
(f) Confidentiality Obligations to the Nonclient Child

The crux of the concern reflected in the rules governing obligations to nonclients is that these nonclients will reveal information to the lawyer under the false impression that the information will be kept confidential, or that it will only be used to serve the confider's interests. While, clearly, the lawyer owes the nonclient no duty of confidentiality,\(^\text{128}\) she cannot exploit the misunderstanding for the benefit of her true client.

As Hazard and Hodes explain, again in the context of entity representation:

[Where entity and constituent interests diverge,] it might be said that the lawyer's duty of diligent representation requires him to discover as much information as he can from a [constituent] with interests potentially adverse to those of the entity, even if that person is severely disadvantaged. However, although the lawyer's [constituents] are not entitled to the full loyalty that a client deserves, they may have grown accustomed to treating the lawyer as if he owed full loyalty to them, and may not understand that he has served them only because they were serving a common master. Fairness therefore dictates that they not be lulled into confiding in someone who might become an adversary's lawyer. To learn confidences under false pretenses would be taking unfair advantage of nonclients, and must be avoided even if the information might be useful to the client.\(^\text{129}\)

To get a sense of how these misplaced confidences are inspired in children, it is worth briefly parsing the confidentiality protection. In its classical form, the confidentiality protection prevents the publication of client confidences, absent client consent. But a client's interest in confidentiality is often focused not specifically on avoiding publication, but on ensuring that the information in question is only used by the lawyer for the client's benefit. The confidentiality obligation, particular when coupled with the interrelated obligation of loyalty, prevents a lawyer from using confidential information in a manner detrimental to the client's interests. In other words, the confidentiality protection allows a client not only to prevent the publication of information, but also to control for what ends the publication of information is used.

As discussed earlier, children are far less likely than adults to assume that their confidences will be protected.\(^\text{130}\) To the extent chil-

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\(^{128}\) Id. § 1.6:101, at 128-30 (noting that confidentiality protections apply only to clients, and therefore the threshold question in applying the confidentiality rule is whether the person in question is, in fact, a client).

\(^{129}\) Id. § 1.13:501, at 430; see also Alschuler, supra note 86, at 351 (concluding that it is unfair for a lawyer to "obtain information by implicit or explicit deception," even if such deception produces information valuable to the legal system's search for truth).

\(^{130}\) See supra section III.B.1.a.iii.
client (as part of her general assumption of decision-making authority), the obligation to explain must remain, if the relationship is to be preserved to the fullest extent possible.

The structure of Rule 1.4, governing a lawyer's communication obligations, supports the severance of the lawyer's duty to inform from the client's authority to decide. Rule 1.4 divides the lawyer's communication obligation into two parts: subsection (a) speaks broadly of a lawyer's general obligation to keep a client informed, while subsection (b) focuses more specifically on lawyer-client communication as a means of ensuring effective client decision making. Although Rule 1.4(b)'s connection between effective communication and client decision making is necessarily severed by the GAL approach, the attorney's basic obligations set out in Rule 1.4(a) to "keep a client reasonably informed about the status of a matter" can and therefore should remain. And, as already noted, the commentary to Rule 1.14 makes clear that, even where a separate legal representative has been appointed to make all legal decisions on behalf of an incompetent client, the lawyer has a continuing obligation, as far as possible, to keep the client informed.

In the context of this Article, the information to be conveyed to the client is information about the GAL's role. To the extent communication of the GAL's role remains "reasonably possible," my analysis circles back to my discussion of the obligations imposed on a child's attorney assuming the "traditional attorney" role: Although a child's minority will require his lawyer to communicate differently in order to communicate effectively, a lawyer should be expected to make such adjustments in order to achieve the purpose behind the communication obligation, namely a client who understands what his lawyer is doing.

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137. Model Rules, supra note 51, Rule 1.4(a) & (b). Wolfram distinguishes between "reporting" communications (governed by Rule 1.4(a)), and "consultative" communications (governed by Rule 1.4(b)). Wolfram, supra note 62, at 164-65. Hazard and Hodes suggest that Rule 1.4(a) focuses on communication as a means of improving the client-lawyer relationship, whereas Rule 1.4(b) focuses on communication as a means of ensuring meaningful client participation. 1 Hazard & Hodes, supra note 52, § 1.4:102, at 83. For a full text of Rule 1.4, see supra note 67.


139. Id. Rule 1.14 cmt. ("Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." (Emphasis added)).

140. Id. Rule 1.14(a). (My discussion here focuses on the nature of the GAL's ethical obligations. Later, I will discuss the extent to which meeting these obligations is pratically possible. Clearly, this division is somewhat artificial—few would contend that lawyers are ethically obligated to do the impossible. Considering the scope of the ethical obligations first, however, will focus the feasibility inquiry more precisely, and will prevent the feasibility inquiry from swallowing up the ethical analysis.)
other way (construing the best interest as the original client and the child as the potentially adverse additional client) the child would have the authority to reject the lawyer's representation, and seek separate counsel. While both of these approaches appear eminently fair (and both create the opportunity for securing separate representation for the expressed and best interests of the child without focusing the court's attention on the lawyer's disagreement with her client's position), 142 these proposals exceed the scope of my discussion here. It is asking far less of a lawyer, and surely only what is fair, to require her to ensure that her client understands her loyalty conflict. Lacking the power to control his lawyer's role or retain his own counsel, the child surely at least has the right to protect himself from some of the most harmful consequences of that divided loyalty.

(d) Confidentiality Obligations within the Modified Client-Lawyer Relationship

One of the primary risks associated with a lawyer's representation of two clients with potentially conflicting interests is the risk that the duty of loyalty to one client will undermine the lawyer's commitment to keeping the confidences of the other. 144 The centrality of the confidentiality obligation to the client-lawyer relationship requires us to explore whether this "piece" of the relationship should be maintained (and therefore what should be communicated to the child client) where the GAL role is viewed as limiting, but not eliminating, the client-lawyer relationship.

In theory, the GAL could still be duty-bound to keep confidences, and could therefore inform her clients that their secrets were safe with her. It is hard, however, to make much sense of this approach in the context of best-interest representation. 147 A lawyer charged with zealously advocating for her client's best interests can hardly be serving that mission by keeping secret information that directly bears on those interests. Indeed, it can be argued that revelations of confidences to the court are permitted under Rule 1.6(a) as "implies authorized in order to carry out the representation," 148 where the terms of the representation are established by a statute or court order directing the

versely effecting" is read, as Hazard and Hodes suggest it should be, to include "a client's subjective feeling of betrayal." 1 Hazard & Hodes, supra note 52, ¶ 1.7:207, at 236.3.

145. Unlike the options suggested in the text, which give the child the authority to protect his own interest in having a zealous advocate, the common practice of requiring the lawyer to request appointment of a separate GAL when she disagrees with her own client's position places the child's lawyer in the untenable position of signaling to the court her disagreement with the very position she is charged with advocating zealously.

146. See Hazard & Hodes, supra note 52, ¶ 1.6:406, at 218.

147. See, e.g., Ross v. Gadwh, 554 A.2d 1284, 1285 (N.J. 1988) (holding that the attorney-client privilege does not apply where the attorney is appointed as GAL).

148. Model Rules, supra note 51, Rule 1.6(a).
GAL will be used to guide the GAL’s assessment and representation of the child’s best interests, regardless of whether this representation is consistent with what the child wants.

Whether his very words are repeated, or simply inspire the GAL to take particular action on his behalf, the child client loses control of the private information he shares with his GAL, and, therefore, he cannot be said to be protected by the confidentiality principle. Moreover, in the pursuit of the child’s best interests, the GAL is surely obligated to uncover whatever confidential information she can from other sources. Unlike the traditional attorney, who must risk sacrificing thoroughness in the interest of preserving client control, the GAL is intended to sacrifice client control to ensure a thorough and accurate assessment of the child’s best interests.

Despite retaining certain characteristics of a “normal client-lawyer relationship,” the child client in this second GAL scenario, just as in the first (where the child is viewed as a nonclient), must be made to understand, not only that he cannot control his own legal position, but also that he cannot control the information he shares with his lawyer in discussing what that legal position should be. While this explanation may undermine the GAL’s ability to ferret out and press for the child’s best interests, the GAL cannot ethically withhold the explanation, or cultivate the child’s misunderstandings, to induce the child to say things he would otherwise not say.

2. The Value of Ethical Representation to Children

Under the traditional attorney model, the value of ensuring that the child understands his lawyer’s role is straightforward: Without the understanding, the child will make assumptions about his unknown adult that will undermine the lawyer’s ability to consult freely with the child, identify the child’s positions, and take direction from him. The better the child understands what it means to have a “real lawyer” acting on his behalf, the better the child can take advantage of that lawyer’s services—by bringing issues to the lawyer’s attention, discussing options, and sharing sensitive information. And without this understanding, the model will fail to have its intended empowering effect. No matter how much power a lawyer is prepared to cede to her child client, the child will not be empowered unless he understands what his lawyer is offering. Helping the child to understand that he has a champion, someone who will press his position no matter the odds, will help him discover and use his power in the system.

But what of the GAL model? Here the benefits to the child of full role disclosure are less clear. While honesty, forthrightness, and fair play are all admirable virtues, does the child really benefit from their exercise, if his GAL’s effectiveness is diminished in the process? Put another way, once it is determined that a child needs an adult, a law-

149. Of course, where state reporting laws mandate that the lawyer report abuse and neglect to state authorities, this mandate would trump any confidentiality duty set out in the Rules, regardless of the model of representation. See supra note 90 and accompanying text.

150. Sandra, one of the children interviewed by Janet Chaplan, captures this experience with the following description:

I only see you one time a year and it’s like an hour before we go to court. And then the first thing [the lawyer says] is “Oh, I want to speak to Sandra alone.” So then that makes my aunt feel like, “What’s she telling them?” and in time it makes it bad for me. . . . It kind of puts you on the spot if you’re in a bad situation. It’s hard to open up because you’re not sure. And then you can’t go in the court room, so you’re wondering.

Chaplan, supra note 13, at 771-72.

151. See supra discussion in section III.B.1.b.i.(f).
yer, to protect him from his own bad judgments, shouldn't our reading of the lawyer's ethical obligations be adapted to serve that end?

If children's best interests were obvious and unambiguous, GALs might be justified in abandoning their traditional ethical obligations as lawyers to achieve those clearly best ends. But best interests are, in fact, extremely hard to define, and no honest GAL can deny that some of her best-interest judgments ultimately did not produce the best results for her clients. The limitations on the GAL's ability to identify best interests argue for full role disclosure to the child client for several reasons.

First, only where the child fully understands that his GAL will take whatever action she thinks is best, and more specifically, what particular actions the GAL is contemplating, will he be in a position to attempt to influence those actions. This opportunity to influence the GAL, in addition to offering the child a modicum of power in the process, is likely to improve the quality of the GAL's best interest judgments. The child's greater expertise can refine and sometimes entirely alter the GAL's crude judgments about what is best. For example, a child having the benefit of understanding that his GAL plans to oppose his desire to remain with his mother will have an opportunity to convince the GAL that the alternative the GAL proposes, such as living with the grandmother, is also not appropriate; or at least that there is a better alternative (or an alternative the child will be more comfortable with); or even that, given the problems with the alternatives, remaining with the mother is not such a bad option for the child after all. Although the GAL model allows decisions about positions to rest ultimately with the GAL, requiring the GAL to share with her client her overall goals in the representation, and her specific views about how to achieve those goals, forces the GAL to hold those views up to the light of her client's opinions and expertise. Indeed, a best interest judgment made in the absence of this open conversation with the client should be viewed with considerable skepticism.


153. In her interview, Sandra made this point, which Chaplan summarizes as follows:

"[E]ven if the lawyer makes a decision to take a position different from the child's preference, Sandra believes that if the child is involved in the decision-making process, the child is more likely to tell her lawyer what the problem really is. Client-centered interviewing makes the difference between whether a client will talk to her lawyer or not, and whether the lawyer can represent her effectively.

Chaplan, supra note 13, at 1772.

154. As noted above, children are often never seen by the judge. See HHS study, supra note 5, at 5-26 (reporting that children rarely speak in court). Proceedings themselves, which decide crucial matters such as where children will live, whether they will get to see their parents, what services they will receive, or whether they will be freed for adoption, often last for only minutes. See NCJFCJ Resource Guidelines, supra note 21, at 10 (noting that deficient resources, and increased caseloads, hearings and parties have "heavily" affected the quality of the decision making process and that cases are "often rushed"); Philadelphia Citizens for Children and Youth, Report of the Dependency Court Watch Project 5 (1990) (reporting that of 529 cases observed, 36% lasted less than five minutes, and only .4% lasted over 45 minutes).
I am convinced, however, that it matters far less which role is assumed than that the role is communicated to the child.\(^{157}\)

IV. CHECKING THE LAWYER'S ETHICAL OBLIGATIONS AGAINST THE CHILD'S CAPACITY TO UNDERSTAND THE LAWYER'S ROLE

A. The Link Between Ethics and Capacity

Children's frequent confusion about their lawyers' roles cannot be explained away simply as the product of inattentive lawyering. While a lawyer's failure to attend to her client's confusion will certainly exacerbate the problem, even a lawyer's most conscientious attempts to explain her role may fail to illuminate (or convince) the confused client. The very commonness of these misperceptions in my own experience, and in my observation of highly skilled lawyers, reflects just how difficult it is to communicate the roles effectively to children. As discussed in part II, children have every reason not to understand their lawyers' roles and the relationships they are expected to have with their lawyers. Children may be particularly resistant to understanding explanations about the traditional attorney role because it relies on the unlikely premise that an adult will cede authority to a child, but both roles are confusing for children, who lack the context and experience to make sense of these unusual relationships.\(^{158}\)

The difficulty even the most conscientious lawyers have in conveying their roles to their child clients raises the question whether such role communication is in fact possible. Ultimately, I must measure my ethical analysis against the reality of what can be done. This takes us back to Rule 1.14's "reasonably possible" inquiry, which recognizes

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157. Howard Lesnick's comments, in a very different context, offer a fruitful comparison. In considering "whether an attorney had any legitimate independent interests in the way a case was to be handled on behalf of a client," Professor Lesnick writes:

"I've come to a curious conclusion: I honestly do not think it matters which position the attorney takes—to leave the final decision with the client or insist on keeping it—so much as I think it matters whether the attorney makes either decision in a way that respects the concerns of both attorney and client, and treats the client as an understanding independent person, with interests and sensibilities separate from the attorney, and the ability and obligation to assume responsibility for his or her decisions."


158. As discussed above, children's misperceptions of the GAL's role can probably be attributed, in part, to the emotional and professional difficulties GALs have in totally "coming clean" about their role and about the details of the positions they are taking. But even if the GAL takes pains to clarify her role, the child is likely to remain confused, because, just like the child represented by the traditional attorney, the child has little sense of the context in which the GAL performs her representation.
that there are practical limitations to a lawyer's ethical obligations to her disabled clients.

Under my analysis, the GAL role is premised on the conclusion that, in whole or in part, the normal client-lawyer relationship is not reasonably possible. From this premise, one could argue that the same considerations that justify the GAL approach make effective role explanation to the child impossible, and therefore not ethically required, under the GAL model. But as a matter of ethical analysis, there is no reason to assume that the ability to maintain a normal client-lawyer relationship and the ability to achieve normal client-lawyer role understanding coincide. Indeed, the commentary to Rule 1.14 expressly counsels against equating the capacity to direct representation with the capacity to be informed, directing that: "Even if the [client] does have a legal representative," (reflecting someone's determination that the client cannot appropriately identify his own interests) "the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." Although the comment concedes that communication will sometimes not be possible, it clearly disjoins that assessment from the lawyer's assessment of decision-making capacity.

B. Children's Developmental Capacity to Understand Roles

Assessing children's ability to comprehend roles requires a look at what we know about child development. Studies of children's acquisition of social role understanding suggest that children's role comprehension increases dramatically in sophistication between the ages of (roughly) three and eight. Before the age of three, children generally have little comprehension of professional roles. At roughly three years of age, most children perceive the professionals with whom they are familiar as a cluster of behaviors and characteristics (for example, doctors are people who wear white coats and give shots). Children at this stage are still too young to comprehend

160. Although I know of no studies that have looked expressly at children's comprehension of the lawyer-client role, studies about role comprehension, generally, and about children's developing understanding of the doctor-patient roles, particularly, suggest a relatively consistent pattern of development during these years. See generally Malcolm W. Watson, Development of Social Role Understanding, 4 Developmental Rev. 192 (1984) (discussing "a systematic sequence of role understanding in children from one to thirteen years of age"); Fischer & Hand et al., supra note 37; see also Malcolm W. Watson & Kurt W. Fischer, Structural Changes in Children's Understanding of Family Roles and Divorce, in The Development and Meaning of Psychological Distance (R.R. Cocker & A. Renninger eds., forthcoming 1996) (reviewing children's developing ability to comprehend family roles) (draft on file with the Fordham Law Review).
162. Id. at 205; Watson & Fischer, supra note 160, at 9-10; Fischer & Hand et al., supra note 37, at 40.
will not achieve a meaningful understanding of these roles, regardless of their cognitive capacity. In order for a child to achieve a true understanding of the lawyer-child relationship, the child must have both the capacity to understand the lawyer's role, and a familiarity with that role. While only the child can supply the capacity, it is up to the lawyer to ensure that the role is familiar to the child.

C. The Narrowness of the Incapacity Exception

Where the child lacks the developmental capacity to understand his lawyer's role at any level, the lawyer is freed from her obligation to communicate that role, for such communication is, by definition, not "reasonably possible." And where the role cannot be communicated, it is probably inappropriate for the lawyer to assume the traditional attorney role, for the child who cannot understand his lawyer's role (or his own role in the relationship) will never be in a position truly to direct the representation. The permissible exception to the lawyer's duty to explain her role is therefore a narrow one: It only applies to lawyers serving as GALs in their representation of very young children.

Where, on the other hand, the child has the capacity to understand his lawyer's role, the lawyer's ethical obligation to facilitate that understanding (to "familiarize" the child with the lawyer's role) comes into play. For lawyers assuming the traditional attorney role or the GAL role as a modified client-lawyer relationship, communicating the lawyer role becomes a "reasonably possible" aspect of the normal client-lawyer relationship. Where the GAL role is viewed as a relationship with a nonclient, the child's developmental capacity to understand the lawyer's role suggests that there is no justification for departing from the lawyer's ordinary obligation to explain her role to nonclients. In sum, at least by the time a child is seven or eight years old (and even, to a lesser extent, when children are considerably younger), the failure of children to understand their lawyers' role probably cannot be accounted for in developmental terms, and therefore cannot be excused as a matter of ethics.

169. See Watson & Fischer, supra note 160, at 12-13 (noting that children's performance in the area of role understanding varies widely, depending upon whether they are provided with a "supportive context"); Fischer & Hand, supra note 37, at 53, 60 (same).

170. This obligation may also fall to others interested in the lawyer-child relationship in the court process. The obligations of other parties and institutions to familiarize a child with his lawyer's role exceeds the scope of this Article.

171. See supra text accompanying notes 75-77.

172. As the preceding discussion about children's development suggests, children's ability to understand roles will become increasingly sophisticated over time. It is my contention that the lawyer has an obligation to communicate her role to all children who can comprehend the role at some level, even a rudimentary level. As the child's ability to understand the role increases in sophistication, so, too must the lawyer's communication of the role.

A. Lessons from Developmental Psychology and Learning Theory

Jean Piaget, to whom all heads turn in discussions of children's cognitive development, focused on the importance of children's activity, and thereby experience of the world, for any real intellectual advances. Cognitive development, according to Piaget, is spurred when children encounter new information, or observe new events, that do not fit neatly with what they already know and understand. Children respond to these experiences of "disequilibrium" by some combination of "assimilation," (that is, adapting what they perceive to fit what they already know) and "accommodation" (adapting what they know to account for what they perceive). Without interaction in the world giving rise to accommodation, significant cognitive development cannot occur.

In applying Piaget's conclusions to the classroom, educational theorists encourage teachers to minimize formal instruction and to facilitate student's independent play and exploration to allow them to encounter, and adapt to, experiences of disequilibrium. Indeed, in the view of these "discovery learning" theorists, teachers who claim to "teach" children, particularly young children, through verbal instruction are not teaching concepts. Rather, they are merely teaching procedures that children can follow, but which have no meaning to them.


174. Piaget's Theory, supra note 173, at 107; see also Wood, supra note 168, at 38-41 (describing Piaget's concepts of assimilation, accommodation, and equilibration); Sylva & Lunt, supra note 173, at 110-11 (same).

175. Piaget's Theory, supra note 173, at 106-09; see also Wood, supra note 168, at 39 (noting that, under Piaget's theory, "some accommodations require dramatic changes in the structure of the child's understanding of the world"); Sylva & Lunt, supra note 173, at 110-11 (noting that accommodation, unlike assimilation, requires a mental change in the child to solve problems that are otherwise too difficult for the child to solve).

176. Wood, supra note 168, at 24; see also Sylva & Lunt, supra note 173, at 184-85. In their summary of discovery learning, Sylva and Lunt explain:
Jerome Bruner departs from Piaget in his willingness to recognize a greater role for instruction in learning, but, like Piaget, he continues to emphasize the origin of learning in interaction. Bruner divides effective learning into three phases: the enactive (learning through activity), the iconic (learning through pictorial representations), and the symbolic (learning through language). While Bruner notes that children generally progress through these phases and become increasingly able to learn through language (symbolic learning) as they grow, he suggests that instruction in all areas should be sequential—moving from the concrete to the abstract, from the hands-on to the purely cerebral. Educators applying his analysis contend that the teaching of all new subjects should progress through Bruner's three phases and that teachers encountering difficulties communicating concepts to students verbally should bring the learning back to a more interactive level.

Lev Vygotsky, too, emphasized the importance of interaction for learning, but he focused on a very different form of interaction. For Vygotsky, it is children's interaction with their social world, with their culture, that forms the basis of their cognitive development. By interacting with their adult role models (and through the active collaboration of these adults) children acquire social knowledge, which is ultimately converted to individual knowledge about the skills, facts, concepts, and attitudes that are relevant to their particular culture.

Vygotsky's work helped focus educators on the social context of learning, and the active collaborative role played by adults in furthering children's intellectual development. In Vygotsky's terms, the job of a teacher is to identify the "zone of proximal development"—the gap between what children can do and know on their own, and what they can do and know with the help of an adult—and to engage in cooperative activity and instruction within that zone.

While the theories of Piaget, Bruner, and Vygotsky differ significantly, they share a common focus on the importance of experience and interaction to the learning process. As all three theories suggest, talking at children, particularly about matters divorced from their experience, is unlikely to advance children's understanding.

Developmental and educational theories addressing broad questions about the sources of children's intellectual growth do not translate neatly into directions about how to teach a child about his lawyer's role. They do, however, offer some powerful advice to lawyers: For children truly to understand what it means to have a lawyer, and what that lawyer does, they need to experience the process, as participants and as observers.

Lawyers cannot expect to convey their role effectively to most children by simply explaining things more clearly. Children have no

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Discovery learning is really opposed to the idea of teaching if by teaching is meant the traditional process of imparting information, or modifying behavior, or even filling up an empty vessel with knowledge. The idea is rather to provide the materials and the environment for the child to explore and let him do the rest almost by himself, motivated to learn by his own curiosity. . . .

[The child] is involved in an active construction and reconstruction of his world view and his understanding of what goes on around him.

### Footnotes

178. Id. at 12-14.
179. Id. at 21, 29-30, 49.
181. See generally Lev S. Vygotsky, Mind in Society: The Development of Higher Psychological Processes (1978); Lev S. Vygotsky, Thought and Language (1986); see also Wood, supra note 168, at 25 (noting that, according to Vygotsky, "only through interaction with the living representatives of culture . . . can a child come to acquire, embody, and further develop a society's knowledge").

While Vygotsky's works were originally published in Russian in the early 20th Century, they received little attention from Western psychologists until recent years. See Wood, supra note 168, at 9. Today, Vygotsky's focus on the social and cultural context of learning is widely embraced. For a leading example of a contemporary developmental psychologist who has built upon Vygotsky's themes, see the writings of Barbara Rogoff, including Apprenticeship in Thinking: Cognitive Development in Social Context (1990) (strengthening the importance of both guidance and participation in the process of cognitive development).

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182. Vygotsky, Mind in Society, supra note 181, at 56-57; see also Wood, supra note 168, at 19 (noting that Vygotsky theorized that "activity in . . . the external social plane is gradually 'internalized' by the child").
183. To recognize that learning occurs within a context is to recognize that learning is shaped by that context—that learning is context-specific. See Kurt W. Fischer et al., The Development of Abstractions in Adolescence and Adulthood, in Beyond Formal Operations: Late Adolescent and Adult Cognitive Development 45-46 (1984) (noting that "people always acquire specific skills tied to particular environmental circumstances" and that "context always plays an enormous role in developing behavior"). Without the contextual supports of experience and assistance, among other things, children's behavior is likely to be developmentally compromised. See Becker & Hand et al., supra note 37, at 52-53 ("Changes in the amount of [contextual] support typically produce profound differences in the developmental level of behavior.").
185. See Educational Psychology, supra note 180, at 126. Rogoff, supra note 181, emphasizes the child's active, participatory role in this collaborative process of instruction which she characterizes as "apprenticeship."
186. See Wood, supra note 168, at 8, 19. Even the proponents of "programmed learning," whose emphasis on an externally controlled, highly structured learning process distinguishes them sharply from the psychologists discussed above, stress the need for active child involvement, and immediate experiential reinforcement of the concepts learned. While the programmed learning approach, inspired by the behavioralist B.F. Skinner, features learning propellled by preprogrammed external stimuli, its proponents actually reject learning through passive listening and suggest a student must be actively engaged in incremental problem-solving in order to learn. See Sylvia & Lunt, supra note 173, at 191.
187. See Perry & Teply, supra note 9, at 1382-83 (noting the difficulty children have in understanding lawyers' verbal explanations and calling for the use of visual aids whenever practical).
context, no relevant experience to make these explanations make sense. Indeed, attempts to create a context by description are more likely to mislead than illuminate, for they must rely on inapt comparisons (who is a lawyer like?), or confounding elaborations on the unpredictable and chaotic goings-on of juvenile or family court. In Piagetian terms, children are likely to respond to these perplexing explanations by assimilating what they hear to fit the world they already know (again, a world that knows no lawyers). Unless a child sees his lawyer in action and has an opportunity to engage in the process of representation as it occurs, he will lack the expertise to make the cognitive accommodation necessary to perceive the lawyer’s role for the unique role that it is.

B. Engaging Children in the Process

The core of the lawyer’s representation occurs, of course, in and around the courtroom. This setting represents the single best place, therefore, for a child to experience his lawyer’s representation. Only in the courtroom can the child observe the constellation of participants, the decision-making process, and the role his lawyer plays in that process. And only in the halls outside the courtroom can the child observe the negotiation process that is often more key than any hearing in determining his fate. The value of coming to court to a child’s understanding of his lawyer’s role is great regardless of which model the lawyer assumes.

For the child being represented by the traditional attorney, nothing so overcomes the child’s incredulity as seeing his lawyer in action. It is one thing for a lawyer to tell a child, at his school or in his living room, that he will go to court and tell the judge what the child wants (maybe she will, maybe she won’t, and what difference, the child may wonder, does it make, anyway?). It is quite another matter for the child to sit in court and hear the lawyer press for what he told her he wants, do battle with opposing viewpoints before the judge, and even, perhaps, persuade the judge, against the recommendations of other parties, that what the child wants should happen. The live demonstration can also provide a proving ground for promises of client confidentiality, where the particular issues being pressed in the proceeding bring the lawyer’s silence on the subject into sharp relief for the child.

Seeing his lawyer in action will also help the child represented by the GAL to understand that role. Unlike the client of the traditional attorney, who needs to be convinced that his lawyer will really advocate what he wants and keep his secrets, the child represented by the GAL needs to be reminded that his lawyer will not necessarily advocate what he wants and may share his secrets with the court and other parties. By observing the GAL in court, general statements about "doing what is best for the child" take on concreteness (both in content and context) that distinguishes the GAL’s role from that of other helping adults.

As important for the child’s education about the lawyer’s role are his observations of the hallway negotiations that precede the hearing. In many cases, the bulk of decision making occurs in these informal negotiations.188 By observing these negotiations, children can learn, in addition to the kinds of information they can gain in the courtroom, a great deal about how their lawyers interact with other adults involved in the case, including parents, care givers, agency social workers, and the lawyers for the various parties. These relationships, and particularly the content of the lawyers’ conversations within these relationships, will tell children a great deal about their lawyers’ role.

A child’s presence in court not only allows the child to observe his lawyer’s role, but it also puts pressure on the lawyer to be true to her role. Away from the watchful eye of the client, it is very easy for traditional attorneys, in particular, to modify the child client’s position to one that it is easier for the lawyer to swallow.189 Where, for example, the child has expressed a desire to go home, the lawyer may represent the child’s position to the court (if the child is absent) as a desire to go home "as soon as appropriate," or "as soon as his mother completes drug treatment," even if such qualifications were never provided by the child. Indeed, in her discussion with her client outside of court, the lawyer may find it just as easy not to press for specifics when the child states he wants to go home, to try to buy some flexibility in the child’s position when she later goes to court. If the child is sitting in the courtroom, however, the traditional attorney is under considerable, appropriate pressure to discover and remain faithful to the core of the child’s position. The lawyer is much more likely to know, for example, that the child emphatically wants to go home that day, regardless of his mother’s condition, and much more likely to convey that position, without qualification, to the court.

In addition to offering an opportunity for first-hand observation, bringing children to court creates an opportunity for participation that cannot be duplicated outside the court setting. By attending court, children have an opportunity to meet with their lawyers at a time when the issues to be resolved among the parties or by the court are most sharply presented. In this context, children can develop and express their positions with the benefit of good information about the positions of other parties, which are frequently not articulated until

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188. See William Wesley Patton & Sara Latz, Severing Haulnet from Greet: An Analysis of Siblings’ Association Rights, 48 U. Miami L. Rev. 745, 795 (1994) (noting that most dependency cases are resolved informally).

189. In their study of lawyers for children in Connecticut, Kim Landsman and Martha Minow found that lawyers frequently took on responsibilities inconsistent with their own characterizations of their roles. Landsman & Minow, supra note 6, at 1145-46.
the day of the court hearing. They can hear their lawyers’ assessment of the strength of the various arguments to be presented and the support that will be marshaled on their behalf. With a decision imminent, children discuss their views with an awareness that the positions they take, and what they say to support those positions, may have a direct effect on the outcome of the process. For the child represented by the traditional attorney, the persuasiveness of his positions translates into his lawyer’s more persuasive arguments in negotiations or before the court. For the child represented by the GAL, the persuasiveness of his positions will determine whether or not the GAL pursues his objectives at all. Either way, the process of discussing options and viewpoints in the context of immediate representation leads to a clearer sense of the role relationships for the child, and, consequently, a better opportunity for the child to modify his own involvement in the relationship to reflect that clearer understanding.

Having represented children under the traditional attorney model in two jurisdictions, one where the children almost always come to court, and one where they generally do not, I have seen a significant difference in children’s comprehension of my role, and, consequently, their willingness and ability to relate to me as a lawyer. In the first jurisdiction (where children generally attend court), I carried far too heavy a caseload (more than 400 clients per year), and therefore saw my clients almost exclusively on the days of their hearings, and only in court. In contrast, I now represent a small number of clients who I can see several times each year, in what are considered more natural and comfortable settings for children, such as schools, homes, and restaurants. These clients rarely come to court, in large part because the expectations of court personnel, judges, potential transporters, and the children themselves are all against their coming. While I see my clients more often now, with the obvious advantages for developing a relationship and providing thorough and competent representation, my sense is that my clients now tend to be more confused about my role than my previous clients who saw me less often, and only in the context of the court process. Like the teachers whom they saw only when they were being taught, and the doctors whom they saw only when they were receiving medical care, my previous clients saw me only in the process of representing them, where that representation was easiest to perceive.

As a result of their clearer perception, the quality of my conversations with my clients was much better. We tended to speak for a longer time, and our discussions were more consistently focused on the issues at hand. I was able to provide much more specific information about the positions of the other parties, as they would be articulated to the court. Our conversations could also be much more strategic because they occurred in court on the day of the hearing. We were able to discuss the comparative strength of tactical options, as well as substantive positions, because of the relative clarity of others’ positions and tactics, and because of the immediacy of the process. Overall, clients’ better understanding of my role produced better conversations and, in turn, those better conversations reinforced my clients’ understanding of my role.

Immediately following these conversations, my clients would watch me in hallway negotiations and in court. I could involve them in the negotiations as they progressed, and consult with them again as positions shifted, or new information was elicited. In court, they could watch me say what I said I was going to say (and not say what I said I would not) to the judge, and I could, again, ask for an additional opportunity to consult with them if unanticipated issues arose. At the end of the hearings, I could ask the judge to explain her rulings to my clients.

Children’s presence in court also allowed me to speak to them immediately after the proceeding, to discuss their impressions and to answer their questions. It allowed me to help them anticipate the next steps in my representation (which, again, reinforced their understanding of what I did). Moreover, children’s presence in court had a carry-over value to our out-of-court discussions, on those rare occasions when those discussions could occur. Once the judge had a face, and the issues and process had been brought to life, my client-lawyer communications in other contexts were enhanced.

There is considerable disagreement about the advisability of bringing children to court. Most of the concern focuses on the potential harm to children, although there is also administrative resistance among child welfare agencies to the prospect of being responsible for the burdensome and time-consuming process of bringing children to court and taking them home afterwards. The fear for children is that they will be traumatized by the place and by the process. At court, children are forced to come face-to-face with their history of abuse or neglect and with the deep family tensions invoked by the proceeding. Moreover, children are often called upon to take sides, against one or both parents.

While coming to court can provoke considerable anxiety in children, we fool ourselves if we think that avoiding court protects children from those anxieties. Much of the anxiety is created by the existence of the court process (a process whereby a child’s future is determined by a judge) and the issues underlying the court’s involvement (the abuse, neglect, foster care placement, or divorce). Lawyers’ conversations with their clients tend to fan those anxieties, whether or not the child appears in court, because these conversations inevitably (if grounded at all) focus on the court process and the decisions the

190. See HHS Study, supra note 5, ¶¶ 5.2.4, 6.2.2.3.
The best argument against bringing children to court is that the process they observe is an abysmal and chaotic one. For the most part, children will not see a decorous or thoughtful adversarial process.\footnote{191} They will see long waits in dreary, toolless waiting rooms, followed by brief hearings, at which hallway agreements are hastily presented. They will see families herded up to the bar of the court and sworn in \textit{en masse}. They will see lawyers trying to out-yell each other to get the judge's attention, and judges making decisions with little or no reference to the governing legal standards. They may see their own lawyers derided for trying to force the court to follow a more formal legal process, or to articulate a clear legal basis for its rulings. They may even see the judge taking phone calls, or speaking with court personnel, while important evidence or argument is being presented.

Given how these overburdened, underfunded, and undervalued juvenile and family court processes tend to function, a good argument could be made that children's presence in court is at least a waste of their time, and perhaps affirmatively damaging. Moreover, the chaos that reigns in most of these courts may undermine children's ability to perceive with any clarity the role played by their lawyers.

Despite the power of this argument, I nevertheless contend that children's presence is more helpful than harmful to them for two reasons that closely parallel arguments already made. First, there is a certain value to children seeing precisely what \textit{does} happen in court. An understanding of how the court functions is essential to a child's understanding of how his lawyer functions \textit{in that system}, and how the system makes decisions on his behalf. This point is only a subtle variation on a primary thesis of this Article: A child's understanding of the true context of representation is an essential piece of a child's understanding of his lawyer's role.

Second, while the workings of the court process guarantee that coming to court will never be fun for most children, the trauma caused by observing a poorly run court process pales in comparison to the trauma caused by children's involvement in the child welfare system, generally, and the trauma caused by the circumstances leading up to the system's involvement. Like the concern about the trauma caused to children by their exposure to the \textit{substance} of the case at court, the concern for the trauma caused by children's exposure to the court \textit{process} understimates children's awareness of the process, and thereby overestimates the effect of seeing that process firsthand. Bringing children to court clearly has the benefit of enhancing their perception of, and participation in, a relationship with their legal representative. Against that, the speculative harm caused to children through their exposure to additional deficiencies in a system they already view as deficient is not, in my view, weighty enough to tip the scales against children's attendance.

Although bringing a child to court is surely not the only means, nor a perfect means, of educating him about his lawyer's role, it is one of the best means that seems readily achievable, and likely to at least help produce the desired ends. The same arguments can be made, to a large extent, about children's attendance at other decision-making events, such as case plan meetings, though the greater informality of these proceedings, and the lesser authority of the decision-making process, can make them less powerful teaching tools than the court proceedings themselves. The value of interactive learning can also probably be captured through modeling and role-playing exercises.\footnote{192} Ultimately, we will need the assistance of those with greater expertise in how children learn to develop an effective curriculum to teach children what lawyers are doing on their behalf. Until such a curriculum is developed, however, there is no substitute for bringing children into the process and letting them experience it for themselves.

\textbf{Conclusion}

My thinking in this Article, which draws so heavily on my experience and observation, needs to be tested. In particular, it would be fruitful for lawyers, psychologists, and educators to combine resources to study the nature and extent of the problem of children's role misperceptions, and to consider the most effective means of clarifying lawyers' roles for children. To get a clear sense of the problem and its solutions would require a thorough examination, in cognitive as well as experiential terms, of how and when children come to understand roles, and to what extent the nature of the role in question effects children's mastery of role comprehension. A thorough examination of the issue also requires us to speak to children of all ages about their understanding of their lawyers' roles and how they derived those understandings.

A child's understanding of who his lawyer is, and what she is doing, is central to any coherent and fair system of representation for children. Establishing the scope of the problems and solutions should,
therefore, be a central inquiry of attorneys seeking to serve their child clients ethically. As is so often true in the representation of children, children's powerlessness to complain—to file a malpractice or disciplinary action, or to take the matter up with the mayor—leaves enforcement of the child's lawyer's obligation to communicate her role entirely in the lawyer's own hands. Unless we confront our failure to communicate our roles to the children we represent and work to overcome this failure, we lawyers for children will continue to "assume" meaningless roles, and children will remain in the dark.
Using Body Language That Kids Trust

by Jackie Rankin

Attorneys who work with children know how critical that first impression can be to establish a framework of trust for the adult-child negotiation. Just as the attorney is “reading” the child, the child, in turn, is sizing up the formidable adult. That, plainly, is body language at work. Thus, the smart attorney is one who avails himself of as many body language secrets as he can use professionally.

This article is intended to help build an easier interchange between the attorney and child client. Body language, let me warn you, is unconscious and unprogrammed. It is completely spontaneous. I am often asked, “Can I change my body language?” Yes, through conscious practice of new, effective, and silent movements and expressions. In time they become an unconscious habit, which is authentic body language.

Caution: faking is not genuine body language and smart kids (and dogs and cats) can read plastic behavior instantly. Don’t try a Jolly Old Uncle Ted with a child—you’ll bear the scars forever. I’m sure you will discover some ineffective ways you use body language to communicate. Take heart and be prepared to study yourself rigorously, honing out ineffective body language to build a silent image that conveys strong credibility. Retraining your own body language takes work.

One caveat: make all your movements slow and steady. Do not act abruptly (nor loudly), because the child must see you as kind, patient, and thoughtful.

Getting Started

How does a tired, overworked lawyer establish meaningful rapport with a child? First off, it’s not easy. Wee ones can be tired, apprehensive, moody, and mistrustful—no easy person to negotiate with. Kids can be tough. That’s for starters.

Next examine the setting—the room in which the meeting takes place, as well as colors in the room, gender of the attorney and the youngster, spacing of furniture and bodies, gestures used, and even smell that is distinctive both in the setting and with the people.

Now you are ready to survey yourself in the situation—the persuader, if you will. I’ve written a book about such an encounter in Body Language in Negotiations and Sales in which all the nonverbal variables of an encounter are explored. Transforming that book to the level of a child client, here are the top three variables every attorney should work with when dealing with a child. Bear in mind there are many more points to explore, but these are my top priorities when dealing with youngsters:

1-EYES
Since body language reveals your thoughts and emotions, try to think kind thoughts. Train the muscles around your eyes to relax to bring a pleasant, nonthreatening expression. Children like open eyes (“eyes wide open”) and fear squinty eyes that are all scrunched up. Keep your gaze steady and don’t hold a gaze too long. Do blink occasionally. I suggest you plant several small mirrors around the office and constantly check out your own facial expressions and eye behavior. Probably you will discover not all your movements are as bright and friendly as you had hoped and that some retraining is needed.

I find most adults have to be taught to bend over, come into the height ranges of the child to give him direct eye contact. Giving up your height also gives away some of your power and the child knows that. Do not be distracted if the child will not make eye contact with you. Adults, when rebuffed, often say to a child, “Look at me!” which gets poor results. Practice gentle patience and tolerance, please.

2-PERSONAL SPACE
Adults take up an inordinate amount of territory and often show their power by the amount of space they control. Children, at best, have a tiny amount of personal space and often that is controlled by others. If your initial encounter is loaded with emotionalism, think how belligerent your invasion of the child’s personal territory must seem. Respect his space, please.

Let’s check out the space bubble. Try poking your elbow into your waistline into your belt, extending the forearm. The tips of your fingers are the end of your own space bubble. Now cut that space in half and you have the miniscule size of the child’s space bubble. Any time you invade his personal territory uninvitedly, you have set up hostile relations and you are an adversary.

The amount of space you choose between yourself and the child is important. When we are intimate, spacing goes from actually touching up to 18 inches; personal distance is 18 inches to four feet; social distance is 4 to 12 feet; and public distance ranges from 12 feet to 25 feet. I do not recommend touching initially and I do suggest that in the beginning you place yourself about a yardstick away. That
signals this is a business meeting, not a personal one. If you are too far away, negotiations will lack personal rapport—too close signals a personal bonding that is not real. Be like the little bear and make it not too hot, not too cold, but just right.

3- FACIAL EXPRESSION
When you, the adult, approach the child, make sure your facial expression is pleasant. I don’t mean a silly smile or a grin that is false: children read fake nonverbal communication very well and react to it in kind, so your facial expression must be genuine.

There are six universal facial expressions as researched by Paul Ekman: happiness, sadness, surprise, fear, anger, and disgust. Literally hundreds of variations of those basic expressions exist, but they are only enhancements of the fundamental expression. The eyes, forehead, and mouth largely tell us what the child is experiencing emotionally and cognitively. My book, Body Language: First Impressions, gives you more information about this subject.

The fear expression which the child may be displaying shows raised and drawn-together brows, short horizontal or vertical wrinkles on the forehead, eyes opened with tension in the lower lids, mouth corners downwardly drawn back, lips stretched, and the mouth may or may not be open. When you see this fear displayed, think of it as a yellow light. Slow down your talk and movements, and delay all negotiations until the child looks calmer. Do not be offended if the child will not give you eye contact or turns her head away from you pointedly. Assume the child is not ready to interact with you and don’t push in an agitated or hurried manner, no matter how busy your schedule.

So much for the child. How about you? Is your basic expression grim? Are you overdoing your smile? Do your eyes seem threatening? Remember, a neutral facial expression is considered negative, so you want to display a winning face with a modicum of vitality to it. (Curiously enough, primates live by the same facial expression rules.) The “win” face displays raised eyebrows, wide open eyes, posture that includes a firmly jutted neck, and a slightly raised chin. The losing face has a furrowed brow, slightly squinted eyes, and the head is generally held down accompanied by sagging shoulders.

There you have it: three basic tips that will help build credibility with a child. There are many other variables to explore: touching, colors you wear, gender displays, how to arrange your office or the meeting room—on and on almost into infinity.

Body language, once you begin to be aware of it, is fascinating. You’ll never see the world nor people the same once you begin to use it.

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Introduction

Decisions regarding child custody and other parenting arrangements occur within several different legal contexts, including parental divorce, guardianship, neglect or abuse proceedings, and termination of parental rights. The following guidelines were developed for psychologists conducting child custody evaluations, specifically within the context of parental divorce. These guidelines build upon the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (APA, 1992) and are aspirational in intent. As guidelines, they are not intended to be either mandatory or exhaustive. The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations.

Parental divorce requires a restructuring of parental rights and responsibilities in relation to children. If the parents can agree to a restructuring arrangement, which they do in the overwhelming proportion (90%) of divorce cases (Melton, Petrika, Poythress, & Slobogin, 1987), there is no dispute for the court to decide. However, if the parents are unable to reach such an agreement, the court must help to determine the relative allocation of decision making authority and physical contact each parent will have with the child. The courts typically apply a "best interest of the child" standard in determining this restructuring of rights and responsibilities.

Psychologists provide an important service to children and the courts by providing competent, objective, impartial information in assessing the best interests of the child; by demonstrating a clear sense of direction and purpose in conducting a child custody evaluation; by performing their roles ethically; and by clarifying to all involved the nature and scope of the evaluation. The Ethics Committee of the American Psychological Association has noted that psychologists' involvement in custody disputes has at times raised questions in regard to the misuse of psychologists' influence, sometimes resulting in complaints against psychologists being brought to the attention of the APA Ethics Committee (APA Ethics Committee, 1985; Hall & Hare-Mustin, 1983; Keith-Spiegel & Koocher, 1985; Mills, 1984) and raising questions in the legal and forensic literature (Grissi, 1986; Melton et al., 1987; Mnookin, 1975; Ochroch, 1982; Okpaku, 1976; Weithorn, 1987).

Particular competencies and knowledge are required for child custody evaluations to provide adequate and appropriate psychological services to the court. Child custody evaluation in the context of parental divorce can be an extremely demanding task. For competing parents the stakes are high as they participate in a process fraught with tension and anxiety. The stress on the psychologist/evaluator can become great. Tension surrounding child custody evaluation can become further heightened when there are accusations of child abuse, neglect, and/or family violence.

Psychology is in a position to make significant contributions to child custody decisions. Psychological data and expertise, gained through a child custody evaluation, can provide an additional source of information and an additional perspective not otherwise readily available to the court on what appears to be in a child's best interest, and thus can increase the fairness of the determination the court must make.

Guidelines for Child Custody Evaluations in Divorce Proceedings

1. Orienting Guidelines: Purpose of a Child Custody Evaluation

1. The primary purpose of the evaluation is to assess the best psychological interests of the child.

The primary consideration in a child custody evaluation is to assess the individual and family factors that affect the best psychological interests of the child. More specific questions may be raised by the court.

2. The child's interests and well-being are paramount. In a child custody evaluation, the child's interests and well-being are paramount. Parents competing for custody, as well as others, may have legitimate concerns, but the child's best interests must prevail.

These guidelines were drafted by the Committee on Professional Practice and Standards (COPPS), a committee of the Board of Professional Affairs (BPA), with input from the Committee on Children, Youth, and Families (CYF). They were adopted by the Council of Representatives of the American Psychological Association in February 1994.

COPPS members in 1991–1993 were Richard Cohen, Alex Carballo Dieguez, Kathleen Dockett, Sam Friedman, Colette Ingraham, John Northman, John Robinson, Deborah Tharinger, Susana Urbina, Phil Witt, and James Wulach; BPA liaisons in 1991–1993 were Richard Cohen, Joseph Kobos, and Rodney Lowman; CYF members were Don Routh and Carolyn Swift.

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3. The focus of the evaluation is on parenting capacity, the psychological and developmental needs of the child, and the resulting fit. In considering psychological factors affecting the best interests of the child, the psychologist focuses on the parenting capacity of the prospective custodians in conjunction with the psychological and developmental needs of each involved child. This involves (a) an assessment of the adults’ capacities for parenting, including whatever knowledge, attributes, skills, and abilities, or lack thereof, are present; (b) an assessment of the psychological functioning and developmental needs of each child and of the wishes of each child where appropriate; and (c) an assessment of the functional ability of each parent to meet these needs, including an evaluation of the interaction between each adult and child.

The values of the parents relevant to parenting, ability to plan for the child’s future needs, capacity to provide a stable and loving home, and any potential for inappropriate behavior or misconduct that might negatively influence the child also are considered. Psychopathology may be relevant to such an assessment, insofar as it has impact on the child or the ability to parent, but it is not the primary focus.

II. General Guidelines: Preparing for a Child Custody Evaluation

4. The role of the psychologist is that of a professional expert who strives to maintain an objective, impartial stance. The role of the psychologist is as a professional expert. The psychologist does not act as a judge, who makes the ultimate decision applying the law to all relevant evidence. Neither does the psychologist act as an advocating attorney, who strives to present his or her client’s best possible case. The psychologist, in a balanced, impartial manner, informs and advises the court and the prospective custodians of the child of the relevant psychological factors pertaining to the custody issue. The psychologist should be impartial regardless of whether he or she is retained by the court or by a party to the proceedings. If either the psychologist or the client cannot accept this neutral role, the psychologist should consider withdrawing from the case. If not permitted to withdraw, in such circumstances, the psychologist acknowledges past roles and other factors that could affect impartiality.

5. The psychologist gains specialized competence.

A. A psychologist contemplating performing child custody evaluations is aware that special competencies and knowledge are required for the undertaking of such evaluations. Competence in performing psychological assessments of children, adults, and families is necessary but not sufficient. Education, training, experience, and/or supervision in the areas of child and family development, child and family psychopathology, and the impact of divorce on children help to prepare the psychologist to participate competently in child custody evaluations. The psychologist also strives to become familiar with applicable legal standards and procedures, including laws governing divorce and custody adjudications in his or her state or jurisdiction.

B. The psychologist uses current knowledge of scientific and professional developments, consistent with accepted clinical and scientific standards, in selecting data collection methods and procedures. The Standards for Educational and Psychological Testing (APA, 1985) are adhered to in the use of psychological tests and other assessment tools.

C. In the course of conducting child custody evaluations, allegations of child abuse, neglect, family violence, or other issues may occur that are not necessarily within the scope of a particular evaluator’s expertise. If this is so, the psychologist seeks additional consultation, supervision, and/or specialized knowledge, training, or experience in child abuse, neglect, and family violence to address these complex issues. The psychologist is familiar with the laws of his or her state addressing child abuse, neglect, and family violence and acts accordingly.

6. The psychologist is aware of personal and societal biases and engages in nondiscriminatory practice. The psychologist engaging in child custody evaluations is aware of how biases regarding age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status may interfere with an objective evaluation and recommendations. The psychologist recognizes and strives to overcome any such biases or withdraws from the evaluation.

7. The psychologist avoids multiple relationships. Psychologists generally avoid conducting a child custody evaluation in a case in which the psychologist served in a therapeutic role for the child or his or her immediate family or has had other involvement that may compromise the psychologist’s objectivity. This should not, however, preclude the psychologist from testifying in the case as a fact witness concerning treatment of the child. In addition, during the course of a child custody evaluation, a psychologist does not accept any of the involved participants in the evaluation as a therapy client. Therapeutic contact with the child or involved participants following a child custody evaluation is undertaken with caution.

A psychologist asked to testify regarding a therapy client who is involved in a child custody case is aware of the limitations and possible biases inherent in such a role and the possible impact on the ongoing therapeutic relationship. Although the court may require the psychologist to testify as a fact witness regarding factual information he or she became aware of in a professional relationship with a client, that psychologist should generally decline the role of an expert witness who gives a professional opinion regarding custody and visitation issues (see Ethical Standard 7.03) unless so ordered by the court.

III. Procedural Guidelines: Conducting a Child Custody Evaluation

8. The scope of the evaluation is determined by the evaluator, based on the nature of the referral question. The scope of the custody-related evaluation is determined by the nature of the question or issue raised by the referring person or the court, or is inherent in the situation. Although comprehensive child custody evaluations generally require an evaluation of all parents or guardians and children, as well as observations of interactions be-
tween them, the scope of the assessment in a particular case may be limited to evaluating the parental capacity of one parent without attempting to compare the parents or to make recommendations. Likewise, the scope may be limited to evaluating the child. Or a psychologist may be asked to critique the assumptions and methodology of the assessment of another mental health professional. A psychologist also might serve as an expert witness in the area of child development, providing expertise to the court without relating it specifically to the parties involved in a case.

9. The psychologist obtains informed consent from all adult participants and, as appropriate, informs child participants. In undertaking child custody evaluations, the psychologist ensures that each adult participant is aware of (a) the purpose, nature, and method of the evaluation; (b) who has requested the psychologist’s services; and (c) who will be paying the fees. The psychologist informs adult participants about the nature of the assessment instruments and techniques and informs those participants about the possible disposition of the data collected. The psychologist provides this information, as appropriate, to children, to the extent that they are able to understand.

10. The psychologist informs participants about the limits of confidentiality and the disclosure of information. A psychologist conducting a child custody evaluation ensures that the participants, including children to the extent feasible, are aware of the limits of confidentiality characterizing the professional relationship with the psychologist. The psychologist informs participants that in consenting to the evaluation, they are consenting to disclosure of the evaluation’s findings in the context of the forthcoming litigation and in any other proceedings deemed necessary by the courts. A psychologist obtains a waiver of confidentiality from all adult participants or from their authorized legal representatives.

11. The psychologist uses multiple methods of data gathering. The psychologist strives to use the most appropriate methods available for addressing the questions raised in a specific child custody evaluation and generally uses multiple methods of data gathering, including, but not limited to, clinical interviews, observation, and/or psychological assessments. Important facts and opinions are documented from at least two sources whenever their reliability is questionable. The psychologist, for example, may review potentially relevant reports (e.g., from schools, health care providers, child care providers, agencies, and institutions). Psychologists may also interview extended family, friends, and other individuals on occasions when the information is likely to be useful. If information is gathered from third parties that is significant and may be used as a basis for conclusions, psychologists corroborate it by at least one other source wherever possible and appropriate and document this in the report.

12. The psychologist neither overinterprets nor inappropriately interprets clinical or assessment data. The psychologist refrains from drawing conclusions not adequately supported by the data. The psychologist interprets any data from interviews or tests, as well as any questions of data reliability and validity, cautiously and conservatively, seeking convergent validity. The psychologist strives to acknowledge to the court any limitations in methods or data used.

13. The psychologist does not give any opinion regarding the psychological functioning of any individual who has not been personally evaluated. This guideline, however, does not preclude the psychologist from reporting what an evaluated individual (such as the parent or child) has stated or from addressing theoretical issues or hypothetical questions, so long as the limited basis of the information is noted.

14. Recommendations, if any, are based on what is in the best psychological interests of the child. Although the profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts, psychologists are obligated to be aware of the arguments on both sides of this issue and to be able to explain the logic of their position concerning their own practice.

If the psychologist does choose to make custody recommendations, these recommendations should be derived from sound psychological data and must be based on the best interests of the child in the particular case. Recommendations are based on articulated assumptions, data, interpretations, and inferences based upon established professional and scientific standards. Psychologists guard against relying on their own biases or unsupported beliefs in rendering opinions in particular cases.

15. The psychologist clarifies financial arrangements. Financial arrangements are clarified and agreed upon prior to commencing a child custody evaluation. When billing for a child custody evaluation, the psychologist does not misrepresent his or her services for reimbursement purposes.

16. The psychologist maintains written records. All records obtained in the process of conducting a child custody evaluation are properly maintained and filed in accord with the APA Record Keeping Guidelines (APA, 1993) and relevant statutory guidelines.

All raw data and interview information are recorded with an eye toward their possible review by other psychologists or the court, where legally permitted. Upon request, appropriate reports are made available to the court.

REFERENCES


OTHER RESOURCES

State Guidelines


Forensic Guidelines


Pertinent Literature


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**Hague Convention**

**Chance of Trauma Keeps French Children in U.S.**

The U.S. Court of Appeals for the Second Circuit has ruled that a woman who abducted her two children from France to the United States because she feared her abusive husband would win a custody battle in the French courts could keep them here. *Blondin v. Dubois*, 00-6066 (Jan. 4). In so ruling, the federal appeals court affirmed a New York Southern District Court's application of the Hague Convention on the Civil Aspects of International Child Abduction to the facts of this case.

Ms. Dubois had argued that the circumstances of her children qualified for the convention's exception to its general requirement that abducted children be repatriated. Under Article 13(b) of the convention, one of the exceptions to repatriation is where "there is a grave risk" that a return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In this case, Mr. Blondin's abusive conduct forced Ms. Dubois into a battered woman's shelter in France; she then fled to the United States. After being instructed to consider any ameliorative measures that might reduce the risk associated with repatriation, and hearing the testimony of an expert who said that the children would suffer from post-traumatic stress disorder under any circumstances of repatriation, the district court found that there were no measures that would sufficiently lessen the risk of harm to the children.

On appeal, Mr. Blondin's attempts to offer evidence contradicting the expert's opinion did not sway the Second Circuit.

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**EXPERT TESTIMONY**

**How to Properly Use Psychological Testing in Custody Evaluations**

By Robert M. Galatzer-Levy and Jeanne Galatzer-Levy

**Psychological testing can be a valuable part of a custody evaluation. Nevertheless, it is time-consuming, expensive and can panic clients who feel like lab rats in a maze trying to see the right things in ink blots or risk losing custody of their children.** Worse, you as the attorney can suddenly find yourself in a wonderland of F-scales, standard deviations, MMPI-2s and descriptions of the parties that make them sound like escapees from back wards of state mental hospitals. By orienting you to the basic concepts of psychological testing in custody evaluation, this article will help you evaluate, support or impeach these elements of an evaluation.

The use of psychological tests in custody evaluations is controversial even among professionals. Some experts regard them as central to good custody evaluations; others regard them as largely irrelevant and often misleading. Everyone agrees, however, that in certain circumstances, psychological tests are useful. Yet, they should never be the sole source of information in the evaluation. Essentially every published guideline and text warns against over reliance on psychological testing and recommends that it only be used in conjunction with other procedures, such as interviews, family observations and reviews of collateral sources of information, in reaching opinions about custody and visitation. Additionally, there is unanimity that if tests are used, they must be administered and scored properly.

With varying degrees of success, psychological tests aim to give objective information. However, even when used properly, each test has strengths and limitations. Because they appear "scientific," they may be given undue weight. Confusion can result when ominous-sounding but basically irrelevant findings are introduced into custody litigation or when strange, multisyllabic terms gloss over fundamentally weak findings.

Assessing the psychological qualities relevant to custody decisions is difficult. The evaluator must examine a wide range of psychological functions relevant to parenting as precisely and objectively as possible. For nearly a century, psychologists have found that psychological functions could be usefully assessed using standardized sets of questions or tasks. Psychological tests are made up of such questions and tasks. They are basically samples of behaviors, exhibited in response to known stimuli, and from which psychologists attempt to predict the person's behaviors in ordinary life.

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Some tests, like intelligence tests, directly examine whether a person can do particular tasks and compare the test taker's abilities to a known population. Other tests, like the various ink-blot tests, focus on the process the person uses to approach a problem, or try to discover underlying ways the person thinks. Another group of tests, the objective personality tests, such as the MMPI-2, compares individuals' responses with those of people with known psychological conditions and leads to hypotheses that the individual may belong to one or another group because the responses are like those of members of that group. A final group of tests systematically explores attitudes and opinions, such as the child's perception of each parent.

Basic Concepts
Although litigators must sometimes become sophisticated about fairly complex statistical and psychological concepts in order to examine experts, four basic ideas are at the heart of understanding psychological tests in custody evaluations:

- Validity. Validity is the extent to which a test measures what it is supposed to measure. For example, a test might be designed, among other things, to measure how well the subject can sustain emotional investments in others. The validity of a test in this regard would speak to how well it measures this ability and what research supports this claim.

- Reliability. Reliability is the extent to which a test gives the same result each time it is given or when it is given by different examiners. Reliability and validity are very different concepts, e.g., a stopped watch is perfectly reliable in that it gives the same readings all the time, but, except by chance, those readings are never valid. Reliability can be a real problem for psychological tests. Older methods of scoring the Rorschach, which for many years was a major tool of personality assessment, turned out to vary dramatically depending on who administered the test. (Note that in law the term "reliability" is used differently, usually to refer to what mental health professionals call "validity.")

- Confidence. Using numerical information, confidence measures the likelihood of the true value being the same as the test value. In election polls, for example, results are usually given with a value "plus or minus x percentage points." This means that

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the pollster has shown by statistical methods that there is a x percent likelihood that the true value is within that number of percentage points from the reported value. Confidence is particularly important to custody evaluations because we are usually comparing two parents. If one parent comes out better than the other on a particular test, we want to know how likely the difference is to be real, as opposed to based on random fluctuation.

Relevance. Relevance is a concept that law and psychology share. A test can be valid, reliable, have good confidence qualities and still be of little use to custody decisions because what it measures is not relevant to childcare. For example, certain psychological disturbances have little impact on parenting, so a valid, reliable test showing that a person is quite disturbed in one of these ways means little in terms of custody.

Relevance often depends on the particular case. For example, many people with low I.Q.s make fine parents, indicating that overall intelligence is rarely relevant to custody evaluations. However, if the child, because of his or her own limitation, needs a parent able to help with school work, low intelligence may become relevant to parenting.

The accompanying article on page 3 discusses five major groups of psychological tests that are conducted in the context of custody evaluations.

The Significance of Psychological Tests in Custody Litigation

People in the midst of custody litigation are under enormous pressure and emotional strain. Test results may be influenced by this strain and should be interpreted with this factor in mind. The fact that a woman whose marriage has fallen apart and who faces the prospect of losing custody of her children or having to raise them on her own might have temporary depressive symptoms says little about her parenting skills. Similarly, individuals who have been involved in extensive litigation may give responses that make them appear unduly suspicious or paranoid by ordinary standards. Though there is only limited published research on the impact of custody litigation on psychological testing, interpretations of any test should include attention to the actual circumstances surrounding the person being tested.

While the strength of psychological tests rests in their validity as measures of function, their use in custody evaluations may be misleading. Because they generate numbers, graphs and technical language, they can seem more authoritative than they actually are. It is imperative that psychological tests be used only in conjunction with other sources of information, never in isolation. Tests such as the Minnesota Multiphasic Personality Inventory (MMPI) (discussed in the accompanying article) clearly state that they generate hypotheses that are to be examined in terms of other data. Tests are designed to address likely occurrences but generally cannot take account of special circumstances. Therefore, by themselves, they are never enough to make a custody recommendation.

There are ways good testing can be extremely useful in custody evaluations. It can help clarify the nature and extent of parents' personal pathology and suggest strengths and limitations in parental functioning. Because tests are designed to systematically explore a wide range of possibilities, they may pick up problems that less systematic and wide-ranging clinical interviews and observations may miss. During custody evaluations, it is common that clinical interviews become focused on one or two problematic areas of parental function and areas of good function are not studied. The Bricklin tests (discussed in the accompanying article), for example, explore a very wide range of parental functioning from several points of view.

Issues for Attorneys

Regardless of whether or not test results are favorable to your client, you must be prepared to address several issues so that the tests are not simply blindly adopted or rejected by the court.

Are the tests reliable, valid and of the type used by examiners in the field? The U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), has led to two major developments in the use of scientific expert testimony by the courts: The increasing number of Daubert hearings and, even where the high court's decision in Frye v. U.S., 293 F. 1013 (1923) remains the applicable standard, the increasing attention to whether an expert's testimony meets the Frye test and the courts' increasing awareness that the credibility of the expert testimony based on psychological testing and other scientific methods can be systematically explored. The old, extreme views, i.e., that courts must be very respectful of testimony that comes with the label "science" attached to it and that psychological testing is hocus-pocus, safely ignored by the court, are giving way to closer consideration of whether particular test findings usefully address the matter before the court.

Much of the strength of psychological testing lies in its being standard, i.e., there are clear rules governing the administration and scoring of such tests, and the ability to determine whether these rules have actually been followed. Sometimes they are broken in obvious ways. For example, instead of being monitored by a professional while taking a test, the test taker is allowed to bring the test home, where he or she may be helped by family and friends.

Furthermore, although computer programs have been developed to aid psychologists in scoring tests, they should not be used without the psychologist's actual evaluation of the tests. With a little practice, it becomes easy to determine whether a report has been written by a human being or a computer. Inappropriate use of computer print-outs can lead to serious mistakes. For example, a computer print-out of a structured psychiatric interview yielded the "information" that the individual being evaluated was psychotic because she endorsed the statement that she "hears voices." On further examination, it was revealed that the individual was a member of a fundamentalist church.
Psychological Testing

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all of whose members spoke of hearing the voice of God within them.

The proper use and interpretation of psychological tests requires appropriate and substantial training. In preparing to examine an expert, find out whether, and by whom, the expert has been trained in the tests being used. Surprisingly often, experts will be weak in the area of psychological testing, having forgotten or never known basic concepts about it. With a little preparation, an attorney can devastatingly cross-examine such experts by asking fairly elementary questions about the tests that reveal the expert’s meager understanding of them. On the other hand, trying to do this with a knowledgeable expert simply gives that expert an opportunity to increase his or her credibility.

Many tests are designed to generate “clinical hypotheses,” basically things the examiner should be alerted to further explore in the evaluation. Generating these hypotheses is extremely useful because it may lead to the discovery of issues that would otherwise be missed. However, be aware that as mere hypotheses, these results should not be misinterpreted to demonstrate the presence of these conditions. If an expert testifies that the tests “show” that some condition exists, he or she puts himself in a position where, not only the particular statement, but his overall care in reaching conclusions, is subject to question.

If you have the opportunity to prepare a friendly witness, use it. Getting across what they have to say to judges is hard work for experts, especially in areas such as psychological testing where the information is technical and potentially confusing. Help the expert understand how to frame the findings in a way the judge will understand and respect.

Increasingly, attorneys are hiring consulting experts to review evaluations and help plan examination of experts. If you do retain a consulting expert, however, make sure that you do so in such a way that his or her work is protected work product.

The more an attorney knows about psychological tests, the more effective he or she will be in dealing with them in litigation. However, psychological testing is an extensive and technical field. Two excellent reviews, with markedly different outlooks, are Otto, R., Edens, J., and Barcus, E., “The use of psychological testing in child custody evaluations,” Family & Conciliation Courts Review 2000; 38(3):312-340 and a book chapter by Barry Bricklin, “The Contribution of Psychological Test to Custody-Relevant Evaluations” in R. Galatzer-Lavy and L. Kraus, eds., “The Scientific Basis of Child Custody Decisions” (New York: John Wiley 1999.) Ziskin’s three-volume “Coping with Psychiatric and Psychological Testimony,” (5th ed., Los Angeles: Law and Psychiatry Press) contains a wealth of material about impeaching mental health testimony, including testimony about psychological tests. However, attorneys should check to make sure that particular information from this book is up-to-date before relying on it to prepare an examination.

4 Sites Offering Free Access to Family Law Info, Paralegal Practice Pointers and Vital Records

By Richard A. Friedling

▲ FamLawLit
Free/Legal Reference
Sponsored primarily by the National Legal Research Group of Charlottesville, Va., which writes memoranda and briefs for attorneys nationwide, FamLawLit provides a survey of periodical literature addressing family law issues, archived for approximately three years. The site is updated by Laura W. Morgan, current chair of the Child Support Committee of the American Bar Association’s Family Law Section, and author of “Child Support Guidelines: Interpretation and Application.” FamLawLit also provides e-mail updates via its other sponsor, Steve Fuchs’ ubiquitous DivorceNet.com, a division of LawTek Media Group, which markets attorneys’ web sites and provides generic and state-specific information for attorneys and laypersons alike at its own site, www.divorcenet.com. You can e-mail Steve Fuchs and obtain monthly FamLawLit e-mail updates at sf@divorcenet.com. Laura Morgan can be reached by e-mail at goddess@supportguidelines.com or by telephone at 1-800-727-6574 or 1-804-977-5690.

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THE USE OF PSYCHOLOGICAL TESTING IN CHILD CUSTODY EVALUATIONS
Randy K. Otto, John F. Edens, and Elizabeth H. Barcus

Evaluation of families for purposes of assisting the court in making decisions about custody is perhaps the most complicated forensic evaluation. Mental health professionals conducting such evaluations must ensure that their evaluations validly assess areas of concern deemed relevant by the judiciary and legislature. Evaluators sometimes use psychological measures in the evaluation process, and in recent years, a number of tests designed specifically for use in child custody evaluation contexts have been developed. Because some published tests do not meet basic professional standards, child custody evaluators should carefully review any test and its supporting documentation before including it in their examination procedures. In this article, the authors discuss the rationale for using psychological tests in child custody evaluations, describe current testing practices, review and critique contemporary custody evaluation instruments, and offer a template for mental health professionals to use when considering use of a particular test.

Cases of disputed child custody may be among the most challenging for attorneys and judges (Settle & Lowery, 1982). Because decisions regarding custody typically involve issues revolving around child development, parenting behavior, family systems, psychopathology, and emotional well-being, courts sometimes request the input of mental health professionals. This is based on the assumption that mental health professionals will be able to provide valuable information about the children and parents, which, in turn, will form the basis for a more informed and better decision on the part of the legal decision maker.

Child custody evaluation may be the most complex and difficult type of forensic evaluation. In contrast to most examinations in which one person is evaluated, in the typical child custody evaluation, the mental health professional examines a number of persons (e.g., mother, father, child or children, and potential or actual stepparents). Additionally, given the expansive nature of the underlying legal issues (i.e., the best interests of the children and the ability of the parents to meet those interests), the examinees must be assessed regarding a variety of behaviors, capacities, and needs. Finally, because the stakes are so significant (i.e., residential placement of the child and decision-making authority with respect to their welfare), emotions in cases of contested custody typically run high, further complicating what is an already complicated evaluation process.

Given the potential level of complexity involved in custody evaluations, it is perhaps not surprising that mental health professionals have attempted to develop instruments to assess those criteria that are putative predictors of children's postdivorce adjustment (e.g., parental emotional stability and degree of a child's attachment to the parents). The recent development of custody-specific tests represents perhaps the most overt attempt to operationalize, quantify, and assess those psychological factors that are often judged to be the most relevant in the judicial decision-making process. In this article, we discuss the rationale for using psychological tests in child custody evaluations, describe current test practices of psychologists and others who conduct child custody evaluations for the courts, review and critique contemporary instruments designed specifically for use in child custody evaluations, and finally, offer a template for mental health professionals to use when they are considering employing a particular test in their evaluations.

CURRENT TESTING PRACTICES AND LIMITATIONS

Brodzinsky (1993) offered a number of reasons why psychologists and other mental health professionals skilled in psychological testing might include traditional and more contemporary child custody assessment instruments in their evaluations. Particularly for psychologists, testing is associated with their professional identity and is part of their usual and customary practice. Thus, it should come as no surprise that they would use standard psychological tests (e.g., measures of intelligence, achievement, personality, or psychopathology) when conducting child custody evaluations, particularly if they are unfamiliar with the specific decision-making criteria used by the judiciary. Brodzinsky also noted that psychological tests lend an air of objectivity, science, and insight to evaluations (whether deserved or not), which may make them popular with attorneys and judges who may be more responsive to test-based or test-anchored evaluations and opinions. Finally, Brodzinsky noted that test use may be driven by financial incentives, given the amount of time it can take to administer, score, and interpret a particular battery of tests given to parents, children, and others.
Although the use of standardized psychometric measures is common, the testing practices of child custody evaluators have been subject to considerable criticism. Brodzinsky (1993) and Bricklin (1992, 1999) noted that the traditional psychological tests used by many child custody evaluators do not address psycholegal issues directly relevant to the child custody question (e.g., parenting ability, the nature and quality of the parent-child relationship, and the willingness of each parent to facilitate a close relationship with the other parent). Use of general psychological measures requires the evaluator, at a minimum, to make an inference from the general construct assessed by the instrument (e.g., psychopathology or intelligence) to a more specific and relevant behavior (e.g., ability to meet the child's emotional and behavioral needs). Grissi (1984) offered a similar critique:

Too often we rely on assessment instruments and methods that were designed to address clinical questions, questions of psychiatric diagnosis, when clinical questions bear only secondarily on real issues in many child custody cases. Psychiatric interviews, Rorschachs, and MMPIs might have a role to play in child custody assessment. But these tools were not designed to assess parents' relationships to children, nor to assess parents' child-rearing attitudes and capacities, and these are the central questions in child custody cases. (Cited in Melton, Petrla, Poythress, & Slobozgin, 1997, p. 484)

These general concerns are partially reflected in the child custody guidelines promulgated by the Association of Family and Conciliation Courts (AFCC) (n.d.), the American Psychological Association (APA) Committee on Professional Practice Standards (1994), and the American Academy of Child and Adolescent Psychiatry (AACAP) (1994), all of which caution that child custody evaluations should be informed by legal criteria, should be expensive in scope, and should not be simply psychopathology–focused.

Although the majority of mental health professionals conducting child custody evaluations use standard psychological tests, specific custody tests have been developed in the past decade, and they are being used with increasing frequency. Such tests are appealing to mental health professionals and the judiciary because they ostensibly address the specific questions involved in forming an opinion in a custody case, such as, "Does the parent have adequate parenting skills?" or "With which parent is the child most bonded?" Such questions are not easily answered by making inferences from the results of standard measures of psychopathology, intelligence, and personality.

**SURVEYS OF TESTING PRACTICES**

Despite the apparent widespread use of psychological tests, relatively little data exist in terms of identifying what instruments tend to be employed as part of child custody evaluations. Three surveys have been published that examine child custody evaluators' use of psychological tests, but how accurately these results depict current practice is unclear; their value is somewhat limited. One limitation is that all of the surveys had a relatively small number of respondents. A second limitation is that psychologists were overrepresented in the studies, and as a result, we know much less about test use by non–psychologist practitioners who conduct child custody evaluations. This, of course, is important, as it seems reasonable to assume that psychologists, given their background and training, are more likely than other mental health professionals (e.g., social workers, psychiatrists, or marriage and family therapists) to use psychological testing in their custody evaluations. Thus, the studies described below may overestimate the use and significance of psychological tests in custody evaluations.

In the earliest published study, Kellin and Bloom (1986) surveyed a national sample of psychologists, psychiatrists, and master's-level practitioners identified through various national and local directories of forensic experts and custody evaluators. A return rate of 63% (190 out of 302) was obtained, although only 82 of the returned surveys provided usable data. Of those persons who responded, 78% were doctoral-level psychologists, 18% were psychiatrists, 5% were master's-level practitioners, and 4% were social workers. No single measure was used by a majority of the respondents when assessing children. Intelligence tests were the tests most frequently employed by the examiners, with 45% of respondents using some measure of intelligence in the majority (85%) of their cases. The next most frequently used measure was the Thematic Apperception Test (TAT) or the Children's Apperception Test (CAT), with 39% of the respondents using such measures in most (75%) of their evaluations. The three next most commonly used tests used with children were miscellaneous projective drawings (the Rorschach Inkblot Technique, and the Bender-Gestalt Visual Motor Test).

With respect to assessment of adults, the most commonly used test was the Minnesota Multiphasic Personality Inventory (MMPI). Seventy percent of the respondents reported using this instrument in child custody evaluations, and those who used it employed it in almost all (88%) of their cases. The next most frequently used instruments were the Rorschach Inkblot Technique (42%) and the TAT (38%), and evaluators who employed these instruments...
reported using them in a majority of their cases. Measures of adult intelligence also were occasionally employed, with the Wechsler Adult Intelligence Scale (WAIS) being used by 29% of the respondents. Those who used the WAIS reported employing it in a majority (67%) of their cases.

Ackerman and Ackerman (1997) replicated the Keilin and Bloom (1986) survey to obtain a more current picture of the types of psychological tests employed in custody evaluations. In the decade between these two surveys, a number of new or revised standard psychological tests had been developed and marketed, as well as several instruments specifically designed for application in cases of child custody. The investigators mailed 800 questionnaires to psychologists identified by various psychological and legal associations. Of these, 336 were returned, but only 201 (25%) fit the study’s selection criteria. In contrast to the Keilin and Bloom survey, all respondents were doctoral-level psychologists.

Similar to the findings of Keilin and Bloom (1986), intelligence tests and projective measures continued to be the instruments most frequently used with children. Fifty-eight percent of the respondents reported using intelligence tests in their evaluations. Those using such tests indicated employing them in 45% of their evaluations. Thirty-seven percent used either the CAT or the TAT (in 53% of their evaluations). With respect to assessment of adults, the MMPI/MMPI-2 remained the most frequently used assessment instrument, with 92% of the respondents employing a version of this test in the large majority (91%) of their evaluations. The Rorschach Inkblot Technique remained the second most frequently used test with adults—48% of the respondents reported employing the test, and those who used it did so in more than half (64%) of their cases. The next most frequently used tests were the revised WAIS and the Millon Clinical Multiaxial Inventory (MCMI-II/MCMI-III), with 43% and 34% of the examiners reporting using these tests in their custody evaluations, respectively.

In terms of the more recently developed tests specifically designed to assess children during custody evaluations, more than one third of the respondents (35%) reported using the Bricklin Perceptual Scales (BPS) (Bricklin, 1990a). Furthermore, those who used the BPS did so in the majority (66%) of their cases. Another custody assessment instrument, the Perception of Relationships Test (PORT) (Bricklin, 1989), was also used by a significant proportion of the respondents (16%) in a large number of their cases (64%).

Few of the respondents reported using specific custody measures designed for use with families or adults. Eleven percent of the respondents reported using the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT) (Ackerman & Ackerman, 1992), but those who used it did so in essentially all (89%) cases. The only other custody-specific measures endorsed were the Parent Awareness Skills Survey (PASS) (Bricklin, 1990b), used by 8% of the respondents (who employed it in 94% of their cases), and the Custody Quotient (CQ) (Gordon & Peck, 1989), used by 4% of the respondents (in 57% of their cases).

LaFortune and Carpenter (1998) recently surveyed mental health professionals about the tests and strategies they employed in their custody evaluations. They solicited data from 286 participants identified through a variety of sources (e.g., state agencies and telephone advertisements) and obtained a geographically diverse sample of 165 respondents. In the sample, 89% of respondents were psychologists, 6% licensed professional counselors, 1% licensed marriage and family therapists, and 3% licensed social workers (1% of the sample was unidentified).

Respondents reported the frequency of use of various assessment methods on a 1 (never) to 5 (always) scale. Regarding psychological tests used to assess adults, parenting scales, such as the ASPECT and the Bricklin measures, were second in frequency of use (mean response level of 3.28) only to the MMPI (mean response level of 4.19). Unfortunately, frequency of use for individual custody tests was not reported by the authors. Nevertheless, it appears that these newer, more specific instruments enjoyed a fairly significant rate of use among these respondents. Data regarding instruments used to assess children apparently were not collected, so it is unclear whether a similar high rate of use would have been found.

Findings from the above surveys indicate that, although traditional psychological tests continue to be employed with a fair degree of frequency by custody evaluators, the new generation of custody assessment measures also are used with some regularity. Although these tests have good face validity (i.e., their item content makes sense and appears to assess factors relevant to child custody decision making), significant questions remain regarding their utility and validity, and their appropriateness for use in custody evaluations at the present time.

CRITERIA FOR TEST USE

Exactly what criteria should be considered in determining whether any given test is an appropriate assessment procedure in a child custody evaluation? Grisso’s (1986) model for conducting forensic evaluations provides a helpful framework for considering the potential utility of psychological testing in the context of custody evaluations. Evaluators considering including a particular test first should identify the psychosocial constructs that they are to assess. These constructs can be specified by examining the law regarding
child custody and identifying the psychological, emotional, and behavioral constructs on which the law is focused. Next, evaluators should select methods of assessment, including potential tests, that ostensibly measure the specific construct of interest or related constructs. Because tests that are valid and appropriate in one context may be poorly suited for other applications or in other contexts, decisions about the value or appropriateness of a test cannot be made independent of its proposed application. Therefore, a test that reliably and validly assesses a particular construct (e.g., psychopathology) in one setting (e.g., psychiatric hospitals) may not be especially useful in another type of setting (e.g., custody evaluations).

Next, examiners should consider whether the particular test meets professional standards for psychological tests and measures in general (APA, 1992; American Educational Research Association, 1999) as well as standards specific to forensic evaluation (Heilbrun, 1992). If a proffered test meets the above requirements then its use in the context of a child custody evaluation can be considered appropriate. Reviewed below are those standards that mental health professionals should consider when evaluating the appropriateness of a particular test for use in a child custody evaluation.

Ethical Principles of Psychologists and Code of Conduct

Section 2 of the Ethical Principles of Psychologists and Code of Conduct (APA, 1992) directs professional practice with respect to psychological evaluation and assessment and clearly applies to all psychologists. These standards specify that psychologists must (a) be familiar with an instrument's reliability, validity, norms, and administration; (b) use assessment techniques in ways that are appropriate in light of research or other evidence; and (c) be aware of cases in which particular assessment techniques or norms may not be applicable or may require adjustment in administration or interpretation. This latter standard seems particularly important given concerns about the possible misuse of instruments that primarily assess issues of concern within a clinical context (i.e., intelligence, psychopathology, or personality).

Standards for Educational and Psychological Testing

The Standards for Educational and Psychological Testing (American Educational Research Association, 1999) represents an interdisciplinary attempt to establish principles for the development and use of psychological and educational tests. Arguably, these standards apply to all test users, regardless of discipline. The Standards for Educational and Psychological Testing is comprehensive and addresses issues such as technical standards for test development and validation, standards for professional practice and use, standards for test use with special populations (e.g., minority individuals and individuals with disabilities), and other issues such as test administration, test scoring, reporting results, the rights of test-takers, and the responsibilities of test users.

Forensic Practice Guidelines

In addition to the general guidelines described above, there are a number of more specific guidelines that are relevant for consideration of test inclusion. Custody evaluation guidelines promulgated by the AFCC (n.d.), the APA Committee on Professional Practice Standards (1994), and the AACAP (1994) all make reference to psychological testing and its use in the context of child custody evaluations. Consistent with the more specific testing standards and guidelines described above, both the AFCC and APA standards urge evaluators to use psychological tests only as appropriate; the organizations also note the tests' limitations in the context of child custody disputes.

In contrast, the AACAP (1994) standards direct that psychological testing is usually not helpful in the context of child custody evaluations and typically results in "professionals battling over the meaning of raw data" (p. 655). That the AACAP guidelines identify psychological test results as the only kind of data gathered in the context of a child custody evaluation that is vulnerable to a "battle of the experts" suggests that this commentary derives more from guild issues than a legitimate concern over the potential misuse of test data.

Heilbrun (1992) discusses the role of psychological testing in forensic assessment and offers guidelines for selecting tests to use in such applications. Those concerns that are applicable to consideration of tests in child custody matters are discussed below. First, Heilbrun suggested that any test forming the basis of an opinion in a forensic evaluation should be commercially available; accompanied by a manual describing its development, psychometric properties, and administration procedures; and listed or reviewed in a readily available resource or reference such as the Mental Measurements Yearbook. With the above, all parties will have access to information regarding the test and its utility and can prepare appropriately for direct examination and cross-examination of mental health professionals who use the instruments. Second, because test reliability limits test validity, Heilbrun recommended that adequate levels of reliability be demonstrated, with special caution being exercised when using instruments with relevant reliability estimates lower than .80. Third, it is suggested that the test should be relevant to the legal issue at hand and that, when possible, this should be established by validation research published in refereed journals. Fourth, to ensure gen-
eralizability from the testing situations, Heilbrun noted that instruments should be administered in a standardized manner. Fifth, the examiner should consider differences between the examinee and the population with which a test was developed and/or differences between the purposes for which a test was developed and the purposes for which it is being used. Finally, Heilbrun directed that, where appropriate, the effect of response styles (e.g., "faking good," malingering, and social desirability) on test results should be considered by the examiner, with interpretations being offered accordingly.

Together, the above authorities provide reasonable guidelines for evaluating the utility of tests that may be used in the context of child custody proceedings. In the next section, we review instruments that have been developed specifically for the purposes of child custody evaluation. A brief description of the instrument and manual is provided first, followed by an evaluation of its strengths and weaknesses and a discussion of the extent to which the test presently meets professional standards.

**CHILD CUSTODY EVALUATION INSTRUMENTS**

There are a myriad of tests that are potentially useful in the context of a child custody evaluation. Tests that might be useful in child custody evaluation fall into one of three broad categories: clinical assessment instruments, forensically relevant instruments, and forensic assessment instruments (for further discussion and explanation, see Heilbrun, Rogers, & Otto, 2000). Clinical assessment instruments assess general psychological constructs (e.g., psychopathology, intelligence, academic achievement, normal personality), are developed for therapeutic applications, and most typically, are used in non-forensic settings. Nonetheless, to the degree that these instruments assess general constructs that may be relevant to decisions involving around custody of children, their use in child custody evaluations is appropriate. For example, in those jurisdictions where emotional stability of the parties is one factor to be considered in making decisions about the custody and placement of children, use of the MMPI-2 as one way of assessing psychopathology and emotional stability as it may be related to parenting is appropriate. Similarly, if an examiner uses the Child Behavior Checklist in her or his assessment of the child's current adjustment and response to the divorce, and as a way of understanding the child's current needs, then too would be appropriate use of a general, clinical assessment instrument in the context of a forensic (child custody) evaluation. As a final example, if a psychologist uses the Parenting Stress Index to assess how interactions with the child affect the parent, this too would appear to be appropriate use of a validated clinical assessment instrument in the context of child custody evaluation.

Forensically relevant instruments are assessment techniques that assess constructs or issues that most typically arise in the course of forensic evaluations, but they are not limited to forensic evaluation. Tests of defensiveness, malingering, and psychopathy (e.g., Paulhus Deception Scales, Structured Interview of Reported Symptoms, and Psychopathy Checklist—Revised) are examples of such instruments. Perhaps with the exception of measures of general defensiveness in responding (for an example, see Paulhus, 1999), forensically relevant instruments are unlikely to prove helpful in the large majority of child custody evaluations.

Forensic assessment instruments are developed specifically for application in forensic settings, and their purpose is to assess constructs relevant to particular legal issues. At the current time, there are five child custody evaluation instruments commercially published, the majority of which have been developed by Barry Bricklin, a Pennsylvania psychologist.

Rogers and Webster (1989) observed that, in many forensic evaluation situations, the best validated tests and assessment instruments are general clinical tests, which have the least direct legal relevance (i.e., the constructs they assess are not directly related to the legal issue at hand). This observation also applies in the child custody evaluation context, where the general clinical assessment instruments that are used typically have better validity data than child custody evaluation measures, but the constructs they assess (e.g., psychopathology, intelligence, academic achievement, or normal personality) are not directly legally relevant (although they may be relevant nonetheless). The review that follows is limited to forensic assessment instruments devoted to child custody evaluation. That the utility of general assessment techniques in the context of child custody evaluation is not addressed here should not be interpreted as indicating that the instruments are of no value in child custody evaluation. Rather, such a task is more deserving of a book than an article.

As the following review demonstrates, although test developers have made some important progress in the assessment of custody-relevant psychological constructs, the existing instruments suffer from a number of limitations. This review, however, is not intended to minimize the important contributions test developers have made; rather, it is designed to alert custody evaluators and consumers to the limitations of some of these instruments and the need for further research.

**Perception of Relationships Test**

The PORT (Bricklin, 1989) is a projective or unstructured psychological test based on human figure drawings and their placement. It purportedly...
assesses (a) the degree to which a child seeks "psychological closeness" with each parent and (b) the types of interactions the child has with each parent. The PORT consists of seven drawing tasks and is identified as being appropriate for use with children age 3 and older. Children's drawings of themselves, their parents, and their families are scored so that a primary caretaking parent can be identified. Bricklin notes that the PORT also has the potential to be a useful tool in detecting physical and sexual abuse insofar as it can detect "psychological consequences of abuse" (p. 44). Scoring guidelines, which are very complex for some items, are provided in the PORT manual. Some evidence supporting the reliability and validity of the PORT also is provided in the manual.

There are several problems with the PORT that raise significant concerns regarding its use at the present time. First, the PORT manual is poorly organized and poorly written. A description of the PORT, scoring procedures, and supporting data are interspersed with the author's commentary on general child custody evaluation issues. Descriptions of research protocols are sometimes vague and incomplete, and information regarding the PORT's psychometric properties is presented both in the PORT manual (Bricklin, 1989) and in a photocopied paper (Bricklin & Elliott, 1997). Thus, the clinician interested in quickly accessing important information such as the test's reliability and validity data will be frustrated.

Bricklin (1989) (Bricklin & Elliott, 1997) did not report any data regarding item scoring and interrater reliability (i.e., the extent to which different examiners will obtain similar scores when administering the test to an examinee). Thus, important questions remain regarding how consistently examiners will score and interpret test results. This issue appears all the more significant in light of the amount of attention Bricklin devotes in the manual to projective interpretation of drawing techniques. No studies examining the reliability or validity of the PORT have been published in peer-reviewed journals. Bricklin (1989) prefaced a brief section on test-retest reliability (i.e., the extent to which an examinee would obtain a similar score across repeated administrations of the test) with a discussion minimizing its significance: "There are no real reasons to expect the measurements reported here to exhibit any particular degree of stability, since they should vary in accordance with changes in the child's perceptions" (p. 64). Despite this assertion, one would hope that, at a minimum, test results would remain approximately the same over at least brief test-retest periods. Also, reliability across different testing conditions (e.g., which parent brings the child to the evaluation) would seem to be crucial to determining the validity of the interpretations offered. Yet only minimal data regarding such issues are provided. Data regarding test-retest reliability are limited to a total of 18 cases in which children were tested twice with the PORT, with periods between testing ranging from 4 to 8 months. Bricklin reported that, although specific scores changed in some cases, in only 2 of the 18 cases did the "chosen parent" change.

Although validity data for the PORT are somewhat better, they leave much to be desired. Most of Bricklin's data address the convergent validity of the PORT. Bricklin (1989) reported findings of one study in which the primary caretaking parent identified by the PORT was identical to the parent of choice identified by the Bricklin Perceptual Scales (Bricklin, 1990a; see below) in 19 of 23 (83%) cases. Also described is a study in which clinicians made judgments about 30 children and their parents, based on extensive clinical data. In 28 of the 30 cases, the PORT-identified primary caretaking parent was consistent with the clinicians' decisions regarding who would be the better primary caretaker. On pages 61 and 62 of the PORT manual, Bricklin (1989) appears to describe a study in which PORT scores and judgments of clinicians who viewed 30 parent-child interactions were compared. According to Bricklin, the PORT primary caretaking parent was in agreement with the clinicians' opinions regarding parent of choice "with better than 90 percent accuracy." Bricklin described a second set of studies in which he compared PORT scores to judges' decisions regarding custody. According to the author, in 80 of 87 cases (92%), the judges granted custody to the parent identified as the primary caretaking parent by the PORT. In a later published supplement (Bricklin & Elliott, 1997), references are made to a number of other studies, but the descriptions of each study are so brief (i.e., one to two lines per study) as to prevent adequate consideration of them. Of these studies, perhaps most interesting is the description of a sample of 1,038 cases in which an agreement rate of 89% was obtained when PORT primary caretaking parents were compared to the judgments of "independent psychologists based on all clinical and life-history data available." These findings, however, essentially appear to be psychologists reporting to Bricklin how frequently the PORT results were consistent with their clinical impressions in custody cases they evaluated.

Although early reviews of the PORT described it as a promising addition to the field (Brodzinsky, 1993), more recent reviews (Carlson, 1995; Conner, 1995; Heinz & Grasso, 1996; Melton et al., 1997) consistently have pointed out the limitations noted above as well as several others that prevent it from meeting basic scientific and legal standards. Problems identified can be classified as relating to (a) a poorly articulated theoretical foundation, (b) a non-standardized administration format, (c) the absence of normative data, (d) subjective scoring procedures, (e) the absence of reliability data, (f) minimal validity data, and (g) failure to assess parents' functional abilities in the process of making custody determinations and recommendations.
First, the basic premise on which the PORT is based, that children's unconscious preferences are more important than their verbalized statements, is not testable via empirical analysis using falsifiable hypotheses. There simply are no data suggesting that this assertion is true or, even if true, that the PORT adequately assesses this unconscious preference. Such a limitation calls into question the relevance of the PORT to custody decision making at all. Second, the PORT allows for considerable deviation in how it is administered. Such deviations, even for a test that otherwise has adequate psychometric properties, may invalidate any data that could have been obtained via standardized procedures. Third, the sample reported in the PORT manual is inadequately described and is too small. There are no normative data available for the PORT, and differences across age groups are not reported. Fourth, the criteria by which some of the PORT items are to be scored are subjective. This leads to significant concerns that different examiners would not obtain similar results when testing the same child (i.e., poor or unknown interrater reliability). Fifth, Bricklin's description as to why traditional reliability estimates (e.g., test-retest) are not applicable to the PORT is simply inaccurate. If a child's unconscious ratings of the preferred parent are so inconsistent as to render them unstable over even brief periods of time, then the entire premise on which the PORT is based (i.e., assessing the preferred parent) is essentially irrelevant to making any decision regarding a child's long-term placement.

Sixth, the validity data provided in the PORT manual are inadequate. Data indicating that the PORT results were consistent with judicial decisions are problematic for at least two reasons. First, it is not clear whether the PORT results influenced the decisions being made. If so, the obtained percentage of agreement suffers from criterion contamination (i.e., the outcome being predicted was actually influenced by the prediction being made, therefore artificially elevating the rate of agreement). A second problem relates to the criterion itself. If the utility of the PORT rests in its ability to predict what a judge ultimately will decide independently, what is the purpose of administering the test at all? A much more relevant outcome to predict would be whether the results of the PORT actually identify the parent truly better suited to serve as the custodian. Unfortunately, no such data have been published, if they exist.

In summary, the PORT has significant limitations in almost every area that is relevant to the development of a useful test. The absence of an adequate manual, normative data, and any published studies examining its psychometric properties suggests that the PORT does not meet basic requirements established by the latest version of the Standards for Educational and Psychological Testing or guidelines for use of psychological tests in forensic settings (Heilbrun, 1992).

Bricklin Perceptual Scales

The BPS (Bricklin, 1990a) is purported to measure a child's perception of each parent in the areas of competence, supportiveness, follow-up consistency, and possession of admirable traits. Using a card and styles, the child indicates how well each parent completes a particular behavior (e.g., being patient) or task (e.g., helping with schoolwork) by puncturing a line along a continuum from not so well to very well; children's responses also are obtained verbally. Each parent is rated on the same 32 items, so the child completes a total of 64 items that are distributed over a total of 4 scales (see above). The parent who receives more positive ratings on the greater number of cards is considered the parent of choice. The underlying assumption is that children's verbal reports about their parents may be distorted and that a nonverbal assessment strategy will provide a better estimate of their "true" preferences.

Many of the limitations of the PORT noted earlier also apply to the BPS and raise significant concerns regarding its use in custody decision making. First, no studies examining the utility of the BPS have been published in peer-reviewed journals, and the information provided in the test manual is inadequate regarding several important issues, particularly reliability and validity. For example, the BPS manual provides no data regarding interrater reliability. It appears likely, however, that this form of reliability would be high given the straightforward manner in which the items are scored. Similarly, scale consistency (i.e., the extent to which individual items on a scale reliably measure the same psychological construct) is not addressed in the BPS manual. Given the small number of items on some scales (e.g., the follow-up consistency scale has only three items, and the admirable traits scale has seven items), it is likely that scale consistency will be low (scales with few items tend to have relatively low internal consistency), thus limiting scale validity.

Similar to the rationale provided for the PORT, Bricklin (1990a) prefaced his discussion of the data regarding test-retest reliability of the BPS by downplaying its significance. "There are no reasons to expect the measurements reported here to exhibit any particular degree of stability, since they should vary in accordance with changes in the child's perceptions" (p. 42). Although it is true that less-than-perfect test-retest reliability is not problematic if a test measures a construct that changes over time, at a minimum it should be demonstrated that test results are stable over relatively brief periods of time. Data regarding test-retest reliability are presented in a confusing manner (see p. 42). It appears, however, that in 12 custody cases in which testing was repeated within a period of no more than 7 months, the parent of choice identified by the BPS remained the same.
Validity data for the BPS also are presented in a confusing manner in the manual, with additional data provided in a photocopied publication that serves as a manual supplement for a number of Bricklin measures (Bricklin & Elliott, 1997). Validity data fall into one of three types: agreement between BPS scores and other measures of parent-child involvement, agreement between BPS scores and judges' decisions, and examiners' opinions regarding the accuracy and utility of the BPS.

Bricklin (1990a) cited two studies that revealed agreement between the BPS and the PORT as evidence of the validity of each test (also see above). In 46 of 55 cases (84%), the BPS and the PORT identified the same parent of choice (with 50% agreement representing chance). As further evidence of the validity of the BPS, Bricklin cited a number of studies that examined the relationship between BPS scores and perceptions of parenting behavior. For example, Bricklin administered the BPS and a set of questionnaires to 23 children and their parents. The questionnaires queried the children and parents regarding the parents' child-rearing behaviors and responsibilities. Parents who were identified by the children as taking more child-rearing responsibilities were identified as the parent of choice in a manner similar to that used with the PORT. In 21 of 23 cases (91%), the same parents of choice were identified by the children's responses to the questionnaires and the BPS. Of some interest is Bricklin's (1990a) claim that this high (but less-than-perfect) rate of agreement provides even greater support for the validity of the BPS than a higher rate of agreement might have demonstrated. He argues that children's responses to the BPS, because they are nonverbal, represent less conscious feelings about their parents, whereas their responses to questionnaires represent more conscious feelings. Thus, perfect agreement between the two measures (one that assesses conscious feelings and one that assesses unconscious feelings) would prove problematic.

Reviewers have consistently criticized the unsubstantiated claim that nonverbal responses are more valid indicators of preference, noting that reliance on purportedly unconscious indicators makes empirical validation of the BPS difficult if not impossible to obtain (Heinze & Grisso, 1996; Melton et al., 1997; Shaffer, 1992). With the same sample, Bricklin (1990a) also examined the rates of agreement between the parents of choice as identified by the children's BPS responses and the parents' perceptions of their involvement with their children. In 13 of 17 (76%) cases, there was agreement between each parent's perception and the parent of choice identified by the BPS. Finally, Bricklin described 29 cases of contested custody in which he conducted evaluations using the BPS. In 27 of these cases (93%), the parent identified as the parent of choice by the BPS was awarded custody by the judge. It is not reported whether Bricklin offered an ultimate opinion on custody that was consistent with BPS scores.

In a photocopied test manual supplement (Bricklin & Elliott, 1997), a number of other studies examining the validity of the BPS are described, but the descriptions of the studies are so sketchy (i.e., one to two lines per study) as to prevent adequate consideration of them. Of particular interest is the authors' report that in a sample of 1,765 cases, the BPS parent of choice was consistent with the judgments of psychologists who had access to "clinical and life history data." Similar to the large sample reported in the PORT section above, these findings appear to essentially be psychologists reporting to Bricklin how frequently the BPS results were consistent with their clinical impressions in custody cases they evaluated, with no appreciation for the limited value of this approach or the problem of criterion contamination.

Published reviews of the BPS (Hagin, 1992; Heinze & Grisso, 1996; Melton et al., 1997; Shaffer, 1992) have noted many of the problems identified above as well as other limitations indicating that use of the BPS is inappropriate at this time. For example, the instructions for administration and scoring are confusing and suggest that a standardized administration format may be abandoned under various circumstances (Heinze & Grisso, 1996; Shaffer, 1992). Also, the absence of normative data is especially problematic, particularly given the likelihood of responses being affected by changes in developmental capacity (Heinze & Grisso, 1996). Also, the language may be too complicated for some children to understand, particularly those with limited cognitive abilities. Another limitation is that the BPS may be biased in favor of mothers, in that in one unpublished study of the BPS (Speth, 1993, cited in Heinze & Grisso, 1996) fathers scored significantly lower than mothers on the supportiveness subscale. Also, gender differences in response patterns were found in this study, with adolescent boys endorsing fewer items in favor of fathers than adolescent girls. In summary, the criticisms noted above raise serious concerns about the BPS. Conservative custody evaluators should consider refraining from using this instrument until better supporting data become available.

Parent Perception of Child Profile

The Parent Perception of Child Profile (PPCP) (Bricklin & Elliott, 1991) is an instrument designed to assess parents' understanding and awareness of a child's development and needs in eight basic areas: interpersonal relations, daily routine, health history, developmental history, school history, chores, personal hygiene, and communication style. The instrument queries parents
about their knowledge and understanding of the child in these important life areas. The rationale behind the PPCP is that a parent who is more knowledgeable about a child's needs and development will be able to do a better job of parenting than one who is less knowledgeable. According to the test authors, the PPCP can be administered by the examiner in an interview format, or it can be self-administered by the parent. The manual directs that data need not be gathered in all eight categories, and the examiner can decide which issues are most critical for a particular child and parent.

It would appear that the PPCP requires that the parents' perceptions of the child be compared to some standard or criterion if the evaluator is to draw a conclusion about the accuracy of the parents' impressions. However, the authors note that the need for this corroborative information will vary from case to case, depending on an examiner's concerns about the parents' degree of interest in the child. In those cases in which corroborative information is considered necessary, the manual directs that "other source information" can be provided by the child or various significant others (e.g., babysitters and teachers). Validity of the parents' responses is also partially assessed in a recall format, with some questions being repeated later in the interview process.

Multiple limitations of the PPCP are apparent and preclude its recommendation for use at present. First, the manual is lacking and incomplete. Scoring directions, reliability data, or validity data are not provided in the PPCP manual (Bricklin & Elliott, 1991), and the summary score sheet is confusing. Second, there are no studies examining the utility of the PPCP published in peer-reviewed journals. The only data provided in the test manual are concerned with the recall format designed to identify parents who may respond inconsistently as a result of simply guessing about their children's behaviors.

Two reviews of the PPCP (Hiltonsmith, 1995; Kelley, 1995) have noted that the PPCP may "elicit valuable information regarding parents' knowledge of their children" (Hiltonsmith, 1995, p. 737). However, both also point out significant limitations of this instrument and warn against considering it to be a psychometric test rather than a semistructured interview. The primary limitation, noted above, relates to the absence of any type of reliability (internal consistency, test-retest, or interrater) or validity (content, construct, or predictive) data in the PPCP manual or peer-reviewed publications. The lack of such information obviously prohibits any meaningful conclusions from being made about scores obtained from the PPCP.

Aside from the absence of data regarding basic psychometric properties, reviewers have noted significant concerns regarding the administration and scoring of the PPCP. First, the manual directions encourage examiners to include or omit items on a case-by-case basis, thereby resulting in a nonstandardized process of data collection. Second, the PPCP may be either evaluator-

administered or self-administered, which raises concerns as to whether results would be comparable across these different administration formats. Third, item scoring and interpretation rely on considerable clinical judgment.

In summary, although the PPCP appears to be a face-valid instrument that reflects the clinical intuition of its developers, its utility as a psychometric instrument (as opposed to a semistructured clinical interview) is presently unknown (Kelley, 1995). Because the PPCP does not meet basic requirements of the Standards for Educational and Psychological Testing, it is recommended that examiners not use it. Those who find the general approach of the PPCP intriguing might consider using it to form the basis of a structured interview but should refrain from scoring it, given the above limitations.

Parent Awareness Skills Survey

The PASS is described as a "clinical tool designed to illuminate the strengths and weaknesses in awareness skills a parent accesses in reaction to typical child care situations" (Bricklin, 1999b, p. 4). The PASS consists of 18 typical child care situations or dilemmas and represents a sampling of relevant parenting behaviors that can be applied to children of various ages. It appears to be rooted in the commonsense notion that strengths and weaknesses in parents' child-rearing abilities can be assessed, in part, by querying parents about how they would respond to various child care scenarios. After being presented with a particular child-rearing situation, the parent offers his or her response, with follow-up questioning by the examiner as necessary. Responses are then evaluated and scored.

No data regarding norms, test reliability, or test validity are offered in the manual, and none appear in any peer-reviewed publications. Although scoring directions and guidelines are offered in the PASS manual, the authors note that

the evaluator, by virtue of appropriate training in psychology and/or child development, can apply his or her own standards in assigning the suggested scores. The PASS allows for wide latitude in scoring since its main purpose is to discover the relative (rather than absolute) strengths and weaknesses any individual or compared set of respondents manifest (Bricklin, 1999b, p. 11).

This description seems to suggest that little can be inferred from PASS results in terms of absolute abilities. However, the author goes on to claim that the PASS can be administered to one parent, with scores having interpretive significance (Bricklin, 1999b, p. 16). The lack of clear scoring guidelines, the author's suggestion that not all items be administered in a particular case, and
the lack of data regarding interrater reliability raise concerns about the validity of inferences derived from responses to the PASS items. Of additional concern is Bricklin's (1990b) suggestion that the PASS can be used in a psychoeducational manner.

The PASS can be used to strengthen parental communication skills by simply allowing an interested parent to read this manual. In having the opportunity to think about sample responses offered by members of the Bricklin Associates research team, the parent can expand his or her available options. (p. 6)

Although whether the test authors recommend doing this in a therapeutic or forensic context is unclear, certainly the utility of any information gleaned from the instrument for purposes of forensic evaluation would be even further compromised if it were to be collected after an examinee had read the manual.

Before the PASS can be considered for use in forensic settings, empirical data supporting the validity of inferences regarding parent awareness skills developed from PASS scores and evidence supporting the reliability of scores are necessary. It is, however, an interesting attempt to quantify a complicated assessment process (Bischoff, 1995; Cole, 1995).

Ackerman-Schoendorf Scales for Parent Evaluation of Custody

The ASPECT (Ackerman & Schoendorf, 1992) is a rating instrument designed to assess the relative child-rearing abilities of parents. The ASPECT is not a test; rather, it is most appropriately described as a test battery that incorporates observations of and interviews with parents and children, responses to parenting questionnaires, and the results of a variety of test instruments. The tests involved consist of the MMPI/MMPI-2 (parents only), Rorschach Inkblot Technique (parents and children), measures of intelligence (parents and children), achievement measures (children only), and projective storytelling devices (children only). The ASPECT is composed of three subscales (Observational, Social, Cognitive-Emotional) that yield an overall summary index of parenting effectiveness for each parent, referred to as the Parent Custody Index (PCI) (for a more detailed description of the instrument, see Otto & Collins, 1994).

The ASPECT manual is easy to read and well laid out. Both the internal consistency of the various ASPECT scales and the interrater reliability of the ASPECT are presented in the manual. Internal consistency of the scales is moderate, whereas interrater reliability is high (Otto & Collins, 1994). In contrast to the easy-to-read format of the manual, the authors' presentation of the validity data is confusing. Data supporting the validity of the ASPECT at the current time are limited to the degree of association between PCI score and case outcome. No research regarding the ASPECT has been published in peer-reviewed journals.

Early reviews of the ASPECT (Brodzinsky, 1993) noted that it is a promising instrument that incorporates many of the content domains typically addressed in a custody evaluation. However, other reviewers have noted serious limitations in terms of the basic conceptualization of the ASPECT (Arditti, 1995; Heinz & Grisso, 1996; Melton, 1995; Melton et al., 1997; Wellman, 1994). Melton (1995) offered three primary concerns, two of which relate to the content validity of the instrument. First, some of the items selected for inclusion have no clear relation to custody outcomes (e.g., IQ differences between the parent and child) and only minimally address issues that have been shown empirically to be related to these outcomes (see, e.g., Maccoby & Mnookin, 1992). Second, key factors relevant to the final custody decision (e.g., third-party interviews) are not incorporated into the assessment process, thereby limiting the scope of information used to obtain the PCI score. Third, and finally, by offering a PCI score at all, the ASPECT encourages clinicians to offer ultimate issue opinions regarding legal decisions that are outside of their area of expertise, something that Melton and his colleagues (Melton, 1995; Melton et al., 1997) are opposed to conceptually.

Other significant limitations have been noted by Melton (1995) and by other reviewers with regard to the basic psychometric properties of the ASPECT. Of critical concern is the limited data regarding predictive validity (Arditti, 1995; Heinz & Grisso, 1996; Wellman, 1994). The limited data that do exist only relate to whether the ASPECT can predict judges' custody decisions. As noted above, this is a particularly weak criterion measure in that it is unclear for what purpose a psychological battery that determines judges' decisions ultimately is to be used. Furthermore, there is evidence that the data reported in the manual are unrepresentative of typical custody outcomes, in that nearly half of the cases resulted in the father's obtaining custody. Other limitations noted include the limited size ($N = 200$) and sociodemographic characteristics of the normative sample (disproportionately well-educated Caucasians evaluated by private practitioners) and the lack of clarity in the manual regarding how interrater reliability was established.

Custody Quotient

The CQ (Gordon & Peck, 1989) initially was developed as a research instrument to assess parenting skills in a custody evaluation and provide a
single standardized score based on ratings of the parent obtained from various sources. The parent is rated in the following areas: (a) emotional needs, (b) physical needs, (c) no dangers, (d) good parenting, (e) parent assistance, (f) planning, (g) home stability, (h) prior caring, (i) acts and omissions, (j) values, (k) joint custody, and (l) frankness (Fabry & Bischoff, 1992). Parents are rated on a 3-point scale (0 = weak to 2 = highly competent) across these content areas, with scores being summed and standardized to derive a composite score, or custody quotient.

The CQ manual contains information about its development rationale and research foundations, standardization data, ethical considerations, administration and scoring directions, and remediation information (Fabry & Bischoff, 1992). There is also an eight-page scoring protocol for recording responses, ratings, and demographic information about the parents and children. It should be noted that when one of the authors (Edens) attempted to obtain a copy of the CQ manual to review for the present article, he was informed that it is no longer commercially available (Wilmington Institute, personal communication, November 3, 1999).

The CQ is a potentially useful organizational tool that may help the evaluator structure information from a variety of sources to make a well-informed decision regarding the best interests of the child. However, the CQ suffers from several of the same limitations that have been noted for the other tests reviewed here. First, the psychometric properties of the CQ have not been well established. Although reviewers (Bischoff, 1992; Fabry & Bischoff, 1992) have noted that the content validity of the CQ seems to be adequate, there are no published data regarding its predictive or external validity. Reliability information is not available for the CQ, with the exception of some preliminary test data on intrarater reliability. The authors found that intrarater reliability ranged from 50% to 100% on five factors. There were, however, only 10 professionals in the sample, including the authors. Also, generalization is a particular problem with the CQ because the normative sample was composed of residents of a small metropolitan area and is not representative of the U.S. population. The CQ authors recognized this problem and suggested in the manual that users develop local norms before employing the test in other settings. Finally, the CQ contains information that can be used to obtain and prescribe remediation recommendations for parents who lack skills, knowledge, and behavior associated with parenting. However, the theoretical rationale for these recommendations is not provided in the manual.

In summary, reviewers regard the CQ as a potentially useful research instrument, but suggest that it should not be used alone in making a custody decision (Bischoff, 1992; Fabry & Bischoff, 1992). A more conservative evaluation suggests that its use in any forensic capacity is unjustified.

Although the CQ could be a useful measure of parenting skills if more conclusive data were available regarding the statistical properties of the test, based on current professional standards, it would seem inappropriate for use at this time (particularly given the absence of a manual).

CONSIDERING USE OF TESTS IN CHILD CUSTODY EVALUATIONS

Offered below is a list of questions that mental health professionals should ask themselves when considering whether a particular test should be used in the context of a child custody evaluation. We emphasize that the questions presented below are offered only as guidelines and that the significance of any one factor may vary across situations. Mental health professionals should always use their professional judgment when considering the nature and scope of their evaluation processes.

1. Is the test commercially published? Ideally, tests used by child custody evaluators will be commercially published. The commercial publication serves as a review process and also ensures a reasonable level of availability and uniformity of test stimulus materials and protocols. Thus, absent unusual circumstances, custody evaluators should avoid using instruments that are not published by an established test publisher. Those who do so risk using a test that has not been subjected to standard review and is flawed in one or more important ways.

2. Is a comprehensive test manual available? Test manuals are an authoritative resource that should fully describe the development, standardization, administration, scoring, and psychometric properties of the instrument (including its reliability and validity). Mental health professionals should proceed very cautiously when the manual does not adequately describe the test's development and validation, as this increases the possibility of inappropriate application, administration, scoring, and interpretation. Indeed, both the Standards for Educational and Psychological Testing (American Educational Research Association, 1999) and the guidelines developed by Heilbrun (1992) provide some authority, suggesting that tests that lack adequate manuals do not meet minimal standards and should not be used.

3. Are adequate levels of reliability demonstrated? Mental health professionals should only use instruments with known and adequate levels of reliability. The particular type of reliability that is most important may vary across tests and situations, but important factors to consider include internal...
consistency, interrater reliability, test-retest reliability, and reliability of parallel forms. Because the reliability of a measure limits its validity, tests with poor reliability are tests with poor validity, and tests with unknown reliability are tests with unknown validity (see, generally, Cohen & Swerdlik, 1999). In addition to concerns about the validity of such instruments, examiners who use tests with unknown or poor reliability can expect (and reasonably so) vigorous cross-examinations regarding the opinions based on the test results.

4. Have adequate levels of validity been demonstrated? A test must not only be reliable; it must also be valid. Does the test really assess what its authors claim? In the abstract, test validity can be examined in a number of ways (e.g., discriminant validity, predictive validity, concurrent validity, or face validity). Child custody evaluators using instruments must independently assess the validity of measures that they are using. A test is not valid simply because it is published or because its authors purport it to be valid. The validity of opinions that are based on tests with unknown validity is unknown, and opinions based on tests with poor validity are invalid.

5. Is the test valid for the purpose in which it will be used? Test validity should be considered by the child custody evaluator not only in the abstract. The more important question for the custody evaluator to ask is whether the test being considered is valid for the purpose for which it will be used. For example, although it is generally accepted that the Wechsler scales provide valid estimates of intellectual ability, few would argue that the Wechsler scales validly inform an examiner’s understanding of a father’s relationship with his child or understanding and appreciation of his child’s emotional adjustment (extremely low scores notwithstanding). This analysis, of course, is of particular significance when custody evaluators consider using tests or measures that assess general psychological constructs that are not specific or are tangentially related to issues of child custody (e.g., measures of intelligence, academic achievement, psychopathology, or personality). As described in more detail above, these caution should not be interpreted as generally precluding the use of such measures in child custody evaluations. For example, examiners may adopt an approach whereby they assess a general construct and then draw inferences about behaviors and capacities that are more relevant and specific to issues of custody. They should make this inference clear to the consumer of their evaluations (i.e., attorneys, judges, and parents), however, and note any associated limitations. In contrast, however, using general clinical instruments that focus on psychopathology, intelligence, and academic achievement, while neglecting to assess factors more central to the custody issue, violates essentially all professional practice standards.

Child custody evaluators also must consider whether a test that is of proven validity for a specific purpose is valid with a particular examinee. Issues of ethnicity, race, setting, and age may affect test results and test validity, and child custody evaluators using tests must be informed of the norms and standardization procedures and make decisions about their use with a particular examinee accordingly, with any limitations or cautions being made clear to the consumer. Testing standards, child custody evaluation standards, and general practice guidelines for all custody evaluators require sensitivity to issues of potential bias.

6. Has the instrument been peer reviewed? The importance and value of the peer-review process cannot be overestimated. Reliability and validity studies should be published in refereed journals because this allows for the most objective examination of the test and its properties. Absent highly unusual circumstances, child custody evaluators (and mental health professionals conducting any kind of forensic evaluation) should only use tests that have been subjected to the peer-review process and whose properties have been investigated by others, not only their authors. Rules of evidence in all jurisdictions require that techniques used by an expert meet certain criteria, and opinions based, in full or in part, on invalid procedures can be barred (see, e.g., Rule 702, Federal Rules of Evidence; Daubert v. Merrell Dow Pharmaceuticals, 1993; Frye v. U.S., 1923). Moreover, child custody evaluators who use instruments of unknown or questionable reliability and validity are doing a disservice to the profession, the legal system, and the families they serve.

7. What are the qualifications necessary to use this instrument? Even a valid and appropriate test can produce invalid results if it is administered, scored, or interpreted by a professional who lacks the requisite knowledge, training, and experience. In those cases in which a test meets all the requisite criteria for use in a child custody evaluation, the professional must next consider whether he or she has the requisite general training and knowledge (e.g., in psychometrics and psychological assessment) and more specific training and knowledge (with respect to administration, scoring, and interpretation of the particular test). Simply having access to a test does not mean that one is qualified to use it. Examiners can be embarrassed, and their opinions barred, if the court concludes that they do not have the requisite qualifications to administer, score, or interpret tests that formed the basis of their opinions in custody evaluations.
SUMMARY AND CONCLUSION

Child custody evaluations may be among the most complicated forensic evaluations. As a result of their expertise in matters of child development, parenting, family relations, and psychopathology, mental health professionals are called on to provide the judiciary with insights about children and their parents in a number of important spheres. In conducting such evaluations, child custody evaluators may consider using standardized psychological tests that assess general constructs that may be related to the specific behaviors and capacities in which the court is interested, or they may consider using forensic assessment instruments developed specifically for purposes of child custody evaluation.

Mental health professionals are obligated by their professional practice standards and child custody evaluation guidelines to use valid techniques that will best inform the court about children and their parents. Child custody evaluators should cautiously consider use of any test. Although the validity of many standard measures (i.e., those that assess personality, psychopathology, intelligence, and academic achievement) has been established, their validity and utility in the context of child custody evaluation is another matter. Certainly, those measures that validate general constructs may be related to parent-child interactions, parent functioning, and child functioning can be included in child custody evaluations, but only if the examiner makes clear the connection or nexus between the general construct being assessed and the legally relevant issue.

In contrast to the above, essentially all of the newer forensic assessment instruments that have been developed specifically for purposes of child custody decision-making have significant limitations. Although those who have developed these instruments have made an important first step, it is clear that further research examining the reliability and validity of these forensic instruments is necessary before they become part of the custody evaluator’s assessment process. What is less clear, however, is whether this research will occur. In essentially every published review of these custody assessment instruments, concerns about their reliability and validity have been identified, and the need for research has been made clear. Unfortunately, child custody evaluators continue to wait for that research.

NOTES

1. There is a small body of literature on the relative importance that judges and lawyers assign to psychological evaluations in the decision-making process. Reidy, Silver, and Carlson (1989) reported perhaps the most optimistic finding regarding judges’ perceptions of the role of mental health experts. As part of a survey of important decision-making factors, 156 judges rated “testimony of court-appointed psychologists” as the fourth most important criterion, following “desires of children, age 13,” “custody investigation report,” and “testimony of the parties.” Other researchers, however, have reported that less weight is assigned to evidence provided by those in the mental health field. In a sample of 43 superior court judges eligible to hear family law cases and 74 attorneys involved in custody cases, Felder, Rawlinson, Parker, Primm, and Bishop (1987) reported that only 20% of the attorneys and only 2% of the judges rated the recommendations of a mental health professional as one of the “five most critical” factors to consider when making custody decisions. When asked to indicate the ideal decision-making situation, only 7% of both judges and attorneys listed recommendations of mental health professionals as among the five most relevant criteria. In a content analysis of custody decision-making of 37 judges and 23 trial commissioners, Settle and Lowery (1982) reported that “professional advice” was ranked 12th on a list of 20 potential criteria employed by judges and trial commissioners making custody decisions. Melton, Weithorn, and Slobozian (1985) report a similarly bleak picture, with nearly half of their sample of judges reporting that mental health testimony in custody cases was no more than occasionally useful.

2. Unfortunately, the authors were not more descriptive in terms of which specific instruments developed by Bricklin were identified by the respondents.

3. Although psychologists are not the only mental health professionals who conduct testing and evaluations, guidelines from this discipline’s ethics code are specifically referenced here because (a) psychologists are most likely to include tests in their child custody evaluations and (b) the American Psychological Association (APA) code specifically addresses issues of psychological testing.

4. We do not review standard tests (e.g., measures of intelligence, academic achievement, psychopathology, or personality) that may be included in child custody evaluations, for two reasons. First, the validity of these instruments has been reviewed extensively in other venues (see, e.g., Mental Measurements Yearbook or Test Critiques for such reviews); second, the limitations of these tests, including the degree of inference necessary when using them in the context of child custody evaluations, have been covered adequately here and by other authors (e.g., Brodzinsky, 1993; Bricklin, 1992, 1999). We also do not review evaluation formats that have been developed for use in child custody evaluation (e.g., Uniform Child Custody Evaluation System, see Munson & Kulkin, 1994), because these formats are not tests but, rather, are structured clinical evaluations.

5. Convergent validity refers to the extent to which a test provides results that are similar in the results of other tests that purport to measure the same psychological construct. We include a review of the Custody Quotient because some examiners apparently continue to employ it in their evaluations (Ackerman & Ackerman, 1997).

6. This section is adapted, in part, from Heilbrun, Rogers, and Otto (2000).

7. Evaluators should seek in mind that test publishers sometimes market, sell, and distribute tests that they have not published. Therefore, inclusion of an instrument in a test publisher’s catalog does not necessarily mean that the test has been published by that firm.

8. This form of reliability refers to the extent to which, if two versions of a test exist, they have been demonstrated to obtain similar results with the same examinee.
REFERENCES


RECONCILING PARENTS’ AND CHILDREN’S INTERESTS IN RELOCATION
In Whose Best Interest?
Hon. Arline S. Rotman, Robert Tompkins, Lita Linzer Schwartz, and M. Dee Samuels

When a family comes before the court, whose interests are really served? Can the court’s representatives act in the best interests of the children while respecting the rights of parents? When a new parent turns to a court-connected evaluator, how does the evaluator balance the tensions and varying perspectives inherent in this work? Within the bounds of advocacy and legal ethics, how does the attorney balance the demands and rights of the client while guiding the parent to consider the needs of the children? How do judges frame the dilemma before them and consider the work of the evaluator? This article addresses these questions in a multidisciplinary fashion, using a hypothetical case as a guide.

INTRODUCTION BY THE JUDGE

Multiple interests and disciplines compete with each other for primacy when separated parents cannot decide what parenting plan best suits their family’s needs. The prevailing legal standard in most jurisdictions, “best interests of the child,” is a legislative determination reflective of collective public sentiment. Its definition is formed by mental health principles, but interpreted by the judiciary.

The legal standard for custody determinations has changed over time, reflecting prevailing social mores. In earlier times, children were of economic value to the family; on the separation of parents, they remained with the father. After the industrial revolution, men left home to earn money, and custodial responsibilities were the mothers’, who generally remained at home with the children. In the first part of the 20th century, courts were called on to decide issues of custody. The decisions were based on the tender years doctrine (a legal term), reflecting the general view that young children should be with their mothers, who were the primary caretakers, except if a mother was found unfit. Fitness, in legal terms, was associated with morality, so a woman would lose custody if she was found guilty of adultery.

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CHAPTER 5

RELEVANCY ANALYSIS APPLIED TO CHILD CUSTODY EVALUATIONS

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A child custody evaluation is a scientific work product and as such needs to be scrutinized by legal professionals under rules of evidence which guide admissibility of scientific evidence. As a scientific work product, the evaluation should incorporate the methods and procedures of scientific inquiry that guide forensic mental health investigations. A competent forensic work product is defined, in part, by the evaluator’s use of conventional forensic methods and procedures applied to child custody examinations.

In this paper, we propose a more complex paradigm for attorneys and other legal professionals to employ when considering the competence and eventual admissibility of a child custody evaluation. A competent critique of a forensic work product must integrate the psychological paradigm of a scientifically crafted child custody evaluation with legal standards of admissibility. Specifically, this paper will argue that an analysis of a child custody evaluation needs to explore three critically important legal concepts: reliability, relevance, and helpfulness. This paper will apply the criteria of reliability, relevance, and helpfulness to the psychological paradigm of a scientifically crafted child custody evaluation.

Judge as Gatekeeper

Increasingly, mental health professionals are entering the forensic arena. Some are skilled in forensic thinking and the application of forensic methodology and procedures to psycholegal questions. Others step into the forensic arena with a poor understanding of the relationship between clinical and forensic concepts, the differences between clinical and forensic roles and responsibilities, as well as standard forensic methods and procedures. Often, mental health professionals carry a poor or vague understanding of relevant rules of evidence applied to expert witness testimony.

One result of increased mental health participation in the forensic arena is an increase in the number of evaluation reports as well as testimony based on those reports offered to the court. Given the wide array of skills, knowledge, and experience which mental health professionals bring to their court involvements, it seems reasonable to presume that judges will need to play a greater role as gatekeeper of admissibility standards for scientific information in child custody evaluations. Judges will need to know what is and what is not a competent child custody evaluation.

Forensic Methods and Procedures Drawn from the Behavioral Sciences

We believe that the current literature addressing appropriate methods and procedures in civil forensic evaluations identifies the following to be included in a competently conducted examination:

- These include formulation of psycho-legal questions which guide the evaluation;
- forensic interview data using a structured interview format;
- self report data;
- standardized psychological tests which have appropriate basis and relevance to the psycholegal questions posed;
- direct observational data;
- collateral interview data and record review;

Rules of Evidence Applied to Expert Witness Testimony in Child Custody Evaluations

Most states have incorporated all or most of the Federal Rules of Evidence into their state rules of
Evidence. Among the rules which are most important to an understanding of expert witnesses in child custody evaluation are Federal Rules 702, 703, and 705 and their state equivalents.

**Federal Rule of Evidence 702** (and its state equivalent) provides the framework for testimony by an expert. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may otherwise testify thereto in the form of an opinion or otherwise."

Different states may have different rules governing expert witness admissibility. The seminal case which opened the door for psychologists to provide expert witness testimony was *Jenkins v. U.S.* (1961). Three important decisions were handed down in Jenkins. First, psychologists were judged to be qualified as experts in the area of mental disorder if it aided the trier of fact. The court ruled, "We hold only that the lack of a medical degree and the lesser degree of responsibility for patient care which mental hospitals usually assign to psychologists are not automatic disqualifications."

The second finding of the court was that qualifying depends on the nature and extent of the knowledge base and not upon the title of the professional. "Anyone who is shown to have special knowledge and skill in diagnosing and treating human elements is qualified to testify as an expert, if his learning and training should show that he is qualified to give an opinion on the particular question at issue."

A logical conclusion drawn from the above statement is that the qualification of who is an expert is a decision made by the judge, not a quality embodied by the witness. The Jenkins court decided that it was fitting to admit testimony based, in part, upon accounts of others which are not in evidence, but which the expert habitually relies upon in the exercise of his profession. To sanction the use of expert testimony, then two elements are required. First, the subject of the inference must be so distinctively connected to some science, profession, business, or occupation as to be beyond the ken of the average layman. Second, the witness must have skill, knowledge, or experience in that area of expertise leading the trier to fact to believe that he will probably be aided in his search for truth.

**Federal Rule of Evidence 703** (and its state equivalent) speaks to the basis or foundation of the opinion testimony which allows expert witnesses to proffer their opinion to the court. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject, the facts or data need not be admissible in evidence.

The distinction between relevance (Rule 702) and basis (Rule 703) is important. Rule 702 addresses the question of when will expert testimony in the form of "scientific, technical or other specialized knowledge... assist the trier of fact to understand the evidence or to determine a fact in issue..." Rule 703 examines whether the methods, assessment procedures and data that form the basis of the opinion (Rule 702) are reliable and valid measures of the constructs and nomological relationships that guide the theoretical conceptualizations forming the foundation of the scientific theory guiding the testimony.

**Federal Rule of Evidence 705** (and its state equivalent) focuses on experts needing to disclose, upon request, any and all facts underlying their expert opinion. Thus, when testifying in court, mental health professionals need to be prepared to reveal the data upon which their opinion is based.

**Changes Governing Expert Witness Testimony**

Among the most profound transformations in forensic mental health practice are the changes governing the rules of expert witness testimony. In *Frye v. United States*, 1923 (*Frye v. United States* 293 F 1013
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D.C. Cir. 1923), the Supreme Court of the United States ruled about the admissibility of scientific evidence. It ruled that expert witness testimony was admissible when the data or techniques have been shown to have gained general acceptance in the scientific community.

Exactly when or where a scientific principle or discovery crosses the line between the experimental and demonstrable stages of scientific application is difficult to define. Somewhere in this twilight zone the evidentiary force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the foundation or construct from which the deduction is made from must be sufficiently established to have gained general acceptance in the particular field to which it belongs. General acceptance within the general scientific community is not enough however. Recall when most scholars and theologians opined that the world was flat.

In 1993, the Supreme Court again ruled on the admissibility of expert and scientific evidence. In the context of the debate about the admissibility of "junk science" or those pseudoscientific data which are drawn from non-empirically derived means with no apparent underlying theory of science, i.e., palm reading, the Court ruled that judges retain primary responsibility to review the reliability and scientific validity of expert evidence.

In the case of Daubert v. Merrell Dow Pharmaceuticals (Daubert v. Merrell Dow Pharmaceuticals, 92-102, 1993), the United States Supreme Court ruled that the Frye "rule" was superceded by the Federal Rules of Evidence, particularly Rule 702. Recall that the Frye standard established the admissibility of expert witness testimony when the data or methods are generally accepted by a majority of the professional community within a particular discipline.

The new standard, referred to as the Daubert standard, held that judges should examine the degree to which the proffered evidence and its consistency and compliance with an underlying theory of science and scientifically based methods of assessment have been examined with respect to four primary factors:

1. Has the validity and reliability of the "evidence" been subject to scientific scrutiny? That is, can the proposed scientific testimony be tested?
2. Has the evidence been subject to peer review and commentary?
3. Has the evidence been subject to sufficient scrutiny to permit estimation of rate of error and is that rate of error justified in the context of application?
4. Does the evidence have a sufficient degree of scientific acceptance?

The Supreme Court noted that under the Federal Rules, scientific or nonscientific evidence is admissible if it is relevant (F.R.E. 401) and not prejudicial (F.R.E. 403). As discussed below, relevant evidence is any evidence that makes a fact in issue more or less probable. Nonprejudicial evidence is evidence that is not more prejudicial than it is probative.

The Court recognized that the Federal Rules placed an additional evidentiary constraint on the admission of expert testimony based on scientific evidence. It argued that jurors likely lack the requisite knowledge to make an intelligent decision about the credibility of scientific evidence and, as a result, may place excessive weight on it with little regard for or understanding of how to determine its veracity (Krauss & Sales, 1999). Finally, the Court determined that the admissibility of scientific evidence is governed by Federal Rule 702. Under 702, scientific evidence proffered by an expert is admissible "if scientific knowledge...will assist the trier of fact to understand or determine a fact in issue" (Daubert, p. 2796). The Court called this the helpfulness standard (Daubert, p. 2796).
Relevance Analysis Applied to Child Custody Evaluations

Why is all this important? Some legal and forensic mental health scholars might rightly argue that the Daubert standard applies only to Federal courts. State and local courts are still free to use the Frye standard. However, there is an emerging trend toward acknowledging the usefulness of Daubert-type criteria. Thirty-eight states have relied upon the Federal Rules of Evidence in drafting their laws. Thus, it seems that a useful paradigm for evaluating the competence and admissibility of a child custody evaluation is to frame the questions within a Daubert-type examination. The Daubert standard of scientific methodology reflects the behavioral science's long held value and belief in the utilization of empirically derived research and scientifically based, psychometrically sound tools for the evaluation of human behavior. A scientifically crafted child custody evaluation needs to show that its methods are grounded in reliable and valid measurement tools, its scope and focus are relevant to the issues before the Court, and the information obtained from the investigation along with the interpretations, conclusions, and recommendations are both relevant and helpful to the Court. In this section, we describe the application of a relevancy analysis to child custody evaluations.

Formulation of Questions

The concept of “best interest” is poorly defined, both from a behavioral science perspective, a legal perspective, and from a statutory perspective. Courts are best served when evaluation (referral) questions are clearly defined at the beginning of the evaluation. Clearly defined referral questions lead the evaluator to choose methods of assessment and areas of inquiry that measure behaviors that are directly relevant to the questions of concern to the court. Poorly defined questions lead to more difficulty in choosing proper assessment tools.

Too often, experts in child custody are not asked to show the relevance of the questions they examined to the concerns before the Court. If the evaluator does not clearly define the questions which guide the focus and scope of the evaluation, two problems occur. It is not uncommon for a court order or consent order to direct an evaluator to conduct a vague and general psychological evaluation of the parents and minor children and to provide information to the court about the best interests of the minor children. Such orders do not provide information to the evaluator about areas of concern to the court regarding this particular family. Further, it should be understood that, ethically, psychologists should limit their custodial assessments to what might be in the psychological best interests of the child.

Well-defined questions are the first step in a relevancy analysis of a child custody report. If the questions are poorly defined, it is likely that the assessment tools chosen to measure the poorly defined areas of investigation will produce data that are less precise (read: less relevant) than could be obtained if the questions were clearly defined at the beginning of the evaluation.

Secondly, the legal concerns stated in the order need to be defined as psychological areas of investigation. For example, a recent order asked the evaluator to assess the parents’ “honesty, conscience, and safety of the home environment.”

Let us examine the concept of “honesty.” Honesty is a construct. It is an idea which has many different definitions. It may or may not be a relevant factor in a child custody evaluation. Its relevance is dependent upon how the evaluator defines the concept and shows its relationship with other relevant factors which affect the best interests of the child. It could be argued that the question of “honesty” nudges the evaluator in the direction of addressing the question of a litigant’s “truthfulness,” something for which the mental health professional is ill prepared and should decline to address. A psychologist can and should address the construct of “response style,” i.e., how an individual responds to being evaluated. An individual’s openness and honesty can therefore be assessed as part of his/her response style, and
inferences can be made which may address the court’s concerns about “honesty.”

Therefore, an important first step is to define how the concept of honesty falls within the context of this particular family system. The second step is to define how the now-defined concept of honest is related to aspects of parenting or aspects of the psychological best interests of the child. Without making that important link between the concept and its possible relationship to the psychological best interest of the child, the relevance of measuring honesty is unknown. That is, if the purpose of a child custody evaluation is to provide information to the judge which is helpful in making a fact more or less certain about a child custody question, then the factor being examined must be shown to have some relationship to the child’s best interest. Without such definition, one cannot make the argument that the data are relevant. A relevance argument occurs when the logical and/or psychological relationship between two or more best interest factors are described and shown to be relevant and helpful to the judge in understanding the family system.

In the example of the above order, the evaluator did not define any of the three concepts—honesty, conscience, and safety of the home environment—into appropriate psychological variables and, as a result, could not choose measurement tools that specifically measured any dimension of honesty, conscience, or home safety. Since the questions were not defined as psychological concepts, it was not possible to identify psychological measures that properly assess the behavior of concern. Thus, as a result of poorly defined questions in this example, both reliability and relevance were seriously hampered at the outset of the evaluation. When reliability and relevance are hampered, the ability of the obtained information to be helpful is also seriously limited. In those instances in which reliability, relevance, and helpfulness are impeded because of poorly defined questions and poorly chosen tools, it is virtually impossible to offer any scientific interpretation of the data. Therefore, the testimony does not meet the standards of admissibility and should likely not be admitted into evidence.

Questions which might be useful in examining the evaluator’s formulation of questions which guide the evaluation process are:

1. Did the evaluator clearly define the main problems or issues to be resolved?
2. Did the evaluator clearly identify the legal questions relevant to the behavioral data to be collected?
3. Did the evaluator identify the factors to be measured?
4. Did the evaluator define testable hypotheses for the evaluation?
5. Did the evaluator consider rival plausible alternative hypotheses?
6. Can the trier of fact understand with clarity what definition of psychological best interests of the child or developmental outcomes are being predicted?

Semi-Structured Interview Format

A semi-structured interview format allows the same set of general questions to be asked of each parent. The evaluator may inquire into additional areas which are specific to the parent or the context of the particular evaluation, but the primary set of information obtained from both parents is based upon the same set of general questions (Gould, 1998). Semi-structured interview formats have been reported to have a higher level of reliability than unstructured interview formats. Semi-structured interview formats allow for the development of interview questions which are directly related to the content areas identified by the court, the parties, or the attorneys as relevant areas of investigation. That is, a semi structured interview format allows for specific questions to be asked to both parents about psycho-legally relevant areas of parental or family functioning.

In determining a reliable and relevant work product, attorneys may want to inquire about whether the
specific areas of concern to the court were discussed during the interview process. That is, were specific questions about particular areas of concern in this family asked in a direct manner. For example, if there are concerns about domestic violence, did the interview contain a useful exploration of variables associated with domestic violence? If there are concerns about parental discipline techniques, did the evaluator ask questions about parenting style, discipline style, parenting philosophy and other relevant factors which contribute to an understanding of a parent’s disciplinary style.

Among the questions which might be useful for an attorney to ask are: 1) did the evaluator obtain interview data from each parent about the specific areas of functioning which are the focus of the Court’s concern? 2) Did the evaluator explain how credibility of interview data was assessed?

Use of Psychological Tests
The purpose of psychological testing in child custody evaluations is to provide a set of data that is genuinely scientific in its origin. Psychological tests used in forensic contexts should have a clearly stated underlying theory of science, established reliability and validity statistics, normative data, and other measurement-related criteria. Examination of the scientific integrity of the measurement tools used in a child custody evaluation goes to the heart of the question of reliability. If the tools used to measure factors do not have adequate reliability, then the data upon which the interpretations, conclusions and recommendations are based are seriously flawed.

Attorneys might wish to consider asking child custody experts to discuss the scientific integrity of their measurement tools. For the legal concept of reliability, attorneys need to ask whether the measurement tool has an appropriate level of reliability and validity (See Otto, Edens, & Barcus, 2000 for a discussion of criteria needed for a test to be used in a forensic context.) They need to ask if the test has normative data for male and female custody litigants. More and more tests commonly used in child custody work have research examining how male and female custody litigants score.

Questions which might be useful for attorneys to consider asking a custody evaluator include:

1. Was the psychological testing implemented in a competent manner in accordance with ethical standards and professional practice guidelines?
2. Was the specific test administered in a manner consistent with its standardized administration?
3. Did the evaluator explain how test response style/bias was interpreted?
4. Did the evaluator seek external support from collateral sources to confirm interpretation of response style interpretations?
5. Did the evaluator obtain objective test data from each parent about the specific areas of functioning which are the focus of the Court’s concern?
6. Was the choice of each objective test clearly related to the psycholegal questions which are the focus of the evaluation?
7. If no, what is the justification or rationale for this choice?
8. Was the indirect relationship between choice of objective tests and the psycholegal questions clearly explained to the trier of fact?
9. Did each objective test possess the characteristics of a test that are suggested when using psychological tests in a forensic context? If no, why?
10. Did the evaluator explain why each test was chosen and how its results would be used?
11. Did the evaluator clearly identify the hypotheses drawn from the objective test data?
12. Did the evaluator compare discrete sources of data drawn from the objective test data and compare them to information obtained from third party collateral sources?
13. Did the evaluator discuss how information from objective test data was analyzed for the degree of convergent validity in the data?
Self Report Measures

Custody evaluations often include questionnaires, self-report inventories and other measures of parenting or parent-child behavior that appear relevant to the questions at hand. Self report measures are a peculiar type of measurement tool. Some have well established reliability and validity and have been supported for use in child custody evaluations. Some have well established statistical properties and have no support in the literature for use in child custody evaluations. Others have no published reliability or validity information and have been used for years in child custody evaluations despite the lack of a proper scientific foundation. Still others have no published statistical information, have no historical use in child custody evaluations, yet are included in an evaluation because of an evaluator’s personal preference, unsupported by the literature.

How the evaluator uses the information obtained from these tools is critical in understanding the relative weight to be assigned to the value of the information. If the information is used to generate hypotheses which lead to examining additional data sources which confirm or do not confirm the hypotheses drawn from the data, then the use of the particular self report measure might be appropriate. However, if the results from these measurement tools are viewed as providing anything other than hypothesis generation, especially those which have no reported reliability and no empirical or logical relevance to the concerns of the court, then the court needs to carefully consider whether such information should be admissible.

Among the questions which might be useful to ask are:

1. Did the evaluator explain how the probable credibility of self report data was assessed?
2. Did the evaluator obtain self report data from each parent about the specific areas of functioning which are the focus of the Court’s concern?
3. Was the choice of each self report measure clearly related to the psycholegal questions which are the focus of the evaluation?
4. If no, was the indirect relationship between choice of self report measure and the psycholegal questions clearly explained to the trier of fact?
5. Did each self report measure possess the characteristics of a test that are suggested when using psychological tests in a forensic context? If no, why?
6. Did the evaluator explain why each test was chosen and how its results would be used?
7. Did the evaluator clearly identify the hypotheses drawn from the self report measures?
8. Did the evaluator compare discrete sources of data drawn from the self report measures and compare them to information obtained from third party collateral sources?
9. Did the evaluator discuss how information from self report measures was analyzed for the degree of convergent validity in the data?

Direct Behavioral Observations of Parent and Child

The fifth area of critical examination is the evaluator’s direct behavioral observation of each parent with the minor children. There is no standard in the field of custody evaluations which addresses how to conduct the observational component of the evaluation. There are some common sense concerns which need to be explored such as whether the evaluator was part of the observation process and if so, how active was the evaluator during the observation process. This is important because it is possible that the evaluator’s involvement in the observation time may significantly alter how the family members relate to each other. If the evaluator does not describe how the observation was conducted, it might be useful for the judge to inquire.

Another important area of examination is what specific aspects of parent-child interaction were assessed
and how were they assessed. It is often useful for the evaluator to take contemporaneous notes or an audio recording of parent-child observations. These observational data should be descriptive rather than interpretative. For example, the data should reflect statements such as “the parent sat next to the child, looking at the child and smiling. The child responded by smiling and reaching toward the parent for a hug. The parent responded by hugging the child. Both parent and child kissed each other on the cheek. The child let go of the parent and asked to be placed back on the floor. The parent placed the child on the floor and the child returned to the dolls...” Too often, evaluators observe parent-child interactions and then comment that the interaction was positive or a demonstration of good parenting. Although such conclusions might be very useful, it is also important for the evaluator to provide the observational data upon which the conclusion was based.

Among the questions which might be useful to ask are:

1. Did the evaluator use a behavioral observation system that organizes observed data in a manner consistent with the psycholegal questions which guide the Court’s concerns?
2. Did the evaluator describe the behavior interaction between parent and child?
3. Did the evaluator use a similar behavior observation rating system for each parent?
4. What hypotheses were drawn from the observed parent-child interactions?
5. Was confirmation for these hypotheses sought through third party confirmation?
6. Did the evaluator participate in the observation? If yes, why?
7. How did the evaluator’s physical presence and participation affect the observed parent-child interaction?
8. How did the presence of other people influence the observed parenting behavior?
9. Were there opportunities for observation of parent-child observation in the natural environment?
10. If yes, was this option used?
11. Did the evaluator discuss the comparative data about observed parent-child interactions?
12. Did the evaluator observe parent-child interaction for more than one observational period to obtain reliability over time information?

Collateral Record Review and Collateral Interviews

The acquisition of reliable and relevant collateral information is arguably the most important component of a child custody evaluation. Obtaining information from parents about their real life parenting is a critical component of a child custody evaluation. Any competent forensic evaluation needs to include information about how the parent and child operate in the real world, outside the artificial and contrived circumstances of the evaluator’s office. Obtaining information from people who have direct observational knowledge of the parent and child in different situations is often the most important data obtained in a child custody evaluation.

Similarly, obtaining historical records may shed light on important aspects of parental cooperation and conflict, parenting challenges, difficulties or triumphs, as well as historical components to the parent-child relationship.

Among the questions which might be useful to ask are:

1. Did each parent provide a list of collateral interview sources knowledgeable about each parent’s relationship with the minor child?
2. Were the collateral sources interviewed in a consistent manner, asking a set of questions from which the evaluator could compare responses across information sources?
3. Were the questions asked of the collateral interviewees focused on specific questions of
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concern in this specific evaluation, as well as more general questions about parenting skills? If no, why?
4. If yes, what hypotheses were generated as a result of the collateral information?
5. Did the evaluator examine similarities and differences across interviewee data (convergent validity)?
6. How did the evaluator assess the likely credibility of the collaterals?
7. Did the evaluator obtain names of other people to interview from the collateral sources?
   Were these people interviewed?
8. Were the choices of collaterals representative of people involved in the child’s life across a wide range of activities, as compared to limiting interviews to family and friends?
9. If no, were the limitations of the collateral information discussed?

Conclusions and Recommendations

The final step is to offer an opinion about the forensic value of the report and recommendations about the weight given to each component of the evaluation. Although it is the responsibility of the Judge to assign judicial weight to the expert’s report, it may be helpful for the attorney to explore alternative perspectives about the nature and quality of the expert’s report.

During this step, the attorney should expect that the evaluator proposes ways in which the current data might be strengthened. The attorney may also expect suggestions for areas for further assessment or ideas about how to evaluate more scientifically specific areas of concern. Among the questions which might be useful to ask are:

1. Does the interpretation reasonably fit the data described in the report?
2. Does the evaluator clearly address the psycholegal questions which are relevant to the legal issues before the Court?
3. Did the evaluator address the limitations of the data?
4. Did the evaluator address inconsistencies of the data?
5. Did the evaluator discuss the degree to which data from different methods provide a convergent (reliable) view of each parent’s parenting competencies?
6. Are relevant research findings introduced to facilitate explanation and prediction?
7. If not, why is the scientific basis of the forensic findings not presented to the Court?
8. Can the Court reasonably conclude that the evaluator was impartial and objective in the substance of the written report? In the substance of oral testimony?
9. Does the evaluator impress the Court as impartial and scientific in approach and demeanor, or does she appear to be an advocate?

Finally, a discussion of the limitations of the report should be included in the evaluator’s report. No report is perfect and the limitations of the evaluator’s work product need to be described to the court in a clear and open manner.

Summary

This paper integrated the methods and procedures of a scientifically crafted child custody evaluation (Gould, 1998) with criteria for admissibility of a scientific work product, specifically focusing on issues of reliability, relevance, and helpfulness (Krauss & Sales, 1999). When attorneys use such an analytic paradigm, courts are better served by allowing into the record only those work products which meet at least minimal standards for scientific evidence.
Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations

VIVIENNE ROSEBY, Ph.D.*

I. Introduction

In King Solomon's legendary judgment, the full custody of an infant was awarded to one of two disputing mothers. The King made his decision on the basis of competence. Competence was determined by each mother's response to the King's suggestion that the infant be cleaved in two so as to satisfy the demands of the disputing adults. Solomon awarded the infant to the mother who offered to relinquish her claim to spare the child. Although professionals in all disciplines have advanced in their understanding of children's needs for access to both parents who are cooperating on their behalf, the win/lose framework of the courtroom continues to dominate decision-making.

Partly the adversarial framework dominates because attorneys, no matter how sophisticated their understanding of total family dynamics, can represent only one of two conflicting points of view. These views often characterize the dynamics of parents who become involved in intractable conflicts in the name of children whose needs

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Dr. Roseby has lectured and written extensively on the needs of children in the conflicted divorced family. She acknowledges that portions of the suggested uses for psychological testing reflect modifications of Marin County Psychological Association Child Custody Evaluation Guidelines published by the Marin County Psychological Association, 1990.
seem tangential to the battle itself. Studies of such highly conflicted families suggest that these types of entrenched disputes often represent a response to overpowering feelings of shame and vulnerability which are evoked by the marital separation as well as by the perception that professionals are increasingly in charge of what was once the family’s private life. Vulnerable parents frequently manage these feelings of shame and helplessness by projecting all incompetence and badness onto the former spouse and holding all competence and goodness for themselves. From this dynamic evolves a wish that the judge, Solomon-like, will erase the shame by publicly answering, once and for all, the question of which parent is good and competent and which parent is bad and incompetent.

A. The Assumptions of the Win-Lose Framework

Unfortunately the power of the parents’ hopes and the inherently split representation of the family in the courtroom has tended to sustain the following set of assumptions:

- When parents divorce and cannot agree about their children’s best interests, the court has both the right and the responsibility to identify the parent who is most competent to provide the majority of care for the child.
- The issue to be decided is which parent shall be considered the better of the two and, therefore, the victor in the war.
- Once the issue is decided in or out of court, the matter will be resolved and the war will be over.

The win/lose framework has driven professionals in the mental health and legal communities to attempt to answer questions about which parent is healthier or more competent without questioning the assumptions of the framework itself. In this way a custody evaluation can take on the appearance of a pathology hunt which often holds the litigating divorced family to a higher standard of mental health than intact and nonlitigating divorcing families and which may not be relevant to the child’s actual needs and experiences. In this evaluation process, which is conducted in the name of the child, the child is essentially rendered invisible. Understanding of the child tends to be limited to understanding which parent the child needs or prefers at the time of the litigation, rather than understanding the child’s struggle to come to terms with the

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intolerable loyalty bind which the parental conflict actually represents. Similarly, the child’s interests are identified in terms of the conflict so that when the most competent or healthy parent is identified, the child’s interests are assumed to be protected.

B. The Reactive Posture of Mental Health Professionals

Although the mental health profession in general and individual practitioners in particular have set high professional standards for their work with families in cases of contested child custody, the pressure to answer the questions which are implicit in the win/lose framework is significant. Not surprisingly, mental health professionals have at times been criticized for exceeding the limitations of empirically based scientific knowledge in their efforts to be responsive.2

In one extreme example, an author3 cited a case in which a psychological test, the Minnesota Multiphasic Personality Inventory,4 was used to identify the presence of a disorder in a parent on the basis of a computerized interpretation. The diagnosis was neither specifically confirmed nor supported by other sources of information such as interviewing, observation, and collaterals, nor related to documented difficulties in the child. In addition, the psychologist made unsubstantiated assumptions in his report about the effects of that disorder on parenting now and in the future.

In such cases the psychologist is working beyond the bounds of knowledge. This is not only a serious departure from appropriate professional standards but, more importantly, it is an outcome that is likely to unnecessarily heighten feelings of shame which are likely to be evoked when a parent is diagnosed under such circumstances. These heightened feelings of shame and exposure tend to escalate rather than diffuse the parental dispute. When the battle is inflamed in this way, the child is often left vulnerable to ongoing parental conflict long after the litigation is over. Short- and long-term empirical studies that have been conducted in the last fifteen years have concluded with striking consistency that this type of chronic exposure to parental conflict is

more predictive of serious behavioral and emotional disturbance in children in divorced families than any other factor.  

II. Points of Understanding in a Child-Focused Alternative

Mental health professionals may serve the child and his or her family more effectively by proactively formulating an alternative framework for child custody evaluations that is based on clinical and scientific knowledge which is now available regarding the conflicted divorcing family. The following points of understanding are suggested as a basis for formulating a more child-focused approach.

A. Parent Dynamics and Evaluator Competence

Divorced parents who become entrenched in chronic conflict about their children tend to be highly vulnerable to shame which is defensively managed by heightened attempts to malign the other parent. An inexpert evaluation can exacerbate the parents shame and so heighten the conflict. In 1994, the American Psychological Association promulgated professional guidelines for child custody evaluations which suggest that education, training, and experience in the areas of child and family development, child and family psychopathology, and the impact of divorce on children are necessary to conduct a competent evaluation. When psychological testing is involved the guidelines further suggest that the evaluator should possess competence in performing psychological assessment of children, adults, and families.

Optimally, evaluator competencies should extend beyond these guidelines to encompass clinical knowledge and experience in the diagnosis and treatment of chronically conflicted as well as well-functioning divorced parents and children. In the area of psychological testing the evaluator’s competencies should extend to an understanding of the strengths and limitations of currently available testing methodology that is specifically applicable to child custody evaluations in divorce proceedings.

6. FAMILY CONFLICT, supra note 1.
B. Adult Mental Health as Distinct from Parenting Competence

A second point of understanding is that parents’ mental health per se is not an indicator of their parenting capacity nor necessarily of the child’s experience of and need for that parent. As Wallerstein and Kelly noted, a parent who is defined by most measures as personally competent is most likely to be hard working, achievement-oriented, assertive, self-controlled, and independent. That same parent, however, is not necessarily receptive to the child’s views and needs, which is a core characteristic of effective parenting and a key predictor of positive outcomes of divorce for children.

C. The Child’s Internalized Relationship with Each Parent

A final and essential point of understanding should be that the child will have a relationship with each parent over the long term because, regardless of actual time spent, each parent is a central and archetypal figure in the child’s inner life. This internalization of the parent-child relationship is a developmental process which begins very early and continues as experiences and subsequent identifications with the real or imagined parent become part of the child’s sense of self. Healthy personality development is predicated upon integrating these identifications with both parents so that they mutually support the child’s sense of who he or she is in the world. When the child is the subject of

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12. Margaret Mahler et al., The Psychological Birth of the Human Infant (1975); Donald W. Winnicott, Home Is Where We Start From: Essays by a Psychoanalyst (1966).
chronic parental warfare, however, identifications with each parent continually evoke inner conflict.

A study of high-conflict divorcing families reported that children were preoccupied with surviving in the battle zone and conflicted about what is true and what is not true with respect to the allegations and expressed fears of their opposing parents; whether to trust their own or each parent's perception of the other parent; and about having and expressing feelings, loyalties, and identifications which might result in retribution or rejection by one or both parents. These conflicts and preoccupations arouse intense anxiety which can distort the child's capacities for reality-testing, trust, and self-integration.

Adjustment and overall development greatly depend upon the degree to which the child is protected from the intrusions of the parental battle into his or her interpersonal and internal life. These points of understanding might shift the assumptions of the win/lose framework so that they would read as follows:

- When parents divorce and cannot agree about their children's best interests, the evaluator has the responsibility to identify each parent's capacities for contributing to the development of the child over the long term.

- The issue to be decided is what long-range custody or time-sharing plan will reduce the parental conflict, maximize the parent's capacities to support their child's development over time, and support the child's access to those capacities in each parent whenever possible.

- The way in which the custody or time-sharing plan is structured will continuously shape the child's experience and affect his or her developmental progress in profoundly serious ways over the long term.

These revised assumptions would suggest that a child-focused custody evaluation should

1. minimize the parents' sense of shame and exposure and maximize their understanding of the child's needs and experiences;
2. explicate the causes and potential avenues for diffusing the parental conflict and its effects upon the child;
3. evaluate each parent's current and characterological capacities to resolve the parental conflict as well as to meet the child's needs over time; and
4. identify what custody plan, support, and/or arbitration structures will be needed to support the child's development in the short and long term.

Such a plan need not involve evaluation of one parent's capacities versus those of the other. Optimally the custody plan can be based upon a description of the total range of capacities which are available to the child from each parent and the ways in which the child can make use of these capacities over the long term.

In other situations one parent may have a documented history of mental disorder, alcohol or drug dependence, neglect, or domestic violence which has been shown to be harmful to the child. In fact the divorce may reflect one parent's need to be separate and protected from these types of difficulties in the other. In these situations the custody plan must include appropriate protections for the child and, in cases of domestic violence, for the nonviolent parent as well.

Such protections may include the imposition of restraining orders, drug or alcohol screening, arbitration arrangements, and supervised visitation. However, even in such seemingly clear-cut decisions, children's needs do not always coincide fully with those of their mothers or fathers. Children often express deep ambivalence and longing toward an impaired, violent, or neglectful parent. These feelings tend to reflect the child's abiding need for that parent, a wish to preserve a positive sense of self as a child of that parent, and a mix of positive as well as negative memories, perceptions, and experiences that are associated with that parent-child relationship. Such cases require careful evaluation of the child's unique needs.

The custody plan should include appropriate protections for the child (and parent, if need be) as well as specification of opportunities for the impaired or violent parent to re-establish parenting competence. A timeline for judicial review of the custody plan and parenting competencies should be established.

Finally, there are families in which both parents' capacities to understand and meet the needs of their child appear to be characterologically limited. In such situations the custody plan should also specify opportunities for parents to enhance their competence as well as identify community and familial supports that are available to the child when in the care of one parent or the other. The child's time-sharing plan should reflect the child's needs for access to such alternate sources of support. These supports may exist within the family, such as a grandparent, step-parent, or adult sibling, or outside the family in the form of a sports coach or family friend. In these cases it is imperative that the plan identify the level of structure and specificity that will be needed in the custody order from the court, and the types of counseling, monitoring, and/or arbitration structures needed to protect the child from the parents' continuing inability to recognize and respond to him or her as a separate person.
III. Uses of Psychological Testing Within a Child-Focused Framework

Mental health professionals have been rightly criticized for their inappropriate use of psychological testing when conducting child custody evaluations. I suggest that these departures from good practice are most likely to result when mental health professionals attempt to answer the type of competitive and global mental health questions which arise in a win/lose framework. When used appropriately, however, psychological testing can be invaluable in helping the court as well as the parents to understand the conflict, the child, and the essential elements of the short- and long-term plan.

A. Evaluating the Child

When the family situation suggests that the parental conflict has intruded upon the child's capacity to enjoy an unconflicted relationship with one or both parents, psychological testing of the child should be carefully considered. Clinical and empirical evidence from the high-conflict project at the Center for the Family in Transition indicated that children who had been exposed to a high degree of parental conflict often appeared, at least superficially, to be competent, mature, and compliant. After a period of thoughtful observation and psychological testing, however, these children were found to be clinically hypervigilant, unable to trust or depend on other people, and chronically overwhelmed by the demands placed upon them. Testing also indicated that these children were profoundly emotionally and cognitively constricted and had seriously distorted perceptions of human relationships.

The Rorschach test, scored according to the Exner Comprehensive System, was particularly useful in evaluating areas of vulnerability in children's personality development which could be systematically compared with normative samples of similar-aged children. The unstructured demand of the Rorschach inkblot tends to bypass defensiveness, allowing the evaluator to access aspects of the child's psychological life which may not be articulated or even acted upon except in


the most subtle ways. Upon consideration it should not be difficult to imagine that children who spend their lives as double agents in a militarized zone are masters of hypervigilance who, pick up cues about what is expected of them almost without thought, and can mask their own difficulties as a matter of survival. Nonetheless, it is essential to assess functioning as accurately as possible so that sources of difficulty may be understood if not managed by the final custody plan.

B. Understanding the Conflict

Test data can be used to understand the conflict between the parents as well as to determine the parents' capacity for co-parenting and the degree to which particular difficulties are situational or characterological. It is particularly useful to differentiate situational and characterological difficulties because this information can help to clarify the potential chronicity of the parental conflict. When co-parenting difficulties reflect characterological vulnerability they are more likely to be chronic.

Cases of unremitting parental conflict can be time-consuming and frustrating, particularly if the court expects that a level of cooperation will eventually develop. When psychological testing can communicate the likely chronicity of the parent's behavior in the conflict, then the court can focus on providing absolute structure and specificity in all its orders. This approach can obviate, as much as possible, the need for parents to cooperate in making decisions when they literally do not have the capacity to do so. When the likelihood of unremitting hostility and noncooperation is understood, the court can also provide or recommend ongoing mechanisms for support and arbitration which will protect the child from parental conflict in the future.

C. Test Data vs. Clinical Impressions

Psychological testing can be used to validate or disconfirm clinical impressions of parents as well as of children. People who appear to be functioning relatively well during a clinical interview may reveal particular vulnerabilities through testing. The reverse is also true. Because custody evaluations are so highly stressful, a very anxious person may appear to be stronger in the context of testing. In fact, the stress of the testing situation itself can provide useful information about how the person copes with stress.

1. Evaluation of Traits Relevant to Parenting

Currently, no psychological tests have been validated for the purpose of directly assessing parenting ability directly. Furthermore, it should
be noted that the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association\textsuperscript{16} expressly prohibit the use of psychological tests for purposes for which they are not validated. Some standardized psychological tests, however, do assess underlying characterological traits as well as behaviors and attitudes which affect the ability to parent a child.

Walters, Olesen, and Lee have successfully used Exner's Comprehensive Scoring System for the Rorschach,\textsuperscript{17} in conjunction with a full battery of psychological tests and clinical interviews, to identify specific traits that are relevant to parenting.\textsuperscript{18} These include qualities such as capacity for attachment, capacity for separation, empathy and accuracy of empathy, ability to perceive the child as separate from self, emotional availability, and ability to modulate emotional expression. The identifiable traits also include flexibility in problem-solving, ability to set limits, having realistic expectations for the child, and being able to help the child have social relationships. In addition, there are other qualities which affect the parental relationship such as level of hostility and suspiciousness; level of projection, denial, or distortion; ability to cooperate with the other parent, and level of simulated good presentation.

As noted above, evaluation of parents' capacities need not and optimally should not be viewed as a comparative process. Rather, the process can yield a constructive description of the parenting capacities of each and the ways in which the child can best access those capacities at present and in the future. Even when parents' capacities are limited, recommendations for counseling, monitoring, and/or arbitration structures can be described in terms of reasonably maximizing available capacities and protecting the child.

2. EVALUATION OF ALLEGATIONS AND DISTORTIONS

Psychological test data can be particularly useful when disputing parents make serious allegations against each other, and/or there are discrepancies in their stories or presentations. It is not unusual in highly conflicted divorce situations for each parent to describe the other as completely malignant. In one such case for example, a mother described herself as a loving primary parent while insisting that the children’s


\textsuperscript{17} Exner, supra note 15.

father was a manipulative liar whose only interest was in the appearance of being a perfect father. The father, in his turn, described himself as the only safe harbor the children had ever had because the mother was a self-involved depressed woman whose own history made it impossible for her to really parent her children. Test data can help the evaluator to understand the underlying reasons for such discrepancies and possible distortions, to determine which parent’s perspective is more distorted, and to identify appropriate protections as well as opportunities to improve parental competence if particular allegations are confirmed.

3. Test Data Credibility

Because of their very appearance of objectivity, test data can be useful in helping parents to focus on their child’s difficulties in a way that clinical impressions, which tend to be perceived as an opinion like any other, are not. In one case, for example, a child had been exposed to chronic and bitter parental conflict over her custody for six of her seven years. The child was being tested because the parents were involved in one of a long line of legal actions regarding the child’s custody. Mediators told the evaluator that the case was completely intractable. Results of the child’s psychological testing showed significant distortions in her reality-testing, clinical depression, and an entrenched inability to trust or rely upon human relationships. It was not until the evaluator showed each parent how objectively different their child’s quantitative scores were from normal sample scores, and openly revealed how worried she was about the child’s prognosis, that the parents began to understand the effect of their conflict on their child. The parents’ newly aroused concern proved to be the leverage necessary to gain their compliance with co-parent counseling aimed at managing the conflict and protecting the child from its effects. Test data can provide a similar sense of objectivity in court, particularly when they are well explained in terms that are relatively free of psychological jargon.

D. Braiding Psychological Test Data into the Evaluation

All psychological test data are best regarded as working hypotheses which can be disconfirmed or further supported and understood in the context of information obtained by other methods. The APA Guidelines for Child Custody Evaluations in Divorce Proceedings specifically direct psychologists to use multiple methods of data gathering. These methods include comprehensive interviews; observation and evaluation
of the parent-child interaction; home visits; and records and collateral contacts with other family members, professionals, and agencies. The process is similar to putting together the pieces of a puzzle.

Unfortunately, when the professional who conducts the psychological testing is not the same professional as the one who conducts the overall evaluation and submits the final recommendations to the court, the finished result is far from seamless. This lack of coherence occurs because evaluators are not always psychologists, so the task of testing is referred out. In this way of working the evaluator gathers interview data, conducts observations, makes collateral contacts, and conducts home visits, while the collaborating psychologist tends to focus more narrowly on those referral questions which the evaluator believes can only be answered by psychological testing. The total picture remains in the hands of the referring evaluator, who will make recommendations to the court.

When psychological reports are completed and returned to the evaluator, an incongruity arises. Specifically, the testing was not conducted by the same pair of eyes, the same mind, the same sifter and sorter as the person who conducted the rest of the evaluation. As a result, the ways in which testing confirms or disconfirms other information are not fully explained and the explicit effects of test data on the final recommendations are not elucidated. When psychological test data are not braided into the logic of the overall evaluation, the data are weakened and legitimately vulnerable in court.

1. Improving Reliability of Data

This situation can be improved by active pursuit of the collaborative use of psychological test data and all other information gathered in the context of the overall evaluation. When reports are completed, professionals need to discuss both portions of the work so that the mind which conducted the psychological evaluation can collaborate with the mind that has conducted the home visit, watched the child on the playground, talked with the parent’s sister or brother, and will make a final recommendation to the court. In this way the custody evaluation process itself can be used to address the validity of what the testing has shown. When test results are incorporated into the overall evaluation in this way the following elements should be in place:

1. identification of the overall purpose of the custody evaluation as well of specific concerns that were identified and/or referred for psychological testing;
2. specification of procedures and tests that were used in the course of the evaluation;
3. discussion of any deviations from standard use of tests and procedures or other concerns about the soundness of the results and/or the evaluator's ability to interpret them reliably;

4. specification of the relationship between any diagnostic statements and issues that are relevant to the evaluation such as parenting capacity, co-parenting capacity, effect of the conflict on the child, potential mutability of the conflict, and specific long term management and/or therapeutic needs of the case; and

5. explication of the relationship of test data to other sources of information.

The report should contain a clear and nontechnical discussion of the way in which data from all sources were applied to the logic of the final recommendations. Specifically, do test data support or disconfirm observations of behavior, interview material, and/or collateral reports? The possible ways of understanding incongruities, and the evaluator's final conclusions about those incongruities should be discussed in clear, nontechnical language.

2. Written Agreements

The evaluation process should begin with explicit written agreements which are signed by the evaluator, both parties, and their attorneys. The agreement should specifically address the questions of how, by who, and to whom the psychological findings and final report will be disseminated. These issues are particularly important in cases of contested child custody because some portions of the report will inevitably pertain to all family members, and may be revealed during court proceedings. As a result, the confidentiality of a single individual cannot be realistically protected. If this limitation is not openly clarified, the parents are likely to feel betrayed by the evaluation process.

Agreements which allow each parent to review the findings and final report in the presence of both the attorney and the evaluator can be particularly useful. This arrangement allows the evaluator to be available for questions (professional standards for psychologists require this practice) while the attorney and client review the report. Such a meeting should not be conducted with the intention of altering the findings or recommendations in any way. Rather it is suggested as a parsimonious use of professional time which can enhance communication and understanding on all sides.

Signed agreements which allow each parent to review the report in the presence of the attorney and evaluator, but disallow release of an actual copy (other than to the court) can also protect clients from the possibility that the report will be used inappropriately by one parent.
to shame or expose the other. These matters are often ignored until too late in the process, yet they carry the potential for great cost or benefit to the cause of diffusing the conflict and helping parents to really understand and make use of what the report has to say.

Allowing the parent to hear the content of a report in chambers or in court rather than in privacy with the evaluator and attorney cannot be considered to be constructive in any sense but win/lose. This type of experience is most likely to exacerbate the parents’ sense of shame and helplessness and precludes any possibility for the report to be used to educate and heighten parents’ understanding of the conflict, their own range of functioning, and the needs of their child over the short and long term.

IV. Conclusion

A child-focused format can represent a constructive and proactive response from mental health professionals who seek an alternative to the traditional win/lose approach to child custody evaluations in divorce proceedings. Understanding how the win/lose approach exacerbates conflict and harms children can help attorneys and mental health professionals to work together to create a more child-focused approach to testing and evaluation.
LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES

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Chapter 29

Psychological Testing

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Texts
Child Custody Practice and Procedure §§ 11:01-11:23
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KeyCite™/Insta-Cite®: Cases referred to herein can be further researched through the KeyCite™ and Insta-Cite® computer-assisted services. Use KeyCite or Insta-Cite to check for form, parallel references, and prior and later history. For comprehensive citator information, including citations to other decisions and secondary material that have mentioned or discussed the cases cited, use KeyCite. ALR and ALR Fed Annotations referred to herein can be further researched through the WESTLAW® Find service.

§ 29:1 Introduction

Child custody and visitation issues are decided in a variety of ways.
Some are resolved within the family, others through informal negotiations leading to a consensual (barely court supervised) custody disposition. In still other divorces, the facts on the ground are so clear, e.g., by evident disparity of parental competences or the expression by a mature adolescent of a reasonable preference, that the judicial decisionmaking requires no expert assistance. The more difficult cases constitute the content of this discussion.

Difficult cases are categorized in that fashion because of three primary sources of uncertainty: (1) social preferences and public policy choices, e.g., whether the primary parent should be afforded a legal advantage in the custody determination if the case is contested; (2) conceptual and scientific understanding of children’s needs to the extent that they are deemed important to insuring children’s optimal opportunity for physical and psychological growth and development, e.g., how should parental competence be weighed against parent-child psychological attachment or parent-child “fit”; (3) how to measure whatever factors or variables are deemed important after determining parameters made relevant by the first two sources of uncertainty. Whether parental competence, attachment, goodness of “fit” of the parent-child relationship, or some other of the denoted factors subsumed in a best interests test are relevant or dispositive, each relevant variable must be assessed and measured.

In most child custody evaluations, measurement is typically accomplished by interviews and observed interactions of the parties, significant others, and the child, followed by subjective clinical assessment. These observations, and the consequent assessments, are inevitably subjective, affected to some degree by the character and biases of the evaluator and colored by the momentary circumstances of the observed parties. All evaluators acknowledge that only a brief picture of lives in progress (and that under the duress of the divorce) can be taken in an evaluation. The turmoil and uncertainty of the situation, as well as the effects of the evaluation process itself upon what is observed, color and distort the picture of the family’s true nature and complexity.

In gathering the data base of observations for a child custody evaluation, the expert will generally follow some assessment protocol. Protocols are promulgated in professional guidelines by organizations such as the American Psychological Association and the American Academy of Child and Adolescent Psychiatry. To be sure, evaluators
are free to improvise, to be eclectic, to employ variations on data
gathering and observation, in ways that seem suited to individual cir-
cumstances, and the evaluator's personal preferences and clinical ex-
perience. In some evaluation protocols, psychological testing is ad-
vised as a matter of course; in others, testing is employed only when a
specific diagnostic issue is raised concerning the child or parents. Most
frequently, some question or allegation concerning the mental health of
one or both of the parties is the trigger for conducting formal psycho-
logical testing to assist the evaluator's diagnostic assessment. Typi-
cally, psychologist evaluators routinely administer psychological tests;
psychiatric and social worker evaluators call upon psychological test-
ing less often—on occasion for efficiency, because a psychologist must
be brought in, or because of professional taste. In many divorce courts,
psychological tests are routinely administered as an adjunct to custody
evaluations conducted by court-employed social workers.

Thus, because psychological testing has become a familiar compo-
nent of many custody evaluations, it is important to understand the va-
rieties of psychological tests in use, their strengths and limitations, and
to explore their appropriate role in custody decisionmaking. That ex-
amination must begin with the basic underlying concepts of reliability
and validity, because these concepts lie at the heart of all discussion of
any estimate of the value of psychological testing. Understanding the
validity and reliability of mental measurement is essential, in turn, to a
fair evaluation of expert opinions incorporating and relying on the
results of such tests.¹

§ 29:2 Validity and reliability—In general

Psychological tests all purport to measure some feature of behavior
or thought. Fundamental to gauging the usefulness of any psychologi-
cal test is information about how well the test serves its measurement
function. Two statistical concepts are used to measure any test's useful-
ness: reliability and validity.

§ 29:3 —Reliability

Test reliability refers to the degree to which a test will yield precisely
the same score upon repeated measurements of precisely the same

¹ The general statements about testing in this chapter are based on concepts accepted
and recognized by psychologists generally. References in the last section of the chapter
include general texts on psychology and testing.
tested attribute or behavior. If a test is unreliable, the score it produces will vary with repeated measurements. If the test has high reliability, it will yield essentially the same score upon repeated measurements of the same tested subject. An analogy may help: if measurement of length is made with an elastic ruler, repeated measurements of the same object will vary. If the ruler is rigid, repeated measurements will be the same. Note that it is the repeatability of the measurement, not its accuracy, to which reliability refers. A scale can give the incorrect weight of an object and thus be inaccurate, but if it shows the same weight for the object each time it is used, giving exactly the same measure each time it is used, the scale is said to be reliable. The same Rorschach protocol, on the other hand, scored by different examiners, will likely yield different interpretations and produce different “diagnoses.” The Rorschach, then, is said to be an unreliable psychological test—one of the “rubber rulers” of psychological testing. No test can be an accurate measure of an attribute if is not first a reliable measurement device. Reliability sets an upper limit upon the claimed usefulness of any psychological test.

A psychological test’s reliability can be computed in a number of different ways. To enumerate them would involve discussion of statistical concepts too complex for us to review here. It suffices for our purposes to note the most common reliability standard for psychological tests is called “test-retest reliability.” The standard refers to the degree to which a test, upon administration and readministration, yields the same score, assuming that the tested subject has not changed between testing intervals. A test’s reliability is indexed as a number between 1.00 and 0.00, with 1.00 meaning perfect reliability and 0.00 meaning no reliability. Most psychological tests used in custody cases have only moderate reliability values, somewhere between .5 and .8. Although .8 reliability is generally considered high by psychologists, even this score portrays an appreciable amount of variability in measurement unexplained by changes in the subject being measured. Under the circumstances, there is good reason for a judge to be aware of the risk of overreliance upon test scores when making assessments and judgments about people.

§ 29:4 —Validity

The concept of test validity refers to the extent to which an instrument truly measures what it intends or purports to measure. Many
psychological tests purport to measure named specific attributes, such as aggressiveness, parenting skill, or introversion-extroversion, yet turn out to be of little use in actually assessing these psychological attributes. The fact that a test is represented to measure something is no assurance that it does. Some of the problems establishing the validity of a test lie in the methods used in test construction; other problems result from the arbitrary definitions of what is being measured.

In physics, validity testing is easy: measurement of length or weight is accomplished with finely calibrated instruments, and the specific operations through which they are employed to assess characteristics of physical objects are fundamental and well defined. Standard or defining test instruments are available to verify the accuracy of alternative measurement devices and the properties to be assessed are not subject to arbitrary definition. Moreover, the units of measurement in physics are fixed and universally accepted, as in centimeters for length and grams for weight. Properly calibrated scales do indeed measure weight, and rulers do measure length. Accurate instruments properly applied to well-defined physical properties produce accurate measurements of what we wish to measure. But when we turn to questions of psychological measurement, the validity of measurement becomes quite difficult:

1. the properties to be measured are not well defined and are not universally accepted;
2. measurement instruments are not precise and measurement units are arbitrary;
3. results of psychological measurement are affected, in part, by the various characteristics of the person conducting the measurement. Thus, the test administrator adds error to measurement, to a greater or lesser extent, depending upon the type of test used, subtle biases and expectations the tester may bring to the assessment, and tester interaction with the specific person being tested.

In evaluating a psychological test one asks what it is that it purports

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Footnotes:

2 In the 1940s, the Army Air Force developed a test for pilot qualification that had the candidates spin quickly in place and then attempt to walk a straight line. Those who could hone to the line were deemed promising pilot material. The test had "face validity," it was said. This is a vague concept psychologist expert witnesses have used to slip unwarranted generalizations past lawyers and judges. When candidates actually had to fly, many of those who had passed the initial test had no sense of height or depth; their lack of dizziness in the ground spin test resulted from impaired middle ear balance function—lack of those microliths in the cochlea that gauge direction change or acceleration.

3 As is the case with reliability, a test's validity is statistically measured as a number between zero and one, with a validity of 1.00 characterizing a test that exactly measures what it purports to measure, while a validity score of 0.00 means that the test scores
to test, how it goes about testing it, and how well it does what it purports to do. Since the validity of a test relates to the extent to which it measures what it claims to measure (rather than measuring something else, or nothing at all), one must understand what the test claims to assess, and what the underlying attribute is. In some cases, as with intelligence assessment, we have a general idea about what it means, but not a specific definition. Thus, sometimes we think of intelligence as a unitary property, varying degrees lying along a single line. At other times we think of intelligence as composed of a cluster of different attributes, each person possessing a certain measure of each attribute, e.g., good at math, poor at language, excelling in music, etc. Caution should also be the rule for tests to make inferences about individuals’ future behavior or psychological makeup. Tests measuring abstract behavioral capacities often carry impressive names, such as “The Perfect Parenting Assessment Scale.” But the name offers no assurance that the test in fact measures anything that truly relates to actual parenting capacity. A test that measures eye color may have perfect reliability—it always correctly repeats its prior measurement—but it may have zero validity, as when an eye color test is used to assess parenting capacity. A test of parenting skills is valid only if scores on the test can be demonstrated to track or predict actual parenting skills as defined in some meaningful and measurable way. Without independent criteria of parenting skills, against which to compare the test scores, the test’s usefulness remains unknown.

A major distinction in psychological testing is made between intelligence tests and personality tests. This dichotomy may appear to be clear; but, in fact, aspects of personality may well affect scores on tests intended to assess only intelligence, while intelligence may influence the manner in which people answer test items intended to assess personality traits. Indeed, psychological test administrators may infer personality traits from patterns of scores on the standard IQ tests, and levels of intelligence may be suggested by the interpretations and explanations that subjects give as they provide Rorschach responses. This cross-use always involves a greater degree of speculation than does direct interpretation of test scores.

bear no relationship to what is claimed to be measured. Few psychological tests come very close to accurately measuring their intended attribute, while many psychological tests fall very far short of assessing what they purport to measure, that is, their validity is low or even close to zero.
§ 29:5 —Intelligence testing

While our everyday language and our descriptions of people regularly refer to intelligence, the precise definition and the proper modes of measurement of this concept are quite complex. Psychologists have been occupied with the definition of intelligence and its measurement since the turn of the century—since psychology sought status as a science of human behavior rather than as a field of philosophical speculation on the nature of mankind. The concept of intelligence has carried with it a positive value in psychological thinking: the more the better! And many of the means of assessing intelligence have been influenced by cultural values and social preferences. Dominant social groups have often been accused of benefitting from test construction approaches that endorse the intellectual superiority of the dominant group; but efforts to approach culture-free intelligence assessment are often frustrated by definitional problems. Indeed, the very notion of "intelligence" in psychology has had a complex history, and arguments continue as to just what the concept means. The day-to-day practice of intelligence testing is constrained, then, by theoretical limitations as well as the vagaries of test construction and administration. These are problems inherent in all efforts at psychological assessment and measurement.

Early intelligence theorists posited the notion of a general factor of intelligence. This concept suggested that individuals could be rank-ordered along a single dimension of intelligence, from less to more. The purpose of intelligence testing was then taken to be simply a determination of where an individual stood on the simple ranking. A series of test questions, assumed to increase in difficulty, could be administered and the individual's intelligence could be assessed by observing how far along the ordered difficulty scale their answers were correct. While it is generally accepted that the concept of intelligence bears some relationship to an individual's ability to solve problems, it soon became evident that "problems" could not be arranged in a simple ordering of difficulty. If problems are multifaceted and call for a variety of abilities, to one or another degree, then the ability of an individual to solve problems may reflect a collection of many different types of skills or specific abilities. If within each individual the skills are not perfectly correlated, then intelligence cannot be a unitary characteristic or general factor, but instead must be a possibly diverse collection of different abilities.
The current view of intelligence makes measurement difficult, at best, and, in any event, suspect on relevance grounds. The current view is that intelligence does not capture a general and unitary problem-solving capacity; rather, intelligence is a diverse set of abilities that defies easy assessment. There are many types of intelligence, the current agreement holds, and an individual may well have varying degrees of each of the different types. Under this definitional regime, it makes little sense to claim that one person is simply more or less intelligent than another; individuals must be described as better at certain things and less skilled at others.

The characteristics constituting this multidimensional concept of intelligence are ill-defined and not inclusively listed. In addition, which skills are important to the measurement of intelligence is deemed to be affected by social values that are inevitably reflected in intelligence test construction. Most important, though, for purposes of resolving custody/visitation questions, an individual’s tested level of intelligence is important only if the individual has difficulties with problem-solving abilities in specific areas. These areas may relate to performing basic child care responsibilities and the capacity to formulate and carry out the planning for life’s ordinary demands. While a bright child may benefit in some ways from interacting with an intelligent parent, there is little research to show that this is necessarily so. Few would argue that a custody question can be resolved by demonstrating even significant differences in the intelligence scores of the contending parties, so long as each is able to accomplish child rearing tasks and the planning those tasks require. Testing may demonstrate specific cognitive deficits—those associated with traumatic injury, say, neurological illness, or the toxic effects of drugs or alcohol; then, specific organic problems affecting memory, impulse control, or judgment may be disclosed by intelligence testing and further explored with more specialized neuropsychological assessment tests. But short of such specific and encumbering cognitive and problem-solving deficits, even reliable and valid measurement differences between parents on intelligence scales cannot be demonstrated to show any predictable relationship to child adjustment.

Psychologists employ a variety of personality tests to assess what are deemed to be persistent and abiding individual personal traits. Personality tests also purport to measure: characteristic ways of viewing the world, for instance, as safe or threatening, promising or bleak;
consistent approaches to problem-solving tasks, such as, compulsive as to detail or fluid and global in overview. Some tests generate a profile of the individual on a set of characteristics that statistically compares the individual to a standardized or normative population. These tests allow the individual to be described as similar or dissimilar to statistical averages. Deviations from group averages then allow an inference to be drawn as to how the individual's thinking or behavior resembles a specific clinical population that deviates in some fashion from statistical norms. Exemplars of this profile approach are the MMPI and the more recent MMPI-2, as well as the Millon Clinical Multiaxial Inventory II. These are the most frequently used of the test instruments assessing personality traits by statistical comparisons to standardized populations. These particular tests enjoy high reliability and validity as psychological tests go. Even the best tests are not very good. But MMPI and Mellon have relatively high validity and reliability, because they have highly structured response sets available for the subject. Thus, the MMPI allows the subject to answer only "yes" or "no." No interpretation of the meaning of the subject's responses is called for by the examiner. Also, these tests are constructed by a careful standardization of questions by prior presentation to a reference group, selecting for final administration and inclusion only those test items that hold up well under test-retest circumstances. Even the most enthusiastic proponents of these tests acknowledge that they do not permit a confident inference that a subject has engaged in the past in particular behavior or confident prediction of a subject's specific future behavior. For example, no "abuser profile" test can be constructed that will permit an inference that a subject abused a child.

Even the most objective of tests, while they provide some quantita-

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4 Thus, all computerized interpretive narratives of the [Millon] obtained from National Computer Systems begin with the following disclaimer:

MCMII reports are normed on patients who were in the early phases of assessment of psychotherapy because of emotional discomforts or social difficulties. Respondents who do not fit this normative population or who have inappropriately taken the MCMII for nonclinical purposes may have distorted reports. To optimize clinical utility, the report highlights pathological characteristics and dynamics rather than strengths and positive attributes. This focus should be kept in mind by the referring clinician reading the report.


tive description of an individual by analogy, should be used with caution in custody decisionmaking. Several reasons support this caution.

1. The tests are not standardized upon a population in the special circumstances prevailing during a contested child custody case. Thus, answers appearing deviant in ordinary circumstances might well be normal in a contested custody case. An ordinary person, answering questions truthfully, might be scaled as abnormal because of the divorce proceeding. To endorse, “someone is trying to do me harm” may be accurate in divorce settings, but inaccurately scored as indicative of paranoia when measured against a nondivorcing standardized group.

2. Scores on personality tests may depict the person’s general way of relating to others, to problem-solving, and to world views, but still fail to permit confident statements as to what the individual might do in the future. That someone answers standardized questions in a specific fashion tells us little about their relationship to his or her child, or how devoted or committed he or she will be to child care and parenting. There are, of course, always “outliers” where the subject is psychotic, endorsing bizarre ideas, or admitting to auditory hallucinations. Here, objective psychological testing is likely to confirm what is objectively apparent to the clinician. In these extremes, testing serves to endorse what is known rather than to disclose what is concealed. Many clinicians are enthusiastic about testing when it confirms clinical impressions, but dubious of testing results inconsistent with clinical judgments.

3. Except in the “outlier” cases mentioned above, there is no necessary relationship between the measured personality of a parent and the impact a parent’s personality will have upon the child’s later personality development.

§ 29:6 —Objective and projective tests

An important distinction about psychological tests is whether the test is Objective or Projective. Objective tests are based upon statistically derived items shown to have a clear association with the defined psychological attribute. The scoring of such tests is also objective, with simple responses that can be counted or otherwise gauged and with little or no likelihood of scoring disagreements between different scorers. The MMPI and Millon are good examples of such objective tests. Projective tests are ones in which the subject responses are not confined to a predefined and limited class of alternatives set by the tester. Thus, pedophiles and nonpedophiles. J. Lanyon, Assessment of Truthfulness in Accusations of Child Molestation, 11 Am. J. Forensic Psych. 29, 38 (1993); “There is currently little verification that the MMPI can directly reflect anything about sexual deviance, even in men who directly admit it, and there is no evidence at this point that it can detect sexual deviance in a nonadmitter.”

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rather than true-false or multiple choice items, characteristic of Objective tests, the Projective test subject is free to generate any number of unrestricted responses. Examples include tests that invite the subject to draw a picture, for example, of a house or a person or a tree, or to report what is seen when examining an ink blot. The scoring of such tests is generally subjective; different testers can reach different results when scoring the same protocol. Projective tests generally exhibit low reliability and poor validity. There is no objective assurance that they measure what they seek to test or that they are predictably repeatable. Such tests are of little forensic value and are useful only for clinical speculation and hypothesis generation. The results of such tests sometimes tell more about the test administrator than about the subject. Some of these tests, such as the "Draw a Tree" protocol, are capable of egregious misuse; they are of no more probative value than tea-leaf patterns in the bottom of a cup.

§ 29:7 Questions judges can ask psychological test witnesses

When test results are offered as evidence in a child custody proceeding, the judge should be sure that questions such as the following are put to the expert witness:

1. What does the test purport to measure?
2. How was the test constructed?
3. What was the standardization group to which the test subject is being compared? Are the group’s social, educational, ethnic, and situational circumstances related to the subject’s?
4. What is the reliability of the test? How was it established?
5. What is the validity of the test? What type of validity is measured, predictive, face, or construct?
6. What, if anything, does the test permit one to predict?
7. Are there any scientific studies demonstrating that the test results bear a predictable relationship to parenting styles or child rearing outcomes? What studies have been done, and what relationships have been found between what the test measures and how these measurements relate to any child custody issue?
8. Was the test ever standardized upon a population of persons in contested child custody situations and, if not, how might the results of such a test be skewed and distorted by its application to the very special circumstances of a child custody/divorce litigant?
The answers to such questions, carefully and responsibly provided, may well show that in many instances psychological tests are a weak evidentiary adjunct to the complex issues child custody cases present to evaluators and courts. Considerable caution should be exercised in their use; affording them decisive weight in custody cases is usually a mistake.

§ 29:8 References


L. Aiken, Psychological Testing and Assessment (9th ed. 1997).

Chapter 16

Visitation with the Mentally Ill Parent

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Research References

Texts
Child Custody Practice and Procedure § 6:20
Handling Child Custody, Abuse and Adoption Cases §§ 8.16-8.27
Legal Rights of Children § 3.08

Jurisprudences
24 Am Jur 2d, Divorce and Separation §§ 1000-1001
59 Am Jur 2d, Parent and Child § 36

Am Jur Proof of Facts
15 Am Jur Proof of Facts 2d 659, Change in Circumstances Justifying Modification of Child Visitation Rights
§ 16:1  Introduction

Not infrequently, judges are faced with the dilemma of whether to allow visitation of a child or children with their mentally ill parent. (Generally, that parent does not have custody.) These cases may be complicated by the horror stories related by the custodial parent and his or her attorney of the great dangers of anything but supervised visitation, countered by the equally benign picture painted by the ill parent and his or her attorney. While the attorneys may suggest that it is a matter of the mentally ill parent’s right to see his or her child, the judge will have the task of balancing to what degree a child’s development is facilitated by visitation versus adversely affected by such exposure. After a brief note regarding undocumented allegations of the presence of a mental disorder, we will assume for this presentation that a diagnosis of a mental disorder has been documented.

This chapter will offer general principles regarding the evaluation of mental disorders and/or illnesses as they apply to visitation. It will address the diagnosis of mental illness and its use and misuse in custody and visitation disputes. This will be followed by a discussion of: (a) those factors associated with mental disorders which are relevant to the issue of visitation; (b) the impact of the parent’s disorder upon the child; and (c) the impact of the parent’s disorder on the custodial parent. The chapter assumes that when one parent attempts to interfere with a mentally ill parent’s contact with his or her child, a forensic mental health evaluation will be ordered. Lastly, clinical case examples will be offered. It will not address the issues of mental retardation or substance abuse. Most of the points made here regarding visitation apply as well when custody is being litigated, although that topic may involve additional independent issues and will be considered separately.

Parties will not infrequently allege that the other suffers from some mental disorder, or more likely will assert that the other party is “crazy.”

§ 16:2  General principles—Diagnosis of mental illness or disorder

In testimony and legal opinions, reference is frequently made to DSM-IV, the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders. (While psychiatrists commonly use the term mental disorder rather than mental illness, here the terms will be used interchangeably.) Frequently, attorneys use the DSM-IV as the Bible of psychiatric diagnosis and of prognosis and consider it to have precise application to issues of custody and visitation. In fact, this manual represents only a classification of mental disorders designed as a guide to clinical practice, a method of collecting data for statistical and research purposes, an educational tool, and a system which facilitates more precise communication among clinicians and researchers. Unfortunately, many mental health professionals, attorneys, and judges pay scant attention to those caveats listed in the introduction to DSM-IV that are relevant to its use in forensic settings. The following are relevant quotations from the manual: American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. Washington, DC, American Psychiatric Association, 1994.

When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a “mental disorder,” “mental disability,” “mental disease,” or “mental defect”... It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability (italics added). (Page xxiii, Use of DSM-IV in Forensic Settings)

DSM-IV also cautions:

Moreover, the fact that an individual’s presentation meets the criteria
for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. (Page xxiii)

Finally, The use of DSM-IV in forensic setting should be informed by an awareness of the risks and limitations discussed above.”  (Page xxiii)

§ 16:3  Use or Misuse of a Diagnosis of Mental Disorder.

It should be clear from these DSM caveats that a diagnosis per se of a mental disorder indicates very little about the capacity of a mentally ill parent to spend time with his or her child and to care for or behave reasonably well with that child. The same mental disorder can result in significantly different presentations in different individuals. Thus, it is not the presence or absence of a particular disorder, but, in light of the diagnosis, what effect the symptoms and manifestations of the particular disorder may have upon (a) that parent’s parenting skills, (b) his or her child, and (c) the relationship between parent and child. Any adequate forensic psychiatric evaluation should give predominant attention to these issues. Conversely, any evaluation whose conclusions are based essentially upon the simple finding of a mental disorder should be viewed with caution.

Additionally, mental health professionals will sometimes observe personality traits or a personality style and mistakenly and inappropriately offer a psychiatric diagnosis of a personality disorder. This can, at times, lead one parent to use this as evidence of another parent’s unfitness. Further, it is essential to note that it is far easier for a mental health professional to offer a diagnostic label than to acknowledge uncertainty or indefiniteness. An individual’s presentation at a particular moment in time may have very little to do with how he will appear even one month from that time, sometimes without treatment, but certainly with even conservative treatment. History is replete with misdiagnoses and with changes in how a particular set of symptoms is categorized. For example, for many years certain symptom pictures were diagnosed as Schizophrenia and given a very poor prognosis. In more recent years, that same symptom picture is diagnosed as Bipolar (Manic-Depressive) Disorder, which is both more treatable and has a far better prognosis. Or, under unusual stress, a vulnerable individual may present a picture that will be classified by different mental health professionals as Schizophrenia, as Bipolar Disorder, as Schizophreniform Disorder, or as Acute Psychotic Disorder, Not Otherwise Specified. That individual’s treatment and psychiatric records will vary according to the diagnosing professional. Recent experience has taught us that some individuals will be inappropriately hospitalized. Thus, a history of psychiatric hospitalization cannot be assumed to have been absolutely necessary and should not be used, by itself, to determine a parent’s appropriateness to have contact with a child.

Psychological testing, particularly projective tests (Rorschach, TAT), while helpful in arriving at a diagnosis, are of limited usefulness in connection with visitation issues. While offering information regarding a parent’s psychological characteristics, such tests shed little light upon parenting skills and capacities or about how the parent’s disorder manifests itself in the parent-child relationship. Individuals who would not be diagnosed with a mental disorder in a clinical setting may well find themselves with such a diagnosis based upon their responses to projective tests. Personality traits (e.g., “obsessive,” “hysterical”) noted in psychiatric and psychological reports are not specific to mental disorders, but are commonly found in the general population.

§ 16:4  Visitation

In light of the above, the presence of a psychiatric disorder should not be a basis for denying visitation between child and parent. The court must determine not only whether visitation should take place with a mentally ill parent, but also the appropriate frequency, and whether visits should be supervised or unsupervised. Advantages and disadvantages (benefits and risks) of visitation, whether supervised or not, must be weighed in arriving at a decision. These issues will be addressed in detail below.

Most mental health professionals believe that children develop best in the context of an ongoing relationship with both parents, and that some form of contact between child and parent is preferable to no contact. In part this is based upon the fact that all children must make an adaptation to their parents’ strengths, weaknesses, and idiosyncrasies. This is a process that develops throughout the life cycle, and applies to disturbed as well as nondisturbed parents. Children accomplish this task best when they are able to confront the actual parent, rather than dealing with an image or fantasy of that parent, distorted by the child’s wishes, fears, and past experiences. Thus, it is easier to deal with the devil without than the devil within. Frequently, what causes even greater distortion and confusion for the child is the custodial
parent’s description of the ill parent, colored by his or her own old resentments. Generally, the ill parent has played some role in the child’s development such that significant attachment exists. Even when that attachment has been limited or the child has been adversely affected by manifestations of the parent’s illness, a child will continue to ascribe significant importance to the relationship.

Under optimal, although infrequent, circumstances, the custodial parent will support the child’s relationship with the opposite parent and be available to help the child make some sense of that parent’s behavior, even when it is unusual. More often, there will be a request either for no or supervised visitation. Although occasionally appropriate, such a request should be viewed by a judge with some degree of initial suspicion. Often, it is based upon one or more of several factors, including (a) the custodial parent’s wish to eliminate the ill parent’s presence in that parent’s life, not infrequently based upon some years of significant marital turmoil related to the other parent’s disorder, and a wish to get on with his or her life unencumbered by the real difficulties of dealing with an ill ex-spouse; (b) a genuine, but exaggerated, concern for the child’s safety; (c) the sense that the child will be unable to make sense of the ill parent’s behaviors and will only be left confused; (d) the experience of having the child come home from visitation upset and difficult (While this may often be true, it is a mistake to attribute this behavior to the effect of the parent’s illness upon the child, rather than to other factors.); (e) a sincere, but mistaken, belief that the child will be better off forgetting his or her “crazy” parent, the mistake being that out of sight means out of mind for the child; and (f) the child’s statement that he or she doesn’t want to see the ill parent. (It is extremely difficult for the judge to evaluate this, since the child’s stated preference may be related to what he or she knows the custodial parent wants to hear).

On occasion, both parents will have diagnosed mental disorders, in which case the judge will have to weight each parent’s capacity for providing the greater stability for the child.

Supervised visitation, which will be addressed further below, is often proposed as an ideal solution, offering the ill parent his or her right, protecting the child, and appeasing the custodial parent. However, it is not without difficulties. In summary, other than in exceptional circumstances (e.g., ongoing abuse), where it will be quite clear that any visitation will be harmful to the child, the court need look for ways to

§ 16:5 Factors for judicial consideration in the evaluation of the parent with a mental disorder

The following represent those factors peculiar to the parent and his or her illness which are relevant to a determination of the appropriateness of visitation and which should be addressed in any forensic evaluation:

1. The nature and general course of the disorder.
   a. Is it recurrent as contrasted to a single incident? For example, a person may have a single nervous breakdown (usually a depressive disorder) or a single psychotic episode from which he or she may recover fully. In contrast, panic attacks, recurrent depressions, or frequent episodes of manic-depressive illness demonstrate a more protracted course. If recurrent, what is the frequency? If there are frequent exacerbations of an illness, are these related to the parent’s noncompliance with treatment or are they due essentially to the nature of the illness? Thus, a parent whose refusal to take medication that controls his or her illness, may have more difficulty appreciating the effect of the illness upon the child. It is essential also to be mindful that a single episode of a mental disorder can receive an inaccurate psychiatric diagnosis.
   b. Acute v. chronic—Is this likely to be an acute disorder which will be time-limited and then go into remission and remain so, or does it have more a chronic course? For example, as noted above, a depressive illness may manifest itself on only one occasion (acute) or represent a long-term process with only minor relief. Additionally, while some chronic mental illnesses follow a deteriorating course, others demonstrate progressive improvement.
   c. What is the usual course and prognosis of the disorder? Does it have a chronic, deteriorating course with increasing symptomatology and greater impairment in functioning? For example, Alzheimer’s Disease with psychiatric features is likely to leave the individual progressively
impaired. Alternatively, some disorders have a chronic course in which, over time, symptoms tend to abate and become less prominent. Again, it is essential to recall that the course of the same disorder will vary with the individual, his or her compliance with treatment, and the level of external support. It is not, then, possible to predict that simply because an individual has a diagnosis of schizoaffective disorder, he or she can be expected to behave in a particular way over the course of years.

d. What aspect of functioning is primarily affected? Is the disorder more one of mood, of thinking, or of behavior, or a combination of these? How does it affect self-care, occupation, relationships, and most importantly, parenting abilities?

(i) If of mood (feelings), it is important to note whether the mood is relatively stable (easier for the child to understand) or labile (frequent shifts in mood, e.g., from tears to great happiness). To what degree does the mood influence the parent’s actions? For example, if depressed, does it lead quickly to suicidal talk or action which would be very upsetting to a child? Or, is the parent so unhappy that he or she is emotionally unavailable to the child or burdens the child with his or her sadness? If there are marked shifts of mood over a short period of time, a child is left not knowing what to expect from hour to hour or visit to visit. If predominantly angry, does it lead to outbursts against the child or the custodial parent?

(ii) If of thinking, is the thinking confused and illogical, leading to gross distortions in the ability to assess reality? This could create enormous confusion and anxiety in a child. If the parent is highly suspicious and interprets outside events as being harmful (a paranoid outlook), does the parent involve the child in his delusional thinking? For example, telling the child that his custodial parent is the devil and will poison him or her. It should be noted that even highly bizarre behavior can be understood by children of school age as the parent’s craziness, such

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VISITATION WITH THE MENTALLY ILL PARENT

that a child may be minimally affected by such behaviors.

(iii) If of behavior, is there evidence of impulsive, aggressive, or violent behavior directed against the self or others? Is the child likely to be placed in danger? Commonly, custodial parents will emphasize the great danger a child might be exposed to, even though no harm has befallen the child when he or she was with the ill parent. They will suggest that should their wish for supervised visitation not be granted, the judge will be responsible for any harm that might come to the child. It is impossible to guarantee the safety of children with any parent, mentally ill or not. There is no research to support the idea that mentally ill parents cause greater physical harm to their children than do non-ill parents.

Obviously, the more predictable a course of illness, the more can be done to insure that visitation take place and that the child not be subjected to the vicissitudes of the parent’s disorder, but instead will obtain maximal benefit from his or her relationship with that parent. On the other hand, a chronic, deteriorating process or one in which there are marked and frequent alterations in mood, thinking, and behavior, suggest a need for regular evaluation of the parent and for consideration of supervised visitation, at least on a time-limited basis.

2. The parent’s conceptualization of his or her disorder.

a. The degree of awareness/insight. Does the parent acknowledge the existence of the disorder, or does he or she insist that there is nothing wrong? Or that it’s simply an attempt on the custodial parent’s part to prevent visitation? If the parent acknowledges the disorder, is he or she aware of what must be done to keep it under control? Is there acknowledgment of the difficulties it presents for the child? These are generally not all-or-none phenomena, but rather ones of degree. Most individuals with psychiatric disorders tend to minimize the effects of their disorder. In a forensic setting, this tendency is exaggerated by the wish of the parent to spend time with his or her child. A parent may attempt to minimize the symptoms, yet still comply with treatment. The parent with
limited awareness or acknowledgment of his or her disorder will have significant difficulty recognizing the impact of the disorder upon the child and will be much more likely to involve the child in his or her symptomatology. This also is a matter of degree and does not, per se, mitigate against visitation. For example, one parent with paranoid thinking may insist that his or her child share a view of the world as a dangerous place, filled with people who are intent on harming both of them. Another parent may have greater appreciation of the peculiarity or idiosyncrasy of this kind of thinking and not insist that the child accept that view.

b. Compliance with treatment. Individuals who acknowledge their difficulties are much more likely to comply with treatment recommendations than those whose appreciation of their condition is limited. Treatment compliance may involve psychotherapy, medication, attendance at support groups, etc. A parent who is either noncompliant with treatment or erratically compliant will be more likely to exhibit symptoms of his or her disorder during times the child is present, running the risk of evoking considerable anxiety and confusion in the child, particularly the younger child.

c. Degree of control over symptoms. Individuals have varying degrees of control over their symptoms. Additionally, some symptoms lend themselves to greater degrees of control over limited periods of time. For example, compulsive behaviors can sometimes be delayed, wherein the parent does not engage in a particular ritual in the child's presence. Or a parent might not place the child and himself in an environment which is likely to trigger an anxiety attack. The individual who has limited control over symptoms will be far more likely to evoke anxiety in the child, who will never know just when his parent will do something strange.

d. Degree to which the parent involves the child in his or her symptoms. Rare extremes of this are present in folie a deux (parent and child share the disordered thinking) and in Munchausen by Proxy situations (parent causes physical symptoms in the child and then brings the child for treatment without revealing what has been done). Extremely dangerous, but fortunately uncommon, is the paranoid delusional parent who views the child as evil and as part of a conspiracy against that parent. In any situation where the child is in physical danger any visitation is clearly contraindicated. However, most cases are not so black and white, instead demonstrate varying degrees of involvement of the child in the parent’s illness. The parent with paranoid delusional thinking frequently attempts to convince the child of the reality of his or her distorted thinking. A more common situation is the ill parent who believes the custodial parent is evil and tries to enlist the child in this belief.

e. Perhaps most important, to what degree is the parent sensitive to the impact of his or her disorder upon the child? This would involve awareness of the child’s confusion, embarrassment, anxiety, fear, etc., about the fact of the parental disorder as well as how the child understands and reacts to the parent’s symptoms. For example, is the parent whose disorder expresses itself in hyperbole in speech and emotion aware of the potential embarrassment it causes his or her child in front of its friends, so that that parent can attempt to control his or her outbursts.

3. The effects of the parent’s symptoms upon his or her parenting abilities.

a. Level of ability to establish emotional contact with the child, and sensitivity to the child’s needs. Is the parent so preoccupied with his or her symptoms as to have great difficulty relating to the child? Is there such egocentricity that the child is not seen as an individual with his or her own needs? Even quite disturbed parents can be connected to their children, even when they appear detached from other adults.

b. Degree of self-control over symptoms so as not to involve the child excessively in the parent’s disturbed thinking or behavior. For example, a depressed parent may be able to pull himself or herself out of a depressive mode of thinking during a visit with a child. Is the child in any physical danger as a result of the parent’s actions or confused thinking? As noted earlier, a parent who is overly
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delusional in the belief that the child represents evil can be of considerable danger to the child.
c. Can the parent offer ongoing adequate care or is the nature of the disorder such that he or she cannot provide for the child’s basic needs? Is the parent so disorganized that he or she is unable to see that the child is fed, goes to bed, etc. Most often this is a relative matter, such that a parent can provide for some, but not all, needs. Or, at some times the parent is quite capable, but at other times quite incapable.

§ 16:6  Factors involved in judicial evaluation of the impact of the parental disorder upon the child

The following must be considered in determining the risks or benefits to a child of visitation with his or her mentally disordered parent.

1. The age and developmental level of the child. This involves a rough estimate of the child’s cognitive level, his or her ability to understand first that the parent suffers from a disorder, and second that his or her symptoms are a manifestation of the disorder. It also involves a child’s ability to distinguish between reality and fantasy. This is important when the parent’s disorder involves major distortions of reality (e.g., hallucinations and/or delusions), but it becomes even more important when the distortions are less clear and involve some significant degree of truth (especially those concerning the custodial parent’s behaviors).

2. The child’s ability to step back and not personalize the parent’s accusations or blame, but instead to understand that such accusations are part of the parental disorder. This ability is generally not fully achieved until the child is well into adolescence. It can be positively influenced by a custodial parent who interprets the disorder to the child, or negatively influenced by the custodial parent who simply suggests that such accusations are evidence of the “evilness” of that parent.

3. The child’s tendency to feel responsible for the parental disorder or to feel responsible for taking care of the ill parent. Obviously, this is very much determined by the nature of the parental disorder. The more dependent and depressed the parent and the more that parent turns to the child for support and nurturance, the more difficult it is for the child not to feel guilty about meeting the parent’s needs.

4. To what degree the child is made anxious, confused, embarrassed, or fearful of the parent’s symptoms. How much of this lies within the child and is independent of the custodial parent’s input?

5. The child’s past history with this parent’s disorder. Was the child neglected, placed in danger, involved in the parent’s disorder?

6. The level of resilience v. vulnerability. Some children appear to be highly resilient and quite invulnerable to the effects of their parent’s disorder. They can state clearly that their parent is “crazy” and indicate the coping devices they have developed to deal with this, for example noting, “Oh, this is just part of my father’s nuttiness. He doesn’t really mean what he says.” While these children’s resources should not be overtaxed, they can be treated quite differently from those children who are more easily made upset by the parent’s symptoms.

7. Mitigating factors. The presence of grandparents, relatives, friends, or teachers who are nearby and available to the child when and if his or her parent shows some signs of difficulty and can help the child try to make sense of his or her parent’s disorder.

§ 16:7  Factors involved in judicial evaluation of the role of the custodial parent

One cannot overestimate the custodial parent’s influence upon the child’s reaction to the ill parent. The custodial parent has, not infrequently, been subjected to episodes of illness on numerous occasions. While he or she may be genuine in the wish to protect the child from the same, lingering anger is present and frequently colors the parent’s description of, and reactions to, the ill parent. This distortion, bias, or coaching of the child can only be ignored to the detriment of the child. It must be addressed both forthrightly and with usual judicial restraint. In those situations where the custodial parent appears to exaggerate the dangerousness to the child of unsupervised visitation, there is good reason to proceed slowly in granting unsupervised visitation, even though the judge will be viewed as supporting the custodial parent’s
§ 16:7  Perspectives on Custody Law

distorted view of the ill parent. This is a situation where parents and their attorneys may be addressing their own needs, including the win-lose paradigm, rather than the child’s welfare. The judge must be mindful that a custodial parent who is very anxious about the proposed visitation can, either willfully or subconsciously, seriously undermine and sabotage any visitation, particularly if it is unsupervised. Here the judge is in a unique position to assure the custodial parent that he or she is being listened to respectfully, and at the same time, reassure the ill parent that the judge’s main interest is to preserve the attachment between parent and child by proceeding slowly in the direction of unsupervised visitation, assuming that to be his direction. The custodial parent must also understand that the supervision is most likely to be temporary and that his or her cooperation in moving in that direction is expected. While demanding cooperation does not, in any way, guarantee it, especially in highly contested cases, it does lay down a framework. Threats to alter custody if there is not cooperation, while tempting, rarely work out in the child’s interests. Very occasionally, the intensity of the custodial parent’s animosity and venom toward the ill parent will, in the child’s best interests, necessitate prolonged supervised visitation. In these cases, appointment of a law guardian may make sense.

§ 16:8  The forensic evaluation—Appointment of a forensic evaluator

When one parent has alleged or substantiated mental disorder in the other parent and petitioned the Court to order either no or supervised visitation, consideration should be given to appointment of a forensic mental health evaluator. This individual should review the ill parent’s past psychiatric history, including psychiatric hospitalizations, and meet with each parent individually as well as with the child. He or she should then offer the court an opinion of the benefits and risks of visitation in a format described below.

When it is not possible to appoint an expert, the judge can use the guidelines noted previously. He or she can interview: (a) the custodial parent to determine to what degree the request is related to genuine concern for the child, and to what degree it is motivated by a wish to shut the opposite parent out of his or her life; (b) the ill parent to determine his or her awareness of and control over unusual behaviors, and understanding of their impact upon the child; and, (c) the child to

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determine his or her ability to understand and cope with his or her parent’s behaviors. It is important to realize that the ill parent is being seen at only one point in time (in itself a time of stress), and may be either better or worse at a future date. Thus, it is important not to be pressed into a definitive decision, but instead to consider a temporary order.

§ 16:9  The forensic report

The Court should expect understandable language without excessive psychological jargon and without speculations regarding unconscious motivations. The evaluation should indicate some awareness that it is particularly stressful for vulnerable parents. The report should document: (a) the past history, the current status, and the expected future course of the parent’s disorder; (b) the bases upon which the custodial parent objects to visitation; (c) most importantly, the degree to which the disorder adversely affects parenting capacities; (d) the child’s response to the ill parent and to what degree this response is influenced by the custodial parent; (e) documented observations of parent-child interactions. The focus of the report should be on how the parent’s mental disorder impacts upon his or her parenting and upon the child. Finally, the report should offer an opinion of the risks and benefits of visitation, including the type and frequency of visitation. Conclusions should follow and be consistent with observations. There should be an absence of professional bias either for or against children having contact with a mentally disordered parent. Both judge and mental health professional must have a clear understanding that the forensic expert is offering only an opinion. It is the judge who should and will make the final decision.

§ 16:10  Visitation options available to the judiciary—Unsupervised visitation

When a parent appears to have either recovered from a mental disorder, or whose disorder is found to be under good control, or who has a good understanding of his or her disorder’s impact upon the child, there is good reason to order unsupervised visitation. For the child’s sake, and sometimes, to reassure the custodial parent, it is appropriate to offer a schedule, beginning with some limitations of time, and graduating to greater periods, including weekends. Often, with weekend visitation, it is helpful to have the parent take the child to school on Monday morn-
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ing, thus avoiding the child’s return to the custodial parent on Sunday
night when the child will likely be subjected to detailed questioning of
how the noncustodial parent behaved. As noted previously, in highly
contented cases, it may be appropriate for a law guardian to remain in
the picture in order to monitor both the progress of visitation as well as
the parent’s compliance with treatment.

§ 16:11 Tempo rary supervised visitation

The concept of supervised visitation frequently appeals to judges as
a fail-safe approach to complicated visitation disputes. However, it is
often not without significant difficulties, appeasing no one while at-
tempts to appease all parties, and offering limited benefits to chil-
dren. In the child’s mind, and supported by the custodial parent, it can
confirm an inappropriate conclusion that the ill parent is dangerous or
otherwise unqualified to be alone with the child. Additionally, when
the parent and child have had a previous relationship, the presence of a
supervisor can be intrusive into a more normal relationship. As noted
earlier, all children need to come to terms with the limitations of their
parents, including the limitations imposed by mental disorder. Further-
more, logistical matters and finding an appropriate neutral supervisor
are not easy.

There are a variety of modes of supervision available. These include:
(a) Supervision by a close relative, such as a grandparent. On occasion,
the custodial parent will complain that all members of that family are
“sick” and will suggest a supervisor unacceptable to the other parent.
This issue may have to be addressed either by judge or forensic evalu-
at or. (b) Supervision by an independent person who is willing simply to
be present during the visit. (c) Supervision by a mental health profes-
sional who can help both parent and child resume their relationship.
At times, this will involve interpreting to the child the parent’s behaviors;
at other times it will involve helping the parent recognize the child’s
concerns. (d) While the preceding generally occur in the ill parent’s
home, at times it is appropriate that supervision occur in a neutral set-
ning with a professional from that setting. Such arrangements are
frequently offered by child care or child protective agencies.

Temporary supervised visitation is frequently indicated in the fol-
lowing situations: (a) after a prolonged period of lack of contact be-
tween parent and child; (b) when the last contact occurred during an
acute episode of mental illness; (c) when the child expresses great anx-

§ 16:14

Visitation with the mentally ill parent

iety about a visit; and (d) when the custodial parent expresses great
concern about the child’s welfare and when it is clear that this concern
is contagious and that he or she will actively obstruct any visitation at
the last minute in order to protect the child.

The duration of the supervision will vary according to how the visitation
progresses. A graduated schedule involving a progression to a
normal visitation setting works best.

§ 16:12 Ongoing supervised visitation

Where there is evidence of a nonremitting illness, an illness unre-
sponsive to treatment, a progressive, deteriorating illness, a parent
unwilling or unable to comply with treatment, or a parent who denies
or minimizes the effect of the disorder upon his or her parenting capac-
ties or upon the child, an order for ongoing supervision is appropri-
ate. Often the ill parent will be more willing to abide by this order when the
judge makes a provision for a rehearing if circumstances change.

§ 16:13 No visitation on a permanent basis

As noted previously, there are very few situations that warrant an
absence of all contact between a mentally disordered parent and a child.
The most extreme circumstances that arise include: parent in the middle
of a psychotic episode who has attempted to kill a child; parent suffer-
ing from a progressive dementia (e.g., as caused by Alzheimer’s or
AIDS) whose confusion or delirium causes him or her not to be able to
recognize the child; parent whose disorder causes him or her to identify
the child as “evil” and who continuously accuses the child of this.
Even in these unusual situations it can be helpful, with appropriate
supervision, for the child to have a single, or infrequent, visit with the
parent.

§ 16:14 Case examples—Parent with obsessive-compulsive dis-
order

Sara has recently been hospitalized with severe anxiety, fears, and
compulsive ritualistic behavior that had interfered with her ability to
maintain her household and take care of her children. During this most
recent hospitalization her husband, Ben, sought and was granted
temporary custody while he pursued full custody, and limited, super-
vised visitation of the children with their mother. The course of Sara’s
disorder over the past 8 years has been chronic and deteriorating with

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her having greater and greater difficulty maintaining her household. She minimizes the effects of her disorder upon her two children, Mary, aged 8, and John, aged 11. However, her overall anxiety and fear that harm will come to them has led her to follow them to school and then to hide in the bushes to observe them when they left school. Her obsessive fears of contamination led to her restricting their activities. Her rituals regarding food led to an inability to cook dinners for them, although she repetitively tried, only to then order food from outside after several hours of their waiting to eat. Sara’s overall unhappiness led to her turning toward her son, John, for support, often crying and asking him to hold her and reassure her.

Ben is extremely angry about the impositions placed upon him as a result of Sara’s illness over the years. At this point, he is quite vindictive, aggravating her symptoms by belittling and degrading her in front of the children. Both children dearly love their mother and are troubled by their father’s nastiness toward her. They acknowledge where, when, and how Sara’s illness affects them, but indicate that they have generally learned how to deal with it, by avoiding her at some times and ignoring her inappropriate fears. Both indicate that life would be easier with their father, but both are concerned that their mother will be cut out of their lives. They do not want that, both for themselves and for their sense of how devastated their mother would be.

A forensic evaluation recommended that the children live with their father and spend frequent, but time-limited, periods with their mother. A suggestion was made that legally depriving Sara of her role as a custodial parent (in name) would be devastating to her, and thus, detrimental to the children. A further suggestion was made that the father speak with a child mental health professional regarding his need to support the children in their dealing with their mother. While the Judge could not order the father to do this, he strongly recommended it and implemented the other suggestions.

§ 16:15 Parent with a bipolar disorder (manic-depressive illness)

Jane’s 6-year history of manic episodes includes seven hospitalizations, clearly related to noncompliance with prescribed medication. The last hospitalization (2 months prior to the evaluation, but 3 years after the previous hospitalization) followed her husband, Sam’s (with whom she was not living), seeking custody of their child, Samantha, aged 6. On examination, Jane appears moderately agitated, with a highly labile mood, with frequent shifts from crying to being elated. She resolutely insists that the prior episodes of her disorder have had no negative effect upon Samantha, even though on one occasion, following a now-forgotten impulse, she had abandoned Samantha in a park.

Sam is currently living with his fiancee, Betty. Both are convinced that Jane constitutes a danger to Samantha and repeatedly elicit from Samantha many stories regarding her mother’s supposed mistreatment (e.g., pulling her hair, yelling at her). The mental health evaluator finds a rehearsed quality to Samantha’s retelling these stories, and learns that her father reminded her to “tell the doctor what your mother has done” just before the visit. After reassurances to Sam, Betty, and Samantha, the evaluator sees Samantha and Jane together, now 6 months following their last visit. A close and loving attachment between the two is apparent. However, Samantha expresses a great deal of anger toward Jane, regarding her feeling that Jane has abandoned her over the past 6 months. Jane responds impulsively and angrily, telling Samantha she has no right to be angry, and that in fact it was Jane who should be angry at Samantha for her not having called Jane.

The evaluator recommends supervised visitation, based upon Jane’s poor control over her feelings and actions, her lack of sensitivity to the impact of her disorder upon Samantha, her inability to acknowledge Samantha’s distress, the chronicity of her condition, and her history of noncompliance with medication. Supervision is to continue for 6 months, followed by a reevaluation of Jane’s emotional state.

§ 16:16 Parent with schizophrenia

Tom and Ann have been divorced for a number of years, largely because of his unrelenting, but unfounded, accusations that his wife was having multiple extramarital affairs. He would threaten her with bodily harm. He has had three psychiatric hospitalizations, the last one, four years ago, all with a diagnosis of Schizophrenia, Paranoid Type. Their child, Billy, now 13 years old, has always resided with his mother who has custody. Tom has had only limited supervised visitation for a number of years, but is now seeking unsupervised and more extended periods of time with his son. Tom is working, sees his psychiatrist regularly, and takes his medication as prescribed. He remains convinced that his ex-wife did have several affairs during their marriage, but this is no longer a preoccupation, and he shows little emotion or conviction.
about this. He is a somewhat isolated man with few friends, but has two major interests, fishing and camping. The forensic evaluator finds Billy quite knowledgeable about his father’s illness, having studied it in school and having attended a group for children with mentally ill parents. He indicates that he understands and has adapted to his father’s limitations. He would like to spend more time with him, especially since he himself has recently become interested in fishing and camping. Ann, while anxious about unsupervised visitation, and angry that Tom is not providing child support, is not unsympathetic to Billy’s wishes. When seen together, Billy and his father appear to have a somewhat emotionally detached relationship. Their main mutual interest is fishing, which they speak of at length and with some enthusiasm. A recommendation is made for progressively increased periods of time of unsupervised visitation.

§ 16:17 Custody and visitation dispute involving a parent with a borderline personality disorder

Ralph and Tiffany have been married for 5 years and have a daughter, Crystal, also five (conceived prior to their marriage). Their marriage has been tumultuous. At Ralph’s insistence, Tiffany sought psychiatric treatment 3 years ago because of her angry outbursts, which she insisted were provoked by her husband. Her anger has been directed both against Ralph and herself. On two occasions she scratched her wrist with a safety pin. On one occasion she threatened suicide. Ralph is now seeking a divorce and requesting custody of Crystal, claiming that his wife is an unfit mother. He has obtained Tiffany’s psychiatric record which indicates a diagnosis of Borderline Personality Disorder. A forensic evaluation is ordered.

The forensic evaluation reveals that Tiffany suffers from impulsivity, intense anger, feelings of emptiness, and a history of unstable and intense interpersonal relationships. While causing significant interferences in her marital relationship and in occupational functioning (she has had five jobs in the past 3 years), there is evidence that these traits have not significantly interfered with her relationship with her daughter. Additionally, for the most part, Tiffany has been the primary caregiver of Crystal and has provided more-than-adequate care for her. For example, although Tiffany had one altercation with a nursery school teacher, she has generally been helpful to the school and to Crystal. Tiffany’s angry outbursts have largely occurred out of Crystal’s presence, and have generally been provoked by an altercation with Ralph. Ralph minimizes his role in their arguments. He appears to be angry at what he sees as Tiffany’s many years of abusive behavior toward him. When Crystal and her mother were seen together, they exhibited a close and loving relationship. When Crystal and her father were seen together, they too were obviously quite attached. Whereas Tiffany was a bit on the expansive and effusive side in her play with Crystal, Ralph was somewhat colder and more distant.

The evaluator advised the court that both parents seemed quite capable of caring for their daughter. The father was dissatisfied with this recommendation and insisted on going to trial. At trial, the father’s attorney brought out his copy of DSM-IV, insisting that the evaluator acknowledge that Tiffany was a “borderline” and therefore unfit to be a custodial parent. He further quoted professionals who had stated that borderline mothers create borderline children. The evaluator refused to be drawn into the issue of diagnosis and instead maintained the focus upon Tiffany’s parenting capacities, the minimal interference of her personality characteristics upon these capacities, and the relationship between Crystal and each parent. Despite the open animosity between the two, the judge recommended joint custody, with Crystal spending roughly equal amounts of time with each parent.

§ 16:18 Conclusion

A search of the psychiatric and psychological literature revealed no scientifically based research related to the specific issues of the effects upon children of either custody or visitation with a mentally ill parent.

IN SUMMARY, only a careful evaluation of the current status of the parent’s mental disorder, his or her adaptation to the disorder, the interferences in parenting, the impact upon the child, and the child’s understanding of the disorder and his or her overall resilience, will provide the court with enough information to decide on whether and under what conditions visitation of children with their mentally ill parents should take place. There is a broad consensus among mental health professions, that in their overall interest, children should generally be deprived of a relationship with their mentally ill parent.

LEGAL PRECEDENTS - KEN KEMPER

North Carolina Court found his OCD had a profound effect on the children - e.g., cleaning the 6 year old until “she screamed and cried and her vaginal area was red and raw.” The Court granted visitation rights conditioned on the husband’s ability to control his obsessive-compulsive behavior while with the children. (This was reported in the Obsessive Compulsive Foundation’s newsletter, researched by a law student!)
REPORT FORMAT

I. Identifying information and referral questions to include:
   - Names
   - Age and date of birth
   - Referral source
   - Statutory authority (if any)
   - Date of referral
   - Date of report
   - Referral questions

II. Structure of Evaluation
   - Persons interviewed (with dates, time)
   - Collateral Contacts (identify phone or in person, dates)
   - Specific records reviewed
   - Psychological tests if any

Non-confidentiality warning

III. Situation at the Time of the Referral
   - Where child resides
   - Existing coparenting/visitation plan

IV. Past or other clinical history
   - Each person's account of when and how difficulties began, were disclosed, detected, or referred (include marital history, history of domestic violence)
   - Special needs from developmental history (prenatal substance exposure, perinatal trauma, stability of attachments, exposure to family conflict, violence, physical or sexual abuse, neglect)
   - Family history including psychiatric disturbance, substance abuse, antisocial behavior, relevant medical problems
V. Evaluation of each parent

- Relevant history (family, school, work, medical, drug and alcohol, criminal)
- Mental Status including Appearance/relatedness, mood/affect, speech/thought, cognition
- Results of psychological testing if available
- Concerns of each parent
- Assessment of own and other parents' strengths and weaknesses
- If questions of parental fitness or capacity to parent, section addressing any of the factors outlined in statute.
- If question of removal, section addressing motivation for move, impact of move on custodial parent's life, plan for new access arrangements, impact of move on child
- Reports of any collateral contacts relevant to parent

VI. Evaluation of Child

- Developmental history
- Current functioning including sleep, eating, peer relationships, school
- History including medical, school, child care, significant caretakers, caretaking by parents, mental health
- Psychological, educational testing
- Content of interviews: include daily routines; perception of each parent; nature of relationship with each parent; parental preferences at times of transitions, illness, play dates; ideas about family composition; exposures to conflict, abuse, neglect;
- Observation of child and mother
- Observation of child and father
- Reports of any collateral contacts

VI. Clinical Summary or Impressions

- Summary of needs of children
- Parental strengths
- Parental weaknesses
- Nature of attachment to each parent
- Parenting capacities as they relate to child's needs
- Prognosis for response to treatment or other services

NOTE: Can integrate clinical summary and forensic opinions unless specific factors to be addressed

VI. Forensic Opinions (specific to question)

Questions of abuse/neglect/unfitness

- Harm stemming from abuse and/or neglect
- Current fitness
Parents' current capacities to meet child's needs
Prognosis for response to treatment

Question of removal
Motivation for move
Improvements in quality of life
Effect on child's psychological functioning in the short term and prognosis for long-term
Prognosis for maintenance of parent-child relationship

VI. Specific Recommendations
Parenting plan/access
Specific treatment or other services
Disposition of report when relevant

Robin M. Deutsch, January 31, 2002
Workshop Objectives-
Children’s Representatives Need to Understand Domestic Violence

First Objective- Define domestic violence

Physical or emotional injury perpetrated by family member

May vary in degree, e.g. one incident or many

Not all domestic violent behavior is legally actionable,
Varies by state.

85% of victims are women

Second Objective- Understand why domestic violence occurs.

Myths
• Caused by drug and alcohol
  May magnify but doesn’t cause
• Caused by stress
• Caused by psychopathology

Domestic Violence is about Power and Control
Batterers believe that
• Violence is valid means to solve problems.
• They have a right to exert power over partners through violence

Theories
• Individualized circumstances
• Learned behavior
• Socially acceptable

To understand domestic violence think in terms of power and control

Domestic violence appears to be about the parents, the adults.
But, domestic violence impacts the child as well.

Is there a typical “domestic violence” case?

Cycle of Violence Theory
Initially understand following phases:
• Tension phase- use tactics to control behavior without violence
• Acute battering phase- use violence to control
• Honeymoon phase- apologize
Cycles get shorter
Battering more physical

More recent studies
• ½ of situations follow this Cycle of Violence

Other Types of Situations
• Ongoing/episodic male battering
• Female initiated violence
• Male controlling interactive violence
• Separation engendered and post divorce trauma
• Psychotic and paranoid reactions

Do not focus on whether cycle of violence exists but rather,
Are power and control tactics being used to govern woman’s behavior?

Look at individual Parent, Family and Child.

Third Objective- Understand barriers to escaping violence
Why doesn’t she leave?

Different Question-
Why doesn’t he stop the violence?
Perpetrator should be held accountable.

To protect children need to understand why she doesn’t leave.

• Children-
  Biggest reason people stay.
  Biggest reason people leave.
• Economic dependence
• Religion
• Culture
• Language deficiency
• Immigration Status
• Low Self esteem
  o Not simple reason
• Survivor, more protective to stay
• Shame, embarrassment, humiliation
• Isolation
• Love, “good days”
  Very difficult issue.
  How do we support families who want to stay together?
  Responses all rely on leaving
• Batterer doesn’t let her
• Race, class, ethnicity and gender all exacerbate
Forth Objective- Understand impact of domestic violence on children

Extent of Problem-
Between 3 and 10 million children witness violence between their parents

Witness in variety of ways
See
Hear
Be part of violence
See after math

Effect of Witnessing
Not all children affected
Important to understand this child

Physical Effects
• Domestic violence frequently escalates during pregnancy.
  Significant t number of birth defects from battery
• Increased health problems for infants, older children from both the physical and emotional injuries of domestic violence
• Abuse/Neglect increase in situations of domestic abuse

Behavioral/Emotional Effects
• Psychological problems
• Aggression and acting out
• Belief that violence is acceptable means of resolving conflict
• Conflicting loyalties

Cognitive Effects
• Poor attendance at school
• Lower verbal skills
• Developmental Delay

Long Term Effect
• Strongest predictive factor for violent behavior
• Girls more likely to be in abusive relationship
• Criminal implications

Fifth Objective- Domestic Violence in Custody Laws

State Laws
Majority of states’ laws consider DV in custody/visitation determinations
• Recognize exposure to DV can be harmful
• Recognize that batterer may be inappropriate primary custodian because of extreme need to control
Recognize that safeguarding non-abusive parent may require limiting batterers control over children

Reality, bias against charges of domestic violence e

Custody- Generally, 3 types of laws
1- Consider DV before deciding
2- Consider how dv impacts “best interest” of children
3- Presumption against batterer having custody

Visitation
Arrange to protect battered parent/child
Focus on Best Interest
Place requirements on batterer

Judges don’t enforce
Child Rep needs to put in evidence

Workshop Objective- Handling Child as Witness
Ways to use children’s statements at trial without their testimony
Excited Utterances
Statement for purpose of diagnosis
Then existing state of mind
Residual exception (More probative than prejudicial)

Improving the Testimonial Experience
Educate and prepare
Adjust setting
FROM PROPERTY TO PERSONHOOD: WHAT THE LEGAL SYSTEM SHOULD DO FOR CHILDREN IN FAMILY VIOLENCE CASES

Leigh Goodmark

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I. INTRODUCTION

Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves—almost invariably a child or a woman—is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one’s daily life. Particularly for children the sense that the place which is supposed to be the place of security is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people have rights and are entitled to respect.1

I am helping Brad Wells with his language arts homework. He is currently learning about verb tenses—past, present, and future. Brad and I are sitting in the front room of his mother and stepfather’s house. In other parts of the house, his younger sister is playing with the cat; his mother is making dinner; his stepfather is watching television.

I am also trying to elicit information from Brad about the incident that has brought me here as Brad’s guardian ad litem. One Saturday, Brad’s father brought him home from a regularly scheduled visit and demanded to speak with Brad’s stepfather about a punishment that he felt was inappropriate. The exchange between the two men grew angry. When Brad’s mother came to take Brad into the house, Brad’s father stepped in her way and refused to let Brad leave. Brad stood on the porch, forced to watch the ensuing altercation, during which Brad’s father beat his mother with an umbrella so severely that the umbrella broke. This incident was just the latest episode in a pattern of violence against both Brad and his mother stretching back to before the couple’s divorce several years earlier.

Brad is, according to his mother, normally a bright, happy-go-lucky child, but this incident has left him shaken and reticent. He answers my questions reluctantly and with a slight stutter, confirming that his father beat his mother and that he had been forced to watch the entire incident. Then he turns away, back to the homework that shields him from any further questioning. As he turns away, I think about Brad’s past, present, and future: the past history of physical abuse of his mother, the present conflicting mix of feelings, from anticipation to dread, that Brad has about seeing his father, and the future prospects for this child, who has been exposed to so much turmoil at so young an age. I will continue to spend time with Brad over the next year, working on homework, playing with his model airplanes, helping him to process his misgivings about his father—and representing him in the court proceedings in which his mother and father are embroiled. Brad, no less than his mother, is a victim of domestic violence.

It has almost become trite to declare that violence against women is an

epidemic in the United States. The figures bear out that assertion: one in three women is assaulted physically by her partner. Each year, four million women are seriously assaulted by their partners. In 1993, 575,000 men and 49,000 women were arrested for offenses involving domestic violence. In the same year, 1300 women were killed by their partners or former partners. Violence has become a commonplace way of resolving family conflict; in one survey, nearly forty percent of the mothers attending a hospital clinic reported that violence was used as a means of resolving family disagreements. Despite these amazingly high numbers, experts believe that family violence is significantly underreported.

Leaving a batterer does not stop domestic abuse; in fact, just the opposite is true. Divorced and separated women report being battered fourteen times as often as women who are still with their abusers, and seventy-five percent of the battered women who are killed by past or present partners are women who are divorced or separated. Nor does having the batterer seek treatment alleviate the problem. Substantial numbers of batterers continue to physically abuse their current partners within six to twelve months after completing counseling. One half of batterers who are “successfully” treated commit acts of physical violence against their new partners. Virtually all batterers who complete treatment programs continue to psychologically abuse their partners.

The concept of family violence encompasses more than simply violence against women. Where one form of violence is present in a relationship, the likelihood increases that other forms of violence are present within the family as well. There is a significant overlap, for example, between partner abuse and child abuse and neglect. Surveys suggest that over half of men who abuse their partners also abuse their children. Batterers use children to hurt their former partners. Thirty-four percent of batterers threaten to kidnap their children (and eleven percent actually do), and twenty-five percent threaten to harm their children. Although batterers are generally responsible for the majority of child abuse within these families, battered women are more likely to abuse and/or neglect their own children. In fact, women are eight times more likely to abuse their children when they are being battered. Child abuse and neglect are more prevalent in homes where violence against women exists, because battering impairs the parenting skills of the abused mother, making the child less likely to receive proper care from either parent. Abused mothers are likely to experience fear and depression, leaving them less nurturing and supportive of their children. Domestic violence actually undermines the mother’s ability to parent; “[a]buse creates dysfunction and disorganization, leaving children with little nurturance, support, structure or supervision.” Abuse towards children decreases when battered women leave abusive relationships, both because the mother is less likely to abuse her children after leaving the relationship and because the children are no longer subject to abuse by the batterer.

Family violence is especially damaging because of the context within which it takes place: it occurs within ongoing relationships that are expected to be

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[2] The majority of victims of domestic violence (95% by some estimates) are women. See Phillip C. Crosby, Comment, Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases, 77 B.U. L. REV. 483, 493 (1997). Moreover, attacks by men on women are more numerous and more severe than those perpetrated by women. See id. For the purposes of this article (and despite the fact that the author has represented, albeit rarely, battered men) victims of domestic violence will be referred to as female, and batterers as male.


[8] See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 13; but see Armin A. Brot, Battered-Truth Syndrome: Hyped Stats on Wife Abuse Only Worsen the Problem, WASHINGTON POST, July 31, 1994, at C7 (arguing that statistics on battered women in America are vastly inflated).


[12] See id, see also Saunders, supra note 10, at 4.
protective, supportive and nurturing.23 The harm done to children when these relationships are undermined—both children who have suffered violence and children who have witnessed violence—is especially acute and often overlooked. Although we have made tremendous strides in acknowledging the epidemic of domestic violence in the United States, and in creating programs and systems that are responsive to the needs of the adult victims of domestic violence, the damage done to children in these abusive home settings is often an afterthought. To the extent that the legal system has recognized the unique problems for children in households where there is domestic violence, its concern has been memorialized in laws creating presumptions against awarding custody to an abusive parent. Although these laws, when enforced, are certainly helpful to both adult and child victims, they do not even begin to meet the needs of battered children and child witnesses to violence.

Failing to meet the needs of these children will have dire consequences, as will be detailed in Section II. Section II will discuss the short and long term impact of witnessing domestic violence on the physical and psychological well-being of children. Section II will also examine some of the coping strategies used by child witnesses.

Once their families’ problems move beyond the walls of the home and into the legal system, children are cast in various roles. Often, the needs and rights of children are ignored as their parents negotiate the legal system. Section III will discuss the role of children as “property,” specifically the property of their parents. It will discuss the various types of laws designed to address issues of domestic violence in the context of custody and visitation and will discuss problems with the implementation of these laws. Section III will also examine the “right” to visitation and suggest strategies that balance the interests of children and parents.

Section IV will look at children as “witnesses,” as participants in the legal proceedings in which their parents are involved, and will examine statutory and procedural strategies for making the act of serving as a witness less painful for the children involved. Finally, Section V will consider children as “persons,” discussing how representation for children can help to ensure that children’s rights are safeguarded in court proceedings. Section V will also outline how the provision of supportive services, such as counseling, is crucial to ensuring the long term health and well-being of children whose lives have been shaped by the violence in their homes.

II. THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN

A. Scope of the Problem

Literally millions of children—estimates range from three to ten million

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23 AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 5.

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24 See Alan Tomkins et al., The Plight of Children Who Witness Women Battering: Psychological Knowledge and Policy Implications, 18 L. & PSYCHOL. REV. 137, 139 (1994) (estimating three million child witnesses yearly); see also HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (between three and ten million witnesses annually) [hereinafter DAVIDSON, IMPACT]; Augustyn et al., supra note 7, at 36 (citing results of 1985 National Family Violence Survey with estimate of ten million child witnesses annually); Griffin, supra note 14, at i (between three and ten million witnesses annually); Gabrielle M. Maxwell, Children and Family Violence: The Unnoticed Victims, (last visited 3/6/00) <http://www.mnscsva.umn.edu/papers/nzreport.htm> (between three and ten million witnesses annually).

25 See DAVIDSON, IMPACT, supra note 24, at 1; see also Tomkins et al., supra note 24, at 139-40; Griffin, supra note 14, at 1.

26 See Maxwell, supra note 24, at 10.

27 See Tomkins et al., supra note 24, at 139-40. These findings have been replicated in a study of children from violent homes in New Zealand. A study of women seeking refuge at battered women’s shelters in New Zealand found that 90% of the children in the shelter had witnessed violence between their parents. See Maxwell, supra note 24, at 1.

28 See Augustyn et al., supra note 7, at 40; Crosby, supra note 2, at 499-500.

29 See Augustyn et al., supra note 7, at 40.

30 See id.

violence or that no violence had occurred.\textsuperscript{32}

What does it mean to “witness” violence? Witnessing includes not only what a child sees during an actual violent event, but also what the child hears during the event, what the child experiences as part of the event, and what the child sees during the aftermath of the event.\textsuperscript{33} During a violent incident, children hear threats and objects breaking.\textsuperscript{34} They hear their mothers screaming or crying or begging. Moreover, children may be a part of the violent event. Batterers often use the children as pawns, hitting or threatening to hit the children, taking them hostage, or forcing a child to watch or participate in the abuse.\textsuperscript{35} Children may also become active participants in the event, attempting to intervene between parents or seek help for the battered parent.\textsuperscript{36} A child may be held in the mother’s arms during the violent event.\textsuperscript{37} And children witness the aftermath of violent events: seeing a parent’s battered or bloodied face, watching as a parent is interviewed or apprehended by the police, moving with a parent to a shelter to escape further violence.\textsuperscript{38} All of these forms of witnessing can have the same detrimental impact on children as actually watching an event take place. In some cases, the impact can be more damaging; when children cannot see what is taking place, they may imagine scenarios that are scarier and more violent than the events that actually occur.

C. The Impact of Witnessing Family Violence

Social scientists, courts and commentators have come to recognize how destructive witnessing violence in the home can be for children. As Chief Justice Workman of the Supreme Court of West Virginia wrote in \textit{Patricia Ann S. v. James Daniel S.},

spousal abuse has a tremendous impact on children. “Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved on is acceptable. Children also fail to grasp the full range of negative consequences for the violence

\textsuperscript{32} See id. at 5.
\textsuperscript{33} See id. at 1-2.
\textsuperscript{34} See Saunders, supra note 10, at 3.
\textsuperscript{35} See Edelson, supra note 31, at 841.
\textsuperscript{36} Survey results from New Zealand indicate that in 15% of cases children actively attempted to prevent the violent event, in 6% of cases children got help, and in 10% of cases children directly intervened in the violent event. Some of the children who became involved in the event were abused verbally or physically. See Maxwell, supra note 24, at 8.
\textsuperscript{37} See Edelson, supra note 31, at 841.
\textsuperscript{38} See id.
There is broad agreement that children who witness violence are gravely harmed. The types of harm done to children who witness violence can be grouped into four categories: physical, behavioral and emotional, cognitive, and long-term harm.  

1. Physical Harm

The physical harm done to children who witness violence frequently begins well before they are born. Battering often begins or increases during a woman’s pregnancy. 48 Nearly fifty percent of batterers beat their pregnant wives or partners; as a result, these women are four times more likely to bear low birth-weight infants. 49 Astonishingly, more babies are born with birth defects as a result of their mothers being battered than as a result of all the diseases and illnesses for which pregnant women are immunized combined. 50

Children who witness violence present with increased numbers of health problems—both actual and psychosomatic. These children are admitted to hospitals twice as often as other children, have an increased number of psychosomatic complaints, and are more frequently absent from school due to health problems. 51 Infants and younger children exposed to domestic violence suffer from generally poor health, insomnia (and a fear of going to bed triggered by the connection between being in bed and hearing abuse), and excessive screaming. 52 Other somatic complaints common to children who witness violence include headaches, stomachaches, diarrhea, asthma, and peptic ulcers. 53

Children are also both inadvertently and deliberately hurt in the course of

54 See supra notes 13-22, and accompanying text.
55 See Peterson, supra note 18, at 521.
56 See Rabin, supra note 52, at 1111.
57 See Peterson, supra note 18, at 521.
58 See Zorza, Protecting the Children, supra note 9, at 1115.
59 See Maxwell, supra note 24, at 9; Zorza, Protecting the Children, supra note 9, at 1115. See also MARIA ROY, CHILDREN IN THE CROSSTUBE 89-90 (1988) (explaining that youngest children sustain the most serious injuries, including concussions and broken bones).
60 See Maxwell, supra note 24 at 9.
61 See Zorza, Protecting the Children, supra note 9, at 1115; see also ROY, supra note 59, at 92 (citing study of 146 children aged 11-17; study showed that all of the sons over the age of 14 attempted to protect their mothers from attacks; 62% were injured in so doing).
62 Matt Mossman, Boy Shot In Fight With Dad Had Become Model Student, PALM BEACH POST, November 3, 1998, at 3B.
63 Maxwell, supra note 24, at 11.
Behavioral and Emotional Harm

Violence "often is learned behavior" and "much of that learning takes place in the home." Exposure to violence is tantamount to psychological maltreatment by the abuser, and this "secondary victimization" carries many of the same symptoms as being the direct victim of a violent act. Batterers use psychological tactics to isolate their partners and children from the outside world in order to exert control over the family and to prevent children from seeking outside assistance to stop the violence. Exercising psychological control can decrease or eliminate the need to use physical violence. The greater the abuser's power within the family, the greater the likelihood that the victim's fear will far outlast the act of violence itself.

Three factors increase the likelihood that child witnesses, who are more susceptible than adults, will suffer from PTSD: close proximity to the violent act; close relationships with the perpetrator and the victim; and the perception of themselves as being vulnerable to injury. Guilt, shame and confusion are also common for these children, as are conflicts of loyalties. Children experience a range of emotions about their parents. Towards the mother, the children may feel fear for her safety, guilt about their inability to intervene to stop the violence, and anger for her failure to escape the violence (or to protect them from the violence). The child's relationship with the father is equally confusing; children express both affection and resentment towards their fathers, as well as pain and disappointment about his behavior. More distressing, children may begin to identify with the power of the abuser and distance themselves from the weaker parent, perceiving that parent as "unfit."

Disturbed emotional and behavioral development is typical in children who witness, although the damage varies with the age and the gender of the child. For example, boys are thought generally to become more aggressive and girls more passive as a result of witnessing. Although there is some evidence that as they age, girls too display aggressive tendencies. Children who become aggressive may be reacting to the stress of witnessing violence or modeling behavior that they have learned through witnessing. Children who witness may also display borderline to severe behavioral problems and below average adaptive behavior skills. They can be disruptive, impulsive and irritable. These children also become "hyper-alert," ready to react to the slightest indication of trouble; because maintaining this state of "hyper-alertness" drains children of energy, it can cause distraction and persistent exhaustion.

Children who have witnessed domestic violence have an increased sense of fatalism. Exposure to violence changes the way that children view the world and their place within it. They see the world as a dangerous and unpredictable place and believe they are likely to die at an early age, which decreases their concern for their personal safety. Their sense of imminent doom pushes these children towards behavior that increases their risk of injury or death, like drinking, using drugs, or using weapons. Children who witness also have increased rates of suicide.

Not surprisingly, child witnesses have lower social competence than children who have not witnessed violence. Their tendencies toward violence and aggression make them less likely to resolve interpersonal conflict in a constructive manner.
manner.86 Their skill in understanding how others feel and visualizing the perspectives of others is diminished.87 They learn that violence is a "normal" part of intimate relationships, that violence is an appropriate method of resolving conflicts, and sadly, that violence often goes unpunished.88 These children, especially boys, often use violence and believe that the use of violence to resolve conflicts is justified.89

3. Cognitive Functioning

Witnessing violence can have serious consequences for a child's cognitive function and ability to learn. For toddlers, witnessing violence can cause developmental regression and language lag.89 Younger children also display delays in verbal development, as well as increased cognitive confusion.90 Children who witness face a range of school problems, including poor performance, erratic attendance, distractibility and school phobias.82

4. Long Term Effects

Long term effects of witnessing domestic violence as a child include trauma-related symptoms, depression, aggression, and low self-esteem.88 Perhaps the most often discussed and most distressing effect is the propensity to carry violence into future relationships. The main risk factors for engaging in or being a victim of adult violence are exposure to parental violence and fighting within the home of origin.84 The reason for the increased risk, as discussed above, is not surprising. "Boys and girls who witness violence are more likely to learn that violence is an appropriate way of resolving conflicts in human relationships. As adults, they are more likely to act in a manner consistent with these childhood lessons."89

Boys who are exposed to or experience violence are at "major risk" of becoming batterers.90 In fact, the strongest risk factor for transmitting violence from one generation to the next is a child's exposure to his father abusing his mother.87 As the level of violence in the family increases, so does the likelihood that a child will grow up to engage in abusive or violent behavior.91 The majority of batterers witnessed violence as children, and sons of violent fathers are three times more likely to batter their partners.92 Girls, in turn, learn that victimization is inevitable, that no one can alter the pattern of violence.100 As a result, girls who have been exposed to or experienced violence are at greater risk for violence in their own dating relationships.93

The long-term effects of exposure to domestic violence have consequences for society as a whole. Domestic violence is a major cause of homelessness for women and children; as many as half of the homeless women and children in America are fleeing domestic violence.102 Witnessing domestic violence has criminal implications as well. Sixty-three percent of males between the ages of eleven and twenty who are serving time for homicide killed their mothers' batterers.103 Nationally, eighty-five percent of federal offenders being held for violent crimes came from homes where they witnessed or suffered domestic abuse.104 In Massachusetts, children from violent homes were twenty-four times more likely to commit a rape, and seventy-four times more likely to commit crimes against persons.105 At one time, the majority of these violent offenders were children cowering as violence invaded their homes.

5. Coping Strategies

Children of violent homes "must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a situation of helplessness."106 Various strategies help children to cope with the violence in their homes. During a violent event, children cope by crying, shouting at or pleading for their mothers, remaining silent, leaving the room, intervening in the event, seeking attention through their own behavior or restlessness, or choosing a parent as a...
target.\textsuperscript{107} They learn to protect themselves by placating the batterer—a strategy that they may have seen their mothers use.\textsuperscript{108} Children use both “emotion focused” and “problem focused” coping strategies. “Emotion focused” strategies help the child to control her own emotional response to the situation: wishing the problem away, minimizing the problem, forgiving the perpetrator, or refusing to discuss the problem. “Problem focused” strategies attempt to change the events, for example, by intervening in the violent event.\textsuperscript{109} After a violent event, children may seek security or comfort from the battered parent, or, conversely, play a parental role with the battered parent, increasing the child’s sense of control.\textsuperscript{110}

Mental health intervention helps children cope with the trauma of witnessing family violence. Strategies for successful intervention will be discussed in Part IV.B, infra.

III. CHILDREN AS PROPERTY: CUSTODY AND VISITATION ISSUES

“Throughout history, children have been treated by the legal system as the property and responsibility of their parents—putting a child in a particularly vulnerable position if family members are abusive.”\textsuperscript{111}

The conception of children as the property of their parents (usually, their fathers) dates back to English common law.\textsuperscript{112} While much has been done to secure legal rights for children, the law surrounding custody and visitation lags behind. Custody provisions underscore the notion of children as property both literally, allowing (and often suggesting) that children be shuttled between their parents, and figuratively, as parents parcel out responsibility for decision-making without considering the child’s input. Decisions made pursuant to custody and visitation laws, while ostensibly furthering the “best interest of the child,” more frequently tend to reflect the interests and desires of the parents, reinforcing the sense that children are essentially chattel.

The likelihood that custody or visitation litigation will reflect the parents’ agendas is greater in court proceedings involving families plagued by domestic violence.\textsuperscript{113} Sensitivity to issues of violence is especially important given that

\textsuperscript{107} For a general discussion of coping mechanisms, see Edleson, supra note 31, at 864.

\textsuperscript{108} See Crosby, supra note 2, at 500-01.

\textsuperscript{109} See Edleson, supra note 31, at 864 (citing studies by Peled and Folkman and Lazarus). Boys who witness are more likely to use “aggressive control” to cope with violent events. They are less able to handle simulated family interactions, more likely to report that they would intervene in violent events, more aroused by simulated conflict, and less likely to criticize those in simulated conflicts. See Edleson, supra note 31, at 864.

\textsuperscript{110} See Kerouac et al., supra note 51, at 413-26.

\textsuperscript{111} AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 47.


\textsuperscript{113} Separation does not prevent domestic abuse; abuse, harassment and stalking continue after separation, especially at times of visitation. Separation brings an increased risk of homicide, which can occur during visitation exchanges or custody hearings. See Saunders, supra note 10, at 3.

\textsuperscript{114} See id. at 3; AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 41.


\textsuperscript{116} See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 39. Similarly, “[w]hen a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse.” Id. at 40.

\textsuperscript{117} See id. at 40. Fathers who batter are also three times as likely to have child support arrearages. Id.

\textsuperscript{118} See id. at 41.

\textsuperscript{119} Zorza, Protecting the Children, supra note 9, at 1113.
balancing the continuation of the relationship between the non-custodial parent and child with the need to make visitation safer for child witnesses and their battered parents: visitation centers.

A. Statutes and Case Law

1. Custody

In custody cases, parents generally start (in the eyes of the court) from equal positions: both are assumed to be “fit” except in “extraordinary circumstances.” Custody decisions turn on the “best interest of the child,” a legal concept whose elements vary by jurisdiction but which is meant to convey a sense that the child’s needs are the central focus of custody determinations. In practice, however, the factors used to determine best interest focus on the behavior of the parents, in order to give the apparently more qualified and capable parent custody.121

Where does evidence of violence fit into this calculation? Prior to 1970 and the ascendency of the best interest standard, decisions about custody were based on the morality of parental conduct. Cruelty, defined as serious and continual abuse, was a basis for awarding custody to the victim of the cruelty. As the focus shifted from parental conduct to the best interest of the child, however, the importance of the relationship between the parents diminished.122 Instead, because the best interest standard largely focused on the relationship between parent and child, evidence of domestic violence was not deemed particularly relevant to custody decisions.123

The growing popularity of joint custody as an option for courts complicates the consideration of violence in custody determinations. Proponents argue that in joint custodial arrangements, where parents share some combination of physical custody of and legal authority over their children, children are better adjusted, fathers are more involved, child support is paid more regularly, and parents work together cooperatively. In fact, however, none of these justifications is actually borne out by research on parents who chose to share custody (the parents most likely to see good outcomes from joint custodial arrangements).124 In families that have joint custody imposed upon them, the results are even worse. Rather than advancing the best interest of children, imposed joint custody can actually be harmful for them. Children in imposed joint custody arrangements are more depressed and disturbed than children in the sole custody of one parent.125

120 Cahn, supra note 22, at 1042 n.1, 1058 n. 100; see also Peterson, supra note 18, at 526.

121 See Kurtz, supra note 44, at 1349.

122 See Cahn, supra note 22, at 1043.

123 See Kurtz, supra note 44, at 1361.

124 See Zorza, Protecting the Children, supra note 9, at 1123-24.

125 See id. at 1124.

Moreover, joint custody requires ongoing open communication between the parents. “Highly conflictual” (if not violent) parents are not likely to co-parent well.126

Joint custody can be dangerous in families with a history of abuse. It assumes an equality of power that is lacking in families where violence is or has been prevalent. Meaningful separation is almost impossible for a jointly parenting victim of abuse given the requirement that parents participate equally in decision-making.127 Joint custody essentially requires a battered parent to jeopardize her safety by mandating frequent and potentially conflict-laden interaction with the abusive parent.

The rise of joint custody and the recognition of the problems it poses for battered parents spurred jurisdictions to consider domestic violence when making custody decisions. As judges have increasingly looked to joint custodial arrangements as a means of resolving custody cases, states have begun to acknowledge domestic violence in their custody statutes. The move toward factoring domestic violence into custody decisions gained a great deal of momentum with a 1990 Congressional Resolution addressing the issue. House of Representatives Congressional Resolution 172, passed by the 101st Congress, urges states to include in their custody statutes a presumption against awarding custody to an abusive parent. The resolution makes specific findings about the damage to children that results from witnessing violence and draws the logical conclusion that awarding custody to an abusive spouse is detrimental to a child’s well-being.128 Subsequently, the National Council of Juvenile and Family Court Judges developed a Model Code on Domestic and Family Violence that incorporated such a presumption:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic . . . violence has occurred raises a rebuttable presumption that it is . . . not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.129

The Model Code further states that it is in the best interest of children to reside with the non-violent parent and emphasizes that the safety and well-being of

126 Saunders, supra note 10, at 2.

127 See Cahn, supra note 22, at 1064; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 101 ("Joint custody . . . is sometimes used as a strategy to force parents to work out their differences, supposedly for the sake of the children. Studies show that this strategy rarely succeeds and is sometimes harmful.").


the child and the battered parent should be paramount in custody decisions. By the end of 1997, thirteen states had adopted the Model Code’s custody provision. The vast majority of the states and the District of Columbia currently have statutes or case law requiring that courts take evidence of domestic violence into consideration when making custody decisions. Domestic violence is generally factored into custody decisions in one of three ways. In some states, evidence of domestic violence must be considered before joint custody is awarded. In others, evidence about domestic violence must be part of the court’s analysis of the child’s best interest. The third group of statutes presumes that awarding custody to perpetrators of family violence is not in the child’s best interest.

The first group of statutes simply requires that domestic violence be considered before judges make decisions about custody. Under this type of statute, judges have a great deal of discretion in determining the weight to be given to evidence of family violence. Family violence is not considered a “special” factor. Some courts are required to consider domestic violence between the parents only where that conduct “affects” the child, which is often defined quite narrowly.

The second type of statute requires that courts consider whether and how domestic violence impacts upon the best interest of the child. Courts have factored domestic violence into the best interest test both in cases between the abusive partner and the abused partner and in cases between the abusive partner and a third party, where the abusive parent has killed the child’s other parent. Under this statutory regime, although the court is required to consider how domestic violence affects the child and usually must provide some rationale for giving even partial custody to an abusive parent, the court still has the discretion to award joint and even sole custody to an abusive parent if the court determines that the custodial arrangement is in the child’s best interest. In a variation on theme, some statutes assume that the presence of domestic violence is contrary to the child’s best interest. Domestic violence can also be folded into other statutory “best interest” factors, including the interaction of the child with the parent, the mental and physical health of all involved parties.

Case law in some states creates the same kind of test. In Massachusetts, an appellate court first embraced the proposition that domestic violence was relevant to child custody decisions. In R.H. v. B.F., the court held that in cases where there was credible evidence of physical abuse to a household member by a person seeking custody of or visitation with a child, a trial judge must make detailed and precise findings of fact which demonstrate that the effects of the domestic violence on the child have been evaluated and, in the event physical or legal custody is awarded to the perpetrator of the abuse, how such an advance best advances the best

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130 See Saunders, supra note 10, at 4-5. It is interesting to note the dissonance between the Model Code of the National Council of Juvenile and Family Court Judges and the Uniform Marriage and Divorce Act, which precludes the court from considering conduct of the proposed custodian that does not affect the relationship to the child. Uniform MARRIAGE AND DIVORCE ACT § 402 (1973).

131 See id. at 1.

132 See Kurtz, supra note 44, at 1349.


134 See, e.g., S.C. CODE ANN. § 20-7-1530 (Law. Co-op 1998) (“In making a decision regarding custody of a minor child ... the court must give weight to evidence of domestic violence ... .”).

135 Saunders, supra note 10, at 1.

136 Cahn, supra note 22, at 1069-70.

137 See Part II.A.3., infra.

138 See, e.g., Ark. CODE ANN. § 9-13-101 (Michie 1987) (court must consider effect of domestic violence on the best interests of the child “whether or not the child was physically injured or personally witnessed the abuse ...”); CAL. FAM. CODE § 3031 (West 1999) (where a restraining order is in effect or has previously been issued, court shall consider whether best interest of the child requires that custody be limited, suspended or denied); N.C. GEN. STAT. § 50-13.2 (1998) (in making determination about custody order that will “best promote the interest and welfare of the child,” the court shall consider “domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party”); N.Y. DOM. REL. LAW § 240 (McKinney 1999) (“court must consider effect of domestic violence upon best interest of child”).

139 See Cahn, supra note 22, at 1063. Some laws are written anticipating that judges will award joint custody despite the presence of domestic violence. See R.I. GEN. LAWS § 15-5-16 (1998) (“Where domestic violence is proven, any award of joint custody ... shall be arranged so as to best protect the child and the abused parent from further harm.”).

140 See Cahn, supra note 22, at 1066.

141 See, e.g., FLA. STAT. ANN. § 61.13 (West 1998) (creating rebuttable presumption that certain degrees of domestic violence are detrimental to the child and requiring court to consider evidence of domestic violence were presumption is not triggered); R.I. GEN. LAWS § 15-5-16 (1998) (“the court ... shall consider evidence of past or present domestic violence, if proven, as a factor not in the best interest of the child”); Wyo. STAT. ANN. § 20-2-113(4) (Michie 1996) (domestic violence is “contrary to the best interest of the child”).

142 See Cahn, supra note 22, at 1074-75; see also Mo. ANN. STAT. § 425.375 (West 1998) (including consideration of domestic violence in “mental and physical health of all individuals involved” and requiring written findings of fact where the court determines that awarding custody to the abusive parent is in the child’s best interest).

Competing provisions can weaken the domestic violence protections in custody statutes. Perhaps no statutory factor poses as great a risk to the consideration of domestic violence as the “friendly parent” in states with “friendly parent” provisions, courts must consider which parent is more likely to facilitate the child’s relationship with the other parent. Several states that allow consideration of domestic violence in custody determinations also have friendly parent provisions. The problem for victims of violence and their children is that if they cannot prove sufficiently that domestic violence occurred, they are likely to appear “unfriendly” to the court. A battered woman’s legitimate concern about the batterer’s ability to parent can be used as a justification for denying her custody under these provisions. Ultimately, the battered woman may feel pressured to accept joint custody rather than risk being labeled “unfriendly” and potentially losing the child to the batterer, who declares himself eager to “co-parent.” See Cahn, supra note 22, at 1064, 1068; Saunders, supra note 10, at 2; Zorra, Protecting the Children, supra note 9, at 1122.
The Supreme Judicial Court later adopted this interpretation. In Custody of Vaughn, the court held that trial courts must make "detailed and comprehensive findings of fact on issues of domestic violence and its effect upon the child as well as upon the father’s parenting ability." The court explained:

The very frequency of domestic violence in disputes about child custody may have the effect of impairing courts to it and thus minimizing its significance. Requiring the courts to make explicit findings about the effect of the violence on the child and the appropriateness of the custody award in light of that effect will serve to keep these matters well in the forefront of judges' thinking.

The court discussed the impact of domestic violence on children, stating that "a child who has been either the victim or the spectator of [domestic] abuse suffers a distinctly grievous kind of harm." Similarly, in West Virginia, case law establishes the principle that "domestic violence evidence should be considered when determining parental fitness and child custody." The third type of statute creates a presumption that a batterer should not have custody of a child. These statutes reflect the belief that giving a judge discretion to consider evidence of violence does not provide sufficient protection to children in custody cases involving issues of family violence. In some states, the presumption against awarding custody to the perpetrator of domestic violence can be rebutted by evidence that the perpetrator has completed a batterer’s treatment program or that there are extraordinary circumstances which show that there is no risk of continuing violence. Other statutes flatly forbid awarding custody to a perpetrator of domestic violence.

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2. Visitation

States factor domestic violence into visitation decisions in a number of ways. Few of them offer protection commensurate to that provided in custody cases, and fewer still assume that visitation might need to be terminated in order to protect the child (although courts certainly retain the discretion to deny visitation where the child’s best interest dictates such an action).

In a number of states, grants of visitation are predicated upon arranging the visitation "so as to best protect the child and the abused parent from future harm." In other states, the language regarding visitation echoes that pertaining to custody. Visitation is awarded where it is in the best interest of the child; domestic violence is relevant to the best interest determination. Still other statutes impose more stringent standards for visitation. Some place the burden of showing that visitation will not endanger the child or significantly impair the child's emotional development on the petitioner of family violence, in addition to requiring a visitation arrangement that protects the custodial parent and the child from physical harm. A few states presume that batterers should not visit with children in an unsupervised setting unless certain conditions are met.

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145 Id. at 439-40.
146 Id. at 437. Subsequently, Massachusetts amended its custody statute to create a rebuttable presumption against awarding custody to a battering parent. MASS. GEN. LAWS ch. 208, § 31A (1998).
148 See Cahn, supra note 22, at 1345.
149 See, e.g., LA. REV. STAT. ANN. § 9-364 (West 1997). The Louisiana statute includes a presumption against awarding either sole or joint custody to a perpetrator of domestic violence. To rebut the presumption, the perpetrator must show by a preponderance of the evidence that he has completed a treatment program, is not abusing alcohol or drugs, and that it is in the best interest of the child for him to participate in the child’s life as a custodial parent. Similarly, Delaware’s statute allows for the presumption against sole or joint custody to be overcome if the perpetrator has completed a family violence or comparable program, has completed a program for drug/alcohol abuse, if such a program was deemed necessary by the court, and has demonstrated that giving custodial responsibilities to the abusive parent is in the child’s best interest. If the perpetrator has not met these criteria, the presumption can only be overcome if the court finds "extraordinary circumstances" warranting the rejection of the presumption. DEL. CODE ANN. Tit. 13, § 705A (1998). See also NEV. REV. STAT. § 125.480 (1997); N.D. CENT. CODE § 14-09-06.2 (1997); Kurtz, supra note 44, at 1249.
150 In Texas, for example, the court cannot award joint custody where "credible evidence" of a "history of pattern of past or present . . . abuse against either a parent, spouse, or child exists. TEX. FAM. CODE ANN. § 153.004 (West 1997); see also ARIZ. REV. STAT. ANN. § 25-403 (West 1998) (forbidding award of joint custody where domestic violence has occurred).
153 See ARIZ. REV. STAT. ANN. § 25-403 (West 1998); D.C. CODE ANN. § 16-914 (West 1997).
154 See LA. REV. STAT. ANN. § 9-364 (West 1998) (presumption against unsupervised visitation for batterers; unsupervised visitation available if batterer completes treatment program, does not abuse alcohol and/or drugs, and the court finds that visitation will not endanger the child and is in the child’s best interests); N.D. CENT. CODE § 14-05-22 (1997) ("court shall allow only supervised visitation . . . unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child’s physical or emotional health."). California’s statute does not create a presumption against unsupervised
3. Judicial (In)Discretion

"The idea that battering is unrelated to parenting is almost beyond belief."

For years, advocates for battered women and children have argued that states should explicitly recognize domestic violence in making custody and visitation determinations. They have largely won that fight: the majority of the states require courts to consider domestic violence in making these determinations. But it seems that advocates have won only the battle and not the war; courts (and those who work for them) continue to routinely discount the impact that witnessing violence has on children, fail to (or, worse yet, refuse to) see how partner abuse links to custody and visitation, or simply disregard the laws altogether.

a. What Should Judges Look For?

In making custody determinations against a backdrop of family violence, judges should consider a range of factors. These factors look to the characteristics of a battering relationship, the impact of violence on children, and the continuing need for the batterer to exercise control over his family.

"[F]amily law courts have as their basic premise that both parents are good for a child and both parents should be involved in a child’s upbringing. This is all extremely unproductive when you’re talking about domestic violence."

Custody and visitation laws assume that the parties are in equal positions of power and that both parents will act in the child’s best interest. This assumption is particularly out of place in cases involving family violence, where power imbalances favoring the perpetrator are the norm and children are often used as pawns in the control games played by the batterer.

visitation, but requires the court to consider whether the best interest of the child requires that visitation be supervised, not supervised, or denied altogether. CAL. FAM. CODE ANN. § 3031 (West 1999). In a similar vein, Washington State’s statute states that visitation "shall" be limited where there is a history of acts of domestic violence. WASH. REV. CODE ANN. § 26.10.160 (West 1998).

It is important to remember the context in which these cases arise. Abusive men are more likely to fight for custody of their children and to receive favorable treatment in court. See McMahon & Pence, supra note 73, at 195. Fathers who fight win either sole or joint custody a majority (70%) of the time, with abusive fathers at least as likely to receive custody as non-abusive fathers. Zorza, Protecting the Children, supra note 9, at 1113. See also Vellinga, supra note 115, at 40 (citing study by Geraldine Stablin, associate professor of psychology at California State University, San Bernardino, which showed that batterers were twice as likely to seek custody and obtain custody about half of the time (in the same rate as non-batterers). Similarly, a study of over 100,000 women in California who had used domestic violence services found that courts were more likely to award full custody to a father who the court knew was physically or sexually abusing the children than to fathers who had not abused their children. Marsha B. Liss & Geraldine Bute Stablin, Domestic Violence and Child Custody, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 183 (1993).

See Kurtz, supra note 44, at 1368.
perpetrator is not a typical brutish abuser; allowing the perpetrator to minimize the abuse; labeling fear of future violence "paranoid;" describing the victim as a masochist; criticizing the victim for her anger at her partner's action for custody; and failing to see the custody fight as a further manifestation of abuse and control.167 Judges should be wary of the batterer's manipulation. For example, abusers may be seeking visitation to gain access to their former partners, using the children to spy on their mother or to urge their mother to allow their father to return to the home.168

Most importantly, judges who hear custody and visitation cases need training in domestic violence. They need to understand and internalize the concepts of power and control, the impact of domestic violence on children, the relationships between partner abuse and child abuse, and the efficacy of treatment programs for batterers.169 This training should be comprehensive, and more importantly, ongoing.170 Like everyone else, judges who confront family violence day in and day out grow inured to it; they need to be constantly reminded of the horrors visited on its victims.

b. What Do Judges Do?

"[I]ntervention, once the court becomes involved, is as unpredictable as the judge who hears the case."171

Even in this era of enhanced awareness of and education about domestic violence and the laws designed to protect its victims, a surprising number of judges still "Don't get it." Many judges lack training in or trivialize domestic violence; others believe that violence doesn't affect the children unless the children are the immediate victims.172 When the court fails to consider the family in the context of the violence, the non-violent parent is at a distinct disadvantage. Actions that may seem reasonable as attempts to protect herself or her children from abuse are read as instability and mothers may appear to be unfit as a result of the impact of the violence.173 Survivors of domestic violence who raise concerns about the potential for abuse as the court is attempting to "smooth things over" are labeled petty, angry or vindictive.174

167 See id. at 40-41; see also David Adams, Identifying the Assaultive Husband in Court: You Be The Judge, BOSTON B.J., July/Aug. 1989, at 23-25.
168 See Adams, supra note 167 at 23-25.
169 See Cahn, supra note 22, at 1093; Johnson, supra note 133, at 283-84.
170 See Salzman, supra note 42, at 356.
171 See Rabin, supra note 52, at 1116.
172 See Kurtz, supra note 44, at 1359; Zorza, Protecting the Children, supra note 9, at 1119; see also Peterson, supra note 18, at 522-23.
173 See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 100; McMahon & Pence, supra note 73, at 200-01.
174 See Zorza, Protecting the Children, supra note 9, at 1120.
the failure of judges to enforce those laws undermines even the staunchest protections.

Such stories are not specific to the District of Columbia. In Sacramento, California, even after an abused wife had filed papers with the court alleging daily kicking, punching, and choking before she fled, and even after a court mediator found that the batterer had "anger control problems," a court awarded the father joint custody and unsupervised visitation. Several weeks after the court's decision, the father did not return the child after a scheduled unsupervised visit. Four days later, both the father and the son were found dead—a murder/suicide. The mother noted, "During the last custody trial we had I did state to one of the judges that I was afraid for my life and my son's life. I think honestly the judges think women are exaggerating about how much they're abused."

Opinions from courts throughout the country demonstrate the judicial system's unwillingness to consider domestic violence when making custody determinations. Appellate courts have repeatedly been forced to overturn the rulings of trial courts that failed to consider or give sufficient weight to evidence of domestic violence. *Hicks v. Hicks* is one such case. In *Hicks*, the court heard the following uncontested testimony: the father hit the mother in the stomach while she was pregnant, causing miscarriages on more than one occasion; the father broke brooms over the mother on more than one occasion; the father picked the mother up with a two-by-four under her neck and threw her off the porch; the father forced sexual intercourse on the mother on more than one occasion. The court heard additional disputed testimony about blows from the husband causing black eyes and broken teeth, a hand being squeezed so hard that a ring caused an indentation in the mother's finger, and the mother being thrown into a chair, causing her to hit her head on a fish tank. Despite this testimony, and despite the presumption in Louisiana against awarding custody to the perpetrators of domestic violence, the father was granted joint custody and primary residential custody, a decision that was overturned by an appellate court almost a year after the original determination.

In *Gant v. Gant*, the trial court awarded primary physical custody of the couple's two children to a husband who, during the course of the marriage, allegedly smashed two watches and a radio with a baseball bat; smashed a television set with a chair; sliced a baseball cap with a box cutter; punched a closet door until it splintered; smashed his wife; poked his wife in the eye, bursting a blood vessel; grabbed his wife by the face and pushed her over the couch while she held a six-month-old baby; and threatened to kill his wife. The husband admitted a number of the incidents, but claimed that they had occurred early in the couple's relationship or that the wife exaggerated their seriousness. In this case, the court made no findings about whether domestic violence had even occurred, let alone its impact on the custody decision. The appellate court remanded the case for the trial court to make specific findings of fact as to the occurrence of domestic violence, as required by Missouri law. Trial courts have also failed to give appropriate weight to domestic violence where fathers have:

- struck the mother several times, causing her to fall and sustain an injury requiring stitches (the mother also alleged being threatened with a handgun, which the father disputed);

- pushed and shoved the mother, threw an object at the mother, punched the mother in the face with a closed fist; smashed the mother's diamond ring with a hammer; injured the child by grabbing his elbow and pulling him down a hallway;

- been convicted of misdemeanor battery/domestic violence during a visitation exchange;

- grabbed the mother by the throat and threw her into a room; struck the mother in the face; and pushed the mother out the door (in addition to a number of incidents where both parties were violent);

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92 S.W.2d 342, 343 (Mo. App. 1995).
97 See id. at 347. On remand, the trial court determined that the "husband's attention to the needs of the children and the wife's alleged lack thereof," which included an alleged failure to regularly bathe the children or brush their teeth, outweighed the history of violence by the father. The court of appeals affirmed this ruling. See *Gant v. Gant*, 923 S.W.2d 527 (Mo. App. 1996).
99 See *In Re Marriage of Daniels*, 568 N.W.2d 51, 52-53 (Iowa Ct. App. 1997). During the trial, the mother's counsel was told, "I don't want anymore of this kind of testimony about domestic abuse coming into the record." Id. at 55 n.2. In dissent, one judge justified the father's behavior, stating, "Bruce exhibited immature and dangerous behavior in reacting to his wife's extramarital affairs by resorting to punches and shoves." Id. at 57.
100 See *McDermott v. McDermott*, 946 P.2d 177, 178 (Neve. 1997). The trial court stated that it did not approve of the violence but "[understood] the provocation which might have existed." See id. at 170.
101 See *Huesers v. Huesers*, 560 N.W.2d 219, 220-21 (N.D. 1997). The mother alleged a number of other violent acts perpetrated by the father. See id. The trial court rationalized the violence perpetrated by the father, stating, "The Court finds those [some of the incidents of violence alleged by the mother] to have happened and there is some mitigation on his part as they were committed after actions by Marla that would have made most reasonable persons commit domestic violence." Id. at 223 (quoting the trial court's memorandum opinion). The trial judge further stated, "However, if one looks at the actions of Marla prior to Stuart striking her in those three incidents, there are probably few people who would not have an anger that
—allegedly struck the mother with a closed fist, causing black eyes, in front of the children; threw a beer bottle at her; threatened that if she left him, he would find her, beat her and take the children away permanently; raised his fist to their six-year-old son;192

—struck the mother and ran out of the house screaming that his family “better get in the house before he tore off his wife’s head”; threw the mother onto the floor and kicked her in the chest, ribs and legs; threw the mother on the floor of "better get in the house before he tore off his wife's head"; threw the mother onto consciousness and requiring hospitalization; physically and verbally abused the mother’s children from another relationship; threatened to take their common child daughter; cuffed, pushed, knocked and poked the couple’s son;194

—had a criminal conviction for a domestic violence offense; shoved the child into a wall; punched the mother in the stomach while pregnant; threatened the mother’s life; struck the mother in the back of the head and choked her, causing an epileptic seizure; and assaulted a visitation supervisor.195

In all of these cases, statutory or case law required the courts to consider domestic violence prior to making a custody determination. The courts simply chose not to follow the law. And it is important to remember that these are only the cases that we know about: the cases that get appealed or are submitted to reporting services. It is impossible to gauge how many hundreds or thousands of children are suffering from the violence of a parent who has inflicted violence and who is not being held accountable for that violence.

The lack of education about the impact of violence on children and its relevance in custody determinations extends to members of the family law bar. In a second set of cases, courts have considered evidence of domestic violence but found other factors more central to determinations of custody. For example, in Patricia Ann S. v. James Daniel S., the Supreme Court of West Virginia upheld an award of custody to a father who, the majority acknowledged, had whipped the children with a belt because they found that the father had been the children’s primary caretaker.196 What the majority did not disclose, however, was that the father had also whipped his wife with the belt.197 Moreover, the father regularly disciplined the oldest child by grabbing his shoulder and pushing him against a wall or tree, bruising his head.198 The father exercised “total power and control” over the mother, regulating her access to money, for example.199 The impact on the children, according to the dissenting justice, was clear:

These children learned from their father . . . that it was okay to demean, disobey, and verbally abuse [the mother], and that physical violence awaited those who did not do as he said. The mother reacted with anger, and the father by word, deed, and dollar delivered the message that mommy’s crazy and mommy’s contemptible.200

In James v. Jll, the Family Court of Delaware ordered joint legal custody over the mother’s objections.201 Although the father acknowledged that he “might have struck” the mother on one occasion and that he grabbed her and threw her against the wall on another, the absence of further violence in the two years after the parties’ separation kept the court from weighing the presence of domestic violence more heavily. The court warned that

[w]hile Father attempts to minimize his actions, he is hereby put on notice that a presumption exists against granting a perpetrator of domestic violence joint custody. Thus, should Father again engage in the conduct that he now attempts to minimize, he will
jeopardize the custodial rights afforded him under this order, and as a result, his relationship with [the child].

Further, while the court acknowledged that the parties should not have a "shared" custody arrangement because of their inability to "communicate effectively," the court ordered an arrangement which required them to "communicate about all father on the wrist, ordering him not to further abuse the mother (who moved with violence offenses, some courts have been reluctant to give those convictions a great deal of "mental incapacity" overcame the presumptions against awarding custody to a

202 Id. at *3.

203 Id. at *4. See also Zuger v. Zuger, 563 N.W.2d 804, 809-10 (N.D. 1997), where the trial court found that the presumption against joint custody was overcome because: 1) the violence was not directed towards the children; 2) the violence was unlikely to continue since the parties were getting divorced; 3) the children were older, and therefore less at risk of harm from the father's temper; and 4) the risk of violence was minimal because of the age of the children and the proximity of the parties' homes; the parents lived close enough that if the father became violent, the children could go to the mother for protection. The trial court's ruling was overturned on appeal. See id. at 809-10.

204 See, e.g., Schmidt v. Schmidt, No. CA98-06-037, 1999 WL 225157 (Ohio App. Ct. Apr. 19, 1999); Taraghi v. Spanke-Taraghi, 977 P.2d 453 (Or. Ct. App. 1999). In Taraghi, there was, in fact, substantial evidence suggesting that the children's interests would be better served by giving custody to their father. But the trial and appellate courts were both strikingly dismissive of the mother's claims. Despite the fact that the father pleaded no contest to a domestic violence charge, the appellate court found "little evidence in the record to support wife's allegations." See id. at 457. The court credited the husband's testimony that he pled guilty on the advice of his lawyer and noted that the wife had written a letter stating that her husband had never harmed her. See id. at 456-57. The court discredited the wife's testimony that the letters were written at the request of the husband and his attorney. See id. See also Sturgill v. Witten, No. CH93-11820, 1994 WL 838133 (Del. Fam. Ct. Aug. 10, 1994) (court ordered joint custody despite father's six convictions for "terroristic threatening" of mother as well as other abusive behavior). This case is notable for the impact that the violence or neglect of the child's own child can have on joint custody judgments. In Holtz v. Holtz, 595 N.W.2d 1, 4 (N.D. 1999), the Supreme Court of North Dakota also overturned trial court determinations in cases where the mother's problems with "depression, food disorders . . . and low self-esteem" trumped the father's history of domestic violence, which included blackening the mother's eye, slapping her, and rupturing her eardrum, Bruner v. Hagem, 534 N.W.2d 825, 828, 827 (N.D. 1995), and where the mother's smoking around an asthmatic child was considered more compelling than the father's abuse, which included pulling the mother's hair, punching the mother in the nose, and twisting the mother's ankle severely, causing her to seek medical treatment, see Heck v. Reed, 529 N.W.2d 155 (N.D. 1995).

205 Salzman, supra note 42, at 353-54. The problem is not unique to judges. Custody evaluators, guardians ad litem, and others within the judicial system must also understand and incorporate their understanding of domestic violence into their recommendations. Evaluators must ask what impact the batterer's violence has had on his relationship with the children and on his ability to parent and whether the harm done by the violence can be undone. See McMahon & Pence, supra note 73, at 201. Equally importantly, evaluators need to ask to what extent the problems of the victim are directly attributable to the abuse. The comments of one Minnesota custody evaluator are illustrative:

I needed to decide custody in a family where the man has repeatedly assaulted his wife. Because of the abuse she isn't in good shape. She is chemically dependent and is not being a very good parent. He has a job, he's sober, and he's stable. I know that it's the violence that has done this to her. But given where she's at, compared to him, how can I not give him custody? Even though I know it's not fair to her, isn't it fair to the children?

Id. at 200-01; see also The Family Violence Project of the National Council of Juvenile and Family Court Judges, Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice, 20 Fam. L.Q. 197, 220 (1995) (explaining survey showing that custody evaluators and guardians ad litem are "the professionals least trained about domestic violence of any actors in the civil justice system."). I would argue that giving custody to the father in this situation is not necessarily fair to the children. The evaluator does not mention the impact that the father's violence has had on the children. He does not discuss the propensity for further violence. He does not acknowledge that what the children learn from such a decision is that violence is rewarded (in this case, through the custody award of the children).

206 Id. at *11-12. Despite all of this, the court stated, "I am satisfied that a joint custody Order is appropriate herein because I believe that the parties should be required to continue to discuss issues involving their child, and that they should be forced to learn to do so in a more amicable and conciliatory fashion than they have done in the past." Id. at *15.

At least one court has found that entry into a domestic violence pretrial diversion program does not constitute a guilty plea or conviction triggering consideration of domestic violence in making custody determinations. See Moore v. Moore, No. 93-CA114, 1994 WL 370005 (Ohio App. Ct. July 11, 1994). See also Carver v. Miller, 585 N.W.2d 139 (N.D. Ct. App. 1998).

See Holtz v. Holtz, 595 N.W.2d 1, 4 (N.D. 1999). The Supreme Court of North Dakota also overturned trial court determinations in cases where the mother's problems with "depression, food disorders . . . and low self-esteem" trumped the father's history of domestic violence, which included blackening the mother's eye, slapping her, and rupturing her eardrum, Bruner v. Hagem, 534 N.W.2d 825, 828, 827 (N.D. 1995), and where the mother's smoking around an asthmatic child was considered more compelling than the father's abuse, which included pulling the mother's hair, punching the mother in the nose, and twisting the

mother's ankle severely, causing her to seek medical treatment, see Heck v. Reed, 529 N.W.2d 155 (N.D. 1995).

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It is possible, and even probable, that in at least some of these cases the trial court made the appropriate decision despite its failure to consider evidence of domestic violence. That argument misses the point. Statutes and case law requiring courts to consider domestic violence exist in order to protect children from the effects of continued exposure to violence and from the belief that violence is rewarded by the judicial system. By failing to adhere to the spirit, and in some cases the letter, of these laws, courts endanger children and undermine the strong policy message that states intended to send. Even in programs with the most progressive responses to domestic violence like that of Quincy, Massachusetts, judges are the weak link. "Judicial misbehavior presents the most significant obstacle to the Quincy Program's successful operation." And as Chief Justice Workman of the Supreme Court of Appeals of West Virginia noted in Patricia Ann S. v. James Daniel S., "Until judicial officers on every level come to a better understanding of the phenomenon of family violence in its finer gradations, the response of the court system will continue to fall short."
B. The Special Problem of Visitation

1. Examples from Case Law

In perhaps no area is the judiciary so unwilling to apply restrictive laws as in determining visitation. Visitation is looked upon as sacrosanct, an absolute right of the biological parent. Judges almost routinely refuse to consider limiting or even denying visitation to abusive parents, regardless of their behavior. Moreover, judges excoriate custodial parents who try to shield their children from exposure to an abusive parent, suggesting that concern for the child is nothing more than a ploy to deny visitation to the non-custodial parent.

Again, an anecdote illustrates the point. While sitting in court one day, I watched two unrepresented parties at a hearing to modify a civil protection order. The father asked to increase his visitation; the mother stated that while she did not oppose visitation, she had concerns about the child’s response because the child had been traumatized by witnessing the violence perpetrated by the father. The judge grew incensed, yelling that the mother would not be permitted to block the father’s visitation, that the mother would be held responsible if the visitation did not go well, and that the mother could potentially lose her child if she continued to attempt to withhold the child. The mother protested that these were not her goals; she simply wished to express that the child had some discomfort with visitation. The judge refused to hear any more from the mother and ultimately ordered more visitation than the father had requested.

In most situations, continued contact with the non-custodial parent after parents separate is incredibly important for children. The analysis changes, however, where one parent has been violent. In that situation, the importance of continued contact has to be weighed against the negative effects of that contact.

Usually, the child has no one to present his concerns or fears or, in the alternative, his desire to visit, other than the custodial parent. But when the custodial parent attempts to present the child’s viewpoint, she exposes herself to judicial displeasure for opposing visitation.

See Straus, supra note 14, at 231. Some jurisdictions have created tools to help judges make such determinations. For example, the Domestic Violence Visitation Task Force of the Probate and Family Court Department of the Massachusetts Trial Court authored a Domestic Violence Visitation Risk Assessment, which suggests various factors, including the level of violence, both physical and emotional, and the impact upon the children, that judges should consider when making visitation decisions and provides sample questions designed to elicit that information. See generally Domestic Violence Visitation Task Force, Domestic Violence Visitation Risk Assessment (draft), October 1994 (on file with the author).

This is not to say, however, that custodial parents never use visitation to further their own interests. I have been involved with parents who want to deny visitation but cannot articulate a reason for doing so or do so to punish the abuser. Certainly this is not an appropriate approach to visitation and risks making the children pawns in a power struggle between the parties. Nonetheless, my experience has been that parents who attempt to put forth their children’s honest views on visitation are routinely ignored, or worse, chastised for opposing visitation.

Giving the child someone else to voice these concerns is discussed in Part IV, infra.

Custodial parents also have an interest in making sure that they are protected from violence during the visitation, which may also be seen as an attempt to interfere with the rights of the non-custodial parent.
conflict and a reasonable fear of violence, and should acknowledge that spending substantial amounts of time with both parents is not always healthy for the child. 219

Courts are reluctant to employ these methods for safeguarding children during visitation. They fail to consider safety concerns, and don't appoint appropriate supervisors for supervised visitation. 220 They are even more reluctant to curtail visitation, even when credible evidence of the child's fear or the parent's propensity for violence exists. Three cases illustrate the trial court's reluctance to "infringe" on the non-custodial parent's right to visitation even in the most extreme circumstances.

In Mary Ann P. v. William R. P., a family law master heard evidence of the physical and mental abuse perpetrated by the father against the mother, with the children as witnesses. 221 The mother testified that the father had a violent temper and cursed at her in front of the children "so frequently that even when the boys were just learning to talk they said explicit curse words." 222 The father punched and kicked the mother, threatened her with a knife, choked her, and dragged her across the floor by her hair in front of the children. 223 He hit and kicked the children's toys and broke toys in front of the children. 224 He locked the mother out of the house and kept the children inside with him. 225 When the children witnessed the abuse of their mother, they would scream, cry and try to hide. 226 Further, evidence was presented to the court that the six year-old boy had been sexually abused by the father. 227 There was also testimony that the boys disliked their father, did not want to visit their father, and demonstrated anger by hitting the father. 228 Three experts testified that the children should not be forced to see their father. 229

The family law master and the appellate court disagreed. 230 The family law master stated:

It is clear that no sexual abuse occurred in this case, that plaintiff does not like the defendant, and justifiably so because of the history of physical violence in their marriage, but that there can be

219 See Saunders, supra note 10, at 5.
220 See Zorza, Protecting the Children, supra note 9, at 1125.
221 475 S.E.2d 1, 3 (W. Va. 1996).
222 Id.
223 See id.
224 See id.
225 See id.
226 See Mary Ann P., 475 S.E.2d at 3.
227 See id. at 3-4.
228 See id. at 4.
229 See id. at 4-5.
230 See id. at 4-5.

The Supreme Court of Appeals of West Virginia, however, overturned the earlier decisions, finding that "[t]he evidence of the negative impact the physical abuse that occurred during the marriage had in regard to the children's well-being was not rebutted." 231 It stated that domestic violence appeared to be the "root cause for why visitation has not been successful" and held that the children should not be forced to visit with their father. 232

Two years later, the Supreme Court of Appeals of West Virginia was again confronted with a case where the family law master and appellate court both ignored substantial evidence of domestic violence in determining visitation. In Dale Patrick D. v. Victoria Diane D., the family law master heard "a significant volume of evidence" about the father's "violent proclivities." 233 The evidence included the following:

— the father's admission that he threw the mother down and hit her on the buttocks with an open hand;
— the father's admission that he climbed on top of his wife, holding her shoulders and legs down and leaving bruises on her body;
— testimony that the father threw a can of beer at the mother, dragged her across the floor, threw her on the floor and banged her head against the floor;
— testimony that the father carried and dragged the mother's son up the stairs, holding him by his feet and ankles and dropping him head first at the top of the stairs;
— testimony that the father pushed the mother's daughter while she held the child at issue in this matter, causing the daughter to fall and drop the child;
— testimony about threats and verbal abuse;
— testimony about the father's repeated use of profanity and the father's testimony that "profanity and retaliation is necessary;"
— testimony about the father's "hostile behavior" towards his first wife. 234

The Supreme Court of Appeals of West Virginia stated that it was "greatly troubled by the history of domestic violence and the absence of meaningful lower court attention to the impact of such violence upon [the father's] visitation rights." 235 The court remanded the case for evaluation of the potential for domestic

231 Mary Ann P., 475 S.E.2d at 5.
232 Id. at 7. The Supreme Court held that it could not find that the factual determination that no sexual abuse had occurred was clearly erroneous and declined to overrule that part of the lower court's ruling. See id. at 6. This finding spurred a concurrence from Justice Workman, who, while agreeing with the final result, vehemently argued that the family law master's determination that no sexual abuse had occurred was clearly erroneous. See id. at 9-10.
233 Id. at 8.
235 Id. at 381 n.1 (Workman, J. concurring in part and dissenting in part).
236 Id. at 379.
abuse and a determination as to whether visitation comported with the best interest of the child.\textsuperscript{237}

The trial court in \textit{Michelli v. Michelli} awarded unsupervised visitation to a father despite at least eight separate incidents of violence over a six year marriage, and despite Louisiana's clear statutory mandate that in cases with a history of family violence, the perpetrator should be awarded only supervised visitation.\textsuperscript{238} The father struck the mother in the face, causing a cut over her right eye and possibly a broken nose; pushed her and called her names including slut and whore; hit her in front of the child, causing the child to run from the home screaming for help; punched the daughter in the stomach and later shook the daughter to prevent her from telling her mother about being punched; cursed at the mother, threatened to rape her and attempted to pull her legs apart; threw the mother, who was holding their son, to the floor, cut her fingers pulling the car keys from her hand, and grabbed her by the neck and choked her, leaving red marks on her neck; hit the mother's legs, grabbed her hair and banged her head against the window and dashboard of the car; and beat the mother and threw her out of a hotel room during a family vacation.\textsuperscript{239} The father did not deny that the violence occurred.\textsuperscript{240} The trial court found that the mother had been violent because she had defended herself during some of these incidents and concluded that "sporadic acts of violence committed by both parties do not rise to the level sufficient to trigger [the presumption against unsupervised visitation]."\textsuperscript{241}

The Court of Appeals disagreed, pointing out that seven of the eight incidents described by the mother and her witnesses constituted batteries and that these seven incidents established a history of violence.\textsuperscript{242} The court noted that one could "reasonably assume that child visitation would be the new forum for abuse of the child or the abused parent," especially where, as here, the violence had escalated over time and some of the violent acts occurred in the presence of the children.\textsuperscript{243}

What is so striking about these cases is both the level of the violence and the unwillingness of the trial courts (and in the West Virginia cases, the appellate court) to consider heightened evidence of domestic violence should impact upon their visitation orders, despite substantial and unequivocal case law and/or statutes requiring them to do so.\textsuperscript{244} Individual judges are the weak link in the system designed to protect children from violent homes in custody and visitation decisions. Judges need to move beyond rote recitations of the best interest standard and consider whether visitation is in the child's interest at all, and if so, how children can be adequately protected from harm.\textsuperscript{245} Laws alone, without judicial education, and more importantly, real understanding of the impact of witnessing domestic violence on children and application of that understanding to judicial rulings, will never protect children from the harm associated with abusive parents.

2. Supervised Visitation Centers

Judges have a number of options available to them to safeguard children when making visitation decisions. One of these options is supervised visitation. Throughout the country, communities are creating sites where visitation can take place in a safe and supervised setting. The next section will discuss the justifications for creating visitation centers, describe the specifications of such centers, provide examples of successful centers, and advocate for the creation of centers in each community where abusive parents visit with their children.

a. Why Supervised Visitation Centers?

The threshold question for any judge making a visitation decision in the context of family violence should be whether there should be any contact between a child and a parent who has abused his partner.\textsuperscript{246} In reality, however, the question is decision overturned in the earlier case did not change his approach in the later one. For a general discussion of state custody and visitation statutory provisions involving domestic violence and specifically, judges' unwillingness to restrict visitation, see \textit{The Family Violence Project of the National Council of Juvenile and Family Court Judges, supra note 207}, at 216 ("Few judges impose protective limitations on visitation in the context of domestic violence, and fewer limit access to supervised visitation.").

Whether a child has an independent right to visitation, and a corresponding right to refuse visitation, is an issue deserving of more attention. Although a parent's right to the company of the child has been given constitutional protection, that right is not absolute. A child's right to safety, security, and self-determination can trump the parent's right—for example, where the child cannot be adequately protected during visitation or where visitation would cause emotional or physical trauma to the child. Such determinations are frequently made in the context of child abuse cases (although given the focus on family reunification, courts are hesitant to suspend all visitation), and that same reasoning should extend to other kinds of cases. As Justice Workman noted in \textit{Dale Patrick D. v. Victoria Diane D.},

The record here reflects an individual with deep-seated problems, who at a minimum has a substantial temper control problem with a propensity for violence and who indeed may even be very dangerous. Although such an individual should not be deprived of the opportunity to have a relationship with his child, that child also has rights. She is entitled to protection as best the legal system can afford, for her safety has been placed in our hands.

508 S.E.2d 375, 381 (W. Va. 1998). By the same token, a child's desire to visit with an abusive parent should be honored if it can be achieved in a manner that is safe for the child. If the child has an independent right to visitation, "[j]udges should not use parent and child contacts as the sanction for violations of court orders or for behavior modification purposes because the court is uncomfortable using its contempt power against batteries." Kabin, supra note 52, at 1117.

\textsuperscript{244} Interestingly, the same West Virginia appellate court judge, Judge Herman Canady of the Circuit Court of Kanawha County, approved the visitation orders in both West Virginia cases. Clearly, having his
somewhat academic—courts routinely order visitation where partner abuse has occurred.246 The real decision for most judges is whether visitation will be supervised or unsupervised.

Supervised visitation is “contact between a child and adult(s), usually a parent, that takes place in the presence of a third person who is responsible for ensuring the safety of those involved.”248 Courts can require supervised visits, but finding appropriate supervision can be problematic. As discussed above, enlisting the assistance of the non-custodial parent’s family is often not advisable, and the victi may have few relatives or friends willing to supervise the batterer.249 If a supervisor cannot be found, courts are forced to choose between cutting off access to the child and allowing the non-custodial parent unhindered access to the child, at the risk of physical or emotional abuse to the child.250 Supervised visitation centers fill this gap by taking on the responsibilities of the third party, providing a safe, neutral setting in which contact between a child or children and an adult, usually a parent, can be monitored by trained personnel able to protect the rights of the child. . . . All visitation centers have the purpose of allowing parental contact, assuring the safety of the child, and keeping an objective or accurate record of events.251

Creating supervised visitation centers can make supervised visitation a viable option for the first time.252

Decreasing the risk of further violence between the parties is a second justification for creating supervised visitation centers. The time immediately following an abused partner’s decision to end a relationship is generally the time when there is the highest risk of violence. But this is also the time when decisions about visitation are being made. And other than court appearances, pick-ups and drop-offs for visitation are the only time that an abuser under a restraining order has sanctioned access to the victim.253 Courts often seem to craft visitation orders without considering the matter that brought the parties before the court in the first place. "[A] man who has battered his partner, and a woman who has been battered, are expected to negotiate a visitation schedule, organize intricate details of exchanging children, meet somewhere, and exchange the children without threat, conflict, or dispute."254 The result? "[T]his discounting of the reality of violence puts women and children at risk."255 Moreover, children are emotionally damaged by further violence. Children feel responsible for the violence that occurs when a non-custodial parent is present for the express purpose of visiting with the child.256 And children are further traumatized by the acrimony between their parents that is manifested during visitation.258 Children also perceive and react to the stress that the custodial parent feels around visitation; supervised visits in a safe setting can alleviate the custodial parent’s anxiety, relieving the child of trauma.259

Another goal of supervised visitation centers is to provide emotional support for the child during visitation. "[C]hildren going from an abused to a previously abusive parent during a visit must make a transition which is far greater than the physical distance they cross."260 The child is trying to maintain her loyalty to one parent without losing contact with the other.261 The supervised visitation center gives the child the opportunity to maintain the bond with the non-custodial parent in a safe setting. In addition, visiting may help the child to develop a realistic assessment of the non-custodial parent. When children lose contact with a parent, they often blame themselves and create idealized versions of the parent; part of this

\[\text{an Abusive Parent, Fam. Advoc., Winter 1995, at 40. In their continuum of family conflict severity, exposure to domestic violence constitutes "moderately severe conflict," with ongoing family violence creating a "high risk situation." Id. at 42-43.} \]

246 See Strauss, supra note 14 at 239-40; see also Zorza, Using the Law, supra note 213, at 1440.

247 Strauss, supra note 14 at 220. It is important to note at the outset, however, what supervised visitation is not: a substitute for difficult decisions by the family court. See id. at 235. Family courts should not use supervised visitation to avoid suspending visitation when such a choice is appropriate, or, in the alternative, to deny a parent fuller access to a child absent justification. Moreover, supervised visitation centers do not offer “long-term solutions to visitation problems in most family court cases;” they should not be thought of as a substitute for addressing the underlying problems that resulted in the need for supervised visitation in the first place. See Karen Oehme, Supervised Visitation Programs in Florida: A Cause for Optimism, A Call for Caution, 71 Fla. B.J., February 50, 55 (1997).

248 Supervised visitation centers are not universally popular. Men’s groups have argued that “because the majority of restricted visitors happen to be fathers, these programs are ‘anti-male.’ " Debra A. Clement, A Compelling Need for Mandated Use of Supervised Visitation Programs, 36 Fam. & Conciliation Cts. REV. 294, 307 (1998). Others believe that no matter how “child-friendly” the centers are, the atmosphere is still artificial and restrictive. See Oehme, supra, at 54. One parent described a center as "a jail with carpet," citing its strict requirements. Id.

249 See Vellinga, supra note 115, at ¶ 61; Oehme, supra note 248 at 239; see also Clement, supra note 248 at 298 (arguing that state legislatures should mandate supervised visitation in certain types of cases and establish and fund supervised visitation centers statewide).

250 See Strauss, supra note 14, at 233.

process involves repressing the memories of the violence.\(^{26}\) Children who are able to visit with abusive parents can learn to accept the parent without needing to wish away his behavior, a position that is emotionally much healthier for the child. The center's job is to empathize with and support the child, broadcasting the message that "whatever has happened, things are going to work differently and safely here."\(^{262}\)

Finally, supervised visitation centers help to highlight the belief that the community's response to domestic violence must integrate the needs of children. Although opening a visitation center does not eliminate or resolve issues of custody and visitation, it does make these issues more "visible and urgent."\(^{263}\) In Duluth, Minnesota, for example, "part of the Center's role was to intervene in and influence the process of reordering family relationships from the standpoint of those who had been harmed by violence. This decision put the children's viewpoint at the center of the program's focus, but in a way that did not treat children as separable from their primary relationships."\(^{264}\) Visitations centers spur communities to recognize the impact of violence on children and to consider creative ways of addressing the harm done by exposure to violence.

b. Operating a Visitation Center

Although there is widespread variation among centers, most share some basic traits. Most centers provide "one-on-one" supervision of visits, with an observer present at all times, as well as "exchange" services, allowing parents to transfer their children at the beginning and end of visits.\(^{265}\) Other programs include "off-site" supervision, with the supervisor accompanying the parent and child to a location away from the center (like a park or a family event), monitoring of telephone calls between children and parents, education and support groups, parenting skills classes and referrals to health, legal and social services.\(^{266}\)

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261 See id. at 239. Some critics assert, however, that supervised visitation with an abuser is inherently damaging. They contend that by acting as though things are normal during the visit and not confronting the batterer about his behavior, the supervisor implies her approval of the batterer, which helps to destroy the child's sense that the abuse was real and unacceptable. See Straus, supra note 14, at 238. The logical conclusion of this position is that batterers should never be permitted visitation, a position that I cannot accept. Many children understand that violence is wrong and yet long to see their parents; "children in most situations want the abuse to stop; they don't want to lose a parent." Id. at 239. Many of my child clients have articulated just this position.

262 Id. at 240-41.

263 McMahon & Pence, supra note 73, at 202.

264 Id. at 192.

265 See Straus, supra note 14, at 234. One of the most valuable functions served by supervised visitation centers is their availability for exchanges. When such services are not available, parents are frequently ordered to exchange children in public settings, most notably police stations. But being exchanged at a police station can be scary for the child. Moreover, the police are not always supportive, and if they are not, the exchange isn't really secure. See id. at 251.

266 See Clement, supra note 248, at 299; Newton, supra note 251, at 56; Straus, supra note 14, at 234.
private settings with toys and books for children and adults to use during the visit.281

Centers are developed and financed by a range of individuals and organizations. Community groups, courts, attorneys, social workers, churches and legislatures have contributed to their inception and growth. Some centers are privately or foundation funded; others receive public funds for operating costs.282

Although some charge for services, few could fully fund themselves using a pure fee-for-service model.283

c. A Case Study

The District of Columbia Superior Court's Supervised Visitation Center is a fairly typical example of both the important contribution a center can make to ensuring the safety of children and the difficulties of initiating such a project.

In 1995, the District of Columbia Superior Court developed the reorganization plan that would ultimately create the Domestic Violence Unit. At that time, advocates for battered women suggested that the court create a supervised visitation center, citing problems with finding appropriate supervisors and the need for a safe and appropriate atmosphere in which visitation could take place.284 The advocates made concrete proposals about how referrals would be made, how the center would be organized, what activities should be available, and how the program should be evaluated.285 Two years later, the Court began soliciting and ultimately received federal grant funding for a supervised visitation center pilot project.286 In late 1997, the District of Columbia Superior Court Domestic Violence Coordinating Council's Children's Subcommittee took responsibility for

272 See id. at 238.

273 See, e.g., BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., THE VISITATION CENTER GROUND RULES (on file with the author); DISTRICT OF COLUMBIA SUPERIOR COURT, VISITATION CENTER GROUND RULES; NORTHERN VIRGINIA FAMILY SERVICES, CONTRACT FOR VISITATION SERVICES.

274 See supra note 14, at 234-35; see also BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., THE VISITATION CENTER GROUND RULES (on file with the author); DISTRICT OF COLUMBIA SUPERIOR COURT, VISITATION CENTER GUIDELINES; NORTHERN VIRGINIA FAMILY SERVICE VISITATION SERVICES PROGRAM, GUIDELINES FOR SUPERVISED VISITATION SERVICES.

275 See supra note 14, at 234-35. These rules are generally the same for visitation exchanges.

276 See supra note 14, at 235.

277 See id.; see also Newton, supra note 251, at 56.

278 See supra note 14, at 244; see also Newton, supra note 251, at 56.

279 See, e.g., BROCKTON FAMILY AND COMMUNITY RESOURCES, INC., Observation Form (on file with the author).

280 See id. at 302-05; Newton, supra note 251, at 56-57. Both describe a variety of program models. For a detailed discussion of supervised visitation centers in Florida, see Oehme, supra note 248, at 50-52, and in Delaware, see McMahon & Pence, supra note 73.

281 See supra note 248, at 299. The most common complaint among children, however, is that they are bored because the programs lack "sensible toys or activities." Id.

282 See supra note 248, at 299. The most common complaint among children, however, is that they are bored because the programs lack "sensible toys or activities." Id.

283 See supra note 248, at 302.

284 See Memo from Raquel Fonte, Donna Gallagher and Stacy Brustin to Sharon Diniro, May 3, 1995, at 1 (on file with the author).

285 See id. at 2-6.

coordinating the opening of the center, although authority for running the center remained with the Court itself. Members of the Children's Subcommittee, composed of court staff, advocates for battered women and children, representatives from the U.S. Attorney's Office, and social service professionals and counselors, collected resumes and interviewed candidates for staff positions, created guidelines and rules for the center, and participated in staff training. The training included sections on child development, parenting skills and communication, child abuse and neglect, domestic violence, substance abuse, confidentiality, observation skills, and center operations. Because the staff had full-time jobs in addition to their part-time work at the center, the training was squeezed into two days.

In July 1998, the center opened for initial interviews with parents. Referrals came solely from the Domestic Violence Unit of the District of Columbia Superior Court, and, at first, came slowly. The center was open for eighteen hours weekly: Wednesday, Thursday and Friday evenings, and Saturday and Sunday during the day. One and two hour visitation slots were available. The center also supervised exchanges for visitation. By July 1999, fifty families were using the center for supervised visits and for weekend exchanges. Word of the center's existence spread to other branches of the Family Division of the Superior Court, and judges in those branches began asking to make referrals as well (although the center generally continued to require a referral from the Domestic Violence Unit).

The initial year of operation has not been entirely seamless. The center is housed in a space that is used by other court programs during the day. As a result, toys and decor must be temporary and are moved into place during operating hours. Staff, who work eighteen hours at the center weekly in addition to their full-time jobs, are struggling with burn-out. Staff frequently are caught between angry and hostile family members; accusations that a child is being abused are common and cause distress for the staff, who are mandated reporters of child abuse and neglect. Staff have repeatedly been asked to testify in court (although judges are beginning to allow the center's observation reports into evidence as court records in lieu of the staff member testify). Funding for the center was held up for months; center staff were being paid by the court rather than through the grant money budgeted for the center. Without the back-up from the court system, they would not have been paid at all. Advocates have complained that staff have

287 Dr. Cheryl Bailey of the District of Columbia Superior Court (and a member of the Children's Subcommittee) handled the majority of the planning for the center, writing grants and creating work plans, working with the court to get job descriptions, finding space within the court, and ultimately, taking calls for the center and talking with parents during the hours that the center was not open. The center would not have opened without her efforts. As Chair of the Children's Subcommittee, I had the opportunity to work closely with Dr. Bailey and have also had access to much information about the operation of the center. This section is largely based on my observations from my participation in the inception and operation of the center.

288 The guidelines, rules and other forms were adopted largely from those of Brockton Family and Community Resources, Inc. and Northern Virginia Family Services. See supra notes 269, 273-274.

289 Although the center is still a pilot project, the original plan, even during the pilot phase, was to have a permanent space that would be decorated in a way that would ease and comfort the children and make the center an inviting place in which to visit.

disclosed information to non-custodial parents that jeopardized the safety of their clients. Parents (both custodial and non-custodial) have complained that visiting in the center is an artificial experience. Some parents choose not to have visitation rather than use the center. Other parents complain that staff overly identifies with one parent or the other.

None of this, however, means that supervised visitation centers are a bad idea. To the contrary, judges, advocates and parents all appreciate having a safe alternative for visitation. The majority of parents use the center happily. After an initial period during which healthy relationships between non-custodial parents and children are fostered, some families have left the center to begin unsupervised visitation without further problems. Even if the center were open only for exchanges, it would be providing a huge service to the community; about half of the families using the center are exchange clients. Children no longer have to meet their parents at police stations for want of a safe alternative. Plans to increase the number of staff (to combat burnout), to use volunteers, and to move into a permanent space are all being made. The lessons to be taken from the experience, though, are important: ensuring sufficient staff training, developing a space in which children feel comfortable (not just safe), engendering realistic expectations in parents, securing stable sources of funding. Addressing the issues that arose during the center's first year of operation will guide other systems in developing centers that provide a viable visitation alternative for children and families.

A system that "awards" children and "divides" them between their parents can only be seen as treating children as property, as a system in which children are essentially powerless. This powerlessness is especially harmful for children in family violence cases, who cannot control with whom they will live or visit. When

290 Interview with Lydia Watts, Executive Director, Women Empowered Against Violence, Inc., July 7, 1999. One of Ms. Watts' clients called the center to inform them that her child could not come to a visit. When asked to justify missing the visit, the mother explained that the child had been admitted to a psychiatric care facility. In canceling the visit with the father, the center revealed this information. The father (who did not have any form of legal custody, and therefore, no right to the information) and his counsel began badgering the facility and Ms. Watts, demanding information about the child, which caused a great deal of distress for both the child and the parent.

291 I have personally been involved in cases where the non-custodial parent has given up his right to visitation rather than use the center, the attitude being, "If I can't go where I want when I want, I won't visit at all." Straus suggests that use of the center distinguishes parents who only want contact with the child in order to manipulate the custodial parent from those who have a genuine connection with their children. See Straus, supra note 14, at 239. I tend to agree with him.

292 Interview with Lydia Watts, supra note 290. Ms. Watts described a situation where the father arrived late, causing him to meet the mother at the door. The mother, who is terrified of the father, began screaming, prompting the security guard to escort her in. Center staff never filed a report, and when asked why they hadn't, explained that although the scene upset, they did not see the incident and were unwilling to report her reaction (although presumably they must have known that the father was late for his visit). Failing to report infractions of the center's rules leads parents to believe that the center is "on his/her side."

293 It is important not to lose sight of the larger goals, however. Although visitation centers can help shield children from violence, "we must develop a clearer understanding of the role violence and power play in shaping the social relationships of families; otherwise, these centers may become administrative and managing agencies of a legal system that makes visitation centers new sites of damage to children and their mothers." McMahon & Pence, supra note 73, at 187.
the legal system disregards evidence of family violence in making custody determinations or ignores potential solutions to the special problems posed by visitation with a violent parent, it highlights how it undervalues this "property."

Ill-advised custody and visitation decisions in family violence cases have an enormous potential to place children in physical and emotional jeopardy. Children are also exposed to emotional harm, however, when they are used as witnesses in the courtroom. Part III considers children as testimonial witnesses, examining how the legal system could adapt both its substantive law and its procedures to make the process of serving as a witness a less destructive one for children.

IV. CHILDREN AS WITNESSES: SAFEGUARDING CHILDREN WHO TESTIFY

My worst experience as a trial lawyer involved a five year old child who was forced to testify during a restraining order hearing. The child, who was living with her grandmother, told her grandmother that her father hit her during a visit. The grandmother filed for protection on behalf of the child and came to me for assistance. The child later repeated the story to me: when she asked her father for money for her school uniform, her father punched her in the stomach. She was absolutely clear about what had happened, and I was convinced that she was telling the truth.

Prior to the restraining order hearing, the child and I discussed what would happen in the courtroom: that she would have to talk to the judge, that she should tell the truth. She was very worried that her father would be in the courtroom, but we talked about how she could look at other people and how he couldn’t harm her anymore. Once in court, we attempted to introduce the testimony of the child through the grandmother. The hearsay objection was sustained. Before her testimony, I asked the court to allow the child to testify in camera, out of the scrutiny of her father. Denied. I asked the court to modify the courtroom setting so that the child was not forced to sit on the witness stand, where her father could glare at her. Denied. And so the child took the witness stand. With the judge sitting above her and to her left on the bench, wearing his black robe, with her father sitting directly across from her, I began to ask her questions. I asked her about whether she understood what the truth was and whether she could tell the truth. I then took her through the day when her father punched her. Opposing counsel cross-examined the child, who never changed the substance of her story—that her father had punched her after she asked for money.

The judge, after hearing all of the evidence, ruled for the father. His ruling, he explained, was based almost completely on one factor: he didn’t believe the child because she hadn’t looked him in the eye during her testimony.294 He found that the child could have been manipulated into saying that her father hit her. And when I went to get her at the day care center, where she’d gone after her testimony, her first question was whether her father was going to get her. Ultimately, he did:

294 At the next hearing involving a child’s testimony that I had before that judge, the child and I had staring contests so that she could practice looking adults in the eye. She did, and we prevailed.
1. Memory

Does a child have the capacity to observe an occurrence and remember it sufficiently to testify? Children develop the skills necessary to "witness" incrementally; age, therefore, is the dominant variable in considering the ability to witness.301 Because children retain and retrieve more information as they get older, they are less able to access distant experiences than adults.302 Developmental immaturity may make children less able to encode and retrieve information, two of the central memory processes.303 Despite these differences, research shows that children can recall experiences accurately and describe them effectively in court.304 Very young children can accurately recall historical events, although they are not as proficient as adults at responding to open-ended questions calling for free recall.305 As age decreases, children recall less information spontaneously and must be assisted in recalling what they know.306 When cues and prompts are used to trigger retrieval, young children's memory substantially improves.307 For "single stimulus tasks" like basic identification, children aged three have reliable memories, and children aged four and a half years old have skills almost comparable to adults.308 Young children can recall basic temporal order, understand the actual frequency of events, and sort out actions involving several individuals.309 Whether a child will notice and recall detail turns on the salience of the detail—the importance of the object or action to the child.310 Like an adult

recommend skepticism upon hearing a child’s disclosure."311

301 See MCGOUGH, supra note 297, at 23-24.
302 See id. at 54.
303 See Julie A. Dale, Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method, 57 ALA. L. REV. 187, 190 (1993). Younger children don't take in as much information about events, and don't always recognize that an event is significant enough to store in memory. Additionally, older children and adults use more complex retrieval strategies, which increases the amount of information that they can recall. In contrast, younger children are more dependent on context to trigger memories. Moreover, younger children have less ability to relax events, their narration tends to be "skeletal" and "loosely organized." Myers et al., Psychological Research, supra note 295 at 9-10.
304 See Berliner, supra note 298, at 171; CECI & BRUCK, supra note 300, at 235.
306 See MCGOUGH, supra note 297, at 65.
307 See Myers et al., Psychological Research, supra note 295, at 11. The problem with using cues and triggers, however, is that they can become suggestive and risk distorting the child's memory. The problem of suggestibility is discussed infra at notes 326-340, and accompanying text.
308 See MCGOUGH, supra note 297, at 26.
309 See id. at 28-29.
310 See id. at 25.
311 See id. at 27.
313 See MCGOUGH, supra note 297, at 44.
314 See id. at 61.
315 See Myers et al., Psychological Research, supra note 295, at 14.
316 MCGOUGH, supra note 297, at 32.
317 See Myers et al., Psychological Research, supra note 295, at 33.
319 See CECI & BRUCK, supra note 300, at 70. When asked open-ended questions, children may say little, and they are not always completely coherent, but they seldom provide wrong information. See Goodman & Helgeson, supra note 318, at 186.
320 CECI & BRUCK, supra note 300, at 298.
321 See MCGOUGH, supra note 297, at 37-38.
‘data-bound,’ more faithful to what they actually saw or heard or smelled and less prone to make assumptions about details that might have been present. Children therefore may have difficulty with questions that require them to make abstract inferences. Moreover, while children as young as four can provide reliable descriptive data about colors, identifying characteristics and basic object characterizations, the ability to make time and distance categorizations is acquired at least four years later.

The social science research supports the position that children have sufficient memory capacity to testify. The next question, then, is whether children are so susceptible to suggestibility that their testimony is worthless.

3. Suggestibility

Suggestibility, or the tendency to accept and incorporate false or misleading information into one’s memory, has become one of the prime topics for social science researchers interested in children’s memory. The research leans toward the conclusion that children are more suggestible than adults, although the question is still being debated within the scientific community.

Research has shown that young children (under the age of five) are disproportionately more vulnerable to suggestibility than school-aged children or adults, and are highly likely to accept misleading information in certain circumstances. By the time children reach the ages of ten to twelve years, they are no more suggestible than adults. Suggestibility should not, however, be seen as a memory failing peculiar to children. Adults’ memories, too, can be influenced, changed, or distorted by suggestive factors.

Suggestibility in children is overwhelmingly a result of the influence of adults’ beliefs and interview techniques on children’s memories. Erroneous suggestions put forth by adults, usually in the context of interviews or therapy, can overwrite the child’s original memory. “Children’s inaccurate reports or allegations do not always reflect a confusion of events and details of an experience, but may at times reflect the creation of an entire experience in which the child did not participate.” Misinformation repeated across interviews is incorporated into the child’s memory both directly (children repeat the same language that they heard) and indirectly (children draw inferences based on the misinformation). When children are repeatedly asked to create mental images of fictitious events, over time they will increasingly begin to believe that the events have occurred and may be reluctant to relinquish that belief.

The manner in which a child is questioned is the key to whether the child’s memory will be tainted by suggestibility. The accuracy of a child’s report decreases when the child is interviewed in leading or suggestive ways by investigators who are not open to considering theories other than those they seek to support through the interview. If the initial interview of the child is neutral, it helps to protect the child’s memory against later suggestive interviews.

Young children are not invariably suggestible. Children are much less likely to be misled about central information than they are about peripheral detail. It is harder to mislead children when the events are fresh than when their memories have faded. And some children are unwilling to accept suggestion at all. “[T]hese children’s resistance is an indication of how difficult it sometimes is to use suggestive techniques to capture and change the memories and reports of some young children who steadfastly refuse to relinquish their accurate memories.”

322 Id. at 36.
323 See Goodman & Helgeson, supra note 318, at 186.
324 See id. at 30.
325 Concepts of time and distance are acquired at the ages of eight to eleven years of age. See McGough, supra note 297, at 31. Concepts of historical time and sequencing are not developed until about ten years of age. See Dale, supra note 303, at 103.
326 See Mauzelle, supra note 312, at 692-93.
327 See Ceci & Bruck, supra note 300, at 233.
328 See McGough, supra note 297, at 67.
329 See id.; see also Myers et al., Psychological Research, supra note 295, at 27. Some researchers claim that children are as resilient as adults at the age of seven years. See McGough, supra note 297, at 67.
330 See Ceci & Bruck, supra note 300, at 238.
331 See Montoya, supra note 305, at 936.
332 Ceci & Bruck, supra note 300, at 133.
333 See id. at 109.
334 See id. at 219-22. Adults are similarly suggestible; they, too, will internalize fictitious events and are reluctant to relinquish what they believe to be true memories. See id. at 226.
335 See id. at 85. This phenomenon is known as “interviewer bias.” See Ceci & Bruck, supra note 300, at 79-80. When the interviewer’s hypothesis is correct, the child’s recall is highly accurate and there are few errors of omission or commission. When the interviewer pursues an incorrect hypothesis, however, a substantial amount of inaccurate information is likely to be generated, especially from the youngest preschoolers. See id. at 90.
336 See id. at 111. It is important to note that not all “leading” questions are harmfully suggestive. Rather, there is a continuum of suggestiveness, ranging from open-ended questions, which are not suggestive, through focused and specific questions, to the type of leading questions that may distort memory. See Myers et al., Psychological Research, supra note 295, at 15.
337 See Myers et al., Psychological Research, supra note 295, at 28.
338 See Goodman & Helgeson, supra note 318, at 188; McGough, supra note 297, at 67-68.
339 See Ceci & Bruck, supra note 300, at 110.
340 Id. at 298.
By the age of four, children can distinguish between reality and fantasy.\textsuperscript{341} At least as early as age six, children can lie,\textsuperscript{342} and do lie when the motivation to lie is strong enough.\textsuperscript{343} Motivations to lie include avoiding punishment, gaining an otherwise unattainable material benefit, protecting themselves or others from harm, protecting friends from trouble, winning the admiration of others, avoiding awkward social situations, avoiding embarrassment, maintaining privacy, demonstrating authority, sustaining a game, or keeping a promise.\textsuperscript{344}

But there is a difference between lying and making mistakes. Young children are commonly inconsistent across several interviews. \textsuperscript{345}"What looks like inconsistency may actually be a product of the child's comfort with the interviewer, the interviewer's developmental insensitivity, or the child's ability to retrieve relevant information at a given moment in time."\textsuperscript{346} In the absence of suggestive relevant information, children's inconsistency should not be equated with unreliability or untruthfulness, as children regularly provide and omit detail over time.\textsuperscript{347} Similarly, as noted above, children have difficulty with time and measurement; problems with misordering the sequences of events or dates do not mean that the child is fabricating central facts.\textsuperscript{348} And occasionally children (like adults) simply give bizarre answers—without leading questions or motivations to distort the facts.\textsuperscript{349} How can we determine when a child's testimony is truthful? While there is no definitive answer, some factors are telling. A child witness' testimony is likely to be accurate when it conveys the central information about an event; when the event was relatively extended over time, allowing ample opportunity for observation; when the assailant is familiar to the child; when the event has been repeated; and when no highly suggestive questioning of the child has occurred.\textsuperscript{350}

Stories that include unexpected complications, unusual details and superfluous

\textsuperscript{341} Although the line may blur when the fantasy causes fear (i.e., the monster under the bed). See McGuough, supra note 297, at 40.

\textsuperscript{342} Six is the conservative estimate; other research suggests that pre-school children can lie. Id. at 85.

\textsuperscript{343} See id.; see also Ceci & Bruck, supra note 300, at 262.

\textsuperscript{344} See Ceci & Bruck, supra note 300, at 40; McGuough, supra note 297, at 40.

\textsuperscript{345} Myers et al., Psychological Research, supra note 295, at 20.

\textsuperscript{346} See Ceci & Bruck, supra note 300, at 235.

\textsuperscript{347} See Goodman & Helgeson, supra note 318, at 190.

\textsuperscript{348} See Ceci & Bruck, supra note 300, at 235.

\textsuperscript{349} See Goodman & Helgeson, supra note 318, at 185. There is a substantial body of thought about how to ensure that interviews of child victims/witnesses are not suggestive, largely in the context of child sexual abuse cases. See, e.g., Dale, supra note 303; Diana B. Lathi, Sex Abuse: Accusations of Lies and Videotaped Testimony: A Proposal for a Federal Hearsay Exception in Child Sexual Abuse Cases, 68 U. Colo. L. Rev. 507 (1997); McGuough, supra note 297; Montoya, supra note 305.

\textsuperscript{350} See Dale, supra note 303, at 201.

\textsuperscript{351} See id. at 203.

\textsuperscript{352} "As a safeguard against the possibility that the child witness may not have internalized the importance of truthful testimony . . . the court should seize the opportunity to give some minimal instruction about that duty and about the serious consequences that could result from giving untrue testimony in a court of law." McGuough, supra note 297, at 115-16.

\textsuperscript{353} See McGuough, supra note 297, at 4.

\textsuperscript{354} United States Department of Justice, Office of the United States Attorney, District of Columbia, Victim Witness Assistance Unit, Children in Court: A Handbook for Parents and Guardians of Child Victims/Witnesses Who Have To Testify in Court (1 on file with the author) (thereinafter Children in Court). See also Myers et al., Psychological Research, supra note 295, at 73-76 ("The overriding theme of the research, however, is that children are strong and resilient. They bounce back.").

those who may be most affected by the family court decisions. Children who are not permitted to participate in the legal process may become angry; "[s]uch anger causes the child more stress than if he or she had testified in court." Moreover, testifying may help children recover from the psychological trauma of the underlying events. At least one study shows that children who testified in juvenile court resolved their psychological trauma more quickly than children who did not testify.

Nonetheless, testifying can be incredibly stressful for some children. The way that the child reacts to testifying depends on the child's personality and ability to handle new and stressful situations, the severity of the underlying event, and how the child was affected by the event. The courtroom setting in and of itself can be stressful. Children have little idea of what to expect from court, what little they do know comes from the media and television and causes "intense fear and anxiety." They believe that they could go to jail for giving a wrong answer or that the defendant will be permitted to "get" them or yell at them. Added to those fears are the pressures of speaking in front of an audience, being cross-examined, and being separated from a support person. Simply being in the same room as the defendant can be incredibly traumatic. The atmosphere of the courtroom can be "threatening," "frightening," or "confusing" for children. Questioning a child in an intimidating environment like a courtroom can increase a child's stress; it can also undermine the quality of the information obtained. While the effects of stress on memory and the reliability of child witnesses are still unclear, researchers have posited that stress can prompt memory retrieval problems, can make children more suggestible, and can cause them to become more easily confused, leading to a loss of confidence in their testimony.

Testifying is difficult for most children, and it is not surprising when young witnesses respond in childlike ways, including whispering, crying and refusing to speak. Some children simply cannot testify in open court. Case law describes children who:

- were rendered inarticulate by intimidating court surroundings;
- were frightened by the jury, the defendant and the court setting, unable to answer any but neutral questions, and left the court clutching the mother and crying hysterically;
- suffered from guilt, fear and anxiety, and faced potential long-term problems including nightmares, depression, eating, sleeping, and school problems, and behavioral difficulties, including acting out.

Children who do testify may perform poorly, undermining their credibility. A traumatized child may refuse or be physically unable to testify in front of the defendant. A young child coping with the anxiety of testifying might avoid questions or fail to fully disclose, especially when they've been told not to tell
The child's reticence may lead judges to discredit a "frozen, inarticulate child,"377 damaging the child's confidence. Moreover, children who are grappling with psychiatric issues like attentional deficits, psychotic numbing, social withdrawal, and feelings of hopelessness, self-hatred or helplessness "can appear to be highly reluctant, uncooperative witnesses who provide little information."378

2. The Adversarial Legal System

The adversarial legal system is not well-equipped to accommodate child witnesses. "[F]or some children, testifying in the traditional manner interferes with the child's ability to answer questions, thus undermining the very purpose of the trial—discovery of the truth."379 For a number of reasons, the time-honored methods of direct and cross examination are not the best means of gleaning the truth from child witnesses.380 As discussed above, children do not always give complete information when asked the type of free-recall, open-ended questions that are common during direct examination.381 Moreover, children are "emotionally and linguistically ill-equipped for the rigors of cross-examination and are easily confused."382 During cross examination, attorneys confuse children by using double negatives, difficult sentence constructions and complicated words.383 The accusatory manner of cross examination can be intimidating for the child.384 Because children have difficulty remembering peripheral events and the sequence of events, questions about those details can undermine the child's confidence and render her testimony less effective.385 Additionally, "[s]uggestibility theory itself suggests that a lawyer may be able to lead a child witness to statements advantageous to the defendant."386

Children are, as discussed above, susceptible to suggestion through leading questions. Moreover, children are motivated by a desire to please adults, and may tailor their answers to reflect what they believe the adult wants to hear, even if that answer is inconsistent with their own knowledge of the event.387 In fact, children are so accommodating of adult questioning that they will struggle against all odds to bring order out of confusion, to make sense of questions, and to provide answers to adults' seriously stated inquiries.388 Finally, children, when asked the same question more than once, often change their answers, assuming that because they have been asked again, the original answer must have been incorrect.389 Children are especially likely to change their answers to specific or leading questions390—precisely the type of situation that a lawyer conducting cross-examination is likely to exploit. The combination of susceptibility to suggestion, confusion about language, desire to please adults and tendency to change answers makes children singularly unsuited to undergo cross-examination. "In sum, many factors point to the conclusion that, if the goal is to determine the truth, the adversary process may not be the best means of obtaining the truth from children."391

3. Intrafamily Cases

Testifying in a case involving family violence presents unique problems for the child witness; while he may be the only eyewitness to the violence, "the child may suffer great trauma from testifying."392 The stakes for children and families are particularly high in family violence cases. "Intrafamily offenses are especially problematic because even young children can foresee the havoc truthfulness can invite."393 Child victims and witnesses often feel responsible for the abuser's actions, especially when a family member is committing the abusive acts.394 Children are pressured by their parents to testify/not to testify, fear physical
retribution if they do testify, and often don’t want to take sides. See LEMON & JAFFEE, supra note 355, at 83. Moreover, other family members may castigate children for “taking sides.” Family Violence Project, supra note 383, at 131.

395 Children become “informational pawns, caught between two beloved parents and facing catastrophic loss no matter how they choose” to testify. See id. at 49-50.

396 Testifying about family violence, especially where custody determinations are involved, requires the child to divide his loyalties and potentially to make derogatory statements about a parent with whom the child wants a long-term relationship. See id. at 50. For the reasons discussed in Part I, supra, children may side with the abusive spouse and request that they be placed in the custody of the abuser. “[O]utright fear” can “determine a child’s testimony.” See LEMON & JAFFEE, supra note 355, at 83.

397 To alleviate the pressure on children to testify in domestic relations proceedings, some states have begun to restrict the ability of parties in these matters to call children as witnesses. Florida Family Law Rule of Procedure 12.407 states that a minor child cannot serve as a witness without the permission of the court, granted on good cause shown, except in emergency proceedings. See id. at 49. Prior to the inception of the Rule, “parents were bringing children to meet with [attorneys]...telling various things that would be ‘helpful’ to our cases and...the parents wanted the kids to testify to these events and to their desires as to parenting in court.” See id. at 19.

398 The Rule was designed to limit children’s involvement in cases of absolute necessity and to create disincentives to parents manipulating or burdening the child. See id. at 19. The Rule does not take the position that children should never come to court or that child testimony is “inherently unreliable”; it simply seeks to dissuade parents from manipulating their children and to control the manner in which the testimony will occur if such testimony is deemed necessary. See id. at 49. Requiring advance notice that a child will testify allows the court to adjust courtroom procedure to protect the child’s best interest—by appointing a guardian ad litem, requiring that the child be brought to court by a neutral third party, setting limits on the nature, manner and extent of questioning, and deciding whether the parents should be present during the testimony.

399 See id. at 19. See also Berliner, supra note 298, at 174 (“There is no reliable evidence to conclude that children in general cannot testify effectively in court or that they are universally traumatized by the experience. In fact the opposite seems to be true...It is therefore possible that a movement to keep children out of the courtrooms could serve to perpetuate the incorrect perception of children as incompetent witnesses.”).

400 CAL. FAM. CODE § 3042(b) (West 1999).


402 In fact, the child witness exclusion provision is part of a statute requiring that the court “consider and give due weight to the wishes of” a child “of sufficient age and capacity to reason so as to form an intelligent preference as to custody.” CAL. FAM. CODE ANN. § 3042(a) (West 1999).

403 In one custody proceeding in which I participated, the father, who had been abusive towards his wife, swore to the judge that if permitted to testify, their five-year-old child would say that the mother had abused the children. The charge was completely unfounded, and the judge wisely recognized that the father’s absolute certainty about what the child would say arose largely from the constant pressure he had put on the child to testify falsely against her mother. The judge refused to allow the child to testify, but did not have the protection of the type of statute described above to support her decision.

404 As in the case of the custody and visitation statutes described in Part II, supra, meaningful protection depends on the willingness of judicial officers to enforce these provisions.
C. Alternatives to In-Court Testimony

Often a child’s experience or opinion will be relevant, and even probative, in deciding cases involving family violence. But when testifying is too difficult for the child, that perspective is often lost. This section will discuss introducing child hearsay statements and will propose modifications to and new applications for the child hearsay exclusions becoming common in child sexual abuse cases.

1. Use of Current Hearsay Exceptions

Hearsay evidence is “evidence of a statement made outside of the proceedings in which it is being offered to prove the truth of the matter asserted in the statement.” Such evidence is generally inadmissible, but hearsay statements may be admitted under a number of exceptions to the hearsay rule when both the trustworthiness of and the necessity for the statement can be established. The hearsay exceptions permit the court to consider the out-of-court declarations "of any witness, including a child.”

Social scientists have determined that "lacking empirical data that children’s volunteered out-of-court statements are inherently less reliable than adults, we may safely continue the traditions of more than three hundred years of the hearsay rule development." Similarly, some courts have found that the hearsay rules and exceptions properly cover children’s declarations, in part to protect children from the harm of testifying.

Historical analyses of the arcane judicial rules concerning hearsay and competency that have developed over the centuries in cases involving adults, whether civil or criminal in nature, are of little assistance in proceedings designed only to determine how to best safeguard the welfare of children of extremely tender years. Such children may be totally incapable of treating with the abstractions that underlie testimonial competency, yet are quite capable of observing and reporting on specific events to which they are privy.

Hearsay statements are objectionable largely because they cannot be tested through cross-examination, deemed "the greatest legal engine ever invented for the discovery of truth." But this adage may not hold true in cases involving children's testimony. In fact, a child's out-of-court statement may be more reliable than her in-court testimony. The reliability of the child's statement may be enhanced because it is spontaneous and unrehearsed, because it is not the product of extended questioning, and because it is free of the stress caused by the courtroom setting. Moreover, certain hearsay statements avoid the problem of memory fade. "Testimonial memory-fade, which is a greater risk for children than adults, is certainly less of a problem when hearsay statements are offered that were made closer in time to the child's experience." Hearsay testimony is crucial in cases where, although the child has the cognitive ability to do so, she simply cannot testify or her testimony is ineffective.

A number of hearsay exceptions are commonly used to admit the statements of child witnesses. They include the exceptions for excited utterances or spontaneous exclamations; statements for the purpose of medical diagnosis or treatment; statements of existing mental, emotional or physical condition; and the residual hearsay exception.

a. Excited Utterances/Spontaneous Exclamations

The excited utterance exception applies to a statement made as a result of a shocking or exciting event, if the event is still affecting the child at the time the statement is made and the statement is made during or immediately following the

415 “The rule against admission of hearsay statements stems from the long-established belief that cross-examination is the best vehicle for discovering the truth and that the most reliable statements come from the witness stand.” Yun, supra note 411, at 1747.
417 See Part Ill.B.2., supra.
418 See Yun, supra note 411, at 1751.
420 See Yun, supra note 411, at 1751-52.
421 MCGOUGH, supra note 297, at 154.
422 See Lath, supra note 349, at 510-12; MYERS, EVIDENCE, supra note 299, at 81. Courts have recognized the need for inclusion of hearsay to counteract a child's inability to testify or inadmissible testimony. "Common sense suggests that in many cases the most probative evidence of the child's opinion may lie in statements the child has made to others . . . rather than in testimony given in the formal surroundings of a court proceeding." In Re T.W., 603 A.2d 116, 117 (D.C. 1993).
event, before there is time for reflection.\textsuperscript{423} Advocates for children should take special note of statements made to police, hospital staff, teachers, doctors and day care workers\textsuperscript{424} all of whom may interact with the child near the time of an incident of family violence.

Courts differ as to how close in time the statement must be to the exciting event to be admissible. Some courts allow statements made after days or weeks; others disallow statements made only a few minutes or hours after the exciting event.\textsuperscript{425} Statements made at the "first safe opportunity" or during a period of "rekindled excitement" may be admissible despite the passage of time.\textsuperscript{426} Such statements may be admitted after significant time has passed because courts recognize that a child witness may not have immediate access to the person he will tell about the frightening event.\textsuperscript{427} But the willingness to allow for the passage of time has prompted some critics to argue that courts have "distorted the hearsay rule."\textsuperscript{425}

b. Statements for the Purpose of Medical Diagnosis or Treatment

Statements made to medical professionals for the purpose of diagnosing or treating an ailment are also admissible as an exception to the hearsay rule. Statements for the purpose of diagnosis or treatment are admitted under two rationales. First, the patient's interest in receiving appropriate medical care suggests that patients will give reliable information to their doctors. Second, the exception allows only for the admission of statements that would be reasonably relied upon by doctors, based on the assumption that doctors can separate accurate from inaccurate information.\textsuperscript{429} States vary on the question of whether statements to mental health professionals are admissible under this exception.\textsuperscript{430}

Commentators have suggested that children's statements to physicians are not sufficiently reliable to be admitted under this exception. They argue that children do not understand the importance of reporting accurate information and therefore do not have the same sense of self-interest in conversations with

\textsuperscript{423} See Yun, supra note 411, at 1753-55.
\textsuperscript{424} See LEMON & JAFFE, supra note 355, at 83. Excited utterances and present sense impressions may also be found in 911 tapes and police records. Id.
\textsuperscript{425} See Bulkeley, supra note 419, at 690.
\textsuperscript{426} MYERS, EVIDENCE, supra note 299, at 170-71.
\textsuperscript{427} See McGough, supra note 297, at 134. Time delays may also be triggered by fear, confusion, guilt, efforts to forget, or threats by the perpetrator. Yun, supra note 411, at 1576-78.
\textsuperscript{428} See Myers, supra note 299, at 218.
\textsuperscript{429} See Bulkeley, supra note 419, at 691; see, supra note 428, at 570-71.
\textsuperscript{430} See MYERS, EVIDENCE, supra note 299, at 220-21.
\textsuperscript{431} See, e.g., In Re L.B., 631 A.2d 1225, 1232 (D.C. 1993) (citing In Re T.W., 623 A.2d 118 (D.C. 1993)).
sufficient indicia of trustworthiness that admission is warranted. The residual exception has been widely used in child sexual abuse cases where a child's statements were not admissible under any other exception. Although the flexibility of the residual exception makes it an attractive option, courts' willingness to employ it has varied widely. In part, the courts' reluctance may stem from the lack of guidance as to "what constitutes 'sufficient indicia of reliability.'" Factors used to determine whether the statement is sufficiently reliable include the age of the child; the nature of the event; physical evidence of the event; the relationship of the child to the defendant; the contemporaneity and spontaneity of the assertions in relation to the event; the reliability of the assertions; and the reliability of the testifying witness. Other indicia of reliability could include the child's physical or mental condition; the circumstances of the statement; how the child was questioned; the consistency of the child's statements; the affect of the child; whether the child used age appropriate language; whether the child had a motive to fabricate; whether the statement was overheard by more than one person; whether the statement was taped; the child's level of certainty; and whether any corroborating evidence existed.

e. Creative Use of Hearsay

Given the difficulty of eliciting useful testimony from children in an adversarial system, a child's hearsay statement may be the most reliable piece of evidence that a court will receive. Many statements made by children fit squarely within traditional hearsay exceptions. Children make excited utterances to police officers and domestic violence advocates after incidents of family violence.

See Bulkley, supra note 419, at 691.

See McCOUGH, supra note 297, at 144-45; Truman v. Watts, 598 A.2d 713, 718 (holding that child's out-of-court statements to mother, child protective service workers and others were admissible under the residual exception "unless the manner in which those statements were elicited render them so unreliable as to be deemed not worthy of consideration by the Court." One commentator believes that using the residual exception is preferable to the specially crafted exceptions for child sexual abuse, which will be discussed in Part III.C.2. See Bulkley, supra note 419, at 619.

See Yun, supra note 411, at 1762-63. The exception has been used in numerous federal criminal child abuse prosecutions. See Truman v. Watts, 598 A.2d 713, 722 (Del. 1991) (discussing the use of the residual exception).

McCOUGH, supra note 297, at 145.

Bertrang v. State, 184 N.W.2d 867, 870 (Wis. 1971).

See Lee, supra note 428, at 586; MYERS, EVIDENCE, supra note 299, at 250-62; Yun, supra note 411, at 1758. In Idaho v. Wright, 497 U.S. 805, 806 (1990), the United States Supreme Court held that statements admitted under the residual exception must be found reliable based on the "totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief," without the use of extrinsic corroborating evidence. In excluding corroborating evidence, the Court was addressing concerns that unreliable statements were being bootstrapped into evidence by using other reliable evidence to bolster them. McCOUGH, supra note 297, at 147. Wright's exclusion of outside evidence may be specific to cases involving the Sixth Amendment, however, and may not apply in the civil context. Id. at 249.

In fact, commentators have criticized the courts for stretching the traditional exceptions beyond their bounds in seeking to admit hearsay statements in child sexual abuse cases. See Montoya, supra note 305, at 981; Yun, supra note 411, at 1759.

See Bulkley, supra note 419, at 690.


Id. at 917.

See, e.g., DEL. CODE ANN. tit. 11, § 3513 (1998); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1998); UTAH CODE ANN. § 76-5-411 (1999). Although California's evidence code provisions apply only to criminal cases, California also has a judicially created "child dependency hearsay exception," See In Re.
criminal and civil cases.449 Some cover only child sexual abuse,450 while others allow statements regarding all forms of child abuse.451 Some statutes require either that the child testify or that the child be unavailable to testify.452 A child's inability to testify due to psychological trauma constitutes unavailability in a number of states.453 Unavailability can also be established where "parents do not allow their child to testify because of fear of causing the child emotional distress, although there would be insufficient evidence of emotional trauma to satisfy the unavailability requirement."454 The majority of the states require corroborating evidence when the child is unavailable to testify.455 Most also require that the court hold a hearing to determine whether the statement is reliable prior to its admission at trial.456 Although the statutes vary, essentially all "child hearsay exceptions are simply residual exceptions for children's out-of-court statements."457 The factors used to assess reliability are the same under the residual exception and the child hearsay exception, and neither is a "firmly rooted" hearsay exception.

All of these exceptions require that the statement pertain to an act of abuse or neglect perpetrated against a child. The goal, in part, is to spare the child from the trauma of testifying. But "the same compassion oddly enough has not been extended to every child who becomes ensnared as a witness in any proceeding.

. All children deserve special consideration when they serve as witnesses."458 Therefore, "there is no reason why child sexual abuse hearsay statutes cannot be used as models for a special hearsay exception that is generally applicable to any proceeding in which a child is a witness."459 Lucy McGough therefore proposes a child hearsay statute that would cover all children's testimony.460 The legislature would enumerate the factors to be considered in determining trustworthiness and "the proponent would ultimately have the burden of demonstrating that, in light of all the enumerated factors, the hearsay carries substantial guarantees of trustworthiness and special evidentiary value that cannot be recaptured by in-court testimony."461 In determining trustworthiness, the court would consider the age and maturity of the child; the child's opportunity to form an accurate impression; corroborating evidence; the interval between the experience and the report; the relationship between the child and the perpetrator; the content of and language used in the report; and whether any subsequent conflicting reports existed.462 McGough's proposed statute mandates that the child either testify at the trial or that the child be found unavailable to testify.463 Finally, McGough's proposed statute requires the court to probe the biases of the adult to whom the statement is made.464 While McGough's proposal has much to recommend it, some of its provisions are problematic.465 For example, if child hearsay statutes are designed to spare children from the trauma of testifying, why should the child have to be "unavailable" before the statement can be used? Moreover, given the empirical data that children's reports are often inconsistent, not because they are lying but because of the function of children's memory, why should the existence of subsequent


See, e.g., ARIZ. REV. STAT. ANN. § 13-1416 (West 1998); COLOR. REV. STAT. ANN. § 13-25-129 (West 1997); FLA. STAT. ANN. § 90.803(22) (West 1998); WASH. REV. CODE ANN. § 9A.44.120 (West 1998).

See, e.g., ARK. EVID. 804(d), (7); MASS. GEN. LAWS ch. 233, §§ 81, 82 (1999); UTAH CODE ANN. § 76-5-411 (1998).

See, e.g., CAL. EVID. CODE §§ 1228, 1360 (Deering 1998); KAN. STAT. ANN. § 60-460 (1997); VT. R. EVID. 804a.

See, e.g., CAL. EVID. CODE § 1360 (Deering 1998); MASS. GEN. LAWS ch. 233, §§ 81, 82 (1999); MINN. STAT. ANN. § 595.02 (West 1998); S.D. CODIFIED LAWS § 19-16-38 (Michie 1999). Some states require that the child be available as a witness; however, such a requirement fails to shield the child from the trauma caused by testifying. See Montoya, supra note 305, at 945. This issue will be discussed in the context of a proposed model statute. See discussion infra Section V.B.


See Bulleit, supra note 419, at 698.

See, e.g., FLA. STAT. ANN. § 90.803 (West 1998); MD. CODE ANN., CTS. & JUD. PROC., art. 27 § 775 (1998); UTAH CODE ANN. § 76-5-411 (1999); WASH. REV. CODE ANN. § 9A.44.120 (West 1998).

See Myers, Evidence, supra note 299, at 267.

Id. at 249.

See id. at 269.

McGough, supra note 297, at 12.
“conflicting” reports be a negative factor?

One strength of McGough’s proposal, however, is its consideration of the bias of the adult listener. As she notes, “The hidden hook in the receipt of all hearsay is the nature of the relationship between declarant and listener, a hook of real danger for the reliability of children’s hearsay.”467 This is especially true in family violence cases, where both parents have a motive to distort children’s statements. Rather than simply relying on the court to judge the bias of such parties, a model statute should take the approach used by Maryland and Rhode Island’s child hearsay statutes. The Maryland statute allows the admission of statements made by a child to physicians, psychologists, nurses, social workers, principals, vice principals, or school counselors acting “in the course of the individual’s profession when the statement was made.”468 Similarly, Rhode Island permits courts to consider statements made to a person to whom the child would normally turn for “sympathy, protection or advice.”469 Narrowing the range of persons to whom a statement can be made confronts the problems with the bias of the adult witness.

I propose a model hearsay statute that incorporates many of the elements of McGough’s, but with a few pertinent changes. First, admission of the statement would require neither that the child testify nor that the child be found unavailable.470 Secondly, the court would be required to consider a range of factors surrounding the “time, content and circumstances”471 of the statement, including but not limited to the age and maturity of the child; the child’s opportunity to observe the event described; corroborating evidence; the interval between the experience and the report; the relationship between the child and the perpetrator; and the appropriateness of the language used in the report. Third, the child’s statements could be introduced through any adult with whom the child has a relationship of trust, with the exclusion of parties to the action. Although other family members or friends might be tempted to skew their testimony to support one of the parties, removing the parents (who are most often the parties in family violence cases) from the equation both helps to keep the child from being made a pawn in litigation and decreases their incentive to manipulate the child.

Employing a hearsay exception like the one described above balances the needs of the child against the importance of the child’s testimony. But a hearsay exception will not meet the needs of all children. Some may not have made out-of-court statements; others have the desire to testify in open court. What can be done,

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then, to improve conditions for children who either have to or want to testify? The next section addresses that question.

D. Improving the Testimonial Experience

“It is peculiar to the domestic relations area that strict adherence to concepts of procedural due process must also be tempered by the need to afford protection to the child whose interests are also at stake, though she is not a party to the action.”472 In civil family violence cases, because there is no Sixth Amendment right to confrontation, courts have greater latitude to adjust courtroom procedures to accommodate child witnesses.473 This section will suggest ways that the legal system can do just that.

1. Education and Preparation

Children have a very limited understanding of the court system, its participants and conventions; as a result, the experience of testifying can be frightening if children are not adequately prepared. And “[i]n fact, why shouldn’t the court be frightened by the courtroom experience? They are asked to enter a formal-looking enclosure, face the American flag and an authority figure in a black gown, and submit themselves to intense and often prolonged questioning from strangers in front of an audience of grown-ups.”474 One way to alleviate these fears is to ensure that a child is comfortable with the courtroom setting long before the child’s testimony begins.

a. What Do Children Understand About Court?

Although comprehension of the legal system improves as children get older, most young people believe that court is a “bad” place where only “bad” people go.475 Children understand very little of the legal system and its players, rules, procedure and language.476 What little they do know is too often based on misperceptions and inaccuracies.477 Children between the ages of three and seven have a visual image of the judge, but don’t understand his role. They have little or no idea of what lawyers do.478 The majority of these children do not understand the role of witnesses in a

467 Id. at 149.
470 Again, this article is concerned only with civil family violence cases, and therefore does not consider the Sixth Amendment implications of the proposal.
471 See, e.g., WASH. REV. CODE ANN. § 9A.44.120 (West 1998).
473 See LEMON & JAFFE, supra note 355, at 85.
475 Id. at 10.
476 See id. at 8.
477 See id.
478 See Myers et al., Psychological Research, supra note 295, at 68; Perry, supra note 474, at 9.
the ages of eight and eleven, children begin to understand the concept of rights and recognize the court's role in settling disputes. Nonetheless, they remain confused about what actually happens in court. At about the same age, children are more likely to say that court is neither good nor bad; towards adolescence, children begin to develop positive perceptions of the court system. Comprehension of the court system is not aided by television or school lessons, which tend to depict it in overly simplistic terms.

b. Preparation to Testify

Preparation prior to testimony can help children to alleviate the stress born of their confusion and misperceptions. A child who is going to testify should be introduced to the court and its processes. Education about courtroom procedures and courtroom figures is one way of providing such an introduction. Court schools in several cities provide children with an overview of the court process and their role in it, familiarizing the children and their families with the court's physical environment, the court's procedures and practices, and what is expected of them as witnesses. Because children are literal, concrete thinkers, taking the child to the courthouse and letting the child sit in the witness chair, touch and use the microphone, and observe where others will sit in the courtroom can also help to alleviate the child's stress. Similarly, arranging a face to face meeting between the child and a judge prior to the child's testimony can eliminate the fear of the unknown and help the child to understand that the judge is a "real person." Preparation can help to enhance the quality of a child's testimony. Children can improve the accuracy of their testimony by being trained to provide complete responses, to resist misleading questions and to handle questions that they do not understand by asking the questioner to rephrase the query. One of the most important things to teach a child prior to testifying is that answering "I don't know," "I don't remember," or "I don't understand the question," is not only permissible, but preferable. Perhaps the most important thing to tell children, however, is that they are not responsible for the outcome of the case and that they cannot control the judge's decision.

Education and preparation prior to trial help to alleviate the child witness' fear of the unknown. But that fear does not end when the child enters the courtroom; in fact, just the opposite is true. Steps must be taken to make the courtroom itself a friendly space for the child witness. Those steps are discussed in the next section.

2. The Courtroom Setting

Accommodating the needs of the child witness by reconfiguring courtroom space is firmly within the discretion of the trial judge. Allowing the child to testify in chambers and/or modifying the physical setting in the courtroom are two options open to the trial judge.

a. In camera v. Open Court

Testifying in the courtroom (as opposed to a less formal setting) can have a direct impact on the child's ability to testify accurately. Children testifying in a courtroom setting are more likely to claim no knowledge of something about which they have personal knowledge and are less likely to accurately recall information than children testifying in a small private room outside of the presence of the perpetrator. One study divided children into two groups; some were interviewed at school and others at court. The children who were interviewed at school (considered a more familiar, less threatening setting) recalled more information...
correctly through free recall than children interviewed at court.\textsuperscript{494} The children interviewed in court were more likely to provide incorrect information to leading questions; the children interviewed at school made fewer errors in response to misleading questions.\textsuperscript{495} The children at court perceived their experience as more stressful, and the more stressful the child perceived the setting, the fewer correct answers the child provided through free recall.\textsuperscript{496}

The decision whether to meet with a child in chambers is generally within the discretion of the trial court.\textsuperscript{497} Concerns about stress and about a child’s unwillingness to divulge certain information in front of her parents can be alleviated by a “nonaversarial inquiry in camera . . .”.\textsuperscript{498} Some states have provided judges with guidelines for conducting in camera hearings.\textsuperscript{499}

But many judges are reluctant to meet with children in chambers. The judges’ discomfort stems from their lack of training as well as the lack of sufficient time to spend with the child.\textsuperscript{500}

Like attorneys, judges vary in their level of comfort in talking to children — particularly young children—because they do not believe they are sufficiently skilled in talking with children about difficult issues. Other judges avoid talking to children because they do not want the children to feel pressured or to feel that they will be the ones to decide who[they] will live with.\textsuperscript{501}

One judge stated that given his discomfort with interviewing children, he would

\textsuperscript{494} See Karen Saywitz & Rebecca Nathanson, Children’s Testimony and Their Perception of Stress In and Out of the Courtroom, 17 CHILD ABUSE & NEGLECT 613, 619 (1993).

\textsuperscript{495} See id.

\textsuperscript{496} See id.

\textsuperscript{497} See, e.g., In Re A.R., 679 A.2d 470, 476 (D.C. 1996) (citing 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 11.32 at 639 (1986), explaining that in most states, the decision is discretionary even given the responsibilities implied by the court's parens patriae authority). The court in In A.R. found that the judge did not abuse her discretion by declining to interview the child in camera. But see id. at 480 (Terry, J. dissenting) (stating that a judge’s refusal to ever speak with a child in chambers constitutes an abuse of discretion by virtue of her failure to exercise discretion).

\textsuperscript{498} In Re I.B., 631 A.2d 1225, 1232 n.12 (D.C. 1993).

\textsuperscript{499} See, e.g., Longo, supra note 397, at 19. Longo explains West Virginia family law rule 16, which permits judges to exclude parents and lawyers from in camera hearings and allows records to be sealed after the attorneys review the child’s testimony.

\textsuperscript{500} See Wood, supra note 290, at 18. Wood also argues that seeing a child in chambers is unfair to the parent litigants, because the judge’s decision could be based on information gleaned during that interview but not shared with the parties. Id.

\textsuperscript{501} In Re A.R., 679 A.2d at 477. In that case, the trial court judge stated that "no Court of Appeals can require me to take children into chambers off the record and chat with them . . . I have read enough articles and been told by enough experts in court, of what we do to children when we say . . . with no expertise whatsoever in talking to children—gee, son, whom would you like to live with . . . " Id. at 473. The court apparently felt that calling the child as a witness would be less harmful, saying, "Now, if you lawyers want to call a child in a case you are perfectly free to do that." Id.
3. Conduct of Proceedings

Altering the courtroom setting is one way of facilitating child testimony. Restructuring the way that proceedings are conducted based on the presence of a child witness is another.

a. Questioning Child Witnesses

"When children and the justice system in this country collide, language gets in the way."506 A number of linguistic issues make testimony difficult for child witnesses. In questioning children, lawyers use vocabulary that children don’t understand and complicate their questions with confusing word orders, double negatives, and ambiguous words or phrasing and by including a number of ideas in a single question, leaving the child unsure of which part of the question she should answer.511

Children misunderstand adults’ questions because they don’t often comprehend the concepts involved; adults misunderstand children’s responses because they don’t use language as a child would.512 To alleviate this confusion, actors within the legal system need to understand how to elicit information from children. For children under the ages of seven or eight, questions and sentences should be short and should contain only one query per question.513 Grammatical constructions should be simple, using the active voice.514 Counsel and the court should use simple words and phrases and the common meaning of terms (and possibly have the child define and use the term to show that she understands it).515

appropriate to the child’s developmental age.”); CAL. PENAL CODE § 868.8 (West 1998) (giving court discretion to relocate persons within courtroom “to facilitate a more comfortable and personal environment for the child witness.”); CONN. GEN. STAT. ANN. § 54-86g (West 1999) (permitting the court to order that attorneys question the child from a table positioned in front of the child); W. VA. FAM. L.R. 16 (permitting the court to make physical alterations to the hearing room). Kentucky’s statute requires that the courtroom be modified through the use of small chairs. KY. REV. STAT. ANN. § 26A.140 (Banks-Baldwin 1998). In addition to making the setting less formal, judges can make their own presence less imposing by removing their robes during a child’s testimony. See CAL. PENAL CODE § 868.8 (West 1998) (authorizing judge to remove robe if judge believes that “formal attire intimidates the minor.”); LEMON & JAFFE, supra note 355, at 85; MCGOOGH, supra note 297, at 10-11.

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Common problems include the use of prepositions (on versus in), asking a child to promise to swear to the truth (when swearing means using profanity to most children), and stringing words and phrases together in ways that make their meaning difficult to understand for children. Id. at 50-52.; see also Myers et al., Psychological Research, supra note 295, at 40.

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See Myers et al., Psychological Research, supra note 295, at 41.

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See id. at 40; see also Walker & Nguyen, supra note 486, at 1592-93.

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See Myers et al., Psychological Research, supra note 295, at 40; Walker & Nguyen, supra note 486, at 1592-93.

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See Myers et al., Psychological Research, supra note 295, at 40; Walker & Nguyen, supra note 486, at 1592-93.

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Children do not develop the ability to tell time until about seven or eight years old; they should not be asked questions about time before they understand the concept.516 Many of these problems are exacerbated by the arcane and unconventional use of language within the legal system. "It is virtually never safe to assume that children understand legal terms."517 Children will understand and use the common meaning for a term that may have a different denotation within the legal system.518 A court is a place to play basketball. Charges are what you do with a credit card. Hearing is what you do with your ears, and parties are a place for getting presents. Swearing is like cursing, and something that you would never do with your parents sitting in the courtroom because you’d be in trouble.519 Moreover, legal words may sound similar to other, more familiar words, causing confusion for children. "Jury" can sound like "jewelry," "allegation" like "alligator."520

Children are capable of testifying accurately, but only when questioned age-appropriately.521 Otherwise, they will try to answer questions that they do not understand, and they will not ask for clarification.522 Responsibility for ensuring that children understand what they are being asked lies with adults: in a courtroom setting, with individual counsel, and most importantly, with the judge.523 When a judge fulfills this responsibility, the ultimate purpose of a trial, the finding of truth, becomes much more likely.

The judge’s responsibility to manage the trial includes a duty to control the manner in which counsel question a child witness. The judge must ensure that the child understands the questions. In doing so, the court increases the likelihood that the child’s answer will accurately reflect the child’s knowledge, and will provide the information which the child wished to convey.524

Judges can set a number of ground rules that will enhance the reliability of children’s testimony. Age-appropriate language should be used in questioning.

516 See Myers et al., Psychological Research, supra note 295, at 55. As discussed earlier, children have trouble with concepts of time and distance; questions seeking such information are likely to be problematic for them. Id. at 41.

517 Id. at 54.

518 See id.

519 See id. at 55.

520 Id. at 54. One child was caused a great deal of distress by the use of the word “minor.” After hearing the judge’s ruling, the child understood that the “minor” could live with her grandmother, but had no idea where she was going to live. Karen Saywitz, Children’s Conceptions of the Legal System: Court Is a Place to Play Basketball, in PERSPECTIVES ON CHILDREN’S TESTIMONY 132 (R.J. Ceci et al. eds., 1989).

521 See Eyre, supra note 296, at 41.

522 See Myers et al., Psychological Research, supra note 295, at 56. Children will answer questions that they do not understand both because they cannot evaluate what they do not understand (they don’t know what they don’t know) and because of the social pressure to provide answers. Id.

523 See id.; see also Eyre, supra note 296, at 41.

524 See Eyre, supra note 296, at 41; see also Myers et al., Psychological Research, supra note 295, at
Attorneys should not raise their voices when questioning children or when making objections during the child’s testimony. The court can limit the scope of cross-examination, precluding attorneys from asking embarrassing, marginally relevant or collateral, developmentally inappropriate, repetitive or confusing questions. Courts can also prevent counsel from harassing child witnesses and from asking questions designed to elicit inadmissible evidence. A number of states have recognized the enormous importance of using appropriate language with child witnesses and have specifically empowered judges to ensure that children are questioned in an age-appropriate manner. California’s evidence code provides as follows:

With a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is age-appropriate to the age of the witness. The court may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.

Children can be frightened by raised voices and argument and are likely to personalize what appears to be anger stemming from the questioning, assuming that they have done something wrong. Myers et al., Psychological Research, supra note 295, at 73.

See Myers, Evidence, supra note 299, at 313-315. Courts can also permit the use of leading questions on direct to ease the child’s testimony, although the problem of suggestibility has been discussed previously. See generally 2 Donald T. Kramer, Legal Rights of Children 577-78 (1994) (discussing cases where courts permitted the use of leading questions).

As one court noted, in a domestic relations proceeding a party’s right to cross-examine a child witness must be weighed against “other interests at stake in this action, most notably those of the child.” Trumman v. Watts, 598 A.2d 713, 719 (Del. 1991). But see Montana, supra note 305, at 923-54 (rejecting McGough’s proposal to circumvent cross-examination of child witnesses as bad evidentiary law and bad constitutional law).

CAL. EVID. CODE § 765 (West 1998). See also CAL. FAM. CODE § 3042 (West 1998) (requiring that the examination of a child witness be controlled “so as to protect the best interests of the child”); Conn. Gen. Stat. Ann. § 54-46g (West 1999) (mandating that attorneys ask questions and pose objections in a manner that is not intimidating to the child); Ky. Rev. Stat. Ann. § 26A.140 (Banks-Baldwin 1998) (requiring that age-appropriate language be used in cases involving child victims or witnesses); Utah Code Ann. §§ 77-38-1 through 77-38-8 (1998) (requiring that questioning of children in criminal cases be conducted in an age-appropriate language). Florida considered, but never voted on, a bill requiring judges to ensure that questioning of children under the age of 14 be age-appropriate, and not repetitive, hostile or harassing. Marks, supra note 300, at 49. Sensitivity to language and questioning can also be achieved via the more general statutes enacted by some states. New York requires judges to be sensitive to the “psychological and emotional stress a child witness may undergo when testifying.” N.Y. EXEC. LAW § 642-a (McKinney 1999). Massachusetts allows the court to take “appropriate means . . . to protect a child witness from trauma during a court proceeding.” Mass. Gen. Laws Ann. ch. 278, § 145 (West 1998). Still other states have recognized the child’s need for age-appropriate explanations about the proceedings in which they will be involved and have incorporated a requirement for such explanations into child victim and witness’s statutes. See, e.g., Colo. Rev. Stat. Ann. § 19-1.3-104 (West 1998); Del. Code Ann. tit. 11, § 5314 (1998); N.D. Cent.
The child could even testify while sitting on the supportive person's lap.536

Courts have the discretion to allow supportive persons to be present during testimony in any of the guises described.537 A number of states and the federal government have specifically authorized judges to permit the presence of supportive persons during child witness testimony.538 Utah's statute is slightly different, allowing the court to appoint an advisor for the child to be present during the testimony and to assist a child aged thirteen or younger in understanding counsel's questions.539

Unfortunately, the majority of these statutes apply only in criminal cases or in cases of child abuse, depriving the child witness in a family violence case (or other type of case) of their protection. Again, states should recognize that testifying in any type of case can be traumatic for a child, and extend the provisions allowing the presence of supportive persons to all child witnesses. In the interim, courts should use their discretion to allow children to be accompanied during their testimony.

A range of issues is raised by the role of the child as witness in family violence proceedings. While the provisions described above assist the child in her role as a witness, they do not address needs that the child has as a person in her own right. The next section will look at the child as a person, deserving of representation and supportive services to alleviate the harm caused by family violence.

V. CHILDREN AS PERSONS: SERVICES FOR THE CHILD

Brad Wells, the child first described in the introduction, had very specific views about the continuation of his relationship with his father. He wanted to live with his mother, stepfather and sisters. He wanted to visit his dad on alternate weekends, but he didn't want those visits to prevent him from participating in choir

536 See MYERS, EVIDENCE, supra note 299, at 324. At the very least, the child should be able to bring his favorite toy or stuffed animal with him when he testifies. MYERS ET AL., PSYCHOLOGICAL RESEARCH, supra note 295, at 71-72.


538 See, e.g., 18 U.S.C. § 3509(i) (1998) (giving child the right to have adult attendant present for emotional support and permitting the court to allow the adult to remain in close proximity to the child, in contact with the child, or allow the child to sit on the adult's lap while the child testifies, so long as the adult attendant does not prompt the child or provide the child with answers); ANK. CODE ANN. § 16.42-102 (Michie 1997) (allowing any person with custody of child to be present during child's testimony); CONN. GEN. STAT. ANN. § 54-86g (West 1999) (authorizing an adult with whom the child feels comfortable to sit in close proximity to the child while child testifies); DEL. CODE ANN. tit. 11, § 5134 (1998) (giving child witness the right to be accompanied by a "friend" in all proceedings); N.D. CENT. CODE § 12.1-35-05.1 (1997) (requiring court to allow individual to sit with, accompany, or be in proximity to child under fourteen years of age during testimony; permitting court to allow accommodations for person over fourteen); R.I. GEN. LAWS § 12-28-9 (1998) (providing that child can be accompanied during all proceedings by "relative, guardian, or other person who will contribute to the child's sense of well-being").

539 See UTAH CODE ANN. § 77-38-8 (1998); see also Eyre, supra note 296, at 39, 42.

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rehearsals. Brad's father, who was frequently late with child support and who was taking medication for mental illness, did not have a strong foundation from which to advocate for visitation; his mother was unwilling to request visitation, although she recognized that Brad wanted to see his father.540

Demetrius and Donald were physically abused by their father and witnessed the abuse of their mother. Their school counselors noted problems with behavior when the children visited with the father. The children needed counseling services to address the issues raised by the history of violence but their mother could not afford such services and the counselors were unaware of any free referrals. The children continued to act out, impeding their ability to learn and strain their relationships with teachers and other children.

Brad's unique position on issues of custody and visitation was heard by the court only because the court had appointed a representative for Brad. Demetrius and Donald received counseling services specially tailored to child witnesses of domestic violence because the court system provided such services to families within its jurisdiction. Providing representation and counseling for children are crucial steps towards developing a legal system that treats children as persons. Such programs will be discussed in this section.

A. Representation for the Child

"One of the most fundamental principles in the legal system is that when a person has an interest in the outcome of a legal proceeding, he has a right to representation."541 Building on that principle, the United States Supreme Court in 1967 first recognized a child's right to counsel in delinquency proceedings542, since that time, the number of lawyers in the United States appointed to represent children in various types of cases has exploded.543 The international community (with the exception of the United States and Somalia) has also embraced the notion that children have the right to be heard, directly and with the assistance of effective counsel, in all legal proceedings affecting their lives and interests.544

540 Brad's parents, like the majority of litigants in the domestic violence and domestic relations courts of the District of Columbia, were unrepresented. Even if they had been represented, however, the attorney for the parent owes no duty to the child and is not required to advocate the child's position, especially where that position is adverse to the parent's. Candice M. Murphy-Farmer, Mandatory Appointment of Guardians ad Litem for Children in Dissolution Proceedings: An Important Step Towards Low-Impact Divorce, 30 Ind. L. REV. 551, 555 (1997). See discussion of justifications for appointing representatives for children, infra text accompanying notes 549-80.

541 See, e.g., In re Gaul, 387 U.S. 1, 41 (1967).

542 See Martin Gugenheim, Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings, 29 LOY. U. CHI. L.J. 299, 301-02 (1998) (hereinafter Gugenheim, Reconsidering the Need). Gugenheim believes that there have been two phases in the development of children's representation: first, the explosion of the right to representation, and later, the consideration of the role of the representative. Id. at 303-04.

544 Article 12 of the United Nations Convention on the Rights of the Child states:
1. States parties shall assure to the child who is capable of forming his or her own
But a child’s right to independent representation in intrafamily cases is not well-established. Although judges have discretion to appoint counsel for children in family violence cases, they are only rarely required to do so, and tend to exercise their discretion sparingly.

views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.


Davidson, Right To Be Heard, supra note 544, at 269-70. Some commentators have suggested that the child be given party status, with the accompanying right to representation, in these types of proceedings. See Raven C. Lidman & Betty R. Hollingsworth, The Guardian ad litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 GEO. MASON L. REV. 255, 285 (1998); see also Guggenheim, Reconsidering the Need, supra note 543, at 334-35 (suggesting that the expansion of a child’s procedural right to counsel in custody cases be rethought in light of the child’s less inclusive substantive rights, i.e., to party status). The courts that have considered this question, however, have denied children standing in their parents’ custody and visitation cases. See, e.g., Auclair v. Auclair, 730 A.2d 1290 (Me. 1999); Miller v. Miller, 677 A.2d 64 (Me. 1996); In re Marriage of Thompson, 651 N.E.2d 222 (Ill. 1995); In re Marriage of Hartley, 886 P.2d 665 (Colo. 1994); J.A.R. v. County of Maricopa, 877 P.2d 1233 (Ariz. 1994); Shlensvold v. Hable, 622 So. 2d 538 (Fla. 1993). In part, standing has been denied because the procedures provided for representation by guardians ad litem, guaranteeing that the child’s interests were already being given requisite consideration. Auclair, 730 A.2d at 1290-70 (“Because [the guardian ad litem] is obligated to represent the children’s best interests, the interests she will advocate are identical to the children’s interests, even though the child may not agree with her best-interest recommendation . . . . The children are not entitled to additional representation of their preferences.”) Id. at 1290-70. Whether a guardian ad litem, in her traditional role, is an adequate substitute for counsel for the child will be discussed in Section 2 infra.

Davidson, Right To Be Heard, supra note 544, at 270; Lidman & Hollingsworth, supra note 545, at 269.

Minnesota, for example, requires appointment of a representative for the child where there is reason to believe the child has been the victim of domestic violence. Wisconsin requires that children be represented in all contested custody cases. See Peterson, supra note 18, at 516; Lauren Young, Children of Violent Homes—Greatest Victims—Leastest Voices: The Need for Children’s Counsel in Disputed Custody Cases, 6 MDJ. CONTEMP. L. ISSUES 47, 54 (1995).

Generally Peterson, supra note 18. Some argue that courts are right to use caution in providing representation for children. Most prominently, Professor Martin Guggenheim believes that courts and legislators have failed to identify the benefits of appointment of counsel or consider the problems created by appointing counsel for children. Martin Guggenheim, The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. REV. 76, 77 (1984) [hereinafter Guggenheim, Right to Be Represented]. He contends that the substantive law of custody, which cites the child’s preference as but one factor in making custody determinations, is the appointed counsel’s of counsel, which creates the risk that the child’s perspective will be elevated unduly by virtue of counsel’s zealous representation on the child’s behalf. Guggenheim, Reconsidering the Need, supra note 543, at 304; Martin Guggenheim, The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective, 13 J. AM. ACAD. MATTNR. L. 33, 53-54 (1991) (hereinafter Guggenheim, Making of Standards); see also Frances Gall Hill, Clinical Education and the “Best Interest” Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy, 73 IND. L. J. 605, 613 (1998) (arguing that children’s wishes should not be weighed more than other factors and advocating use of guardian ad litem rather than an attorney to avoid over-emphasis on child’s preference).

Despite the judges’ reluctance, there are powerful reasons for providing representation for children in cases involving family violence. The next section will look at the justifications, both generally and specifically in family violence cases, for appointing representatives for children.

1. Why Do Children Need Representation?

a. Presumption Against Parents

At common law, children’s rights derived from those of their parents; parents were presumed fit and able to advocate on behalf of their children. But where a child’s interests are adverse to those of his parents, the presumption that parental judgments can be substituted for a child’s choices is rebutted.

Children’s interests are likely to be adverse to those of at least one of their parents in family violence cases. The child’s substantive legal interest in choosing to live with a non-violent parent, to visit with a violent parent, or to provide testimony about the impact of the violence, as well as the child’s procedural interest in seeing the litigation end quickly and with a minimum of hostility, will often be adverse to the interests of one or both parents. Because the parents’ attorneys owe no duty to the child, the attorneys may advocate in a manner that is detrimental to the child’s interests, depriving the child of any protection. A parent may refuse to disclose confidential information that undermines her case but that is crucial to understanding the child’s situation and the child’s choice. If the child is unrepresented, parents and their attorneys become the “voice” for the child and have the ability to silence the child or manipulate the child’s expressed opinions, beliefs, and fears. Representation for the child is crucial when the child’s interests depart from those of the parents, and “[t]he trend in favor of independent counsel reflects a growing awareness that the state, the courts, and even parents do
not adequately represent the child’s interests.\textsuperscript{555} For that reason, judges seek independent advocates, \textquote{... free of the influence of either parent or any other person using the litigation to promote a cause.}\textsuperscript{556}

b. Child Centrality/Child Protection

\textquote{As a society we encourage families to include children in family meetings and discussions and to give children choices among appropriate options in matters concerning their day-to-day lives. However, we frequently exclude them entirely from any direct participation in the court proceedings that affect them directly.}\textsuperscript{557} Few decisions are as central to a child’s life as decisions about protection, custody and visitation, and few have as great a potential for harm if made without sufficient information and deliberation. Custody and visitation actions can make children feel as though they are responsible for the separation of their parents; the family, in choosing sides, may alienate the child’s affections from one parent or the other.\textsuperscript{558} \textquote{The child’s entire world is in turmoil. Life as he or she knows it is at risk. At such a time, the child believes that ‘he is the source, if not the cause, of the contention.’}\textsuperscript{559}

In such cases, the child’s representative can both ensure that the child is an active participant in the decisions that will profoundly affect her life and shield her from the harm that the process generates those decisions can cause.\textsuperscript{560} Representatives for children prevent unnecessary delays in litigation and procure supportive services for the child client.\textsuperscript{561} The child’s representative can ensure that \textquote{the child’s life is not made miserable by terms of visitation that interfere with the child’s need to live a secure and stable life.}\textsuperscript{562} Appointing a representative for the child increases the likelihood that the child’s needs, wants and rights are the central

\textsuperscript{555} Shannan L. Wilber, \textit{Independent Counsel for Children}, 27 \textit{FAM. L. Q.} 349, 350 (1993); but see Hill, supra note 547, at 613 (explaining argument that custody disputes are essentially private matters in which parents safeguard the child’s best interests).

\textsuperscript{556} Elrod, supra note 544, at 55.


\textsuperscript{558} See Principles, supra note 552, at 2.

\textsuperscript{559} Young, supra note 547, at 50 (citation omitted). If not handled carefully, court proceedings \textquote{can cause permanent damage to the child’s psyche and ability to function.}\textsuperscript{Id}

\textsuperscript{560} See Principles, supra note 552, at 6; Wilber, supra note 555, at 351. One study of divorce suggested that the best thing that the child’s attorney can do for the child is to keep the child out of the divorce case and ensure that the child’s regular activities proceed without interruption. See Louis I. Parley, \textit{Representing Children in Custody Litigation}, 11 \textit{J. AM. ACADEM. MTRIM. LAW} 45, 58 (1993).

\textsuperscript{561} See Wilber, supra note 555, at 351. \textquote{Uncertainty and instability of placement can have a particularly negative effect on children, who cannot control the decisions about where and with whom they live. The prolonged uncertainty brought on by protracted court battles inflicts its own harm on children.}\textsuperscript{Ann M. Halamblie, \textit{The Child’s Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases} 27 (1993) [hereinafter Halamblie, \textit{The Chid’s Attorney: A Guide}].

\textsuperscript{562} Principles, supra note 552, at 6.

\textsuperscript{553} See Guggenheim, \textit{Making of Standards}, supra note 548, at 40.

\textsuperscript{554} See Horn, supra note 552, at 476.

\textsuperscript{555} See Murphy-Farmer, supra note 540, at 562.

\textsuperscript{556} See Hill, supra note 547, at 613; see also \textit{Principles}, supra note 552, at 5 (explaining that the greatest need for a lawyer in custody visitation proceedings is to advance the child’s position in the case).

\textsuperscript{557} Wilber, supra note 555, at 351.

\textsuperscript{558} See Haralambie, \textit{Role of Child’s Attorney}, supra note 557, at 953.

\textsuperscript{559} See Elrod, supra note 544, at 54.

\textsuperscript{560} See Murphy-Farmer, supra note 540, at 561. \textquote{Many commentators argue that the fundamental fairness of due process requires appointment of counsel for the child in all contested custody cases.}\textsuperscript{Peterson, supra note 18, at 314. But see Guggenheim, \textit{Making of Standards}, supra note 548, at 41 (allowing child to participate may foster undue pressure on the child to choose one parent over another, causing the child to feel overwhelmed by the responsibility and creating danger of parental manipulation of the child).


\textsuperscript{552} Wilber, supra note 555, at 355.

\textsuperscript{553} See Lyon, supra note 550, at 686.
d. Justifications in Family Violence Cases

"While an argument could be made for appointing counsel for children in every case . . . there is a compelling need for counsel in judicial proceedings when physical, sexual, or emotional abuse or neglect is alleged . . ."574 Children become third party victims in abusive homes, and their interests "should receive equal consideration and, if required, adversarial equity."575 In family violence cases, representatives for children play a number of important roles. Parents may have an incentive to hide issues of family violence; the child's representative can bring such issues to the fore, especially as they relate to the issue of joint custody.576 The batterer's ability to use the child as a pawn is minimized by the presence of an independent voice for the child's wishes.577

Some commentators argue that appointment of representatives for children should be mandatory in family violence cases. Because the batterer may minimize or block inquiries into the violence, judges often lack sufficient information to understand why the child needs representation.578 Moreover, the battered parent might not disclose the abuse for fear of retaliation or of losing the child, given the perception that someone who tolerates abuse is not a fit parent.579

Appointing a representative for a child in a domestic violence case "does not assume that parents would not instinctively seek to represent the best interests of their child in seeking protection. Instead the judge and the attorneys in the case have an opportunity to seek assurance that the child's safety and well-being are addressed as a separate area of inquiry . . ."580 Especially in cases of family violence, where at least one parent's interests almost certainly diverge from the child's, where the child needs protection, and where the child needs to regain a feeling of empowerment, representation for the child is crucial.

There are powerful justifications for appointing representatives for children in family violence cases. What form that representation should take has been the subject of considerable debate, and is the subject of the next section.

B. Attorney v. Guardian ad Litem: Which Model Is Better for Kids?

Perhaps no question is more hotly contested by child advocates than what role an attorney representative for the child should play.581 While most states that authorize the appointment of advocates for children statute require that the child's interest be represented, "it is unclear whether the child's preferences should be advocated in addition to or in lieu of the minor's best interests." The tension between the traditional attorney model (representing the child/client's expressed preferences) and the guardian ad litem model (representing the child's best interest) is at the heart of the debate.

1. The Traditional Representation Model

A number of commentators have forcefully argued that the only acceptable position for an attorney representing a child is the traditional attorney/client relationship model, where the child client directs the representation and the attorney advocates for the position expressed by the child client, regardless of her personal feelings about the child's choices.582 The traditional model requires that the lawyer,

574 Young, supra note 547, at 48; see also New Directions, supra note 362, at 12-13; Peterson, supra note 18, at 535.
576 See The Honorable Sheila M. Murphy, Guardians ad Litem: The Guardian Angels of Our Children in Domestic Violence Court, 30 LOY. U. CHI. L. J. 281, 287 (1999). "Expediting custody proceedings by eliminating this issue and withholding domestic violence information from the judge is unacceptable." Id. at 288.
577 See id. The representative may also present information on how the battered parent is coping with the violence and what the impact of the violence on her ability to parent has been. Id. at 289-90. While such information is certainly relevant to the well-being of the child, especially where the child expresses a desire to leave the care of the battered parent, it raises red flags for battered women's advocates, who fear that battered women will be punished doubly: once by the batterer, and again by the system. Judicial education, as discussed in Part II, infra, can help judges to account for the survivor's actions and to craft remedies that are sensitive to the needs of both the child and battered parent.
578 See Peterson, supra note 18, at 518-19.
579 See id. at 521.
580 Muhlhauser, supra note 575, at 646.
to the extent possible, maintain a regular attorney/client relationship with the child, with the same ethical constraints as a traditional attorney.584 "The attorney appointed as an attorney for the child . . . owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as he or she would to an adult client . . . ."585 Extending the client-centered decision-making model to child clients assumes that children are capable of making reasoned choices about central events in their lives. Children should not be held to a higher standard than adult clients, who frequently make irrational choices for which their lawyers must advocate.586 "[L]awyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child."587 The traditional attorney/client relationship can be modified only when the lawyer determines that crucial elements of the relationship with the child cannot be maintained.588 The child's ability to direct the representation turns on whether the child can distinguish between available options589; when the child is unable to do so, the attorney must determine how best to advocate for the child.590

The strength of the traditional attorney/client model is that it gives the child a real voice in the proceedings. "A child capable of forming a reasonable position should be able to have that position advocated—otherwise nobody is presenting the child's position from the child's perspective."591 As in any traditional attorney/client relationship, the attorney can and should counsel the child about the ramifications of any decision that the child makes, but ultimate decision-making authority rests with the client.592 Children are disempowered when their attorneys, who are supposed to be their advocates, take positions that are contrary to their wishes. When the child perceives that the advocate has heard and presented her views, a child can accept even an adverse result more easily.593

Assuming the traditional attorney/client relationship also maintains the appropriate balance of power between the parties and the court. The "personality, personal opinions, values and beliefs" of the attorney should not influence the court's final determination.594 Providing counsel for the child equalizes the child's power in relation to other parties in the matter, but does not give the child a disproportionate voice. "It is not the province of the child or his attorney to decide the case; rather it is the court's responsibility to do so after considering the viewpoints of the parties and experts."595 The traditional model constrains the lawyer's ability to exercise independent judgment about what is best for the client, reserving that role for the judge.596

The traditional model has detractors. First, determining when a child client is impaired is difficult, which can diminish the attorney's confidence that the child is competent to direct the representation.597 If the child is too young to direct the representation, providing an attorney for the child does not really give the child a voice in the proceedings. "If four-year-olds have a right to be heard but cannot speak for themselves, how is the attorney for the child to determine what is to be said on the child's behalf?"598 Moreover, assuming that an attorney is actually voicing the child's expressed wishes may be dangerous. "When lawyers are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child

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584 See Haralambie, Role of Child's Attorney, supra note 547, at 954; see also Haralambie, The Child's Attorney: A Guide, supra note 561, at 25; Lidman & Hollingsworth, supra note 545, at 266. Ethical rules for the child's attorney: the child's attorney should be a zealous advocate, should provide competent representation, should abide by the client's decisions, should provide diligent and prompt representation, should communicate effectively and thoroughly with the client, should not communicate with represented parties or accept payment from a third party, should avoid conflicts of interest, and should maintain confidentiality and privileges for the child client. Ventrell, supra note 112, at 270-72.


586 See Wilber, supra note 555, at 353-54.

587 Peters, supra note 573, at 1509.

588 See id. at 1507.

589 See Elrod, supra note 544, at 65.

590 Commentators offer several potential approaches for advocating on behalf of an impaired child. The American Association of Matrimonial Lawyers Standards prohibit attorneys from taking a position on behalf of a child who cannot articulate one. Other commentators allow lawyers in limited circumstances to advocate for a specific result where there is a "definitively preferable option." Guggenheim, Reconsidering the Need, supra note 543, at 320. Professor Guggenheim suggests that lawyers for very young or preverbal children can advocate for the child's "legal interest." Id. at 328-29. Shanan Wilber argues that when the child client is impaired, the attorney should substitute her judgment for what the child would want if the child could direct the representation. Wilber, supra note 555, at 349, 359. Linda Elrod maintains that if the child is not able to direct the representation, the attorney should advocate what she perceives to be the child's best interests. Elrod, supra note 544, at 65. Jinanne Elder suggests that the attorney for an impaired child explore and define the needs of the particular child in the particular case and advocate a position on the child's behalf that maximizes the attainment of the client's objectives and minimizes harm or prejudice to the client and her interests and needs. Jinanne S.J. Elder, The Role of Counsel for Children: A Proposal for Addressing a Troubling Question, BOSTON B.J. Jan./Feb. 1991, at 6, 9.

591 Haralambie, Role of Child's Attorney, supra note 547, at 954; see also Haralambie, The Child's Attorney: A Guide, supra note 561, at 12; Lyon, supra note 550, at 692.

592 See Lurie, supra note 550, at 209. "If the child's preference is contrary to what counsel believes is in the child's best interests and the child cannot be persuaded otherwise, the child's counsel must present the child's position, withdraw, or perhaps ask that a guardian ad litem be appointed." Elrod, supra note 544, at 66.

593 See Wilber, supra note 555, at 355.

594 Guggenheim, Reconsidering the Need, supra note 543, at 301.

595 Wilber, supra note 555, at 356.

596 See Guggenheim, Reconsidering the Need, supra note 543, at 312. Reducing lawyer discretion helps to reduce the danger that the attorney's values or opinions will be interjected into the proceedings and to ensure uniform performance from attorneys in similar types of cases. Id. at 313.

597 See Guggenheim, Right to Be Represented, supra note 548, at 77; Hill, supra note 547, at 621.

598 Guggenheim, Right to Be Represented, supra note 548, at 96.
wants or needs. Additionally, maintaining the duty of confidentiality to a child client could actually be dangerous for the client; children may reveal information about their safety or other issues that must be kept confidential despite the risk posed for the client if the attorney does not act. Similarly, given that the attorney must forward the child's expressed wishes, the attorney could find herself advocating for a position that is the result of parent manipulation or that is illogical or irrational.

2. The Guardian ad Litem Model

Although the guardian ad litem (GAL) may be an attorney, she is generally considered an officer of the court rather than an independent advocate for the child. In almost every case, the attorney appointed as guardian ad litem is expected to advocate for the child's best interest rather than the child's expressed wishes or desires. While the primary function of the GAL is not to zealously advocate for the child's desires, the GAL should determine whether the child wants to take a position and articulate the child's position to the court; nonetheless, the GAL ultimately decides what weight to give the child's desires in her overall presentation.

Whether the attorney acting as a guardian ad litem is bound by the ethical rules governing the attorney/client relationship is another subject of debate. Arguably, because the attorney is representing the child's best interest rather than the child himself, no attorney/client relationship exists with the child, and therefore,

the ethical strictures do not apply. More consensus exists about the lack of attorney/client privilege between GALs and children. In their reports to the court, guardians ad litem frequently provide information derived from their interactions with the child without the child's consent. Despite the fact that communication is not privileged, however, the attorney/GAL is free to disclose the child's confidences only as necessary to carry out her investigation, to promote the child's best interest, and as required by law. In assessing whether to disclose information, "the GAL must always accord the child respect and honor the child's autonomy as appropriate to the child's age and maturity." 

Proponents of the guardian ad litem model argue that children are not small adults and have needs and limitations that the traditional attorney/client model does not address. Appointing guardians ad litem is consistent with society's sense that children do not have all of the skills necessary for making autonomous decisions. Children lack the maturity of judgment and cognitive capacity to assess their own interests and to appreciate the consequences of their decisions, especially in the long-term. The GAL model also facilitates "positive paternalism," allowing for protection and oversight of the child. Using the guardian ad litem model shields the child from the burden of having to make decisions or take positions in litigation and from the pressure to misidentify or misarticulate their interests. Lawyers are especially well-suited to the guardian ad litem model given their skills as fact-finders and interviewers/counselors, and their ability to sort feelings from facts, to recognize gaps and inconsistencies in information, and to understand the legal process.

Critics of the guardian ad litem model voice a number of concerns. First, the guardian ad litem model assumes that the attorney will articulate the "correct" viewpoint, that the attorney is well placed to determine what the child's best interest actually is. But "[I]legitimate questions have been raised about the training and ability of attorneys to make independent best interests judgments . . .

608 See Hill, supra note 547, at 626.
609 See Haralambie, supra note 561, at 10; Lidman & Hollingsworth, supra note 545, at 269. GALs may also have the authority to waive the child's privilege regarding medical and mental health records over the child's objection. Haralambie, supra note 561, at 7.
610 See Hill, supra note 547, at 618.
611 See id.
612 See id. at 623.
613 See Buss, supra note 583, at 1702; Haralambie, supra note 561, at 6.
615 See Buss, supra note 583, at 1703.
616 See Hill, supra note 547, at 625.
617 See Willber, supra note 555, at 356.
Guardians ad litem render expert opinions despite their lack of specialized training; “they are imbued with expertise, merely by virtue of having been placed in that role, irrespective of their actual background.”

Others question whether the guardian ad litem is given disproportionate power in legal proceedings. Judges look for help in making decisions involving children; they want “outside, neutral, objective” persons to assist them in these cases and believe that guardians ad litem should perform that function. This quasi-judicial status creates a “halo effect” around the guardian ad litem’s version of the facts, giving her presentation greater credibility than those of the parties. In her role as a mediator, the presence of the guardian may create undue pressure on one party or the other to settle, as the parties sense the weight that the judge will give to the guardian’s recommendation. In litigation, the guardian is treated as a party “plus,” permitted both to present a case and to state a position on the ultimate outcome. More generally, the guardian enjoys the power associated with the role itself; most parties recognize that failure to comply with the guardian’s requests can turn the guardian, and therefore the court, against the party.

Perhaps most importantly, the guardian ad litem model has the potential to disempower the child. The guardian ad litem is not an advocate for the child, but for the concept of the child’s interest (or, in the investigator role, for the truth). Although the guardian ad litem is said to give the child a voice in the proceedings, the child’s voice can and will be drowned out when the guardian believes that doing so is in the child’s best interests. “[W]hat the child wants may be subordinated to some vision of the child’s best interests and to what is a ‘good’ or ‘right’ decision.” As a result, “[t]he child is only heard if his viewpoint is consistent with that of his guardian ad litem.”

The child is further disempowered if she believes that the attorney has been appointed to serve as her

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voice, only to find that the attorney, acting as a guardian ad litem, has failed to zealously advocate her position.

3. How Is Brad Better Served?

The debate over the appropriate role for a child’s representative reflects the tension between protecting children and respecting the rights and dignity of children as “developing human beings.” The debate also highlights society’s ambivalence about empowering children, especially in ways that conflict with the power of parents.

But how do competing theories of representation apply to one ten-year-old boy in the midst of family violence? Brad, the child first seen in the introduction, was given a representative by the court. That representative was called a guardian ad litem, but was deeply conflicted about her role. Brad had clear views about what he wanted from the court: specific visitation, not to conflict with his other activities. And while the guardian understood what Brad wanted, she felt concerned. The father was clearly mentally ill and taking medication that might impair his ability to care for the child, as well as inflame the violence that had touched Brad in the past. The guardian did advocate Brad’s position, but with misgivings that were probably clear to the court. The system worked, however. The judge heard the evidence on mental illness from the mother, the father’s desire for unfettered visitation, and Brad’s request for somewhat more limited visitation, and provided visitation between father and son as soon as the father provided proof that he was in treatment and taking medication for his illness. No one voice drowned out any other, and a solution that all parties could live with was reached.

My understanding of my role as Brad’s counsel should have turned what Brad had lost as a victim of family violence—his power. Brad had begun to stutter and was unsure of himself, behaviors that emerged after witnessing his father’s mistreatment of his mother. Brad needed to know that his advocate was, in fact, his

616 Lidman & Hollingsworth, supra note 545, at 276; see also HARALAMBI, THE CHILD’S ATTORNEY: A GUIDE, supra note 561, at 12; Peters, supra note 576, at 1507.
617 See Lidman & Hollingsworth, supra note 545, at 297.
618 See id. at 279. The presentation, however, is colored by the GAL’s perspective on the case; the GAL is often permitted to testify to information about which she may not have personal knowledge and to assess the credibility of the information, a function that should rest with the finder of fact. Id. at 278-79.
619 See id. at 283.
620 See id. at 285-86.
621 See id. at 286. Allowing the attorney to testify to the ultimate issue in the case by asserting an opinion as to the appropriate outcome also risks usurping the province of the finder of fact. Guggenheim, Right to Be Represented, supra note 548, at 102.
622 See Guggenheim, Right to Be Represented, supra note 548, at 108.
623 See Lidman & Hollingsworth, supra note 545, at 300.
624 Federle, supra note 582, at 1656.
625 Wilber, supra note 555, at 356.


627 This section will focus on a choice between the role of guardian ad litem and that of traditional attorney. But, as Ann Haralambie notes, “[i]t is futile to try to ‘shoehorn’ child advocacy standards into the traditional roles and rules.” Haralambie, Role of Child’s Attorney, supra note 557, at 947. Haralambie advocates for a hybrid role for representatives that addresses both the child’s best interests and the child’s wishes and integrates them into a recommendation for the court. She acknowledges that the ethical rules make such a stance problematic but believes that blending the roles is a “sensible” way of representing and protecting children. Haralambie, The Child’s Attorney: A Guide, supra note 561, at 13, 37. Determining which role to play might also be a fluid concept, turning on which regime produces better outcomes for the child or is better suited to protecting the child’s non-legal interests (for example, the child’s psychological or emotional well-being). Green, supra note 626, at 671-72. In practice, moreover, the roles are probably far more intertwined than most advocates for either position would care to admit.

628 Lyon, supra note 550, at 681; see also Hill, supra note 547, at 612.
630 Me.
advocate, arguing his position and expressing his needs. Safety and security are certainly important concerns for child victims of family violence, but empowerment is no less important for these children. And part of empowerment for these children is learning that violence is not the only means of resolving problems and that the court system can respond to conflict and provide acceptable solutions. Giving Brad a strong voice in the process and allowing him to see that his wishes and his desires were important and were valued was probably the best service I could have provided for him.

In cases involving family violence, children should have lawyers who exist only to advocate for their positions, to give them power in a process in which they are otherwise powerless, to impart a sense that violence is not the only way to resolve conflicts. Lawyers should be aware of their potential to dominate their child clients; in the counseling process, lawyers should work collaboratively, encouraging the child to reach his own decision by identifying alternatives and considering consequences. When the child can voice a preference, including a preference not to be involved in the proceedings, the duty of the representative should be to forward that preference. [The point of client empowerment is not to make sure that the child client has made a good decision or the best choice; nor is it to ensure that the way in which she reached a decision is a reasoned one. Rather, by empowering the client, the lawyer ensures that the child, and no other, has truly made her own choice.

4. Model Programs

Discussing which model of representation best serves children is academic if trained lawyers for children do not exist. Simply being a lawyer does not qualify an individual to advocate on behalf of a child. The role of the child advocate is to identify and argue for the needs of a particular child in a particular case, for children generally, or even children at a particular developmental level generally. In order to assess the child’s needs, child advocates should have training in child development and developmental needs, the social and psychological needs of children, interviewing and counseling children, mediation, the effects of various forms of custody and visitation arrangements, family violence and the role of race, culture, ethnicity and class in children’s choices. Representatives for children should understand the roles of social workers and psychologists and be open to collaborating with members of other professions and disciplines. Serving as counsel for a child is comparable to representing a person of a different language or culture; the attorney must understand “differences in language, cognitive and experiential development” in order to “translate choices and options into language the child can understand, obtaining the aid of a therapist or child development specialist where necessary.”

A number of jurisdictions have developed programs to train lawyers in the skills needed to represent child clients. Although only a few directly address family violence cases specifically, and even fewer have chosen to represent children via the traditional attorney/client relationship, the models developed to train attorneys can be adapted and applied to the specialized representation of children in family violence cases.

One model of providing representation for children is through law school clinics. The Child Advocacy Clinic at the Indiana University School of Law—Bloomington represents children in paternity, guardianship, termination of parental rights and primarily, dissolution cases. Although the clinic has chosen to represent children in custody proceedings as guardians ad litem, consistent with the law and practice in Indiana, the clinic clarifies, distinguishes and teaches different models for representing children. When the clinic is appointed as the guardian

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631 See Federle, supra note 582, at 1691-92, 1695.
632 Some would argue that it is naive to think that the judicial system will reach the appropriate resolution, especially when children sometimes prefer to remain with the violent parent. See HARALAMBE, THE CHILD’S ATTORNEY: A GUIDE, supra note 561, at 31. I acknowledge that in these situations, the principle of client-centered representation can and probably will fail some children because courts will not appropriately consider the violence and the danger to the child. Judicial education has been one of the consistent recommendations of this article, and it is important in supporting this principle as in other facets of family violence legal proceedings involving children.
633 Federle, supra note 582, at 1696.
634 See HARALAMBE, THE CHILD’S ATTORNEY: A GUIDE, supra note 561, at 57. The attorney must be able to visualize the proceedings from the child’s perspective, incorporating the child’s sense of time, developmental needs, and individual needs, interests and desires. Haralambe, Rule of Child’s Attorney, supra note 557, at 949.
635 See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 103; Cerrone, supra note 549, at 1.
ad litem for a child, a team of students is assigned to the case. One student acts as the guardian ad litem, investigating, interviewing and making a recommendation; the other student files her appearance as counsel for the guardian ad litem and performs the traditional legal work (filing, research, communication with opposing counsel, negotiating, trial appearances) required in the case.645 Both law and social work students participate in the clinic, and the clinic is staffed by social workers and supervising attorneys who oversee the cases.566

The strengths of this approach are numerous: the availability of interdisciplin ary resources both within the clinic and in a university setting generally647, the engagement of the law students, the strength of the mentoring and support provided for the students, the lasting commitment to child advocacy that the clinical program fosters. The weaknesses include the small number of cases such a clinic can handle and the potential for a great deal of turnover, creating distress for a child who is constantly meeting her "new" attorney. Nonetheless, law school clinical programs could serve as one source of representatives for children in family violence cases.

Pro bono projects can also increase the pool of representatives for children. Perhaps the best model for this type of endeavor is the "Representing Children in Restraining Orders Court Pro Bono Project" of the Rocky Mountain Children's Law Center. The Project, which represented 174 children in 1996-97, pairs pro bono attorneys acting as guardians ad litem with children whose parents are involved in domestic violence restraining order proceedings.648 Volunteer attorneys receive continuing legal education credit for the Project's required one-

make decisions in her own interest. Kell, supra note 629, at 655. Although I prefer a different model of representation than the clinic uses, the clinical program could just as easily train lawyers for children, and is therefore worth considering here.

See Hill, supra note 547, at 606-07. This structure essentially detaches the advocacy from the decision regarding the position to advocate. See Green, supra note 626, at 666.

In representing children, interdisciplin ary work is crucial. For that reason, "guardian ad litem" teams consisting of social workers, psychologists and attorneys are being proposed. The team would have the opportunity to review, discourse, share knowledge and bring their different skills to the representation of the child and could add members as needed, depending on the facts of the particular case. Creating multi-disciplinary teams also reduces the opportunity for bias and increases the likelihood that cultural factors and different philosophies will be considered by the advocate. Tara Lea Mulhau ser & Douglas D. Knowlton, The "Best Interest Team: "Exploring the Concept of a Guardian ad Litem Team, 71 N.D. L. Rev. 1021, 1023-26 (1995).

See Rocky Mountain Children's Law Center, Rocky Mountain Children's Law Center Pro Bono Attorney Project: Pro Bono Conference, Friday, March 27, 1998 at 1, 4 [hereinafter Rocky Mountain]. The Project's materials state that it is the "first and only program to provide legal representation to children in domestic violence cases involving parents seeking restraining orders." Id. at 1. However, Chicago's Sidney & Austin initiated a small program providing guardian ad litem representation for children in the parents in domestic violence cases in Cook County, Illinois, in 1990-91. "Although no formal study was done on the effectiveness of the Sidney & Austin pilot program, it was deemed a huge success by the children, families and attorneys, as well as the participating court." Murphy, supra note 576, at 300. In a similar program, Utah's Office of the Guardian ad Litem, a branch of the state judiciary, co-sponsored a project that trained approximately two hundred attorneys to serve as guardians ad litem in contested custody and visitation cases. JUDGE'S GUIDE, supra note 633, at 81-82.

day training, which includes information on the dynamics of domestic violence, Colorado's domestic violence laws, child development, the role of the guardian ad litem, and community resources.664 Center staff provide support for volunteer attorneys,665 and assemble pro bono interdisciplin ary teams of social workers, psychologists, and pediatricians to work with volunteer attorneys on a case-by-case basis.666 The Center also helps volunteer attorneys to secure needed services, including substance abuse counseling, domestic violence services and batterer's treatment, for families.667 Cases are referred to the Center by judges hearing Domestic Abuse Act proceedings; judges are more likely to seek representation for children when there are allegations of verbal, physical, or sexual abuse or neglect toward the child, when the child has been involved in the violent incident, when the child is exhibiting "red flag" behavior (for example, running away), or when the judge is uncertain that the nonviolent parent can protect the child from violence.659

The strength of the Project lies largely in the commitment of the attorneys—volunteer lawyers spent an average of twenty hours per case, logging fifty to one hundred hours on some cases, and chose to continue working on eighty-two percent of the cases that went beyond the restraining order court668 and the support of the Rocky Mountain Children's Law Center, which provides volunteers with training materials, links to community resources and access to other child-serving professionals.669

The District of Columbia Bar Public Service Activities Corporation also trains volunteer attorneys to serve as guardians ad litem in cases involving family violence.660 The first training was held in 1997, after public interest attorneys with
experience as guardians ad litem in family violence cases became concerned about the disproportionate number of cases they were being asked to handle. We began looking for ways to increase the pool of lawyers serving in this capacity without compromising the quality of the representation. After two years, approximately thirty additional attorneys are volunteering to represent children in family violence cases. The training focuses heavily on issues of role conflict, child development, domestic violence dynamics, and interviewing and counseling children. Mentors (generally the trainers) are available to assist new attorneys with questions arising out of the representation. A few of the attorneys trained in the program have become mentors within their own firms, encouraging and supporting other attorneys who take the training. Judges refer cases to local legal services providers, who place the cases with volunteer attorneys. Representatives for children are appointed in civil protection order, divorce, custody and visitation disputes.

Has the program been successful? Certainly we have increased the pool of volunteer attorneys available to represent children in family violence cases, although some battered women's advocates have expressed concern about the lack of sensitivity of some of the guardians to the dynamics of domestic violence. The judges have been supportive, but some are resistant to the idea that children need representation; even in cases where the parents insist that their children have strong desires one way or the other, judges are not always willing to give those desires an independent voice. We are constantly reevaluating the training, seeking to provide more insight into working with children in an empowering way.

In the absence of public funding for representatives for children, law school clinics and pro bono projects are two of the best ways to increase the pool of attorneys available to advocate for children. Judges, advocates, law school faculty and administrators and other professionals should work together to create, support and refine such programs in their communities. In a system where the only voice available to the child is through an advocate, we must ensure that such advocates exist.

One way of affirming the child's personhood is through representation in the legal system. Another is by directly addressing the emotional and psychological scars caused by family violence. The next section will examine programs helping children to cope with family violence and consider how such programs should be provided.

Matrimonial Lawyers Standards are advisory; where they conflict with local laws, judges and attorneys must follow the local law. I must admit that when I began the training, I did not have the same philosophical misgivings about serving as a guardian ad litem that I now face. As a lawyer, I have taken the pragmatic approach that if we did not accept appointments as guardians ad litem, children would not be represented in these matters at all. I have tried to advocate for the child's wishes and to avoid making recommendations whenever possible, following the advice that even when appointed as a guardian ad litem, the attorney should, to the greatest extent possible, serve as she would if appointed as a lawyer for the child. Green & Dohrn, supra note 583, at 1295. We have also incorporated this principle into our training, spending a great deal of time discussing role issues and urging attorneys to act as advocates for the child in the traditional sense whenever possible. I thank Matt Fraiden, legal director of the Children's Law Center, for helping me think through these difficult issues.

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C. Counseling Services for the Child

Emphasizing the need for counseling for the child brings this article full circle. The article began with a discussion of all of the horrors inflicted on children who witness domestic violence; it ends with a consideration of how to counteract that damage.

Clinical intervention can reduce the short and long term effects of witnessing domestic violence and can reduce the likelihood that children will be victimized as adults. Through intervention, children improve their self-esteem, their ability to develop trusting relationships, and their ability to act appropriately in social situations. They are less likely to suffer from somatic complaints. They learn techniques for non-violent conflict resolution and to reject violence as a means of dispute resolution. Given the obvious benefits, children who witness family violence should receive specialized mental health services and social service intervention. Yet anecdotal evidence suggests that child witnesses are not being evaluated to assess their need for services and are not receiving needed services.

The goal of therapy for child witnesses of domestic violence is to help them to cope with the confusion and terror that arise from violent incidents and their aftermath. In working towards that goal, counselors should seek to establish a safe environment, with stability and structure, for the child; to reduce the child's isolation and sense of responsibility and give the child a sense of control; to help the child to realize that she cannot change her parents' behavior; to develop the child's capacity to express anger constructively; to teach problem solving, coping mechanisms and social skills; and to provide information and education on the cycle of power and control. Most programs help children to identify and express their feelings honestly, to improve their self-esteem, to develop personal protection and safety plans, and to focus on the feelings of grief and loss engendered by the violence. Effective interventions are culturally competent, take into account the child's specific needs, avoid subjecting children to further trauma through repeated descriptions of abuse, and are designed to prevent harm to the child by minimizing...
the child’s exposure to additional violence.663 Treatment modalities include play therapy, which allows children to express their feelings using a variety of props, including dolls, puppets, and stuffed animals.664 Children also learn to express their emotions and handle trauma symbolically through art and music projects.665 Behavioral therapy can help to reduce the symptoms associated with witnessing violence.666 Parents should be encouraged to initiate treatment and should have ongoing communication with the therapist, especially when the child is visiting with the batterer.667

Donald and Demetrius, the children described earlier, were fortunate that in the District of Columbia, the court system has recognized the centrality of treatment for child witnesses. The District of Columbia Superior Court's Domestic Violence Unit is closely connected with two programs providing counseling for children.668 The Children of Violent Environments (COVE) Program is housed within the District of Columbia Superior Court Social Services Division’s Family Counseling Program. The program is staffed by family counseling probation officers, probation assistants, parent/community partners, and graduate interns in social work and counseling. Children who have witnessed domestic violence and/or suffer from the effects of the violence are referred to the program by judges in the Domestic Violence Unit of the Superior Court. Program counselors visit with children and families in their homes for sixteen weeks of play therapy (which can be extended upon the agreement of the counselor and family) and run ten week group sessions for children involved in the program. Parents are frequently referred to the "Parents Empowering Parents" groups taking place at the same time as the children's groups. Counselors assess the child's need for and make recommendations about long-term therapy, but do not conduct individual therapy themselves.669 Counselors are available (albeit reluctant) to testify on behalf of the child in domestic violence, custody and visitation cases. The strength of COVE is its direct tie to the court system; referrals can be made immediately upon leaving

663 See id. at 61-62.
664 See id. at 70. The Child Witness to Violence Program housed at Boston City Hospital seeks to identify children traumatized by acts of domestic violence and provides developmentally appropriate counseling, using play therapy, for the children. Augustyn et al., supra note 7, at 36.
665 See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 71.
666 See id.
667 See id. at 71.
668 Two local battered women’s service providers, House of Ruth Counseling Center and the S.O.S. Center, also provide services for child witnesses but have not been as closely affiliated with the court.
669 Two local battered women’s service providers, House of Ruth Counseling Center and the S.O.S. Center, also provide services for child witnesses but have not been as closely affiliated with the court.

the court system, facilitating the process for the custodial parent. In the past, COVE has had problems with waiting lists and with an inability to serve non-English speaking children, although both of those problems vary with the number of referrals and the current contractors. After working with a COVE counselor, Donald and Demetrius, and their mother, who became a parent counselor, were able to confront their feelings about their father and express them constructively.

Resilience Works, Inc., is a newer program available to child witnesses to domestic violence. Recognizing that children are “co-victims” exposed to domestic violence, the United States Attorney’s Office partnered with the National Institute of Justice, the Executive Office of Weed and Seed and the directors of the project, Drs. Hope Hill and Howard Mabry, to provide free counseling services to children aged six to sixteen. The project runs groups for children on Friday, Saturday and Monday afternoons (because weekends are the times of greatest violence). The groups run for twenty-four week sessions, and individual therapy is also provided for a number of the children. Parent participation is expected; parent groups last for ten weeks. Resilience Works provides transportation for children and families to and from the sessions, which are based in community locations. Referrals come from various court personnel: judges in the Domestic Violence Unit, the Domestic Violence Intake Center, the court’s mediation services, and private attorneys.670 As of June 1999, forty-four children had been referred to Resilience Works; nineteen were actively participating.671

Although these projects operate from different institutional bases, they share a common goal: addressing the impact of violence on children at the earliest possible stage. They also share one important feature—close ties to the judicial system. Unfortunately, but realistically, many child witnesses to domestic violence are first identified when their parents engage the court system. Courts are uniquely placed to recognize and refer these children, but only if such referrals are available. By creating in-house counseling programs and/or partnering with programs in the community, courts can ensure that children have access to needed mental health services. When intervention services are publicized and easily accessible, families are more likely to use them.672 Making referrals through the court meets both

670 See Child Witnesses to Domestic Violence; Protocol for Referrals to Resilience Works, Inc. From Court and Community Agencies (on file with the author).
671 See Children as Witnesses to Domestic Violence: Intervention to Break the Cycle and Heal the Pain, June 16, 1999 report to the Advisory Council for Resilience Works (on file with the author). The children assessed by the program have been found to suffer from attention deficit/hyperactive disorder, post-traumatic stress disorder, conduct disorders and separation anxiety. Parents assessed by the program are struggling with post-traumatic stress disorders, major depression and substance abuse issues. Id. Given the large number of three-year olds who have been referred and the lack of services in the city to serve children that young, the program is considering how to incorporate an early childhood component.

Since the end of the first grant period, Resilience Works, Inc., has decided to continue its operations independent of the U.S. Attorney’s Office.

672 See AMERICAN PSYCHOLOGICAL ASSOCIATION, supra note 3, at 62. The APA also recommends developing programs within public schools to detect and intervene in cases of family violence. Ideally, such programs would train teachers to recognize the violence, develop components for student consideration of family violence issues, and provide services and referrals for children who are identified as witnesses to or
Restoring a child's self-esteem, teaching a child to manage conflict, preventing a child from becoming an adult victim—these are all essential elements in recognizing and fostering the child's personhood. The court system should be no less concerned with enhancing this component of the family violence system than with the traditional litigation components discussed previously. Courts that truly care about addressing the cyclical nature of family violence should create the linkages that will provide children with mental health services.673 By providing a child with a voice and with the tools to use that voice in a non-violent, confident manner, the legal system would do much to prevent the next generation from suffering as this one has.

VI. CONCLUSION

The legal system must ensure that children living with family violence receive the help they need in order to avoid perpetuating the cycle of violence so harmful to families and society as a whole.674 Even in a system where children are still largely treated as property, family violence skews the ordinary calculations; enforcing custody and visitation laws and creating safe alternatives for visitation ease the child's transition from a home fraught with violence to the redevelopment of a relationship with an abusive parent. Creative use of evidence law can shield children from the trauma of testifying. When they do testify, attending to their unique needs as witnesses will prevent further victimization of children already in the untenable position of testifying against a parent. Finally, providing advocates and mental health services for children will help to ensure that a system that too often ignores them will pay special attention to children as people in their own right. The legal system's past neglect of children from violent homes is already evident in the one-time child witnesses who are the plaintiffs and defendants in current family violence cases; our responsibility as members of that system is to stop the cycle now.

673 Although courts have a unique opportunity to provide family violence services, they are certainly not the only state actors with a responsibility to do so. In Nebraska, for example, the Protection From Domestic Abuse Act requires the Department of Health and Human Services to provide services for children of domestic violence survivors, and specifically mentions "counseling for trauma which occurs when children witness or experience violence," as a service that the Department could provide. NEB. REV. STAT. § 42-910 (1998).

674 See Crosby, supra note 2, at 505.
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I. Introduction

"Any time you go through a process of major social change, you have four stages of response. The first is anger; the second is retribution; the third is grudging acceptance. In the fourth stage, people all of a sudden get it . . . ." [FN1]

While this quote by Donna Lopiano is related to the acceptance of women in sports and the effect of Title IX, it could apply equally to the response of legislatures and courts to domestic violence over the last twenty-five years. Given the historical condonation of such violence by the U.S. legal system, we are indeed going through a process of major social change as we advocate for the same system to take a stand against domestic violence. In the custody arena, laws first allowing, then mandating that courts consider domestic abuse, and most recently creating presumptions against batterers as custodial parents, have met with very mixed results. While some states seem to have made this transition without significant problems, other states have seen a backlash in the courts' response to
such presumptions.

This article will examine the effect of state statutes creating a rebuttable presumption against custody to batterers. Part II will trace the development of these presumption statutes, situating them within historical trends in custody law. Part III will describe the statutes, including how they vary. Part IV will examine how the presumption statutes are being implemented, including the backlash seen in some jurisdictions. Part V will propose solutions to problems with implementation of presumption statutes. These include legislative amendments; training for judges, attorneys, guardians ad litem, mediators, and evaluators; seeking clarification from appellate courts; funding for attorneys for indigent victims of domestic violence; and community organizing. The conclusion, Part VI, notes that while the passage of such statutes is not a "quick fix" to the fundamental problems presented by these cases, the process of enactment and implementation of the presumption statutes is worthwhile, as another step on the long road toward the elimination of domestic violence.

II. Development of Rebuttable Presumption Statutes

A. Historical Custody Standards

Until the 1970s and the advent of no-fault divorce, abuse by one parent of the other was considered quite relevant to custody decisions throughout the United States, as this was evidence of the abuser's poor morals. While the rate of divorce was low, victims of domestic violence were usually awarded custody of the parties' children.

A significant change in custody decisions took place in the 1970s, as most U.S. states amended their divorce laws from fault-based divorce to no-fault divorce. Under the new regime, domestic violence was no longer seen as relevant by divorce courts; judges were trained to look toward the future, not evidence of past misdeeds, and to consider the parents as generally equally qualified to be custodians of children. Unless the children were physically harmed, what a husband did to his wife was not seen as relevant to his ability to parent.

No-fault divorce was generally hailed as a progressive move, both by feminists and by fathers' rights groups. Fathers' rights groups celebrated this as a move away from what they saw as gender bias, whereby mothers were allegedly awarded custody solely by virtue of their sex. However, the emphasis on no longer making findings of fault set the stage for courts refusing to consider domestic violence as a relevant factor in custody decisions. Domestic violence was not seen as affecting the best interests of the child unless the child was also physically abused. And even though the overlap between partner abuse and physical child abuse is great, courts often failed to acknowledge this connection in making custody decisions.

B. Move To Allow, Then Require Courts To Consider Domestic Violence In Custody Decisions

By the 1980's, the domestic violence movement had become a vocal presence, and was developing some sophistication in terms of changing entrenched policies. Advocates began to call for legislators and courts to protect children from batterers. Feminists stressed the harmful effects of exposure to domestic violence on children, and stated that it is not actually possible to be a violent husband and a good father.

At the same time, there was a strong trend toward trying to keep fathers close to their children. Father's rights groups pushed for, and succeeded in getting, legislation stressing the importance of joint custody. Families were no longer seen as "broken," but instead were "in transition," with the goal being that both parents were still involved in their children's lives. In some cases, courts gave fathers more time with their children than they had generally spent with them while living with the children's mother; in these cases the goal was not merely to continue the father/child relationship, but to try to strengthen it.

Legislatures started to respond to both these groups. Some states enacted laws stating that domestic violence could be taken into account in making custody decisions, but leaving the decision up to the judge whether or not to even admit such evidence. Other states went further, actually mandating that judges consider domestic violence.
A few states passed laws stating that perpetration of domestic violence was detrimental to children. [FN18] Others required that judges state their reasons for awarding custody to alleged or proven batterers on the record [FN19] or make findings of fact that joint custody is not detrimental to the children despite the violence, if joint custody were granted in a domestic violence case. [FN20]

Meanwhile, many states were also enacting laws allowing for or preferring joint custody of children. Some states created presumptions favoring joint custody if the parents agreed to it [FN21] or required judges to state their reasons for denying joint custody. [FN22]

In all too many cases, these two trends worked at cross-purposes. Given the high rates of domestic violence in the U.S., especially among divorcing couples, [FN24] there were many cases in *606 which courts were presented with one parent arguing for joint custody and the other parent arguing that the history of domestic violence should preclude such a decision. Starting in 1991, some states resolved this conflict by enacting statutes creating a presumption against custody to batterers. [FN25]

III. Increasing Support for Enactment of Rebuttable Presumptions Against Custody to Batterers

A. Policy Statements

There were several bases for this new trend. The first U.S. national policy statement supporting a rebuttable presumption in domestic violence cases was H. R. Congressional Resolution 172: "It is the sense of Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse." [FN26] While Congress does not have the authority to tell states how to handle custody decisions, this Resolution was intended to encourage states to pass their own statutes establishing such presumptions.

In 1994, the National Council of Juvenile and Family Court Judges released the Model Code on Domestic and Family Violence. [FN27] This Code was developed in conjunction with legislators, the American Bar Association, the American Medical Association, domestic violence experts, prosecutors, and defense counsel over a period of three years. [FN28] Section 401 of the Model Code states:

In every proceeding where there is at issue a dispute as to *607 the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. [FN29]

The American Bar Association (ABA) passed a resolution in August 1989 that joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur. [FN30] In 1994, the ABA published a report to its president suggesting the adoption of statutes creating a presumption against custody to batterers. [FN31] In July 2000 the ABA adopted new policy statements with respect to domestic violence and custody, and recommended that states and lawyers take action to provide for the safety of adult and child domestic violence victims during visitation and visitation exchanges. [FN32]

In 1996, the American Psychological Association also recommended that states adopt such statutes:

In matters of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent. [FN33]

Similarly, the Uniform Adoption Act provides for terminating a father's rights if "the respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the
respondent's behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor . . . " [FN34]

1. Social Science Literature

Another reason statutes establishing a presumption against custody to batterers were enacted was the growing body of social science literature showing the often severe and long-lasting effects of domestic violence on children. [FN35] This literature also argued that joint custody was contraindicated when there has been family violence. [FN36]

3. Mothers Losing Custody

Furthermore, studies and articles started to show that when fathers in general or batterers in particular fought for custody, they usually won. [FN37] There are also many cases in which mothers initially or eventually lost custody due to their inability to get along with the fathers. In some of these, in which there were no allegations of partner abuse, the court first awarded joint custody, then found after awhile that this was unworkable due to continued conflict between the parents. [FN38]

In other cases, there was extensive evidence of partner abuse. The fact that a formerly battered mother and her former batterer are not able to co-parent effectively is not at all surprising. However, it is very unfortunate that many courts are still so unaware of how domestic violence dynamics enter into custody cases. One wonders why the court ever expected people in this situation to suddenly be able to cooperate.

An example of such a case is found in In re Marriage of Devilbiss. [FN39] In that case, the evidence included fifteen police reports, testimony by the daughter that the father used to hit the mother, and allegations that he also choked the daughter. [FN40] However, the court ignored this evidence in its order changing the joint custody order to "rotating custody." [FN41] Under this arrangement, the daughter was ordered to live with her mother for seven months each year and with her father for five months. [FN42] The court noted that the parents had not been able to cooperate as required by the joint custody order. [FN43] Another example is found in Canty v. Canty, [FN44] in which the trial court modified the joint legal and split physical custody award to sole physical custody with the father, in spite of his admitting that he had committed domestic violence on the mother. [FN45] The appellate court upheld this order, noting that the evidence of domestic violence was merely one factor in the best interests analysis. [FN46]

In all too many cases, batterers are in effect using the family courts to re-victimize their victims. [FN47] Instead of preventing this, courts sometimes collude with this behavior by awarding the batterer joint custody, sole custody, or extensive unsupervised visitation. While examining appellate cases decided in states without such a presumption or before the enactment of the presumption is beyond the scope of this article, it is noteworthy that in many such cases judges clearly ignored extensive histories of domestic violence in making custody decisions. [FN48]

IV. Description of Statutes Establishing Presumptions Against Custody to Batterers

A. Overview

In response to the growing body of policy statements, studies, articles and cases, states started to adopt statutes establishing a rebuttable presumption against custody to batterers. [FN49] As of January 2001, there were sixteen states plus the District of Columbia which had adopted such statutes. [FN50] In the summer of 2001, Texas passed legislation strengthening its statute, creating a rebuttable presumption against joint custody, sole custody, or unsupervised visitation in cases of child abuse, child neglect, or partner abuse, including sexual abuse resulting in the birth of the child. [FN51] Additionally, at this point, three states have adopted presumptions
against joint custody in domestic violence cases or considered the perpetration of domestic violence stronger than a factor, but do not actually state a presumption against awarding custody to the abusive parent. [FN52]

These twenty states plus the District of Columbia are a subgroup of the forty-eight jurisdictions that had adopted some type of legislation regarding domestic violence as a custody factor by the beginning of 2001. [FN53] The only states without any statute discussing this issue as of that date were Connecticut, Mississippi, and Utah. [FN54]

The presumption statutes vary greatly, in terms of 1) whether the presumption applies to all types of custody or only to joint custody; 2) how domestic violence is defined, that is what type of evidence is required to trigger the presumption; 3) what evidentiary standard is required to trigger the presumption; 4) what type of evidence is required to rebut the presumption; and 5) what evidentiary standard is required to rebut the presumption. They also vary in terms of what the court is to do if both parents appear to have been abusive, and what standard should be applied if the presumption is found inapplicable.

**614 B. Presumption Applicable Only to Joint Custody**

Some presumption statutes apply only to decisions regarding joint custody. In a few of these states, the presumption against joint custody to the abuser is coupled with a presumption favoring joint custody in the absence of abuse. [FN55] The District of Columbia Code provides that there is a rebuttable presumption that joint custody is not in the best interest of the child if the court finds by a preponderance of the evidence that an intra-family offense has occurred. [FN56] It also provides for a rebuttable presumption favoring joint custody unless the court finds by a preponderance of the evidence that an intra-family offense has occurred. [FN57] Similarly, section 32-717B of the Idaho Code states that there is a presumption that joint custody is not in the best interests of a minor child if the court finds that one of the parents is a habitual perpetrator of domestic violence. [FN58] It also contains a presumption that joint custody is in the best interest of the child absent a preponderance of the evidence to the contrary. [FN59] This type of provision is not very beneficial for victims of domestic violence, since even if the presumption against joint custody is rebutted through evidence of abuse, the victimized parent must still prove to the court that it is in the best interests of the child to be placed with him or her rather than with the abusive parent.

A particularly problematic statute is found in Minnesota, which contains a similar provision, but applicable only to joint legal custody. [FN60] Minnesota Statute section 518.17 includes a rebuttable presumption that joint legal custody is not in the best interests of the child if domestic abuse has occurred between the parents. [FN61] However, the same code section states that there is also a rebuttable presumption that joint legal custody, if requested by either or both parties, is in the best interests of the child. [FN62] Clearly there will be many cases in which these two policies conflict, especially when the abusive parent can trigger the presumption favoring joint legal custody merely by requesting it. Case law demonstrating how courts have resolved this dilemma will be discussed below. On the other hand, the Minnesota statute does state that if the court awards joint custody, it must make detailed findings of fact on each of the best interest standards. [FN63]

**C. Presumption Applicable to Sole or Joint Custody**

Most of the presumption states have no contrary presumption favoring joint custody in the absence of domestic violence or when requested by a parent. Statutes stating that the presumption applies to sole or joint custody to a perpetrator are in effect in Alabama, Arizona, California, Delaware, Florida, Hawaii, Iowa, Louisiana, Massachusetts, Nevada, North Dakota, Oklahoma, Oregon, Texas, and South Dakota. [FN64]

**D. What Triggers the Presumption?**

Statutes vary in terms in how they define domestic violence and what standard of proof is required in order to trigger the presumption against awarding custody to an abuser. Several states define domestic violence by cross-referencing other statutes, such as a state's restraining order statute. [FN65] It is important to take note whether these
statutes include threats of physical harm, or only actual physical harm. Also note that the statutes tend to leave out other types of batterer behavior which are intended to dominate and control victims, such as emotional abuse, sexual abuse, financial abuse, and property abuse, all of which may be intended to dominate and control the victim. [FN66]

In terms of standards of proof, in some states, the statute merely provides that there must be a "finding of domestic violence," [FN67] or "credible evidence of domestic violence." [FN68] A few statutes specify that the standard will be the lowest possible, the *616 preponderance of the evidence. [FN69] Other states require the standard of "clear and convincing evidence" of domestic violence. [FN70] Wisconsin requires evidence of a crime of inter-spousal battery or abuse, as defined in the statute providing for civil protective orders. [FN71] However, actual conviction is not required in this state before the presumption is triggered.

Some states require that the domestic violence have occurred more than once. For example, Idaho requires that the abuser be a "habitual perpetrator" before the presumption is triggered. [FN72] Iowa requires "a history of domestic abuse," [FN73] and Oklahoma requires "ongoing domestic abuse." [FN74] In several states, there must be either a pattern or history of abuse, or at least one serious incident before the presumption is triggered. These include Louisiana, Massachusetts, and North Dakota. [FN75]

The highest standards of proof are found in states requiring that the abuser first be convicted of a domestic violence crime. [FN76] As stated above, Nevada's presumption can be triggered by clear and convincing evidence of domestic violence; alternatively, it can be triggered by a conviction of sexual assault or first-degree murder of the other parent. [FN77]

Setting the standard for triggering the presumption high will *617 of course exclude many domestic violence cases, in which there has been only one incident of abuse, and no conviction. In many relationships, one incident of abuse can be sufficient to dominate and control the victim throughout the relationship. This can occur when the batterer uses the incident to warn and remind the victim of what can happen. [FN78] Of course, children who are aware of the abuse by one parent toward the other can also be traumatized by one incident. [FN79]

However, in some cases the high standards enumerated here were narrowly drafted to account for the possibility that some abused parents might use violence in self-defense or to protect children, in which case the presumption was not designed to apply. [FN80] As will be seen in the discussion in Part IV, in states with lower standards for triggering the presumption, such actions by the abused parent may be seen as nullifying the presumption. In drafting the language of such statutes, legislators and advocates must always engage in balancing tests, weighing the benefits of a lower standard for triggering the presumption against the danger to victims who fight back.

E. Cases In Which Both Parents Have Engaged in Domestic Violence

Some of the presumption statutes address situations in which both parents appear to have engaged in abuse. In at least one state, Louisiana, the statute contains a "primary aggressor" [FN81] provision. This directs the court to determine which of the parents is the main or dominant aggressor, and to ascertain whether one of the parents was actually acting to defend herself or himself or another person, such as the child. [FN82] The North Dakota Supreme Court has developed such a concept through its decisions interpreting the presumption. [FN83] In other states, the statute provides *618 that if both parents are found to have committed domestic violence, the presumption against the abuser does not apply. [FN84]

Given the likelihood that both parents will be found to be abusers in states with low standards for triggering the presumption, it would probably be advisable to amend these statutes to provide for a primary or dominant aggressor analysis. This is similar to the analysis which law enforcement uses in some states when determining which party to arrest. [FN85]

F. Rebutting the Presumption
The statutes also vary in terms of what is necessary in order to rebut the presumption. Most states do not specify what is required for rebuttal, which does not give courts any guidance. A few states specify the evidentiary standard required, but do not list actual factors for consideration, which also leaves the court having to create its own standards from case to case. [FN86]

Other states list specific factors that the court must consider in finding that the presumption has been rebutted. [FN87] For example, California states that the court must consider 1) whether the perpetrator has shown that it is in the best interest of the child to be in the custody of that parent; 2) successful completion of a batterer's program; 3) successful completion of a program for alcohol or drug abuse if found appropriate by the court; 4) compliance with court orders and with probation and parole conditions, if applicable; and 5) whether there has been any further violence. [FN88] The Arizona [FN89] and Delaware factors are virtually identical to this. [FN90] Louisiana requires the successful completion of a treatment program for batterers, refraining from abuse of alcohol *619 or illegal drugs, and demonstrating that the absence or incapacity of the abused parent or other circumstances are such that custody granted to the perpetrator is in the best interests of the child. [FN91] Its statute also directs the court to give sole custody to the parent who is least likely to continue perpetration of family violence. [FN92]

As noted previously, Wisconsin has a presumption only against joint legal custody in domestic violence cases. [FN93] In order to rebut this, there must be clear and convincing evidence that the perpetrator will not interfere with the abused party's ability to cooperate in future decision-making. [FN94]

G. If the Presumption is Found Inapplicable or Rebutted

If the presumption is found inapplicable or rebutted, then the parties may still have the benefit of statutes requiring that domestic violence be considered in custody decisions. [FN95] Legislatures are strongly encouraged to enact such statutes, so that the issue of domestic violence does not disappear from the custody decision. In the absence of such statutes, the court applies the general best interest of the child standard and the parties are on a level playing field. This may be very problematic for the battered parent, who then still has to convince the court that the child has been adversely affected by the abuse, or that there is ongoing danger to the victim parent or child.

H. Case Study: Development of the Presumption in California

While California was not the first state to adopt a rebuttable presumption statute, the history of its legislation is a useful example of a "step by step" approach. Like many other states, California attempted several different versions of its custody statutes before passing a statute establishing a presumption against custody to batterers.

California was the fifteenth state to adopt such a presumption statute, which took effect January 2000. [FN96] This legislation, A.B. *620 840, [FN97] was carried by Speaker Pro Tem Sheila Kuehl, a long-time advocate for victims of domestic violence. [FN98] The California Alliance Against Domestic Violence (C.A.A.D.V.) sponsored the bill. [FN99] Supporters included medical groups, law enforcement, prosecutors, Boards of Supervisors, many women's groups, the California State PTA, and numerous domestic violence organizations. [FN100] Opposition included the California Judges Association, the Judicial Council, the Family Law Section of the State Bar, and the Coalition of Parent Support, a father's rights group. [FN101] This legislation was based on the Model Code. [FN102] Kuehl had been a member of the national task force which wrote that Code.

A.B. 840 was preceded by two bills, both of which were carried by Assemblywoman Kuehl. A.B. 800, introduced in 1996, died in the Senate Judiciary Committee, and A.B. 200, introduced in 1997, was amended in that same committee to remove the rebuttable presumption language. A.B. 200, amending Family Code sections 3011 and 3020, was effective January 1998. [FN103] Among other provisions, these sections now mandate that judges prioritize the child's health, safety, and welfare over the policy favoring frequent and continuing contact with each parent after separation. [FN104] They also require judges to make written findings of fact or statements on the record as to why they are awarding custody to an alleged perpetrator of domestic violence or child abuse, or to an alleged substance abuser. [FN105]
A.B. 840 created a new code section, Family Code section 3044. [FN106] Subdivision (a) describes how a victim of domestic violence raises the presumption. [FN107] There are several limitations. First, the incident must have occurred within the last five years. [FN108] Second, the presumption is triggered only by incidents in which the victim was the other person seeking custody of the child, the child, or the child's siblings. [FN109] Third, the court must make a finding that domestic violence occurred, so that allegations alone do not trigger the presumption. [FN110] If the court makes such a finding, the burden of proof then shifts to the perpetrator to prove why it is in the best interests of the child to be in his or her custody. [FN111] All types of custody are specifically included, whether legal or physical, sole or joint. [FN112] However, the new code section does not address visitation. [FN113]

Subdivision (b) of Family Code section 3044 describes how the perpetrator can rebut the presumption, clarifying that the standard of proof is a preponderance of the evidence, and listing several factors that the court is directed to consider in making this determination. [FN114] According to subdivision (c) the presumption does not apply if both parents are found to have perpetrated domestic violence. [FN115] This subdivision had originally provided for a "primary aggressor" analysis, cross-referencing the California Penal *622 Code's definition of that term, [FN116] but was amended in the Senate Judiciary Committee to delete that provision. Subdivision (d) defines domestic violence, using the same standard as is used in Family Code section 6320 for obtaining a Domestic Violence Restraining Order. [FN117]

I. Effects of Presumption Statutes

1. Overview

How are these statutes working? Are they accomplishing the objectives of the legislators who authored them and the groups who supported them? Is implementation uniform or uneven? Do presumptions against custody to batterers mean that family courts now are giving domestic violence the weight it deserves? Is there a backlash in some jurisdictions, and if so, what does it look like? In attempting to answer these questions, this section will look at appellate cases, [FN118] articles by commentators, surveys, and anecdotal comments from advocates, attorneys, judges, and academics in the presumption jurisdictions.

Appellate cases from the jurisdictions with such a presumption indicate that in general it appears to be useful. [FN119] However, there *623 are some problems with implementation found in the appellate cases. These include a lack of guidance for judges as to what factors should be considered in determining whether the presumption has been raised or overcome.

The jurisdictions will be discussed in roughly the order in which they adopted the rebuttable presumption, with the most experienced jurisdictions first, followed by those which have moderate experience with this statute, and finishing with jurisdictions where the presumption is very new. Looking at the jurisdictions in rough chronological order is useful in determining whether the initial problems presented by the enactment of such statutes, if any, are eventually resolved over time.

2. Jurisdictions With Many Years Experience Applying the Presumption

a. North Dakota

North Dakota has by far the most reported appellate decisions applying the rebuttable presumption, having enacted its first such statute in 1991. [FN120] Notably, the statute has been amended several times in response to some of these decisions. [FN121] While the North Dakota Supreme Court has had to restate the basic rules many times (for example, that the trial courts must make findings as to whether domestic violence occurred), it appears that the statute is effective in ensuring that domestic violence is taken seriously in custody decisions.

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The first North Dakota case decided under the new presumption was Schestler v. Schestler. [FN122] In this case, the wife's evidence of domestic violence by the husband was found to have triggered the presumption. [FN123] However, the court then held that *624 the husband had rebutted the presumption. [FN124] This holding was upheld by the Supreme Court, which stated that domestic violence had no priority over the other best interest factors. [FN125] Thus the presumption could be rebutted by the customary weighing of those factors. A strong dissent by one of the justices argued that this interpretation of the statute rendered the new law meaningless. [FN126] This dissent was later quoted with approval in several North Dakota Supreme Court cases. [FN127]

As a result of this decision, the statute was amended the following year, 1993, to clarify that the presumption could be rebutted only by showing clear and convincing evidence that the best interests of the child require the perpetrator to be the custodian. [FN128] This raised the evidentiary standard from the previous one, which had required only "credible evidence" for rebuttal. [FN129] However, at no time has the statute given courts guidance in terms of what is necessary to rebut the presumption. The courts have had to determine this on a case by case basis.

The amended statute produced a great number of appellate decisions in the following few years. In 1995, the North Dakota Supreme Court decided five cases on this topic, three of which dealt with rebuttal issues [FN130] and two with what triggers the presumption. [FN131]

In Heck v. Reed, [FN132] the first case decided in 1995, the court stated that the rebuttal of the presumption requires compelling or exceptional circumstances demonstrating that the best interests of the child require custody to be placed in perpetrator. [FN133] Thus, the trial court may not consider the absence of abuse directed at the children as a factor rebutting the presumption. The court discussed the negative effect of domestic violence on children even *625 if they are not directly abused. [FN134] Furthermore, there was no evidence that the father had gone to counseling or was no longer violent. [FN135]

Next came Krank v. Krank, [FN136] in which the court addressed the issue of what level of violence is necessary to raise the presumption, with the high court holding that a single act could do this. [FN137] The court reversed an award of joint legal custody and sole physical custody to the batterer father. [FN138] It remanded the case for findings on whether the alleged domestic violence had occurred. [FN139] This analysis was necessary in order to respond to the allegations of mutual violence. [FN140] The court stated that if one parent were the more significant abuser, the presumption should apply only to that parent, but if both parties were equally violent, the court should apply the general best interest factors. [FN141]

In Helbling v. Helbling, [FN142] the court found that the presumption had been raised and not rebutted. [FN143] The appellate court reversed the award of custody to the batterer father and remanded the case. [FN144] Since both parties had alleged violence by each other, the high court directed the trial court to determine which one was the most significant abuser. [FN145] Only in Ryan v. Flemming, [FN146] did the court find that the presumption had not arisen at all, even though the father admitted having broken a flower pot and tearing the phone out of the wall. [FN147] The court stated that because the incident resulted in no injury to the mother, and was isolated and remote in time, it did not trigger the presumption. [FN148] In Bruner v. Hager, [FN149] the *626 trial court's award of custody to the batterer father was reversed, with the court stating that now domestic violence is the paramount factor in a custody decision where such violence has occurred. [FN150] Similar to the holding in Heck v. Reed, [FN151] the North Dakota Supreme Court stated that the father's cessation of substance abuse in Bruner and fact that he had not physically abused the children did not rebut the presumption. [FN152]

The following year the North Dakota Supreme Court decided five more cases interpreting this statute. In the first, Owan v. Owan, [FN153] there were allegations of mutual violence; the high court directed the trial court not to rely on the father's expert witness to assess his trial testimony, but instead to make its own findings as to whether domestic violence had been perpetrated or not and by whom. [FN154] In Engh v. Jensen, [FN155] the high court again reversed the trial court, which had also awarded custody to the batterer father. [FN156] The high court explained that the father's mere separation from the mother was insufficient to rebut the presumption. [FN157] In Anderson v. Hensrud, [FN158] the court held that the presumption is not confined to situations in which a parent or child is the direct victim of the domestic violence, since the statute defines domestic violence to include any family or household member. [FN159] In Kraft v. Kraft, [FN160] the appellate court held that domestic violence by the
mother's fiance, who lived with the mother and her children, could potentially rebut the presumption against custody to the father, who had been violent toward the mother in the past. [FN161] In Ternes v. Ternes, [FN162] one parent's attempt to show that the other parent was violent was not raised at the trial court level, thus was not something the high court could address. [FN163]

*627 The North Dakota statute was most recently amended effective April 3, 1997 as an emergency measure. [FN164] The amendment provided that the presumption could be triggered if "there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding." [FN165]

The North Dakota Supreme Court also produced five cases about the rebuttable presumption in 1997. Kluck v. Kluck, [FN166] the first case that year, involved allegations of mutual abuse. [FN167] The high court upheld the trial court's assessment that one parent's violent conduct was significantly greater than the other's. [FN168] In Zuger v. Zuger, [FN169] the high court reversed a joint custody award where the presumption had been raised and had not been sufficiently rebutted. [FN170] The high court stated that the trial court's finding that the victim parent was over-protective, that the violence would not occur again, and that the violence was not directed at the children was insufficient to rebut the presumption. [FN171]

In Dinius v. Dinius, [FN172] the high court applied the new amendment and held that the acts of domestic violence were too remote in time and too minor to trigger the presumption. [FN173] In Zimmerman v. Zimmerman, [FN174] the high court again reversed the trial court and remanded the case because the trial court had failed to determine which parent had been the more significant abuser. [FN175] In Huesers v. Huesers, [FN176] the high court also reversed the trial court, which had refused to consider the new amendment. [FN177] It held that the trial court should use the new amendment as a guide to determine whether pre-amendment conduct was sufficient to *628 invoke the presumption. [FN178]

In 1998, two cases on this topic were published. In Kasprowicz v. Kasprowicz, [FN179] the high court reversed the trial court, giving two reasons. [FN180] First, the high court reversed and remanded because the trial court failed to make a factual finding in support of their decision to grant rotating custody. [FN181] In addition, the court also reversed and remanded the trial court to apply the amended presumption statute if applicable. [FN182] In Carver v. Miller, [FN183] the high court upheld the trial court's finding that the presumption against the batterer father had been rebutted by the mother's drug use and exposure of the child to a drug-related atmosphere. [FN184]

In 1999, the Supreme Court returned to its earlier volume of cases, issuing five rebuttable presumption decisions. In three of these, the presumption was found inapplicable because the standard for triggering it established in the 1997 statutory amendment was not met. [FN185] In the first, Reeves v. Chepulis, [FN186] the high court upheld the trial court's award of custody to the father. [FN187] While there was one episode of domestic violence by the father, it did not rise to the level required to trigger the presumption. [FN188] In Green v. Green, [FN189] the court reiterated that clear and convincing evidence was required to rebut the presumption. [FN190] In Schumacher v. Schumacher, [FN191] there were allegations of mutual abuse. [FN192] The court held that even though the wife had slapped the husband twice, his violence against her was worse, thus triggering the presumption against him. [FN193] In Holtz v. Holtz, [FN194] the court held that *629 the presumption also applied to dating relationships, cohabitants, and former cohabitants. [FN195] In Brown v. Brown, [FN196] the high court upheld the trial court's finding that the presumption had not been triggered where there were allegations of mutual abuse. [FN197] Neither party was seriously injured and neither party's behavior established a pattern sufficient to trigger the rebuttable presumption. [FN198] The high court further stated that "[d]omestic violence under [the] statute does not include name-calling." [FN199]

In 2000, the court decided only two cases in which the presumption against custody to perpetrators was at issue. In Cox v. Cox, [FN200] the court held that the wife's evidence of domestic violence by the husband was insufficient to trigger the presumption, in spite of evidence that he had hit her car once and bruised her in several places another time. [FN201] The court stated that it did not find most of her allegations credible. [FN202] In Tulintseff v. Jacobsen, [FN203] the court interpreted the phrase "reasonable time proximate to the proceeding," a prerequisite to raising the presumption under current statute, if there is no evidence of use of a dangerous weapon or serious bodily

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injury. [FN204] The trial court held that abuse which had occurred three or more years before the wife filed a request to modify joint custody to sole custody was too remote to raise the presumption. [FN205] This was upheld by the Supreme Court. [FN206]

*630 So far, the North Dakota Supreme Court has decided only one case on point in 2001, Hurt v. Hurt. [FN207] In that case, the court upheld the custody award to the wife, based partly on the history of domestic violence. [FN208] Notably, the trial court rejected the recommendation of the guardian ad litem. [FN209] With no explanation, the trial court found that the presumption was not triggered even though the wife had obtained orders of protection and had taken the children with her to a domestic violence shelter twice, shortly before filing for divorce. [FN210] The appellate court did not reverse this finding. [FN211] Since the presumption was not raised, the domestic violence by the husband was considered as part of the best interest analysis, along with an overall assessment of each party's parenting abilities. [FN212]

Overall it is clear that the presumption statute has been taken seriously in North Dakota. It is also clear that frequent appellate review is key to actually changing trial court practices.

b. Louisiana

Louisiana adopted the rebuttable presumption in 1992, with very mixed results. In the first case to interpret the statute, Simmons v. Simmons, [FN213] the appellate court held that a single past act of violence is not a "history of perpetrating family violence," which would have triggered the statutory presumption against the award of custody to a perpetrator. [FN214] The court reasoned that this determination must be based on a review of the total circumstances of the family and involves the weighing of evidence. [FN215] In this case, *631 the appellate court agreed that the trial court did not err in refusing to apply the presumption. [FN216] The wife claimed that she had needed both police and medical assistance as a result of the husband's violence but could document only one incident. [FN217] The husband stated that the abuse had never taken place in front of the children and was provoked by the wife's adulterous affair. [FN218] The husband was upheld as the primary domiciliary parent, principally because he was more stable geographically. [FN219]

In Michelli v. Michelli, [FN220] decided later that same year, another circuit of the appellate court held that the family violence does not have to have been frequent or continuous before the presumption is triggered. [FN221] In that case, the trial court had held that the presumption was not triggered in spite of evidence of numerous incidents of physical abuse by the husband, some of which were documented and witnessed by third parties. [FN222] The trial court referred to the abuse as mutual "family fights," discounting evidence that the wife was defending herself. [FN223] However, this time the appellate court disagreed, holding that it was reversible error not to allow the wife to submit a proffer of evidence concerning the criminal charges against the husband, [FN224] and that the trial court should have found that the presumption was triggered by the evidence of the many incidents of abuse. [FN225]

Subdivision (A) of the statute was amended in 1995 to clarify that a history of perpetrating family violence means either one incident resulting in serious bodily injury or more than one incident. [FN226] This was presumably a response to the Simmons holding.

Two years later, the Louisiana Court of Appeal decided Morrison v. Morrison. [FN227] The court upheld the award of provisional custody to the mother, based on the presumption. [FN228] The court *632 found that both parents had a history of perpetrating family violence. [FN229] However, the court additionally found that the mother was less likely to continue to do so than was the father. [FN230] This is a statutory consideration. [FN231] However, the court remanded the case so that the trial court could order the mother to participate in and complete a treatment program, due to her history of violence toward the father, as required by statute. [FN232] The final decision was contingent on the mother's completing this program. [FN233]

The following year, the Louisiana appellate court decided Raney v. Wren. [FN234] In that case, the trial court ordered that the parents have joint custody, with the father as the domiciliary parent. [FN235] In her motion to modify the ruling, filed a year later, the wife alleged that she signed the original consent judgment only because of

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the husband's abusive behavior and threats. [FN236] However, her motion was denied by the trial court. [FN237] The trial court found that the earlier abuse was not relevant and that her allegations were not credible, thus the presumption against custody to batterers was inapplicable. [FN238] The trial court stated that it preferred the father as custodian because he was more stable geographically. [FN239] The appellate court upheld the custody order. [FN240] A concurring judge argued that it was error to exclude evidence of the father's domestic violence, as this was relevant to his fitness as a parent regardless of whether it took place before or after the stipulated order. [FN241] However, even this judge felt that the exclusion was *633 harmless error. [FN242]

In 1999, the court of appeals decided Hicks v. Hicks [FN243] and McGee v. McGee. [FN244] In the Hicks case, the award of joint custody with the husband having primary custody during the school year was reversed due to the trial court's failure to comply with the presumption. [FN245] In spite of uncontroverted evidence of severe domestic violence by the husband, the trial court did not apply the presumption statute, instead the court used a best interests analysis. [FN246] In reversing this, the appellate court also explicitly rejected language from the Simmons [FN247] court. [FN248] The Simmons court had added two more factors to the statutory language: 1) whether the violence occurred in the presence of the children, and 2) whether the violence was provoked. [FN249]

In McGee, [FN250] using a best interests analysis, the same court upheld the trial court's award of joint custody with the husband having primary custody. [FN251] The court stated that a single specific incident of family violence was insufficient to trigger the presumption. [FN252] There were allegations of mutual abuse. [FN253] Both parties were arrested during one incident, but apparently neither was actually injured and thus not meeting the statutory requirement that there be serious bodily injury if there was only one incident.

The following year the appellate court decided Harper v. Harper. [FN254] This time, based on a best interest analysis, the award of sole custody to the mother was upheld. [FN255] The father had not abused the mother since they separated very early in the relationship. [FN256] However, the father had been physically abusive to his prior wife and children. [FN257] Without explanation, the appellate court *634 did not mention the presumption against custody to perpetrators, even though it is not limited to abuse against the other parent or the child whose custody is at issue. [FN258] The court considered the statutory presumption favoring joint custody, though it found that the mother had overcome this, based partly on the father's history of violence and partly on his failure to establish a relationship with the child. [FN259] The fact that the court would even consider awarding joint custody to a batterer and child abuser is, of course, cause for great concern.

The most recent Louisiana case on point is Lewis v. Lewis. [FN260] In this case the presumption was key to the holding. The trial court had found that the husband abused the wife. [FN261] Nonetheless, the trial court awarded the parties joint custody, with the husband as primary domiciliary parent, refusing to apply the provisions of the presumption statute. [FN262] The appellate court held that the refusal was reversible legal error, noting that the husband had admitted to having abused the wife on more than one occasion. [FN263] The court used this fact to distinguish the case from Simmons [FN264] and triggered the presumption. [FN265] The husband had also alleged that the wife was violent towards him. [FN266] However, the appellate court held that the abuse had occurred on only one occasion, did not result in serious injury and thus did not trigger the presumption. [FN267] It further held that the husband had not rebutted the presumption, awarding the wife custody and the husband supervised visitation until he satisfied all the statutory requirements. [FN268] Both parents were ordered to complete parenting classes. [FN269]

*635 3. Jurisdictions With A Moderate Amount of Experience Applying the Presumption

a. Jurisdictions with No Appellate Cases

In many of the jurisdictions that have had the presumption for some years, there is not yet any appellate law involving custody cases with allegations of abuse from one adult partner toward another. These jurisdictions include the District of Columbia, Hawaii, Idaho, and South Dakota. However, advocates in three of these have commented on their experience with the statutes.
(1) District of Columbia

The presumption in the District of Columbia applies only in cases where the court is considering an award of joint custody. [FN270] One attorney specializing in domestic violence family law cases there stated that batterers are now going to court quickly to file for civil protective orders in order to benefit from this presumption. [FN271] She also reported that batterers are zealously opposing such orders in order to prevent the court from finding that the presumption has been triggered. [FN272] She noted that if the court finds that this presumption has not been raised, the court then applies another presumption, favoring joint custody. [FN273]

A clinical professor at Georgetown University Law School stated that while the statute [FN274] requires judges to give written statements specifying factors and findings supporting custody to batterers, she believes that this section is "usually ignored." [FN275] In any event, she was not sure that an appellate decision requiring judges to make such findings would actually alter the outcomes, given the frame of mind of the trial court judges. [FN276]

*636 (2) Hawaii

Hawaii adopted its presumption statute in 1996. [FN277] A lawyer specializing in domestic violence family law cases says that the judicial response has been quite mixed. [FN278] While there have been no problems regarding the issuance of restraining orders, if the batterer agrees to the order, no finding of domestic violence is made. [FN279] When findings are made, the issue of the violence is usually not re-litigated in the later divorce proceeding, but the impact the violence has had on the children often is. [FN280]

In terms of what is required to rebut the presumption, some judges require the batterer to have had "a major turnaround," or evidence that the victim is an active drug user or has a mental illness. [FN281] Other judges take the position that if the batterer has not hit anyone recently and has taken some classes for batterers he has overcome the presumption. [FN282] One of the main problems is that the guardians ad litem do not apply the new statute correctly, and often see the presumption as very easily rebutted. [FN283] The judges tend to place great weight on the recommendation of these guardians. [FN284]

However, according to this attorney, victims of domestic violence who have competent counsel have a great success rate in terms of getting custody, often at the settlement stage. [FN285] On the other hand, unrepresented litigants and those with attorneys who think domestic violence is not that relevant to custody do poorly. [FN286]

The attorney also noted that the statute used to include a provision that if the judge awarded custody to a perpetrator, he or she had to make written findings regarding how the presumption was overcome and how the safety of the adult victim and the *637 children had been considered. [FN287] With no notice to the public or opportunity to comment, this provision was mysteriously removed when the statute was amended for some other purpose. [FN288] While the advocates have been trying to get the provision reinstated, the judges' association testified against this legislation, saying it would create too much work for them. [FN289]

(3) South Dakota

South Dakota passed its presumption statute in 1997. [FN290] The Director of the South Dakota Coalition Against Domestic Violence and Sexual Assault reported that they have had better luck with the law than anticipated. [FN291] While there are still major problems with custody cases involving domestic violence, the situation is better than before. [FN292] Like many of the respondents around the country, this advocate reported that it is hard to get the judges to come to training on domestic violence. [FN293] She noted that there must be a conviction before the presumption is triggered, and there are few convictions since the prosecutors tend to agree to "deferred prosecution." [FN294] But overall the law is working, and the Chief Justice of the South Dakota Supreme Court has been proactive on domestic violence issues generally, setting a positive tone. [FN295]
b. Jurisdictions With Appellate Cases

In several of the states where the presumption has been in effect for a few years, appellate courts have interpreted the *638 presumption, with very mixed results. These include Alabama, Delaware, Florida, Iowa, Massachusetts, Minnesota, Nevada, and Oklahoma.

(1) Alabama

Alabama enacted a rebuttable presumption statute effective July 31, 1995. [FN296] The statute appears to have had a significant effect, judging from the outcome of the appellate decisions.

Most of the cases citing the statute emphasize the need for trial courts to make written findings regarding any allegations of abuse so that the appellate courts can determine whether the presumption has been triggered, and if so, whether it has been rebutted. [FN297] So far this has occurred in six cases; in all of these, the trial courts had awarded primary physical custody to the fathers, all of whom were allegedly batterers, but the appellate courts reversed and remanded the cases. [FN298]

However, in the most recent case on point in Alabama, Ex parte Fann, [FN299] the Alabama Supreme Court held that it was not automatic grounds for reversal for the trial court to fail to make a finding on the record as to whether domestic abuse had in fact occurred. [FN300] In the process, the high court overruled Fesmire v. Fesmire. [FN301] While the high court agreed that such a finding is useful so that the appellate court can determine whether the trial court actually applied the appropriate statute, it characterized the failure to make such a finding as harmless error. [FN302] The high court stated in its reasoning that the statute itself did not specifically require such a finding, nor *639 did it actually require that the trial court state any reason for its order. [FN303] The state supreme court also stated in dicta that there were many factors besides domestic violence committed by a parent which should be given great weight in custody determinations but which were not mentioned in the custody statute. [FN304]

The Alabama appellate court has also addressed other issues presented by the statute. The first case to mention the new statute was Kent v. Green, [FN305] in which the appellate court upheld the custody award to the father in spite of his history of violence toward the mother. [FN306] At one point the mother had to be hospitalized due to the father's choking her. [FN307] Applying a best interests test, the majority opinion did not mention the new statute, which had become effective after the action was filed. [FN308] The majority stated that the father was unlikely to be violent in the future, and that the violence had not been directed toward the child. [FN309] The dissent argued that it was an abuse of discretion to award custody to the father and not to appoint a guardian ad litem. [FN310] Additionally, given the enactment of the new statute, which arguably could apply, it argued that the case should be remanded to the trial court. [FN311]

The following year the appellate court decided Jackson v. Jackson, [FN312] the first Alabama case in which the presumption against custody to a batterer was applied. [FN313] The trial court awarded joint custody based on a statutory preference for this. [FN314] The court did not mention the new domestic violence statute and concluded that the parents were equally fit. [FN315] The appellate court held that because the domestic violence statute was more specific than the joint custody statute, the former controls. [FN316] Thus in domestic violence cases, the court may not consider joint custody unless the *640 perpetrator has rebutted the presumption against custody to him or her. [FN317] Since the wife's evidence had raised the presumption, the case was reversed and remanded to determine whether the husband could rebut it. [FN318]

In 1998, the appellate court decided Harbert v. Harbert, [FN319] in which both parents sought to modify the split custody arrangement. [FN320] Three years after their divorce, the mother was granted a restraining order based on the father's recent abuse of her. [FN321] At the subsequent custody hearing, the trial court refused to hear the children's testimony or to accept an offer of proof. [FN322] It then granted the father's request for joint custody. [FN323] The appellate court held that this was reversible error, as was issuing the restraining order without making a finding that abuse had or had not occurred. [FN324] It also reminded the trial court that joint custody could not be
awarded in domestic violence cases until the perpetrator had rebutted the presumption against custody to him. [FN325]

The following year the court decided E.M.C. v. K.C.Y., [FN326] involving a modification of a joint custody order with primary physical custody to the father. [FN327] The trial court granted the mother's request to modify this to sole custody to her. [FN328] The father was not only abusive to the mother and child, but also had a violent outburst in court. [FN329] Citing the statutory presumption against custody to batterers, the appellate court held that joint custody was not in the best interest of the child, and that the father should not even be allowed visitation until he receives "professional counseling." [FN330]

More recently the Alabama appellate court decided Howard v. *641 Howard, [FN331] in which the mother was given custody and the father appealed. [FN332] The appellate court upheld the trial court's findings. [FN333] The appellate court held that the absence of written findings of abuse was at most harmless error, as the record showed that the father had abused her and the children, and there were no allegations that the mother had committed abuse. [FN334] The dissent argued that findings were still required in the event that the father later filed for modification and in order to determine whether the children and mother were adequately protected by the visitation order. [FN335] The same result occurred in Ex Parte Fann, [FN336] the first case in which the Alabama Supreme Court addressed the issue of the presumption statute. In that case, the court held that lack of a finding on the issue of abuse was not automatic grounds for reversal.

(2) Delaware

There appear to be only two cases interpreting the Delaware presumption statute, both quite recent, and in both of which the statute was determinative. The first is a trial court case, J.D.E. v. C.K.W., [FN337] in which the custodial mother sought to relocate to another state. [FN338] Her new husband and their children had already moved there due to the husband's job. [FN339] The father, who had visitation, had been convicted of assaulting the mother, thus triggering the presumption. [FN340] However, he had not completed the program for perpetrators necessary to rebut it, nor had he demonstrated extraordinary circumstances that warrant the rejection of the presumption. [FN341] Therefore, the court held that the presumption controlled and allowed the mother to move. [FN342] The court stated that once the father had completed the batterers' *642 program, a full hearing would be scheduled. [FN343]

The other case, Webb v. Pfusch, [FN344] was decided by the Delaware Supreme Court. [FN345] In Webb, the father's visitation rights had been suspended by a one-year restraining order. [FN346] The mother was granted sole legal custody and primary residential custody. [FN347] The father had pled guilty to burglarizing the mother's residence and assaulting her, but claimed that her testimony at the custody hearing was false. [FN348] In a very brief opinion, the Delaware Supreme Court upheld the trial court's decision, citing to the presumption statute, and holding that there was no merit to any of the father's contentions. [FN349]

(3) Florida

Florida's rebuttable presumption statute, [FN350] enacted in 1995, has resulted in only four appellate decisions. [FN351] This statute requires evidence of a felony conviction before the presumption is raised and thus is rarely invoked. [FN352] Judging by both appellate cases and comments from attorneys practicing in the state, the statute appears to have had little effect on the day-to-day custody decisions made by trial courts. [FN353] In fact, the Florida standard for triggering the presumption is so high that so far there is no appellate case in *643 which a mother was awarded custody as a result of it. In the only case in which the statute was found applicable, the father had killed the mother. [FN354]

In the first appellate case decided after the statute was enacted, Ward v. Ward, [FN355] the appellate court upheld the trial court's transfer of primary residential custody from the mother to the father. [FN356] This occurred in spite of the father's conviction and imprisonment for murdering his first wife. [FN357] The trial court stated that it was concerned about the girl's inappropriate sexual comments and behavior, which the court felt came from the custodial

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mother's being a lesbian. [FN358] The new presumption statute was not raised at trial and the mother did not argue on appeal that this was fundamental error but only reversible error. [FN359] Therefore, the appellate court refused to apply the new statute. [FN360] The court concluded that in any event, the father's remarriage, stable job, and ownership of property would seem to support a conclusion that he had rebutted the presumption. [FN361]

In the second case, In re Marriage of Ford, [FN362] the appellate court reversed the trial court's award of custody to the father, who had admitted abusing the mother but had not been convicted. [FN363] Thus, the presumption statute was not triggered, and the court used a best interests analysis. [FN364] The trial court found both parents fit, but awarded the father custody because he was more likely to encourage contact with the mother. [FN365] This followed the "friendly parent" provision found in many state statutes. [FN366] The appellate court held that the trial court had abused its discretion, because its final judgment was "devoid of all but the most minimal mention of what undoubtedly became the central focus of the testimony presented to the trial court: an established pattern of domestic violence perpetrated by the former husband upon the former wife." [FN367] The appellate court also noted that the wife might not be "friendly" to the husband due to her justifiable fear of him. [FN368]

The same result is found in Fullerton v. Fullerton, [FN369] where the father's domestic violence toward the mother was the basis for the award of custody to her. [FN370] In upholding this, the presumption was not mentioned by the appellate court, probably because the father was not convicted of the abuse. [FN371]

In Burke v. Watterson, [FN372] the only Florida case in which the presumption actually was found to apply, the father had been convicted of killing the mother. [FN373] The custody battle was thus between the convicted father and the mother's parents. The appellate court upheld the trial court's determination that the father had not rebutted the presumption. [FN374] The grandparents were awarded custody. [FN375]

(4) Iowa

Iowa enacted its presumption statute in 1995. [FN376] This statute applies only to joint custody awards, though domestic violence is *645 also a best interests factor if the presumption does not apply. [FN377] Iowa has only three appellate cases on point, two of which call into question the usefulness of this limited version of the presumption. [FN378] However, in the most recent case, the presumption was the key factor in reversing an award of custody to the batterer. [FN379]

In the first case, In re Marriage of Ford, [FN380] the trial court awarded joint custody, with the husband as primary caretaker. [FN381] The trial court appeared to be unaware of the new statute, as the court did not mention this in its order, nor did it discuss in any detail the evidence creating a presumption against joint custody in domestic violence cases. [FN382] In spite of this omission, the Iowa Supreme Court upheld the trial court order. [FN383] The Iowa Supreme Court stated that the trial court "gave careful thought to the domestic abuse issue and found that it was not significant enough to be the sole factor in determining custody of the children." [FN384] The state supreme court also held that the husband had rebutted the presumption against joint custody by showing changes in his life since the last incident of abuse four years earlier. [FN385] These changes included getting help from his family and church, becoming an active church member, earning his college degree, obtaining a full time job, and overcoming his substance abuse problems. [FN386] Though he never went to a batterer's program, the husband was found to be the more stable parent, since the wife had moved out to live with her boyfriend and left the children with the husband. [FN387]

In the second Iowa case, In re Marriage of Forbes, [FN388] the mother and father were given joint custody and the father was awarded primary physical care even though he had pled guilty to abusing the wife. [FN389] The court found that the wife's discipline of the children was very abusive and that both parents had abused each other. [FN390] The trial court failed to discuss the presumption statute in its order, or to find whether the presumption had been triggered or rebutted. [FN391] In upholding the trial court's order, the Iowa Supreme Court stated that it was not sure that the wife had shown a "history" of domestic abuse by the husband. [FN392] It further held that the husband had rebutted any presumption against him by the evidence that the wife had been abusive to him and to the children. [FN393]
In the most recent case, In re Sulzner, the presumption was the key factor in the trial court's decision to award custody to the mother, with supervised visitation to the father. The custody award was upheld by the appellate court, although the visitation issue was remanded, with instructions to order unsupervised visitation. The father had been convicted of domestic assault against the mother. The appellate court noted that if there was only one documented incident, that might not have triggered the presumption. However, in this case there was credible evidence that the father had repeatedly abused the mother. His attempt to rebut the presumption by citing his completion of a court-ordered batterers' education program was rejected by the trial court. The supreme court agreed with this holding, noting that "[the father's] post-separation hostility towards [the mother] suggests he does not understand the extent to which his abusive behavior adversely affects [the child]."

Massachusetts adopted a rebuttable presumption in 1998, which is triggered by a "pattern or serious incident of abuse." While the statute is not specifically automatically triggered by the issuance of a protective order, the underlying facts in the protective order can be grounds for a finding of abuse. The statute also states that the court must make written findings regarding the effects of the abuse on the child.

While the legislation was pending, the state senate asked the state supreme court to give an opinion as to the constitutionality of such a presumption. The supreme court issued a formal opinion, holding that this statute would withstand constitutional scrutiny. The high court held that the child's interest in being free of abuse and neglect and the state's interest in promoting the welfare of its children outweigh any risk of erroneous deprivation of the parental right to a relationship with the child which might result from the application of the "preponderance of the evidence" standard in a custody proceeding between the parents when there is proof of a pattern of abuse or an incident of serious abuse.

However, in the only case citing the statute to date, In re Custody of Zia, the appellate court found the statute inapplicable. In that case, the father was awarded sole legal and physical custody, even though the mother had been the primary caretaker and the father had been convicted of a drug offense and assault and battery against someone else. The mother had also obtained two protective orders against him, and the father faced pending assault charges, though it is unclear from the decision who the victim was. In spite of all this evidence of the father's abuse, the trial court used a best interests analysis, barely mentioning the presumption statute. The appellate court affirmed the trial court's order, dismissing the domestic violence issue in one short paragraph. It stated that the trial court had "considered the question of abuse and was of the opinion that the present case presented no history or pattern of domestic violence that would preclude an award of custody to the father." The presumption against custody to batterers was mentioned only in passing, in a footnote.

The case is troubling, as it raises the question as to what triggers the presumption. If two protective orders, an assault conviction, and a pending assault charge are not "a history or pattern of domestic violence," what is?

In 1990, Minnesota enacted its presumption statute, applicable only in joint custody cases. Since then, there have been only three appellate cases decided regarding domestic violence allegations in custody battles. Two of the three are unpublished and only one even mentions the presumption statute. Thus, the statute appears not to have been particularly effective in ensuring that domestic violence is given great weight by custody judges.

In the first case, Nazar v. Nazar, the trial court had awarded custody to the father where the mother had left the state with the children and defaulted in the divorce, having had no notice of it. Though the appellate court did not mention the presumption against joint custody in domestic violence cases, it did reverse the trial court's
custody decision, based on a best interests analysis. [FN422] It reasoned that at the foundation of the dissolution were the allegations that the father physically, emotionally and verbally abused the mother and children. It stated that the trial court must seriously examine any allegations of child abuse before determining custody. [FN423] The allegations of spousal abuse disappeared in this holding. Since the trial court had not undergone a serious examination of any of the allegations, the appellate court reversed. [FN424] The appellate court also disagreed with the trial court finding that the mother had "falsely" and "maliciously" alleged that the father had been violent in order to obtain emergency custody jurisdiction from another state. [FN425]

In the second case, Canning v. Wieckowski, [FN426] the appellate court affirmed the order granting custody of the child to the father in a case where both parties alleged abuse by the other. [FN427] While the mother had been granted an order of protection, no findings of abuse were made at that time. [FN428] The court appointed evaluator was of the opinion that the mother had fabricated the allegations of abuse, and the trial court found no substantial evidence that the alleged abuse had any effect on the child, relying on the evaluator's report. [FN429] The court also found that the father was the more friendly parent, and that the mother "demonized" the father. [FN430] The case does not mention the presumption, perhaps because joint custody was not being considered, and the Minnesota presumption *650 is not relevant when the court awards sole custody to either parent.

The most recent case and the only one that mentions the presumption is Schmid v. Schmid. [FN431] In this case, the trial court held that the presumption against joint custody was triggered by the mother's evidence that there were numerous instances of physical and verbal abuse by the father, and by an order of protection ordering the father to leave the household. [FN432] However, the trial court also found that the presumption was rebutted when the father produced evidence that the abuse occurred more than four years ago and had not been repeated. [FN433] Then turning to a best interests analysis, the court awarded custody to the father. [FN434] It reasoned that the abuse did not affect the parties' ability to co-parent, the children had developed a good relationship with the father, and the mother, if awarded sole physical custody, would restrict the father's access to the children, which would not be in their best interest. [FN435] The father, on the other hand, was found to be the more friendly parent. [FN436] The court of appeals affirmed the trial court's award of joint legal and physical custody. [FN437] This case is illustrative of the need for specific factors that the court must consider in determining whether the presumption has been rebutted. The Minnesota statute contains no such factors. [FN438] In their absence, courts are free to create their own standards.

(7) Case Study: An Unsuccessful Attempt to Pass Stronger Legislation

While Minnesota's statute does not seem to have much effect on the outcome of custody cases at present, it is not an easy matter to pass stronger legislation. The experience of advocates during the 2001 legislative session is an interesting case in point.

A retired Minnesota judge, Mary Louise Klas, stated that she has been intrigued for many years by the reluctance of the judiciary *651 to recognize and understand domestic violence in custody cases. [FN439] Since this did not improve with the appointment of more women to the bench, her conclusion was that this was not an issue of the gender of the judges, but that other factors were the cause, including very busy calendars. [FN440] She stated that family court calendars are a "cattle call," and that judges are pressured to keep the cases moving, giving them no time to stop and question allegations of domestic violence, or to issue the statutorily mandated findings required under the best interests statute. [FN441] She also mentioned that the attorneys are often not vigorously pursuing the arguments to make judges issue such findings. [FN442] Furthermore, the Minnesota statute provides that joint custody is presumed to be in the best interests of the children except in domestic violence cases. [FN443] Thus in cases where domestic violence has actually taken place but the court does not believe the allegations, joint custody is often awarded. [FN444]

Even when the presumption is not applicable, Minnesota's best interests statute requires judges to consider the effects of domestic violence on children. [FN445] However, "this is consistently ignored" according to Cyndi Cook, the former Legislation and Public Policy Coordinator for the Minnesota Coalition for Battered Women. [FN446] Partly in response to this, in 2001, the Minnesota State Bar, [FN447] in conjunction with the Coalition and the
Domestic Violence Legislative Alliance, sponsored legislation that would have strengthened the state's custody laws in domestic violence cases. [FN448] The first version would have extended the rebuttable presumption to sole custody cases, but was never introduced due to opposition *652 from the Academy of Matrimonial Lawyers. [FN449] In addition, domestic violence advocates heard feedback from other jurisdictions that a presumption against sole custody to batterers was sometimes problematic, especially in cases where the batterer has an attorney and the victim does not. [FN450] Thus, they decided they were not prepared to move forward with such language at that time. [FN451]

The two companion bills as introduced, S.F. 1212 [FN452] and H.F. 1256, [FN453] provided that the court must document how any award of custody or visitation to a batterer best protects the safety and emotional well being of the child and of the other party. [FN454] Findings would be required whenever there were allegations of injury, use of a dangerous weapon, or a pattern of domestic abuse. [FN455] Domestic abuse would be defined by the Domestic Abuse Act, which governs issuance of orders for protection. [FN456] During legislative hearings, proponents of the bill stated that a "pattern of domestic abuse" meant two or more acts of domestic abuse, consistent with a Minnesota homicide statute. [FN457] Thus, according to Ms. Cook, one threat of abuse, plus one incident in which the abuser interfered with the victim's making a 911 call, could constitute a "pattern of domestic abuse," triggering the requirement of findings. [FN458]

This standard is higher than that required by the Domestic Abuse Act, [FN459] which was a deliberate decision made by the proponents of the legislation. [FN460] They were concerned about the significant numbers of victims of domestic violence who are arrested when they engage in self-defense or in non-legal violence. [FN461] If the custody statute were triggered by an arrest for the use of legal violence, that is, self-defense, it could backfire against many victims of domestic violence. [FN462] Their hope was that in setting the standard low for protective orders and higher for custody orders, this backlash could be minimized. [FN463]

However, when the legislation was considered in the state Senate, conservative Senators insisted on adding a provision defining how the court would determine whether domestic abuse had occurred. [FN464] This amendment required that there had to be corroboration of the abuse before the court would be required to make the findings. [FN465] The corroboration was limited to one of the following: a prior court finding of domestic abuse, the issuance of an order for protection, a criminal conviction, or a police report in which the officer observed domestic abuse. [FN466] At the request of the State Bar, the legislation was withdrawn, as they could no longer support it. [FN467] Supporters of the legislation are meeting to determine what the legislation should look like in the next session. [FN468]

The next version will probably include "predominant aggressor" language, giving the court guidance when there are allegations of abuse by both parties. [FN469] However, this provision is *654 controversial even among proponents of the legislation. Loretta Frederick, a prominent domestic violence advocate from Minnesota, is of the opinion that this language should not be included in a presumption statute, as this would trigger a full trial on that issue in every case, given the prevalence of batterers asserting that they are actually the victims. [FN470]

The next domestic violence custody bill in Minnesota may also address the role of guardians ad litem and child custody evaluators. This is an issue for two reasons. First, many judges give great weight, some would say undue weight, to the recommendations of these professionals. [FN471] Additionally, guardians ad litem in Minnesota are sometimes able to cause the parties to change their custody and visitation agreements, which in at least one case has had fatal results. [FN472]

During the pendency of the 2001 bill, several members of the legislature, as well as the matrimonial lawyers association, stated repeatedly that what a man does to his wife bears no relationship to his parenting. [FN473] This viewpoint is, of course, what stands in the way of rebuttable presumption legislation or even legislation mandating that judges consider domestic violence in custody cases being passed and implemented around the country. In spite of this hurdle, it seems likely that eventually the Minnesota legislature will enact a stronger statute governing custody decisions in which domestic violence has occurred.
Nevada adopted its presumption statutes on October 1, 1995. [FN474] Since then there have been four appellate cases interpreting it. [FN475] Overall, it appears that this statute has made a significant difference in how allegations of domestic violence are treated in custody decisions. However, it also appears that it is necessary to appeal the decisions in which the statute was ignored or given little weight, as in every appellate case so far, the trial court order was reversed and remanded. [FN476]

In Lesley v. Lesley, [FN477] the first Nevada appellate case on point, the husband was initially awarded custody because the wife defaulted in the divorce. [FN478] She had fled the state with the children and obtained temporary custody and a restraining order in the new state. [FN479] She and witnesses later testified that there were several occasions on which the husband had struck her, leaving bruises. [FN480] However, the Nevada trial court found that this was not a meritorious defense and refused to set the decree aside. [FN481] The Nevada Supreme Court reversed, citing the presumption statute, and citing the public policy of ensuring that children were not placed with an abusive parent. [FN482]

In McDermott v. McDermott, [FN483] the initial degree ordered joint legal custody and gave the wife primary physical custody. [FN484] The husband's motion to modify this in his favor was granted by the trial court, in spite of the fact that the husband had recently been convicted of assaulting the wife when she came to pick up the *656 child. [FN485] The trial court stated that it "understands the provocation which might have existed," suggested that the husband go to domestic violence classes, and threatened to order this unless he went voluntarily. [FN486] It did not mention the presumption statute. This modification was reversed by the Supreme Court, holding that the trial court was required to consider the rebuttable presumption, which was triggered by the husband's conviction. [FN487] The dissent argued that since the presumption was not raised at the trial court level, it could not be the basis for reversal, and that the trial court's decision appeared appropriate. [FN488]

In Russo v. Gardner, [FN489] there was evidence that the father had abused the mother and two children, one of whom was not his. [FN490] He had been convicted of abusing the mother, and there was a police report regarding his abuse of the woman who brought the children for visitation. [FN491] In spite of this abuse, the trial court found that the mother's testimony was motivated by animus toward the father, and that the father had equitably adopted the child who was not his. [FN492] It granted the parents joint legal custody of both children, with primary physical custody to the mother. [FN493] The state supreme court reversed the joint custody award, citing the presumption statute, which had been triggered and not rebutted, and noting that the trial court lacked jurisdiction to award custody of the non-biological child to the father. [FN494]

In the most recent Nevada case, Hayes v. Gallacher, [FN495] the initial award was also joint legal custody, with primary physical custody to *657 the mother. [FN496] The mother had obtained a one year restraining order against the father based on his abuse of her, and the judge had made a finding that time that domestic violence occurred. [FN497] Later, the mother sought permission to relocate with her new husband and the children to Japan, where the new husband had been transferred by the Air Force. [FN498] Without an evidentiary hearing and also apparently without considering the presumption, a different judge ordered that custody be transferred from the mother to the father if the mother moved. [FN499] The state supreme court reversed and remanded, ordering the trial court to reexamine the custody arrangement in light of the presumption statute, since the presumption had been raised by the earlier finding of domestic violence and had not been rebutted. [FN500]

(9) Oklahoma

Oklahoma adopted the rebuttable presumption against custody to batterers in 1991. [FN501] So far there are only two cases on point, with contrary holdings: Brown v. Brown [FN502] and Smith v. Smith. [FN503]

In Brown, the issue was what triggers the presumption. [FN504] The trial court awarded custody to the father. [FN505] There was evidence that the father had shoved the mother, threatened her with violence, and broken out the windows in the car of a man who the father believed was having an affair with the mother. [FN506] The father had
also acted similarly on other occasions with third parties. [FN507] The trial court quoted the criminal definition of domestic abuse (physical harm or threat of imminent physical harm), and noted that the abuse in this case appeared to be "one or two isolated instances of prescribed behavior." [FN508] The trial court found that this behavior did not constitute "ongoing domestic abuse" so as to *658 trigger the presumption. [FN509] It also appeared to disapprove of the mother, mentioning that she had propositioned one of the father's co-workers and stating that she was evasive and dissembling. [FN510] The appellate court upheld the trial court order. [FN511]

In Smith, the father was also awarded custody by the trial court. [FN512] However, in this case the court of appeals reversed and remanded, holding that there was clear and convincing evidence of ongoing domestic abuse by the father, triggering the presumption. [FN513] The evidence of abuse included the wife's restraining order declaration, in which she alleged that the husband had physically and verbally abused her, threatened to kill her, and threatened to kill himself, all in the presence of the child. [FN514] There were also several witnesses who testified regarding the father's abuse of the mother and child. [FN515] The Smith court held that the evidence met the test that the abuse be frequent and recent, and also held that the father had not rebutted the presumption. [FN516]

c. Jurisdictions Where the Presumption is Very New

As we have seen above, implementation of presumption statutes is often uneven. However, in some states these statutes have actually resulted in a backlash towards victims of domestic violence, as will be described in this section.

In the jurisdictions where the presumption against custody to batterers is very new, there is not yet any appellate law on point. However, there are anecdotal accounts of how the law is working and a survey conducted by four law students in one state. Based on the history in other jurisdictions where the presumption has been in effect for several years, it appears that it may be necessary to ask the appellate courts to intervene before the procedure in the trial courts actually changes.

*659 (1) Arizona

Arizona adopted the presumption effective January 2001. [FN517] A lawyer with the Arizona Coalition Against Domestic Violence reported that the legal committee of the Coalition discussed how the presumption was working six months later, on June 21, 2001. [FN518] Their conclusion was that things have worsened since the enactment of the statute. [FN519] This attorney stated that there is a strong preference for joint custody on the part of the judiciary, and that sole custody is awarded almost exclusively in default cases. [FN520] She estimated that the local legal advocacy center receives about six calls each week in which battered mothers are complaining that judges are refusing to hear evidence of domestic violence, in spite of the new statute. [FN521] For example, one judge looked at photos taken by the police and acknowledged that the violence had been significant, but then stated that because there was no evidence of a history of violence, the judge would not give any weight to it. [FN522]

The Arizona statute is internally inconsistent: when it discusses domestic violence as relevant to joint custody, it requires either "significant domestic violence" or "a significant history of domestic violence." [FN523] On the other hand, when it discusses custody generally, it requires only "an act of domestic violence against the other parent," defined as intentionally causing or attempting to cause sexual assault or serious physical injury, or apprehension thereof, or engaging in a pattern of behavior which would qualify for a protective order. [FN524] This inconsistency is inherently confusing; it is hoped that the legislature will amend the statute so that it is consistent.

While this lawyer said she suspected that the statute might be helping battered parents at the settlement stage, she had no actual proof of this. [FN525] She also stated that Arizona has had a statute since 1986 stating that domestic violence is detrimental to children, but *660 that it did not seem to make a difference, so it was predictable that the new statute might have the same lack of effect. [FN526]
Oregon adopted the presumption effective in 2000. [FN527] Lawyers specializing in domestic violence family law cases give mixed reports at this point. An attorney working for the Oregon Coalition Against Domestic and Sexual Violence reported that some unethical attorneys now send their clients to get restraining orders regardless of whether there has been any history of domestic violence in order to bolster the custody case. [FN528] She commented that such orders are fairly easy to obtain in Oregon. [FN529] She also stated that the new statute does not seem to be keeping batterers from getting custody, probably because the batterers "tend to look better on paper." [FN530] She opined that the presumption is fairly easily rebutted: in cases where the father has a home and job, and does not suffer from post-traumatic stress disorder or chemical dependencies, judges are finding that these factors rebut the presumption. [FN531] She concluded that the new statute has not been very helpful, other than philosophically. [FN532]

A staff attorney from Oregon Legal Aid reports that in one county, the new statute has resulted in a backlash in terms of the issuance of restraining orders. [FN533] Characterizing this as a "huge *661 problem" in that county, she stated that judges are continuing orders without making findings, ordering joint custody prior to any hearing or trial, or setting up parenting plans without making custody orders. [FN534] In other counties, however, there does not seem to be this backlash, though it may be harder to get a restraining order now if the respondent is represented. [FN535] Legal Aid attorneys are also seeing more abusers filing for restraining orders in hopes of receiving the benefit of the new statute. [FN536] In terms of orders issued in dissolution and custody cases, she reported that in some counties, judges are reluctant to apply the new presumption. [FN537]

Another Oregon attorney stated that the presumption works well in her county when custody is being decided in a restraining order hearing. [FN538] She also stated that these judges accepted the issuance of a restraining order as preclusive on the issue of whether the presumption had been raised. [FN539] However, she stated that when this issue is being decided at a custody trial, judges will easily find that the presumption has been rebutted if the judge wants to award custody to the abuser. [FN540] She said the practice is often to hear all the evidence, but then to make the decision based on the traditional best interest factors, finding that these factors rebut the presumption. [FN541] This attorney has argued that the new statute means the court must treat domestic violence as the most important and primary factor before looking at traditional factors, and that the abuser must rebut the presumption by engaging in batterers' treatment or otherwise demonstrating that the abuse will not impact the child. [FN542] However, as of yet, no judge has accepted this argument. [FN543] She concluded that she would like to see a higher court interpret the new statute so that the trial courts have guidance on how it is rebutted. [FN544]

*662 (3) California

In March and April of 2001, a telephone survey was conducted by four students at Boalt Hall School of Law, UC Berkeley, on how California's rebuttable presumption statute, Family Code section 3044, was working. [FN545] This statute became effective January 1, 2000. The students interviewed twenty-four people from nine counties throughout the state, including attorneys, judicial officers, legislative aides, custody evaluators, survivors of domestic violence, domestic violence experts, and community resource people. [FN546] The overall conclusions of the students were that the statute's passage "is a rather hollow victory for social justice," [FN547] but also that the new code section is "a positive addition with significant potential." [FN548]

The students found that there were major problems with section 3044 of the California Family Code, consisting of "inconsistent and often distorted implementation." [FN549] The problems fell into four categories. [FN550] First, there were polarized positions with regard to the purpose of the code section. [FN551] These took the form of disagreement as to whether domestic violence is relevant to the custody decision. [FN552] For many years, California has required that judges consider any past domestic violence in every custody decision. [FN553] Respondents also disagreed with the provision in the statute that domestic violence is relevant to legal custody as well as physical custody orders. [FN554] Finally, some respondents felt that judges already adequately considered the occurrence and effect of domestic violence without a statutory directive. [FN555] Notably, an earlier survey conducted by the California Alliance Against Domestic Violence in 1998 found that many judges did not take
domestic violence into account in custody decisions, thus ignoring both prior pieces of legislation on this topic. [FN556] This lack of judicial *663 response to the prior legislation was one of the reasons cited to the legislature in arguing for the enactment of a rebuttable presumption. [FN557]

The second problem the students found was that many respondents saw the statutory language as ambiguous. [FN558] Even though the California statute is much more specific than many other presumption statutes, some respondents stated that they thought the statute should more clearly define what type of finding was necessary in order to trigger the presumption. [FN559] Additionally, though the statute contains a list of factors which the court must consider in determining whether the presumption has been overcome, as discussed in Part III, some respondents felt that this section of the statute was still too vague and should provide more direction to the court (for example, what if the batterer has complied with one or two of the factors but not with the others?). [FN560] This request from the judiciary for more specific legislative directives is ironic, considering that the legislation was opposed by the California Judges’ Association, who argued that the discretion of family law judges in making custody decisions should not be further limited. [FN561]

Third, the survey found that some judges were not resistant to the presumption and appeared to have adequate resources, including enough time on court calendars to hold a timely evidentiary hearing as to whether domestic violence had occurred. [FN562] These judges had either always given domestic violence great weight in making custody decisions, or had recently changed their court practices and procedures to give this issue *664 greater weight. [FN563]

However, the survey also found that there was substantial judicial resistance in several counties, due in part to lack of such resources. [FN564] Some judges opined that joint custody was almost always appropriate, even in domestic violence cases. [FN565] Judicial officers also stated that they resented statutorily imposed restrictions on their discretion. [FN566] Examples of such resistance on the part of judges took the form of ordering the litigants to repeatedly try to mediate the dispute in hopes that they would eventually come to an agreement. [FN567] Additional examples of resistance included awarding joint custody in spite of police reports or even prior convictions for domestic violence. [FN568]

The lack of judicial resources is a very real problem in many areas. Many judges have severe time constraints on their calendars, making the presumption yet another hurdle which they have to surmount. [FN569] In these courts, judges are faced with a dilemma regarding how to structure temporary custody and visitation, given that it may be months before the calendar is free for an actual evidentiary hearing, so the temporary order is usually based only on allegations. [FN570]

Finally, the students found that there had been an adverse impact on the issuance of restraining orders in several California counties. [FN571] In these areas, it has become increasingly difficult to obtain orders; judges are now requiring independent corroboration of the abuse in many cases, [FN572] and of course many victims have no such corroboration. This appears to be happening because judges are leery of triggering the presumption through the issuance of a restraining order. However, it is unclear whether the mere issuance of an order is in fact a finding triggering the presumption. In response to this concern, some judges are encouraging or requiring the parties to stipulate to the order, which thereby avoids a court finding of abuse. [FN573] Other judges are *665 issuing restraining orders but stating on the record that they are making no finding of domestic violence. [FN574] (Query whether such orders would be upheld on appeal, since there appears to be no basis for the order, and thus no subject matter jurisdiction.) Still other judges are continuing temporary orders several times rather than issuing a long-term order after hearing, again hoping to avoid the triggering of the presumption. [FN575]

The backlash in court response to restraining order requests has been great in some parts of the state. Some victims have been discouraged from even seeking judicial remedies for domestic violence. [FN576] If the victim does seek such help, she is often forced to go to court several times, which may have serious consequences in terms of her employment, [FN577] as well as forcing her to confront the batterer repeatedly. And ironically, the more times the court requires the victim to return to court, the more court time is spent on the case, arguably wasting this precious resource, which perhaps could be better spent holding an evidentiary hearing.
The survey concludes with several recommendations. These include greater and more consistent implementation of the statute, [FN578] clarification from the legislature or the appellate courts as to what constitutes a "finding" of domestic violence, [FN579] eliminating the negative effects on issuance of restraining orders, [FN580] and increased resources for family courts. [FN581] The survey also recommended educating judges regarding the fact that the presumption is rebuttable, [FN582] educating attorneys regarding how to advocate for this new law and how to work with courts on changing existing practices, [FN583] and educating the public as to the relevance of domestic violence to custody decisions, given that many litigants have no attorneys. [FN584]

*666 The survey also recommended the alteration of pre-existing roles in family court, [FN585] along with educating mediators working for Family Court Services regarding how to address domestic violence cases generally and the use of this new statute in particular. [FN586] One of the challenges which will need to be resolved in implementing this new law in California will be how mediators working for Family Court Services will deal with domestic violence cases. California mandates mediation of all disputed custody or visitation cases. [FN587] While victims of domestic violence may bring a support person to the mediation session, [FN588] or request a meeting separate from the perpetrator, [FN589] they are not exempted from the mediation process. Given that mediators do not usually engage in fact-finding, but that in many counties they make recommendations to the court, their procedures may need to be changed, so that they actually investigate allegations of abuse and then apprise the court of their findings. [FN590]

Some California attorneys routinely appear in front of the same judges every week, representing or assisting numerous of clients from the local restraining order clinics. Several of these attorneys have expressed an unwillingness to "rock the boat" by insisting that the judges comply with the new domestic violence custody statutes. [FN591] They state that they are concerned that if they advocate too stridently on behalf of one client, the judge will retaliate against all the other clients coming from that same agency. [FN592]

Additionally, judges presiding over these dockets are aware *667 that the likelihood that a litigant will appeal one of their decisions is highly unlikely. This is due in part to the high incidence of parties who represent themselves, in part to the high cost of an appeal, and in part to the reluctance of attorneys to anger the judge by appealing judgments. Thus, they are not actually required to follow the statutory mandates, such as making a formal finding when ordering joint custody in a case where there are allegations of domestic violence. [FN593]

V. Possible Solutions to Problems With Implementation

A. Introduction

In a 1995 article examining the effectiveness of the presumption statutes in effect in eight jurisdictions at that time, the authors came to the following conclusions: [FN594] 1) The private bar is remarkably uninformed about domestic violence, and the quality of representation afforded victims by the bar is uneven. 2) Legal Services attorneys are relatively well informed about domestic violence. 3) Few jurisdictions have court systems that are "user- friendly" to Pro Se custody litigants. 4) The judiciary is largely uninformed about domestic violence and judicial practice is inconsistent. 5) Specialized court services related to domestic violence custody cases are sorely wanting. 6) Domestic violence custody cases are not mandated to mediation in most presumption states. 7) Evaluators and guardians ad litem utilized by the courts have minimal specialized training on domestic violence. 8) The award of a protection order to an abused parent in most presumption states is not dispositive of the claim of domestic violence in custody proceedings. 9) The lack of secure supervised visitation facilities jeopardizes the protective mandates in state codes.

Additionally, these commentators found that it is not yet clear that the domestic violence presumptions have effected ameliorative and protective outcomes for children and abused parents. [FN595] In discussing this, the authors noted that while "[e]vidence of domestic violence is more . . . readily admitted in custody proceedings now than before statutory reform made domestic *668 violence relevant," resulting in a practice of generally awarding sole physical custody to victims, courts still were not safeguarding women and children from further abuse. [FN596] Furthermore, they noted that the statutes were sometimes being used against women who defended themselves or
their children. [FN597] In most presumption states, however, this was not a serious problem because the standard for triggering the presumption was high enough that the victims' actions were not found to have raised it. [FN598]

What can we learn from all these comments, cases, and surveys? How do we ensure that domestic violence is given the weight it deserves in custody disputes without creating even more problems for victims of abuse? These are complex questions, without easy solutions. Additionally, the solutions may need to vary depending on which state and local community are involved. However, some conclusions can be drawn from this inquiry, and some recommendations made.

B. Statutory Language

First, statutes of this kind should be carefully worded, giving a clear definition of what type of abuse is needed in order to trigger the presumption against custody to a batterer. Additionally, the statute should clarify what standard of proof, and possibly what type of evidence is necessary in order to raise the presumption. For example, does issuance of a restraining order after a hearing automatically trigger the presumption or not? [FN599]

In making this determination, legislatures might consider adopting a higher standard of abuse than is used for restraining or protective orders, as this may minimize judicial reluctance to issue such orders. [FN600] In deciding how domestic violence should be *669 defined in the presumption statute, legislatures must decide whether to include physical abuse only, or also threats of physical abuse and destruction of property. It is also possible to include the infliction of emotional abuse as part of the definition of domestic violence. [FN601] Of course, if emotional abuse is included, it is advisable to define this term for purposes of the statute, to prevent a finding that occasional verbal arguments or infrequent insults were sufficient to trigger the presumption. Note that there is a split among domestic violence experts regarding the inclusion of threats or emotional abuse in presumption statutes. In some cases, statutes were deliberately very narrowly drawn, in order to prevent a backlash against victims of domestic violence, who may have at times made statements which could be interpreted as threats or as emotional abuse. [FN602]

It is also advisable to define abuse for triggering the presumption to include abuse against current or former partners, not just abuse against the co-parent who is contesting the custody of the child. [FN603]

Statutes such as Minnesota's allowing either parent to trigger a presumption favoring joint custody merely by requesting this should be amended to clarify that the domestic violence presumption trumps any joint custody presumption. [FN604]

Furthermore, the statute should establish a clear procedure and standard of evidence for rebuttal of the presumption, with enumerated factors that the court must consider. This helps prevent the court from simply making a conclusory statement that the batterer's testimony showed that it was in the best interests of the child to be with him or her, as was the situation in several of the cases discussed above.

An additional recommendation is that the custody statute contain a provision requiring judges to make written findings regarding whether domestic violence has taken place, why custody or visitation with the abuser has been ordered, and how the *670 children and adult victim will be protected by the order. This could be triggered by any allegations of abuse, [FN605] or by a judicial finding that abuse had occurred. This can both encourage judges to think carefully about any orders they make and lay a foundation for appellate review.

Statutes establishing rebuttable presumptions against custody to batterers should apply to all types of custody, sole or joint, legal or physical. These statutes need to specifically address the issue of contact between the children and the abusive parent, clarifying that the safety of everyone involved is the "bottom line." In many states, visitation statutes addressing domestic violence situations are already in place. [FN606] In states without such provisions, the presumption statute should be amended to include language concerning visitation, or a companion statute should be enacted covering the issue of visitation in domestic violence cases.
Statutes should also provide that if the presumption is found not to apply (either because it was not raised, or because it was rebutted), domestic violence is still a factor that courts must consider when making any custody award. [FN607] Statutes such as this will help ensure that the victim of domestic violence or the children's attorney is not starting from scratch, having to prove to the court that domestic abuse is relevant to the custody decision even when that abuse has not been sufficient to trigger the statutory presumption.

Statutes should also incorporate a dominant aggressor analysis, for the court to apply in cases where there are allegations of mutual abuse. [FN608] This analysis should be specifically described, listing the factors for the court to consider in making its determination, and clarifying that the issue is not "who started the fight," but the history of violence between the parties, whether one party was injured more severely, and whether there is any evidence of self-defense. [FN609]

*C671 C. Training

While the actual statutory provisions are important, the mere passage of the most well-written and comprehensive statute will not automatically solve the problems presented by cases in which domestic violence is an issue. One of the key aspects of implementing any statute is training for everyone involved. Participants in a 1995 survey on the effectiveness of the presumption statutes reported that "in those judicial districts and states where there has been specialized training of the bar, the 'presumption' has shaped judicial decision-making and has produced custody awards designed to safeguard children and abused parents. In fact, the anticipated changes in practice have been most noticeable in those jurisdictions where the courts and legal services programs developed specialized programs." [FN610] Training needs to be provided for judges, [FN611] mediators, [FN612] custody evaluators, [FN613] family law attorneys, [FN614] and guardians ad litem. [FN615] The training needs to be very specific, addressing the studies leading to the passage of the state's presumption statute, the legislative intent *672 of the statute, how domestic violence is defined under the statute, how the presumption is raised, and how it is rebutted. [FN616]

Time needs to be given to any concerns or disagreements on the part of the participants, as this is an important opportunity to discuss fundamental beliefs, necessary for any real attitudinal change. [FN617] After participating in this very specific and comprehensive training, it is more likely that these actors will feel a higher level of comfort with the new statutes and more willing to apply them on a daily basis, rather than resisting the statutes due to feeling unsure of how to proceed or because they do not understand the basis for the presumption. [FN618]

D. Changing Roles of Family Court Services Staff, Mediators, Custody Evaluators, and Guardians ad Litem

Yet another part of the solution may be changing the role of mediators employed by Family Court Services staff. In many areas, the current job description is only to mediate between parents in contested custody cases. However, increasingly courts are changing this to provide that these workers should screen for and then investigate any allegations of abuse. [FN619] They could then report on their findings to the court. Mediators are also sometimes directed to be aware of and refer litigants to community resources such as domestic violence shelters, legal assistance, and batterers programs. [FN620] This type of service is invaluable in cases where the litigants have no attorneys, which is becoming the norm rather than the exception in family law cases. [FN621]

*673 Additionally, in areas where guardians ad litem have decision-making power in custody cases, this role needs to be carefully examined and re-evaluated, as this may be an improper delegation of judicial authority. [FN622] In these jurisdictions, legislation, rules of court, or standards of judicial administration need to be enacted clarifying the judicial role as opposed to the roles of other professionals in custody cases.

E. Increased Funding for Attorneys for Low Income Victims of Domestic Violence

Due to the devastating funding cuts to the Legal Services Corporation under the twelve years of Presidents Reagan and Bush, the numbers of free or low cost attorneys available to help poor victims of domestic violence were greatly

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reduced. [FN623] In custody cases involving domestic violence, victims are at a severe disadvantage if they are forced to represent themselves, but many have no choice. [FN624]

If presumption statutes are to be effective, money must be found for attorneys to handle these complex cases at the trial level. Additionally, a widespread pro bono project among the private bar needs to be instituted. [FN625] In some areas, these attorneys can be trained by and co-counsel with attorneys employed by Legal Services or local non-profit domestic violence agencies. [FN626] While Congress has earmarked funds for many attorneys to work on civil domestic violence cases around the country, [FN627] this is still a huge *674 and largely unmet need.

F. Using the Appellate Process

In a great many of the appellate decisions discussed above, courts overturned inappropriate trial court decisions in custody cases involving domestic violence. And in virtually all the reported appellate cases cited in this article, both parties were represented by counsel. Appellate review is how problems with trial court decisions are supposed to be resolved. Thus, our legal system is often ineffective if litigants have no access to the appellate courts.

In too many cases, poor victims of domestic violence cannot afford to file appeals when the family court awards custody to the batterer. While some Legal Aid agencies will take on such cases, many will not. [FN628] Thus, funding must be found for private representation, or qualified pro bono attorneys must be recruited. Additionally, attorneys who routinely represent many victims at the trial court level must be trained to raise the presumption issue appropriately, laying the foundation for an appeal. And these attorneys could be encouraged to appeal decisions that appear to be in violation of the statute.

G. Community Organizing

In addition to the above recommendations, it is often necessary to organize members of the community before domestic violence is treated seriously in custody cases. This effort may focus specifically on the legal community, or may include the larger non-legal community.

For example, in some cases, judicial training has been attempted but has not been successful; either it is not mandated, or when it is, few judges attend. [FN629] Thus, another avenue being tried in some jurisdictions is a court watch program, in order to obtain systematic information about how domestic violence custody cases *675 are handled at the trial court level. Once this information is compiled and analyzed, the hope is that the presiding judge will be more willing to mandate training for the family law judges. [FN630]

Another example of community organizing on this topic comes from Minnesota, where the Duluth Abuse Intervention Project recently conducted and published an extensive report regarding judicial response to domestic violence, then met with judicial leaders to discuss the findings in the report. [FN631] While judges are barred by codes of ethics from discussing pending or specific cases, it is appropriate for them to examine the court's response in the aggregate. The response from the judiciary to this report and discussion has been positive. [FN632]

Another way to organize and also to conduct informal training with attorneys and judges is to work closely with them on policy committees. For example, when domestic violence attorneys join and participate in meetings with the family law section of the state bar, these "mainstream" attorneys become more knowledgeable about domestic violence issues, and may even become advocates for changing the laws. [FN633]

An example of organizing within the larger community is an ongoing project taking place in Durban, Ontario, near Toronto, in Canada. The domestic violence advocates there have used a community organizing model to address problems with custody cases involving domestic violence. [FN634] They started with several focus *676 groups of mothers who were involved in such cases, led by a social worker/researcher. [FN635] The findings and recommendations from these groups were then used as the basis for an ongoing working group and conferences in which survivors, advocates, judges, custody assessors, and others are participating. [FN636] The results so far have...
been quite promising. [FN637]

VI. Conclusion

"I have always embraced the idea that the pursuit of a worthy, deep goal is never for a day or for a year, that the journey is long and hard, and no one can say how long it will take. You take in all the information you can, you decide what is right, and once you make the decision, you pursue it. You commit, with perseverance, steadfastness and faith." [FN638]

Ending domestic violence is a monumental task. Effecting any fundamental changes in the legal system takes great perseverance and creativity. Enacting statutes creating presumptions against custody to batterers is not a "quick fix." It does not solve the problems presented in these cases overnight. In some areas, it has actually produced a backlash, making it harder for victims to obtain restraining orders or limiting the effectiveness of such orders.

However, these difficulties should not discourage states from enacting statutes creating a presumption against custody to batterers. First, it appears that the courts that have been dealing with presumption statutes for the longest period of time seem to be using them most consistently. It seems that making a change this fundamental takes many years.

Second, these statutes are designed to protect victims and their children, and when applied appropriately, they accomplish this goal. While fully implementing such statutes and dealing with the backlash in some jurisdictions will take a great deal of work, the end result is well worth it. The ultimate goals include no longer enabling batterers to use the family law courts to continue to re-victimize their partners, and exposing many fewer children to ongoing abuse and inappropriate parenting. With steadfastness and ingenuity, we are slowly but surely moving in that direction.

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[FN3]. Id.


[FN6]. While domestic violence can be committed by either sex, most domestic violence is committed by men.

[FN7]. Cahn, supra note 2, at 1044; Kurtz, supra note 5, at 1347.


[FN10]. Peter G. Jaffe et al., Children of Battered Women, 20-21 (1990); see infra note 35 (citing social science literature about effects of domestic violence on children).


[FN12]. Id.

[FN13]. Id.


[FN15]. Germane et al., supra note 9, at 181-82.


[FN23]. Tjaden & Thoennes, supra note 6.


[FN34]. Uniform Adoption Act § 3-504 (1994).


[FN38]. See, e.g., In re Marriage of Cobb, 988 P.2d 272, 273 (Kan. Ct. App. 1999) (court briefly mentions without comment allegations that father abused child, then changed joint custody award to sole custody to father due to parents' inability to co-parent); Brown v. Brown, 19 S.W.3d 717, 722-23 (Mo. Ct. App. 2000)(without any allegations of abuse, the court modified the joint custody arrangement to sole custody to the father because of the mother's unwillingness to co-parent and that the father is best suited to make decisions in the best interests of the child); Thomas v. Thomas, 991 P.2d 7, 10 (N.M. Ct. App. 1999) (noting no allegations of abuse, the court changed joint custody to sole to father due to parents' inability to co-parent).


[FN40]. Id. at 378-80.
[FN41]. Id. at 383.

[FN42]. Id. at 380 (affirming the trial court's ruling that the daughter live with the father from the first Saturday after the end of the school year to the first Saturday of November).

[FN43]. Id. at 385.


[FN45]. Id. at 1005.


[FN47]. This problem is described at length in Leigh Goodmark, From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases, 102 W. Va. L. Rev. 237 (1999). See also, Quirion, supra note 36, at 67.

[FN48]. See cases described in Goodmark, supra note 47, at 254-75. See also, Nancy K. D. Lemon, Domestic Violence & Children: Resolving Custody and Visitation Disputes, Family Violence Prevention Fund, 39-40 (1995). But see Bruscato v. Bruscato, 593 So. 2d 838 (La. Ct. App. 1992) (remanding case for more thorough evaluation and retrial where batterer father was awarded sole custody even though rebuttable presumption was not yet in effect).

[FN49]. For an argument in favor of the adoption of such a presumption in Massachusetts, see Pauline Quirion et al., Commentary: Protecting Children Exposed To Domestic Violence In Contested Custody And Visitation Litigation, 6 B.U. Pub. Int. L.J. 501 (1997). A similar argument in New York is found in Kurtz, supra note 6, at 1346.

[FN50]. These included Alabama, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Nevada, North Dakota, Oklahoma, Oregon, and South Dakota. In Alabama, there exists a rebuttable presumption that it is detrimental to child and not in best interest of child to be placed in sole custody, joint legal custody, or joint physical custody when court determines that domestic violence has occurred. Ala. Code § 30-3-131 (1975). In addition, the state has a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence. Ala. Code § 30-3-133 (1975). The state of Arizona makes it a rebuttable presumption that an award of custody to the parent who committed the act of domestic violence is contrary to the child's best interests, if the court determines that a parent has committed an act of domestic violence against the other parent; however, such presumption does not apply if both parents have committed an act of domestic violence. Ariz. Rev. Stat. § 25-403 (2000). California provides that a rebuttable presumption exists against sole or joint physical or legal custody if the court finds that a party perpetrated domestic violence. Cal. Fam. Code § 3044 (West Supp. 2001). The statute allows that this presumption may be rebutted by a preponderance of the evidence. Id. The statute identifies factors to overcome the presumption. Id. In Delaware, there is a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody and a rebuttable presumption that no child shall primarily reside with perpetrator of domestic violence. Del. Code Ann. tit. 13 § 705A (1999). This presumption is overcome by a preponderance of the evidence. Id. The
The statute identifies factors needed to overcome presumption. Id. Otherwise the presumption may be overcome only if a judicial officer finds extraordinary circumstances that warrant the rejection of the presumption. Id. The state of Florida has a rebuttable presumption of detriment to the child and against ordering shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, if there is evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence. Fla. Stat. Ann. § 61.13 (West 1997). Hawaii's rebuttable presumption statute provides that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody if the court determines that family violence has been committed by a parent. Haw. Rev. Stat. Ann. § 571-46 (Michie 1999). In Iowa, rebuttable presumption exists against joint custody if the court finds a history of domestic abuse. Iowa Code Ann. § 598-41 (West Supp. 2001). This finding, if not rebutted, outweighs any other factor in determining the award of custody. Id. Louisiana has a presumption against sole or joint custody if a parent has a history of perpetrating family violence. La. Rev. Stat. Ann. § 9:364 (West 2000). The court must find that that one incident of family violence resulted in serious bodily injury or more than one incident of family violence occurred before such a presumption can be applied. Id. Such a presumption may be overcome by a preponderance of the evidence. Id. This statute also identifies factors to overcome the presumption. Id. Massachusetts has a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent if court finds, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred, which may be overcome by a preponderance of the evidence that such custody award is in the best interests of the child. Mass. Gen. Laws Ann. chs. 208 § 31A, 209 § 38, 209C § 10 (West Supp. 2001). In Nevada, the statute provides that a rebuttable presumption that sole or joint custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. Nev. Rev. Stat. Ann. § 125.480 (Michie Supp. 1999). The state also provides that there exists a rebuttable presumption that sole or joint custody of the child by the perpetrator of sexual assault is not in the best interest of the child if the person is convicted of sexual assault and the parties later divorce. Nev. Rev. Stat. Ann. § 125C.210 (Michie Supp. 1999). In addition, there exists a rebuttable presumption that sole or joint custody by the parent convicted of first degree murder of the other parent is not in the best interest of the child and also includes a rebuttable presumption that rights to visitation with the child by the parent convicted of first degree murder of the other parent are not in the best interest of the child and must not be granted if custody is not granted. Nev. Rev. Stat. Ann. § 125C.220 (Michie Supp. 1999). There is a rebuttable presumption that sole or joint custody by the perpetrator of domestic violence is not in the best interest of the child, if after an evidentiary hearing the court finds by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent, or any other person residing with the child. Nev. Rev. Stat. Ann. § 125C.230 (Michie Supp. 1999). Nevada also provides a rebuttable presumption that custody with the perpetrator of domestic violence is not in the best interests of the child if court determines after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence. Nev. Rev. Stat. Ann. § 432B.157 (Michie 2000). In North Dakota, there is a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody if the court finds credible evidence that domestic violence has occurred and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding. N.D. Cent. Code § 14-09-06.2 (1999). This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. Id. Oklahoma's rebuttable presumption statute provides that it is not in the best interests of the child to have custody, guardianship, or unsupervised visitation granted to the abusive person if the occurrence of ongoing domestic abuse is established by clear and convincing evidence. Okla. Stat. Ann. tit. 43 § 112.2, tit. 10 § 21.1 (West 2001). In Oregon, there exists a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody to the parent who committed abuse. Or. Rev. Stat. § 107.137 (1989). In South Dakota, there is a rebuttable presumption that awarding custody to the abusive parent is not in the best interests of the minor if the person has been convicted of domestic abuse or assault against a person, other than a person related by consanguinity, but not living in the same household. S.D. Codified Laws § 25-4-45.5 (Michie 1999). In addition, there is a rebuttable presumption that awarding custody or granting visitation to the parent convicted for the death of the other parent, excluding vehicular homicide, is not in the best interests of the minor. S.D. Codified Laws § 25-4-45.6 (Michie 1999).

[FN52]. These included Colorado, Washington, and Wisconsin. In Colorado, if the court makes a finding of fact that domestic violence has occurred, then it shall not be in the bests interest of the child to allocate mutual decision-making responsibility over the objection of the other party or the child's representative, unless the court finds that the parties can make shared decisions about their children without physical confrontation and that places the abused party or child in danger. See Colo. Rev. Stat. Ann. § 14-10-124 (1.5)(b)(v) (West 1997). In the state of Washington, a parent's residential time with child will be limited if there exists a history of acts of domestic violence or assault/sexual assault "which causes grievous bodily harm or fear of such harm." Wash. Rev. Code Ann. § 26.09.191(2)(a)(ii)-(iii) (West 1997). In Wisconsin, a rebuttable presumption exists that the parents will not be able to cooperate in future decision-making when domestic violence is present. See Wis. Stat. Ann. § 767.24(2)(b)-(c) (West 1993). Pennsylvania also gives great weight to the perpetration of domestic violence or sexual assault by requiring successful completion of a batterer's treatment program if the abuser is convicted of certain crimes. See 23 Pa. Cons. Stat. Ann. § 5303 (West 1991).


[FN54]. Id.


[FN57]. Id.


[FN59]. See id. § 32-717 B (4).

[FN60]. See Minn. Stat. § 518.17, subd. 2(d) (2000).

[FN61]. Id. The statute does not state what evidence rebuts the presumption. Id.


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[FN64]. For citations to the rebuttable presumption statutes, see supra note 51.


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[FN80]. The Family Violence Project, supra note 18, at 206.

[FN81]. This term was changed to "dominant aggressor" in Cal. Penal Code § 836, effective January 2001. The legislative history indicates that this change was made in order to clarify that the focus should be on which party dominates the other, rather than on who "started the fight."


[FN85]. See, e.g., Cal. Penal Code § 836 (West Supp. 2001). However, see the discussion in Part IV regarding the controversy surrounding whether to include such a provision.

[FN86]. For example, in Massachusetts the court must find by preponderance of evidence that custody to abuser is in best interests of child. Mass. Gen. Laws Ann. chs. 208 § 31A, 209 § 38, 209C § 10 (1998). In North Dakota, the presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as custodial parent. N.D. Cent. Code § 14-09-06.2(1)(j)(1999).

[FN87]. These states include: Arizona, California, Delaware, and Louisiana.


[FN92]. Id. § 9:364(B).

[FN93]. See supra note 52.


[FN99]. Devers, supra note 98, at 3.

[FN100]. Id. at 8-9.

[FN101]. See id. at 9.

[FN102]. See id. at 3. See also, supra note 27 and accompanying text (describing the ABA's Model Code).


[FN105]. Id. See also, Marlene Rapkin, The Impact of Domestic Violence on Child Custody Decisions, 19 J. Juv. L. 404 (1998) (describing the legislative history of A.B. 200 and arguing that it did not go far enough, that is that California needed to enact a presumption against custody to batterers).

[FN106]. Cal. Fam. Code § 3044 (West Supp. 2001). A particularly useful document in terms of legislative history of this code section was written by Syrus Devers, legislative counsel for the California Assembly Judiciary Committee, when the bill was heard in that committee April 22, 1999. See Devers, supra note 98.

[FN107]. Cal. Fam. Code § 3044(a) (West Supp. 2001) (stating "[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against
the child or the child's sibling within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to the person who has perpetrated the domestic violence is detrimental to the best interest of the child.

[FN108]. Id.

[FN109]. Id.

[FN110]. Id.


[FN112]. Id. § 3044(a).

[FN113]. Id.

[FN114]. Id. § 3044(b)(1)-(6).

[FN115]. Id. § 3044(e) (stating that "[i]n most cases in which both parents are perpetrators of domestic violence, this presumption shall not be applicable.").

[FN116]. See Cal. Penal Code § 863 (c)(3) (West 2001) (defining the term "primary aggressor"). Section 836 also states the factors that a police officer should consider in identifying the primary aggressor, including "the intent of the law to protect victims of domestic violence from continuing abuse" and "the history of domestic violence between the persons involved." Id.

[FN117]. Cal. Fam. Code § 3044(d) (West Supp. 2001) (stating that a person has "perpetrated domestic violence" for the purposes of section 3044 "when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person... for which a court may issue an ex parte order pursuant to section 1320.").


[FN119]. Cases decided in and anecdotal reports from the states that give domestic violence great weight but do not have an actual rebuttable presumption against awarding custody to a perpetrator will not be included here, as they are beyond the scope of this article. See, e.g., Bartholf v. Bartholf, 619 N.W.2d 308 (Wis. Ct. App. 2000). Anna Farber Conrad, Criminal Justice Advocacy Director of the Colorado Coalition Against Domestic Violence, stated that Colorado judges often do not see any correlation between partner abuse and custody issues, and may not allow domestic violence experts to testify at custody trials. E-mail from Anna Farber Conrad, Criminal Justice Advocacy
Director of the Colorado Coalition Against Domestic Violence to author, Professor of Law, University of California at Berkeley (June 18, 2001). See also Caven v. Caven, 966 P.2d 1247 (Wash. 1998) (relying on the plain language of the statute to conclude that the father's history of domestic violence restricted the trial court's discretion in determining whether the parents should mutually make decisions about the children).

[FN120] North Dakota, like several other less populous states, has no intermediate appellate court, so whenever a trial court decision is appealed, it is heard by the state supreme court.


[FN123] Id. at 511-12.

[FN124] Id. at 512.

[FN125] Id.

[FN126] Id. at 515 (Levine, J., dissenting). For a discussion of this case see Garner, supra note 121, at 158-61.


[FN129] Id. at 161.


[FN131] Krank, 529 N.W.2d at 844; Ryan, 533 N.W.2d at 920.

[FN132] 529 N.W.2d at 155.

[FN133] Id. at 162.

[FN134] Id. at 164.
These acts would suffice to trigger the presumption in some states. See for example, the California Family Code section 3044, which includes destruction of personal property in its definition of domestic violence through a cross-reference to sections 6203 and 6320. See Cal. Fam. Code § § 3044(d), 6203, 6320 (West Supp. 2001).

Ryan, 533 N.W.2d at 924.

534 N.W.2d 825 (N.D. 1995).

Id. at 828-29.

529 N.W.2d 155 (N.D. 1995).
[FN152]. Bruner, 534 N.W.2d at 828.


[FN154]. Id. at 722-23.


[FN156]. Id. at 923.

[FN157]. Id. at 926.


[FN159]. Id. at 413.


[FN161]. Id. at 661.


[FN163]. Id. at 358-59. While this may have been a strategy decision on the part of the victim parent's attorney, it is more likely to have been an oversight, in which case it is an example of the importance of training family law attorneys about any statutes involving domestic violence.


[FN165]. Id.

[FN166]. 561 N.W.2d 263 (N.D. 1997).

[FN167]. Id. at 267.

[FN168]. Id. at 268.
These rebuttal factors are not typical of those found in statutes which specify such factors. Given the lack of rebuttal factors in the North Dakota statute, trial courts must make this determination on a case by case basis.

[FN184]. Id. at 143-44. These rebuttal factors are not typical of those found in statutes which specify such factors. Given the lack of rebuttal factors in the North Dakota statute, trial courts must make this determination on a case by case basis.

[FN199]. Id. at 874. This last comment is significant because the court is thereby excluding emotional abuse, the most frequent form of domestic violence, and according to victims, the most damaging, as unlike physical violence, it tends to be continuous, chipping away at the victim's self esteem until she feels powerless. See Pincolini, supra note 56, at 7; Dutton & Golant, supra note 78, at 23, 140. Of course, including emotional abuse in the definition of domestic violence would also open the door to a backlash from perpetrators, who often say that they feel emotionally abused by their victims.

[FN200]. 613 N.W.2d 516 (N.D. 2000).

[FN201]. Id. at 521.
North Dakota's presumption statute creates a rebuttable presumption against awarding custody to the perpetrator of domestic violence under three circumstances: (1) if "there exists one incident of domestic violence which resulted in serious bodily injury," (2) if "there exists one incident of domestic violence which involved the use of a dangerous weapon," or (3) if "there exists a pattern of domestic violence within a reasonable time proximate to the proceeding." N. D. Cent. Code § 14-09-06.211(i).

The trial court also stated that the husband's breaking a table, two chairs, a stairway railing, and a mirror did not constitute domestic violence. Id. at 133 n.2. This was because, according to the trial court, there was no evidence that these actions caused the wife to feel afraid that the husband would harm her. Id.

This finding, upheld by the appellate court, shows the danger of defining domestic violence too narrowly in statutes creating presumptions against custody to batterers.

"The evidence of domestic violence presented to the trial court did not trigger the rebuttable presumption under N.D.C.C. § 14-09-06.2(1)(j)." Id.
[FN217]. Id.

[FN218]. Id. at 800.

[FN219]. Id. at 802-03.


[FN221]. Id. at 1349.

[FN222]. Id. at 1347-48.

[FN223]. Id. at 1348.

[FN224]. Id. at 1350.

[FN225]. Id. at 1349.


[FN228]. Id. at 1127.

[FN229]. Id. at 1126-27.

[FN230]. Id. at 1127.

[FN231]. Louisiana's presumptive statute provides: "If the court finds that both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence." La. Rev. Stat. Ann. § 9:364(B) (West 2000).

[FN232]. Morrison, 699 So. 2d at 1127. Completion of a treatment program are mandated by section 9:364(B). Id. at 1128. Such treatment programs are defined by section 9:362(7). Id.

[FN233]. Id. The father was ordered to complete a treatment program before he could engage in any form of visitation, as required by the statute. Id.

[FN235]. Id. at 55.

[FN236]. Id. at 58.

[FN237]. Id. at 56, 58.

[FN238]. Id. at 58.

[FN239]. Id. at 60. The mother had remarried, and her new husband was in the Navy, so they had to relocate periodically. Id. at 61.

[FN240]. Id. at 62.

[FN241]. Id. at 62-63 (Gonzales, J., concurring).

[FN242]. Id. at 63.


[FN245]. 733 So. 2d at 1262.

[FN246]. Id. at 1263.


[FN248]. 733 So. 2d at 1265-66.

[FN249]. Simmons, 649 So. 2d at 802.


[FN251]. Id. at 712.
[FN252]. Id.

[FN253]. Id. at 711-12.


[FN255]. Id. at 1190.

[FN256]. Id. at 1187, 1190.

[FN257]. Id. at 1191.

[FN258]. See La. Rev. Stat. Ann. § 9:364(A) (West 2000) (stating that "no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children," but not specifying that such family violence may be considered solely in reference to the other parent seeking custody or the child whose custody is at issue).

[FN259]. Harper, 764 So. 2d at 1190.


[FN261]. Id. at 858.

[FN262]. Id.

[FN263]. Id. at 860.

[FN264]. Id.

[FN265]. Id.

[FN266]. Id. at 861-62.

[FN267]. Id. at 862.

[FN268]. Id.
[FN269]. Id.


[FN271]. E-mail from Susana Sâcouto, attorney at w.e.a.v.e. (women escaping A Violent Environment) in Washington D.C. to author, Professor of Law, University of California at Berkeley (June 15, 2001) (on file with author).

[FN272]. Id.


[FN274]. Id. § 16-911(a)(1).

[FN275]. E-mail from Prof. Lisa DeSanctis, clinical professor at Georgetown University Law School, to author, Lecturer, University of California at Berkeley (June 13, 2001) (on file with author).

[FN276]. Id.


[FN278]. E-mail from an anonymous source in Hawaii to author, Professor of Law, University of California at (July 18, 2001) (on file with author) [hereinafter Anonymous E-mail].

[FN279]. This attorney noted that issuance of orders without findings raises the question whether there is subject matter jurisdiction. Id. She will be discussing this with the judiciary soon. Id.

[FN280]. Id.

[FN281]. Id.

[FN282]. Id.

[FN283]. Id.

[FN284]. Id.
Hawaii statute states that "[a] court may award visitation to a parent who committed family violence only if the court finds that adequate provisions for the physical safety and psychological well-being of the child and adequate provision for the safety of the parent who is a victim of family violence can be made." Haw. Rev. Stat. Ann. § 517-46(10) (Michie 1999).

Anonymous E-mail, supra note 279.

S.D. Codified Laws § 25-4-45.5 (Michie 1999).

Telephone Conversation Verlaine Gullickson, Director of the South Dakota Coalition Against Domestic Violence and Sexual Assault, with author (Aug. 10, 2001).

Ms. Gullickson also noted the biggest problem presented by these cases is the judges' refusal to order that the batterers relinquish their firearms, as mandated by 18 U.S.C. § 922(g)(8) and (9). Id. See 18 U.S.C. §§ 922(g)(8) & (9) (1994 & Supp. 1999) (other sections have been held unconstitutional).


A.S., 2001 WL 259278 at *2-3; Nye, 785 So. 2d at 1151; Ray, 782 So. 2d at 799; Davis, 743 So. 2d at 487; Fesmire, 738 So. 2d at 1287-88; M.J.Y., 758 So. 2d at 574.

Fesmire held that if allegations of domestic abuse have been made, then "the trial court must, on the basis of the evidence presented, make a finding on the record as to whether domestic abuse occurred and then... it must apply the remaining provisions of the Custody and Domestic or Family Abuse Act." Id. at 1288.

Ex parte Fann, 2001 WL 793009, at *3.

Id. at *5.

Id.


Id. at 6.

Id. at 5.

See id. at 5-6.

Id. at 5.

Id. at 6.

Id. at 9.


Id.

Id. at 47.

Id.

Id. at 47-48.
[FN317]. Id. at 48.

[FN318]. Id.


[FN320]. Id.

[FN321]. Id. at 226.

[FN322]. Id. at 225.

[FN323]. Id.

[FN324]. Id. at 226.

[FN325]. Id.


[FN327]. Id.

[FN328]. Id. at 227.

[FN329]. Id.

[FN330]. Id. at 1228, 1230.


[FN332]. Id. at *1.

[FN333]. Id. at *2.

[FN334]. Id. at *1-2.
The Delaware statute does not require a conviction, but merely that the parent be a "perpetrator of domestic violence," which is not defined by the statute or case law. Del. Code Ann. tit. 13, § 705A (a) & (b) (1999).

There is no intermediate appellate court in Delaware.

[FN353]. E-mail from Celia Yapita, attorney in North Central Florida, to author, Professor of Law, University of California at (June 13, 2001) (on file with the author). Ms. Yapita, an attorney specializing in domestic violence civil cases, reports that the presumption rarely arises because most abusers are not arrested, much less convicted of a felony. Id. Most of the judges she has appeared before give very little, if any, weight to domestic violence allegations if there are no charges or convictions. Id. Judges do routinely grant injunctions for protection, but they also usually grant unsupervised visitation to abusers. Id. Unless the abuse is severe and documented, most judges in her area do not believe the violence has affected or will affect the children. Id.


[FN356]. Id. at 255.

[FN357]. Id.

[FN358]. Id. at 252.

[FN359]. Id. at 255.

[FN360]. Id.

[FN361]. Id. This case, which received a great deal of publicity nationally, shows the lengths to which a conservative court will go in order to prevent a lesbian from raising her child. It also demonstrates the need for specific rebuttal factors to be included in statutes creating a presumption against the batterer.


[FN363]. Id. at 192.

[FN364]. Id. at 196.

[FN365]. Id. at 194.

[FN366]. Id. The trial court followed the "friendly parent" provision found in many state statutes. See id. These

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[FN367]. Ford, 700 So. 2d at 195.

[FN368]. Id. at 196. Nina Zollo states that the Ford case was very helpful in reversing a trial court that had not follow the statute. Email from Nina Zollo, the Legal Director of the Greenberg Traurig/Florida Coalition Against Domestic Violence Alliance for Battered Women, to author, Professor of Law, University of California at (June 18, 2001) (on file with author). She said that this case may be why there do not seem to be problems with judges following the statute, or unintended consequences. Id.


[FN370]. Id. at 163.

[FN371]. Id. Apparently it is rare in Florida for a batterer to be convicted, as even in the largest city in that state, diversion is used in most misdemeanor domestic violence cases. See Dana Canedy, Officials Drop Criminal Charge Arising in Miami Mayor's Spat, N.Y.Times, August 7, 2001, at http://www.nytimes.com/2001/08/07/national/07MIAMI.html (quoting the Miami-Dade state attorney as saying this is the standard disposition for first time offenders charged with misdemeanor battery).


[FN373]. Id. at 1095.

[FN374]. Id.

[FN375]. Id.


[FN377]. Id. § 598.41(2)(c).


[FN379]. In re Sulzner, 2000 WL 504728 at *2.

[FN380]. 563 N.W.2d 629.
Iowa has no intermediate appellate court. Thus, both cases interpreting the statute are from the state supreme court.

The Iowa statutes, like most presumption statutes, do not include specific rebuttal factors that the court must consider.

570 N.W.2d 757 (Iowa 1997).

Id. at 759.

Id. at 760.

[FN398]. Id. at *2.

[FN399]. Id. at *1.

[FN400]. Id. at *2.

[FN401]. Id.


[FN403]. Id. This is a higher standard than that needed to obtain a protective order in Massachusetts, which may be one reason there does not seem to have been any judicial reluctance to issue protective orders for fear of triggering the presumption against custody to batterers. E-mail from Doug McCormack, Mass. Attorney/advocate to author, Professor of Law at California at (June 18, 2001) (on file with author). For a discussion of the Massachusetts statute, see generally Quirion, supra note 36. For an argument that prior Massachusetts statutes and case law could serve as the basis for a rebuttable presumption even without a statute explicitly authorizing this, as well as an argument in favor of such a statute, see generally Pauline Quirion et al., supra note 49.


[FN405]. Id.


[FN407]. Id.

[FN408]. Id. at 916.


[FN410]. Id. at 454.

[FN411]. Id. at 451.

[FN412]. Id.

[FN413]. Id.
"The mother makes no argument that the father's conduct constitutes a pattern or serious incident of abuse that would give rise to the rebuttable presumption contained in § 10(e)."

Given the pre-presumption decision by the Massachusetts Supreme Court, in which the court held that it was reversible error not to make findings of fact on domestic violence in a custody case where domestic violence had been an issue, *Custody of Vaughn*, 664 N.E.2d 434, 440 (Mass. 1996), Zia appears actually to be a step backward.

Loretta Frederick, a prominent domestic violence advocate and attorney in Minnesota, reported that there has been no backlash to the presumption statute because it is so weak. Telephone Conversation Loretta Frederick, Attorney, with author (July 16, 2001).


505 N.W.2d at 628.

Id. at 638.

Id. at 632.


Id.

Id. at 634.


Id. at *1.

Id. at *5.

Id. at *4. The court stated that," [h]ere, a thorough custody evaluation of both parties and the child was
completed; the court had no need to investigate further." Id. at *4 n.5.

[FN430]. Id. at *5.


[FN432]. Id. at *1.

[FN433]. Id. at *2.

[FN434]. Id.

[FN435]. Id. at **1-2.

[FN436]. Id. at *2. The court noted that father acknowledged the importance of the mother in the child's life and that the mother did not reciprocate this importance of the father's role. Id. at *4.

[FN437]. Id.


[FN439]. Telephone Conversation with Mary Louise Klas, retired judge (July 31, 2001). Judge Klas is part of a group of attorneys, advocates, and academics currently drafting Minnesota domestic violence custody legislation.

[FN440]. Id.

[FN441]. Id.

[FN442]. Id.


[FN444]. Klas Telephone Conversation, supra note 439.


[FN446]. Telephone Conversation with Cyndi Cook, former Legislation and Public Policy Coordinator, Minnesota
Coalition for Battered Women (July 30, 2001).

[FN447] This sponsorship was the result of a domestic violence expert, Loretta Frederick, working closely with the State Bar Family Law Section for several years. Frederick Telephone Conversation, supra note 418.

[FN448] Id.; E-mail from Cyndi Cook, former Legislation and Public Policy Coordinator, Minnesota Coalition for Battered Women to author, Professor of Law, University of California at (Aug. 5, 2001) (on file with author).

[FN449] Cook Telephone Conversation, supra note 447; Cook E-mail, supra note 448.

[FN450] Cook Telephone Conversation, supra note 447; Cook E-mail, supra note 448.

[FN451] Cook Telephone Conversation, supra note 447; Cook E-mail, supra note 448.


[FN454] Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN455] Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN456] Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN457] Cook Telephone Conversation, supra note 446. See Minn. Stat. § 518B.01(2)(a) (2000) (defining domestic abuse as physical harm, bodily injury, or assault, infliction of fear of one of these, terroristic threats, criminal sexual conduct). Since the statute does not require more than one of these, presumably one such act would suffice as grounds for a protective order.

[FN458] Cook Telephone Conversation, supra note 446. This definition did not actually appear in the 2001 legislation, but may be included in the 2002 version. See id. § 518B.01(2)(a).


[FN460] Cook Telephone Conversation, supra note 446.

[FN461] Id.
[FN462]. Id.; Cook Email, supra note 448.

[FN463]. Cook Telephone Conversation, supra note 446. Loretta Frederick, another proponent of the legislation, stated that the definition of domestic abuse in the next version of the bill may be even more narrow, that is physical abuse alone, in order to minimize problems with backlash and inclusion of victims. Frederick Telephone Conversation, supra note 418.

[FN464]. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN465]. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN466]. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN467]. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN468]. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN469]. Cook Telephone Conversation, supra note 446. Minnesota does not have this type of language in its criminal statutes, thus, it would be a new concept for the entire state. Id. Ms. Cook also stated that during legislative hearings, proponents of the legislation argued that if there were allegations that both parties were abusive, it was imperative for courts to make findings, rather than ruling that the presumption was inapplicable. Id.

[FN470]. Frederick Telephone Conversation, supra note 418.

[FN471]. Id. Ms. Cook also stated that the Minnesota Supreme Court's Gender Fairness in the Courts Task Force is currently examining the role of guardians ad litem, so this may be another way to redefine this role, require training on domestic violence. Cook Telephone Conversation, supra note 446.

[FN472]. In one recent case described by Cook, the father convinced the guardian ad litem that he no longer required supervision during the visitation. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448. When he refused to return the child, and the mother came to the father's house to get the child, the father killed the mother. Cook Telephone Conversation, supra note 446; Cook E-mail, supra note 448.

[FN473]. Cook Telephone Conversation, supra note 448.


[FN476]. Nevada has no intermediate appellate court; thus all appellate cases are decided by the state supreme court.


[FN478]. Id. at 452.

[FN479]. Id.

[FN480]. Id. at 453.

[FN481]. Id.

[FN482]. Id. at 455-56. The Lesley case was overruled in Epstein v. Epstein on other grounds, 950 P.2d 771 (Nev. 1997). Epstein held that the respondent does not need to show a meritorious defense in order to set aside a default judgment of divorce. Id. at 773.


[FN484]. Id. at 178.

[FN485]. Id.

[FN486]. Id. at 179.

[FN487]. Id.

[FN488]. Id. (Springer, J., dissenting). Contrast the holding in McDermott with that in Ward v. Ward, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996), in which the mother’s failure to raise the statutory presumption in the trial court was held to preclude consideration of the statute by the appellate court. Id. See also supra note 355 and accompanying text (explaining the Ward case).


[FN490]. Id. at 99.

[FN491]. Id.
A factually very similar case is found in Barkaloff v. Woodward, 47 Cal. App. 4th 393 (Ca. Ct. App. 1996). In Barkaloff, a batterer boyfriend was granted visitation of his ex-partner's child by the trial court. Id. at 397. This was reversed by the appellate court due to lack of jurisdiction. Id. at 399.
[FN510]. Id. at 479.

[FN511]. Id.


[FN513]. Id. at 26.

[FN514]. Id. at 25.

[FN515]. Id.

[FN516]. Id. at 26.


[FN518]. E-mail from Dianne Post, Attorney, Arizona Coalition Against Domestic Violence, to author, Professor of Law, University of California at (June 26, 2001) (on file with author) [hereinafter Post E-mail (1)].

[FN519]. Id.

[FN520]. Id.

[FN521]. Id.

[FN522]. Id.


[FN524]. See id. § 25-403(N).

[FN525]. Post E-mail, supra note 518.

[FN526]. E-mail from Dianne Post, attorney for Arizona Coalition Against Domestic Violence to author (July 3, 2001) (on file with author) [hereinafter Post Email 2]. This is apparently referring to Arizona Statute section 25-403(M), Ariz. Rev. Stat. § 25-403(M) (2000).

[FN528]. E-mail from Katy Yetter, Attorney, Oregon Coalition Against Domestic and Sexual Violence, to author, Professor of Law, University of California at (June 18, 2001) (on file with author).

[FN529]. Id.

[FN530]. Id. This appears to be a reference to fact that there are no restraining order hearings in Oregon unless the respondent requests a hearing. See Or. Rev. Stat. § 107.718 (1999). This was also mentioned by Maureen McKnight, the Regional Director for Oregon Legal Aid, who said that the fact that restraining orders are so often issued ex parte means that many judges feel that a finding of abuse in a restraining order has no effect in a subsequent family law proceeding. E-mail from Ms. McKnight, Regional Director for Oregon Legal Aid, to author, Professor of Law, University of California at (June 18, 2001) (on file with author).

[FN531]. Id.

[FN532]. Id.

[FN533]. E-mail from Caitlin Glass, Attorney, Oregon Legal Aid, to author, Professor of Law, University of California at (June 16, 2001) (on file with author). Ms. Glass summarized comments made to her from Legal Aid attorneys in several counties. Id.

[FN534]. Id.

[FN535]. Id.

[FN536]. Id.

[FN537]. Id.

[FN538]. E-mail correspondence from Jud Carusone, Oregon attorney, to author, Professor of Law, University of California at (June 13, 2001) (on file with author).

[FN539]. Id.

[FN540]. Id.

[FN541]. Id.

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[FN542]. Id.

[FN543]. Id.

[FN544]. Id.


[FN546]. Id. at 22.

[FN547]. Id. at 23.

[FN548]. Id. at 22.

[FN549]. Id. at 23.

[FN550]. Id.

[FN551]. Id.

[FN552]. Id. at 23-26.


[FN555]. Id. at 24-25.

[FN556]. Id. at 13. The unpublished C.A.A.D.V. survey results are on file with the author. One of the prior pieces of legislation was A.B. 200. See infra Part III (H).

[FN557]. See Devers, supra note 99, at 3-5. "Providers of services to domestic violence victims from 12 counties, ranging from Shasta to San Bernardino, responded to the [C.A.A.D.V.] survey. The result was unanimous that AB 200 is virtually ignored except in those courts that were already dealing effectively with domestic violence prior to its passage. One response from Santa Cruz County was particularly telling: 'I have never heard a judge here make a specific finding as mandated by AB 200, and one, when prompted, said he didn't have to - that was his order.' " Id.
at 5.

[FN558]. Warren et al., supra note 545, at 23.

[FN559]. Id. at 26-27. The California presumption is triggered by the same low level of abuse required to qualify for a restraining order. Section 3044 of the California family code cross references section 6220 of the Domestic Violence Prevention Act in defining domestic violence.

[FN560]. Id. at 24-27.

[FN561]. See Devers, supra note 98, at 7-8.

[FN562]. Warren et al., supra note 545, at 29, 33-34.

[FN563]. Id. at 33-34.

[FN564]. Id. at 29-33.

[FN565]. Id. at 29-30.

[FN566]. Id. at 29.

[FN567]. Id. at 33.

[FN568]. Id.

[FN569]. Id. at 30.

[FN570]. Id. at 29.

[FN571]. Id. at 34-37.

[FN572]. Id. at 35.

[FN573]. Id. at 31-32.

[FN574]. Id. at 32.
While the California Labor Code section 230 protects victims of domestic violence who take time off to go to court, many victims do not know about these provisions or how to access legal help to enforce them. Cal. Labor Code § 230 (West 2000).

Warren et al., supra note 545, at 38.
[FN591]. Conversations between author and anonymous attorneys from the San Francisco Bay Area on various occasions in spring 2001.

[FN592]. Author's discussions with anonymous attorneys from non-profit agencies working exclusively with victims of domestic violence and practicing in the San Francisco Bay Area, spring and summer 2001.


[FN594]. Family Violence Project, supra note 18, at 211-222.

[FN595]. Id.

[FN596]. Id. at 221. This is presumably a reference to visitation provisions, a source of great and ongoing danger in many post-divorce families.

[FN597]. Id.

[FN598]. Id.


[FN600]. For example, the Massachusetts presumption statutes, Mass. Gen. Laws Ann. chs. 208 § 31A, 209 § 38, and 209C § 10 (West Supp. 2001), incorporate a higher standard than is used in the protective order statute, 209A. The former requires "a pattern or serious incident of abuse," while the latter requires only "one or more of the following acts," and includes threats and attempted physical harm as well as actual physical harm or involuntary sexual relations.

[FN601]. Pincolini, supra note 56, at 8.

[FN602]. Family Violence Project, supra note 18.

[FN603]. See, e.g., Anderson v. Hensrud, 548 N.W.2d 410, 414 (N.D. 1996) (holding that the presumption could be raised by abuse of other victims besides the co-parent).

[FN604]. See, e.g., Ala. Code § § 30-3-131, 30-3-133 (1975), as discussed in Jackson v. Jackson, 709 So. 2d 46, 48 (Ala. Civ. App. 1997) (holding that the joint custody preference is trumped by the rebuttable presumption against custody to batterers).

[FN606]. See, e.g., id. § 3100.

[FN607]. See, e.g., id. § 3011 (continuing to apply even if the presumption statute, Cal. Fam. Code § 3044, does not).

[FN608]. See, e.g., La. Rev. Stat. Ann. § 9:364 (West 2000). This may be called a "primary aggressor" or "predominant aggressor" determination, as well as "dominant aggressor."

[FN609]. See, e.g., Cal. Penal Code § 836 (West 2000). However, as noted previously, at least one prominent domestic violence advocate is of the opinion that such a provision is not useful in a statute establishing a presumption against custody to batterers, since its inclusion may trigger many more trials on the "primary" or "dominant" aggressor issue. Fredrick Telephone Conversation, supra note 418.

[FN610]. Family Violence Project, supra note 18, at 221-22.

[FN611]. In 1997, Minnesota passed a law mandating judicial education in the area of domestic violence and child custody. Minn. Stat. § 480.30 (2000). However, while such training is offered at the annual state judicial conference, judges are not actually required to attend. Cook Telephone Conversation, supra note 446. Such statutes are very rare, and are often opposed by judicial associations on the grounds that they violate the separation of powers doctrine. The Oregon Coalition Against Domestic Violence and Sexual Assault is offering statewide judicial training, focusing on the theme that one cannot be a batterer and a good parent at the same time. E-mail from Katy Yetter to author (June 19, 2001) (on file with author).


[FN613]. See, e.g., id. § 3110.5 (West Supp. 2001); Cal. Rules of Court § 1257.7 (West 2001) (mandating annual training on domestic violence for custody evaluators).

[FN614]. In several of the appellate cases discussed above, the attorneys seemed to be unaware of the rebuttable presumption statute, as it was not raised at the trial court level. While some states are considering including domestic violence issues on the general bar examination, so far no state has done so. Thus, it is quite possible for family law attorneys to have had no training on domestic violence.

[FN615]. See, e.g., Cal. Welf. & Inst. Code § 16206 (West 2000) (mandating domestic violence training for court-appointed attorneys for children in juvenile court). While these attorneys do not have the same role as guardians ad litem, these are similar functions. Both groups should be mandated to have domestic violence training.

[FN616]. Such trainings have been provided for court-based mediators and child custody evaluators by the California Judicial Council. For more information, contact Julia Weber at the Center for Families, Children, and the Courts, Administrative Office of the Courts, San Francisco, California. They have also been provided for judges by

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the California Commission on Judicial Education and Research. For more information contact Bobbie Welling, CJER, Administrative Office of the Courts, San Francisco, California.

[FN617]. This is recommended in a thoughtful article discussing how to actually effect attitudinal change in the family courts on the topic of domestic violence. See Clare Dalton, When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System, 37 Fam. & Conciliation Cts. Rev. 273 (July 1999).

[FN618]. Id.

[FN619]. See, e.g., Cal. Rule of Court, R1257.2, which is due to take effect Jan. 1, 2002.

[FN620]. Id.

[FN621]. A 1997 study by the California Administrative Office of the Courts found that more than eighty percent of domestic violence cases are handled without attorneys. Sharon Lerman, Litigants Without Lawyers Flood Courts, 1 Cal. Bar J. 32 (2001).

[FN622]. Cook Telephone Conversation, supra note 446 (describing an example of what may have been the improper delegation of such authority).

[FN623]. Steve Berenson, Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnick v. Nathanson, 35 San Diego L. Rev. 1, 49 (1998) (noting that the "[I]legal Services Corporation has barely survived elimination, suffering deep funding reductions and draconian restrictions on the scope of its activities"); Jessica Pearson, Court Services: Meeting the Needs of Twenty-First Century Families, 33 Fam. L.Q. 617, 620 (1999) (observing that federal appropriations for these programs have been cut and that both government and private legal assistance meets only about 20.5 percent of the needs of the poor).

[FN624]. Lerman, supra note 6232.

[FN625]. For example, the Center for Domestic Violence Prevention, San Mateo, Ca., has been successfully recruiting and training attorneys from large firms to handle contested custody cases involving domestic violence at the trial level. Conversation with Kim Milligan, Attorney for C.D.V.P., Aug. 6, 2001.

[FN626]. Id.

[FN627]. The Violence Against Women Grants Office, part of the U.S. Dep’t of Justice, has provided several million dollars in 1999, 2000 and 2001 to non-profit agencies around the U.S. to start meeting the civil needs of domestic violence victims, primarily focusing on family law cases.

[FN628]. Yetter E-mail, supra note 614. Ms. Yetter says that Oregon Legal Aid has not taken any appeals of domestic violence custody cases. Id. She says the priority at Legal Aid is to take on cases which will create new law. Id. Of course, a well reasoned appellate decision interpreting a new statute could resolve a lot of interpretation.
problems at the trial court level and save Legal Services trial attorneys much time and trouble.

[FN629]. Post E-mail, supra note 526.

[FN630]. E-mail from Dianne Post, Attorney, Arizona Coalition Against Domestic Violence, to author, Professor of Law, University of California at (July 9, 2001) (on file with author) [hereinafter Post E-mail (3)]. Domestic violence court watch programs have been conducted in several states, though these usually focus on criminal cases. See, e.g., Sarah Buel, Family Violence Court Watches: Improving Services to Victims by Documenting Practices, The Texas Prosecutor 16 (July/Aug. 1999). Minnesota also has a domestic violence court watch program, focusing on criminal cases; the results are used to inform the public when the judges are running for re-election. Cook Telephone Conversation, supra note 447. For more information about court watch programs, contact the Battered Women's Justice Project, 800-903-0111.

[FN631]. Cook Telephone Conversation, supra note 446.

[FN632]. Id.

[FN633]. Fredrick Telephone Conversation, supra note 418. Ms. Fredrick joined the family law section of the Minnesota State Bar and attended many of the meetings, raising domestic violence issues. Id. After a few years, the State Bar decided to sponsor the 2001 legislation extending the state rebuttable presumption to sole custody cases. Id.


[FN635]. Id.

[FN636]. Id.

[FN637]. Id.


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Child Custody and Visitation Decisions in Domestic Violence Cases:
Legal Trends, Research Findings, and Recommendations

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Revised October 1998

It may be hard to believe an abusive partner can ever make good on his threat to take the children away from his victim. After all, he has a history of violent behavior and she almost never does. Unfortunately, a surprising number of battered women lose custody of their children. The actual number is not known and offenders appear to be no more successful in gaining custody than non-offenders (Liss & Stahly, 1993). However, violence against one parent by another is often considered in custody-determination proceedings (Family Violence Project, 1995). This document describes some of the legal and cultural trends surrounding custody and visitation decisions and the social science evidence supporting a need to consider domestic violence in these decisions.

Legal Trends

Over the past 200 years, the bases for child custody decisions have changed considerably. The patriarchal doctrine of fathers' ownership of children gave way in the 1920's and 30's to little preference for one parent or the other obtaining custody. When given such broad discretion, judges tended to award custody to mothers, especially of young children. The mother-child bond during the early, "tender years" was considered essential for children's development. In the 1970's, "the best interests of the children" became the predominant guideline (Fine & Fine, 1994) and presumably was neutral regarding parental rights. Exposure to domestic violence was not originally included in the list of factors used to determine the child's best interest.

States recently came to recognize that domestic violence needs to be considered in custody decisions (Cahn, 1991; Hart, 1992; for a review of state laws see Family Violence Project, NCJFCJ, 1995, and legislative updates for 1995, 1996, and 1997). While a growing number of states specifically mention domestic violence as a factor to be considered, most of them allow wide discretion and do not give it special weight. It is simply one additional factor when considering the best interests of the child. By the end of the 1997 legislative session, 13 states had adopted the Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges (NCFCJ, 1998). These statutes specify that there is a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence" (p. 33).

Statutes now address other concerns related to custody and the recent proliferation of legislation seems likely to continue. Statutes in some states now cover: the prevention of child abduction by the
perpetrator through supervised visitation and similar safeguards (Girdner & Hoff, 1996; Hart, 1990), providing a defense against child abduction charges if battered women flee with their children, exempting battered women from mandated mediation (Girdner, 1996), protecting battered women from charges of "child abandonment" if they flee for safety without their children (Cahn, 1991), and allowing parents to check on the criminal charges against a divorce partner (Pennsylvania's Jen & Dave's law). Recent case law makes it easier for battered women to relocate far away from their abusers (Dunford-Jackson, in press). Unfortunately, courts may apply psychological pressures that keep women tied to their abusers. "Friendly parent" statutes ask courts to assess each parent's willingness to co-parent when making custody decisions (Zorza, 1992). Despite their reasonable reluctance to co-parent, battered women may end up being labeled "uncooperative," with an increased risk of losing their children. Along with legal changes, training and resource manuals for judges and court managers have recently been published, including guidelines for selecting custody evaluators and guardian ad lites (Goelman, Lehrman, Valente, 1996; Lemon, Jaffe, & Ganley, 1995; NCJFCJ, 1995; National Center for State Courts, 1997). For further discussion of these topics, see the references at the end of this document.

General Views About Joint Custody

Enthusiasm for joint custody in the early 1980's was fueled by studies of couples who were highly motivated to "make it work" (Johnston, 1995). This enthusiasm has waned in recent years, in part because of social science findings. For example, Johnston (1995) concluded from her most recent review that "highly conflictual parents" (not necessarily violent) had a poor prognosis for becoming cooperative parents and there is increasing evidence that children of divorce have more problems because of the conflict between the parents before the divorce and not because of the divorce itself (Kelly, 1993). "High conflict" parents should be allowed to develop separate parenting relationships with their children. Frequent visits and joint custody schedules led to more verbal and physical abuse. More frequent transitions between high-conflict parents were related to more emotional and behavioral problems of the children. If this is true of "high conflict" parents, it is likely to be even more true if mothers are being physically victimized.

Not all social scientists conclude that joint custody can be problematic. For example, Bender (1994) believes that "even the small percentage of parents who are very angry may be able to work out procedures to alleviate anger so that the child is not caught in the middle" (p. 126). However, his conclusion relies on data gathered at one point in time and thus statements about cause and effect are not possible. For example, better child adjustment is likely to result when joint custody is requested by (or ordered to) non-violent, low-conflict couples rather than from joint custody per se. Joint custody can be quite beneficial to the children of these non-violent, low-conflict couples, but not in cases of battering.

Parents Most at Risk for Physical and Emotional Abuse of a Child

Social science evidence can help to establish which parent is most likely to harm children. The most convincing evidence for the potential of men who batter their partners also to batter their children comes from a nationally representative survey (Straus, 1983). Half the men who battered their wives also abused their children. Abuse was defined as violence more severe than a slap or a spanking. Battered women were half as likely as men to abuse their children. Several non-representative surveys show similar results (reviewed in Saunders, 1994). When battered women are not in a violent relationship, there is some evidence that they are much less likely to direct anger toward their children (Walker, 1984).

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Emotional abuse of children by men who batter is even more likely because nearly all of these men's children are exposed to domestic violence (Pagelow, 1990). This exposure often constitutes a severe form of child abuse since the problems associated with witnessing abuse are now clearly documented (e.g., Edleson, 1997). There are short and long-term emotional and behavioral consequences for both boys and girls. Parents may not realize that their children can be affected even if they do not see the violence. For example, the children may be hiding in their bedrooms listening to repeated threats, blows, and breaking objects. Obviously, they may be afraid their mother will be injured or killed, but they may also have divided loyalties between their parents, guilt about not being able to intervene, and anger at their mothers for not leaving (Saunders, 1994). If mothers cannot find safety, their fears and depression may keep them from being as nurturing and supportive to their children as they normally would be.

Although state laws include emotional abuse in their statutory definitions of child abuse, such abuse is difficult to substantiate and child protection workers often give it low priority.

Mothers may also be blamed for harming their children in cases where evaluators and practitioners do not understand the dynamics of abuse (Edleson, 1997). Their cases are sometimes labelled as "failure to protect" since they are supposedly able to protect their children from the physical and emotional abuse of their partners (Enos, 1996). Battered women may even face criminal charges (Sierra, 1997). However, battered women's actions often come from their desire to care for their children. They may not attempt to leave because of financial needs, because they believe that the children need a father, or because they fear losing the children to their abuser. They often leave the relationship when they see the impact of violence on their children, only to return when threatened with even greater violence or out of economic necessity. Innovative programs, like Project Protect in Massachusetts, were developed to address these concerns. They use specially trained staff and multidisciplinary teams to integrate interventions for child abuse and domestic violence (Davidson, 1995). On a policy level, states generally allow evidence to show that the non-abusive spouse feared retaliation from her partner and thus could not try to stop or prevent abuse to the child. However, only a few states explicitly authorize this type of evidence.

Factors Related to Risk to the Children

In a given custody case, a number of factors related to or incorrectly attributed to child abuse and exposure to domestic violence may be present. Several factors--parental separation, childhood victimization of the parents, the parents' psychological characteristics, and abuser interventions--are discussed next.

**Parental Separation.** Parental separation or divorce does not prevent abuse to children or their mothers. On the contrary, physical abuse, harassment, and stalking of women continue at fairly high rates after separation and divorce. In one study, a fourth of the women reported threats against their lives during visitation (Leighton, 1989). Separation is a time of increased risk of homicide for battered women (Wilson & Daly, 1994) and these homicides sometimes occur during custody hearings or visitation exchanges of children. In rare cases, men kill children in retaliation for their female partners leaving them.

Children are also likely to be exposed to renewed violence if their fathers become involved with other women. Over half of men who batter go on to abuse a second woman (Wofford, Elliot, & Menard, 1994). Judges who consider the remarriage of a man to be a sign of stability and maturity should instead consider it as a possible sign that the children will once again be emotionally harmed.
Parents' Childhood Victimization. Evaluators may look to childhood risk factors of each parent to assess their child abuse potential. The link between being abused in childhood and becoming a child abuser is not as strong as was once thought, with about 30% of child abuse victims becoming abusers (Kaufman & Zigler, 1987). Some evidence suggests that the link is stronger in men than in women (Miller & Challas, 1981).

Parents' Psychological Characteristics. The parents' personality traits and psychological disorders are generally poor predictors of child abuse (Wolfe, 1985). Neither parent is likely to have chronic mental disorders of genetic origin (e.g., schizophrenia, or bipolar disorder). Personality disorders are much more likely to appear on the psychological tests of both parents. Great care must be taken, however, when interpreting parents' behaviors and psychological tests. Men who batter often have the types of personality disorders that keep childhood traumas, anxiety, and other problems hidden (Holtzworth-Munroe & Stuart, 1994).

To the extent that psychological disorders continue to be used to describe battered women, they can be placed at a serious disadvantage. Compared with the chronic problems of their partners, battered women's psychological problems are much more likely to decrease as she becomes safer. Many battered women may seem very unstable, nervous, and angry (Crites & Coker, 1988). Other battered women may speak with a flat affect and appear indifferent to the violence they describe (Meier, 1993). These women probably suffer from the numbing symptoms of traumatic stress. The psychological test scores of some battered women may indicate severe personality disorders and mental illness. However, their behaviors and test scores must be interpreted in the context of the traumas they have faced or continue to face (Rosewater, 1987). The tactics used by their abusers parallel those used against prisoners of war and include threats of violence, forced isolation, degradation, and attempts to distort reality and increase psychological dependence. Severe depression and traumatic stress symptoms are the likely results. When women fear losing custody of children to an abusive partner, the stress can be overwhelming.

Interventions for the Abuser. Successful completion of treatment does not at all mean that the risks of child and woman abuse are eliminated. Although the evaluation of programs for men who batter is still in its infancy (Saunders, 1996), it is clear that a substantial proportion of women (35%, averaged across a number of studies) report that physical abuse by their partners occurs within 6-12 months after treatment. Psychological abuse is even more prevalent. Only two studies of programs for men who batter investigated the reduction of actual or potential violence toward the children (Myers, 1984; Stacey & Shupe, 1984). Both of these studies showed promising results, yet did not specifically focus on parenting issues. Only one description could be found of a special parent training program for men who batter (Mathews, 1995).

Recommendations for Custody and Visitation

Despite the dearth of sound research in this area, some tentative recommendations can be made from practice wisdom and the research that does exist. There is general agreement that joint custody has many advantages when a woman has good financial resources and an ex-partner who is nonabusive and supportive as a co-parent. However, the past and potential behavior of men who batter means that joint custody (or sole custody to him) is rarely the preferred option for these families. In to their propensity for violence, these men are likely to abuse alcohol (Tolman & Bennett, 1990) and communicate in a hostile, manipulative manner (Holtzworth-Munroe & Stuart, 1994).

As stated earlier, the model state statute of the National Council of Juvenile and Family Court Judges clearly states that there should be a presumption that it is detrimental to the child to be placed in sole or joint custody with a perpetrator of family violence (NCJFCJ, 1994). The model statute

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emphasizes that the safety and well-being of the child and the parent who is the victim must be primary. The perpetrator's history of causing fear as well as physical harm should be considered. A parent's absence or relocation in an attempt to escape violence by the other parent should not be used as a factor to determine custody. Courts sometimes label battered women as "impulsive" or "uncooperative" if they leave suddenly to find safety in another city or state. The model statute specifies that it is in the best interest of the child to reside with the non-violent parent and that this parent should be able to choose the location of the residence, even if it is in another state. The noncustodial parent may also be denied access to the child's medical and educational records if such information could be used to locate the custodial parent.

Visitation guidelines should be based on the following general principles: a) contact between child and parent should be structured in a way that limits the child's exposure to parental conflict; b) transitions should be infrequent in cases of ongoing conflict and the reasonable fear of violence; and c) substantial amounts of time with both parents may not be advisable (Johnston, 1992). Ideally, a court order should detail the conditions of supervised visitation, including the role of the supervisor (NCJFCJ, 1995). Unsupervised visitation should be allowed only after the abuser completes a specialized program for men who batter and does not threaten or become violent for a substantial period of time. Practitioners need to be aware of the strong likelihood that men who batter will become violent in a new relationship and that they often use nonviolent tactics that can harm the children. Rather than rely on official records of recidivism, the best way to establish that the perpetrator is nonviolent is to interview current and past partners.

Visitation should be suspended if there are repeated violations of the terms of visitation, the child is severely distressed in response to visitation, or there are clear indications that the violent parent has threatened to harm or flee with the child. Even with unsupervised visitation, it is best to have telephone contact between parents only at scheduled times, to maintain restraining orders to keep the offender away from the victim, and to transfer the child in a neutral, safe place with the help of a third party (Johnston, 1992). Hart (1990) describes a number of safety planning strategies that can be taught to children in these situations.

The model statute (NCJFCJ, 1994) states that visitation should only be awarded to the perpetrator if adequate safety provisions for the child and adult victim can be made. Orders of visitation can specify, among other things: the exchange of the child in a protected setting, supervised visitation by a person or agency, completion by the perpetrator of "a program of intervention for perpetrators", and no overnight visitation. If the court allows a family or household member to supervise the visitation, the court can set the conditions to be followed during visitation. For example, an order might specify that the batterer not use alcohol prior to or during a visit and that the child be allowed to call the mother at any time.

Visitation centers are expanding across North America in response to the need for safe access and visitation (Straus, 1995). The approaches of these centers vary. For example, most of them provide some form of observational records of the visit, but the role of these programs in evaluating parents and reporting to courts differs. The experience of the visitation center in Duluth, Minnesota, shows the difficulty of keeping a neutral stance given the traditional biases in our social systems (McMahon & Pence, 1995). The Duluth center found that the traditional over-emphasis on parental rights and child welfare may block from view the harm of domestic violence to both battered women and their children.

In conclusion, although there is a need for further practice experience and research, our current knowledge of risk factors for continued abuse of women and children means that decision-makers must exercise great caution in awarding custody or visitation to perpetrators of domestic violence. If
custody or visitation is granted, careful safety planning and conditions attached to the court order are important to help lower the risk of harm to the children and their mothers.

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Child Custody and Visitation Decisions in Domestic Violence


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In Brief: Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations

Daniel G. Saunders

The current enthusiasm for joint child custody and liberal visitation need to be tempered drastically in cases involving domestic violence for the following reasons:

- Men who batter their intimate partners have a high potential for physically and emotionally abusing their children.
- Child custody evaluations often place battered women at a disadvantage because living in an abusive relationship may produce traumatic effects that give the false impression that they are unfit parents.
- Battered women's attempts to protect themselves and their children can also give the false appearance that they are unfit parents.
- Men who batter are likely to have chronic behavioral and emotional problems that may not be easily detected.
- Many states are responding to these concerns by enacting laws that require domestic violence to be considered in child custody determinations and sometimes presume that the abuser should not have joint or sole custody. Other statutes address concerns over visitation, mediation, child abduction, and child abandonment.

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Although more research is needed in the field, our current practice wisdom and social science research indicate that:

- Men who batter should rarely have sole or joint custody of their children.
- Divorce, separation and/or treatment of the abuser do not guarantee that the abuse of the women and children will stop.
- Visitation needs to be supervised in many cases or restricted in other ways.
- Battered women need to be allowed exemptions from mandated mediation.
- Battered women should be allowed to relocate with their children at a safe distance from their ex-partners and not be labelled "uncooperative" if they do not wish to coparent.

This In Brief highlights issues discussed in a longer document created by Daniel G. Saunders and is available through your state domestic violence coalition.

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Representing Children in Civil Cases Involving Domestic Violence

Annette M. Gonzalez\(^1\) and Linda M. Rio\(^2\)

Introduction

There has been a lot of focus on domestic violence issues in the past ten years. But one area is still lacking attention – representation and services for children in civil cases with domestic violence issues. This article will explain the current status of the law in both custody and civil protective order cases with regard to general children’s issues and representation for children. The article also will focus on recommendations regarding legal representation and other services for children, statutory changes for jurisdictions, and decision-making recommendations for civil cases with domestic violence issues.

I. Current Status of the Law

A. When domestic violence is raised in a pending custody case

Throughout the past forty years, trends regarding the relevance of domestic violence in custody disputes have changed, and continue to change today. After the advent of no-fault divorce, courts first found that evidence of domestic violence was irrelevant to custody decisions.\(^3\) However, courts began to realize that domestic violence was still relevant to custody decisions even with no evidence of abuse to the child. Today, all states, with the exception of Connecticut, the District of Columbia, and four U.S. Territories, at least require courts to consider evidence of domestic violence as relevant to custody decisions.\(^4\) Another emerging trend is the adoption of statutes that create a rebuttable presumption against custody to a perpetrator of domestic violence. The U.S. House of Representatives, the National Council of

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\(^4\) See Appendix A. Appendices A and B list the state statute citations regarding domestic relations and civil protective order cases for the fifty states, the District of Columbia, and the U.S. Territories of Guam, the Marianas, Puerto Rico, Samoa, and the U.S. Virgin Islands. For purposes of this article, when describing a number of states at the same time, the footnote will list the state abbreviations and a “see Appendix” cue to direct the reader to the statutory citations.
Juvenile and Family Court Judges (NCJFCJ), and the American Bar Association (ABA) have passed resolutions that joint custody is inappropriate in cases where domestic violence allegations are founded. Given the recency of these newer trends and the difficult issue of domestic violence itself, the laws that address domestic violence in pending custody cases are complex. Forty-nine states, the District of Columbia, and three territories require that courts look at domestic violence when allegations are raised in a custody dispute. Within these jurisdictions, however, variance in court proceedings is large and many jurisdictions fall into more than one category. For example, twenty-four statutes have a rebuttable presumption that custody to the perpetrator of domestic violence is not in the child’s best interests. These statutes differ with regard to whether this presumption applies to joint custody, sole custody, legal custody, or residential custody. These statutes also differ on the degree of evidence necessary to activate the presumption, rebut the presumption once activated, what domestic violence actually means, how far in the past the domestic violence can occur and still be relevant, and how courts deal with cases where both parents are alleging domestic violence against the other. Thirty-two jurisdictions have statutes that include domestic violence as a best interests factor that courts have to consider, and another twenty-one jurisdictions have statutes that require courts to consider evidence of domestic violence if alleged. For those jurisdictions that list domestic violence as a factor that courts have to consider, whether as a best interests factor or otherwise, courts have enormous discretion in determining what factors are most relevant in a given case and how to weigh each factor. Connecticut is the only jurisdiction that does not statutorily require courts to look at evidence of domestic violence if it is alleged in a custody dispute.

To confuse things even further, thirty-one states have some version of a friendly parent statute that gives a custody preference to the parent that is more likely to allow the other parent contact with the child, and eighteen states have a presumption that joint custody is in the child’s best interest. Given these different and sometimes conflicting statutes and the complex nature of domestic violence itself, courts are still struggling to find a consistent approach to cases with domestic violence allegations.

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6 See Appendix A (Connecticut excluded).
7 AL, AZ, AR, CA, DE, DC, FL, HI, ID, IA, LA, MA, MN, MS, MO, NV, ND, OK, OR, SD, TX, WI, Marianas, Puerto Rico, see Appendix A.
8 AL, AK, CA, CO, DE, DC, FL, ID, IL, IN, IA, KS, KY, ME, MI, MN, MO, MT, NE, NV, NJ, NM, ND, OH, OR, TN, UT, VT, VA, WI, Marianas, Puerto Rico, see Appendix A.
9 AL, AZ, AR, DE, FL, GA, MD, MA, NH, NY, NC, OK, PA, RI, SC, SD, TX, WA, WV, WY, Guam, see Appendix A.
10 See supra, note 6.
11 AL, AK, AZ, AR, CA, CO, DC, FL, ID, IL, IA, KS, LA, ME, MI, MN, MO, MT, NV, NJ, NM, OH, OR, PA, TN, TX, UT, VT, VA, WI, WY, see Appendix A.
12 AL, CA, CT, DC, FL, ID, LA, ME, MN, MS, NV, NH, NM, OK, TN, TX, WV, WI, see Appendix A.
B. When domestic violence is raised in separate civil protection order cases

Civil order of protection cases offer another opportunity for courts to decide issues related to children's well-being. For example, forty-nine jurisdictions allow courts to make custody determinations during a protective order hearing. Only seven jurisdictions lack provisions regarding custody of minor children in their protective order statutes and of those six, only two, Oklahoma and Wisconsin, explicitly deny courts the power to decide custody issues. The other four states, Arizona, Indiana, Michigan, and Montana, and the territory of Samoa, implicitly fail to address the issue of custody in protective order statutes. However, Indiana allows the court to make visitation decisions that will provide for the safety of both the child and the petitioner of the protective order, and Oklahoma allows courts to modify or change current visitation orders that are in place.

As another way to protect children's well-being, thirty states and three territories allow a party other than the child to petition for a protective order on a child's behalf. Additionally, sixteen states allow a child to petition on his or her own behalf for a protective order. Of those sixteen, Washington, Minnesota, Oklahoma, and Utah require the child to be sixteen or older and California requires that the child be twelve or older to petition for his or her own protective order. In Missouri, however, the statute regarding who can be a petitioner for a protective order refers only to adults and not to minors or even an adult petitioning on behalf of a minor. New York has no provision regarding who can petition for a protective order. Finally, eight states and Puerto Rico have ambiguous statutes where it seems possible that a child would be able to petition for a protective order in some instances.

13 AL, AK, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MN, MS, MO, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WY, Guam, Marianas, Puerto Rico and U.S. Virgin Islands, see Appendix B.
14 OKLA. STAT. tit. 22 § 60.4 (2004).
17 See supra, note 16, at IND. CODE ANN.
18 See supra, note 14.
19 AL, AK, AZ, AR, CA, CO, DE, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MN, MS, MT, NC, OH, OK, PA, SC, TX, VT, WA, Marianas, Puerto Rico, and U.S. Virgin Islands, see Appendix B. Although there is no D.C. statutory provision regarding who can file for a protective order for a child, the current practice is that a parent or someone else can file a petition on the child's behalf, (email from Vivek Sankaran, staff attorney at the Children's Law Center in Washington, D.C., to Annette Gonzalez, intern at the ABA Pro Bono Child Custody Project (July 1, 2004), (on file with the authors)).
20 CA, CT, DC, MN, NV, NH, NJ, NM, ND, OK, OR, RI, SD, TN, UT, WA, see Appendix B.
21 WASH. REV. CODE § 26.50.020 (2004); MINN. STAT. § 518B.01 (2003); UTAH CODE ANN. § 30-6-1 (2004); UTAH CODE ANN. § 30-6-2; OKLA. STAT. tit. 22 § 60.2 (2004); CAL. FAM. CODE § 6301 (Deering 2004); CAL. CIV. PROC. § 372 (Deering 2004).
24 FL, MA, MI, NE, VA, WV, WI, WY, Puerto Rico, see Appendix B.
C. Current representation for children in pending custody cases

Most appointments for child representatives in divorce cases are made at the discretion of the judge. In fact, thirty-nine jurisdictions, including the District of Columbia, leave the decision of whether to appoint a child representative completely within the court’s discretion. In eight other jurisdictions, however, a child representative is required in cases where there are allegations of child abuse or neglect. In addition, Texas requires a child representative when it is in the child’s best interests and Vermont requires a child representative when the child will be called as a witness during the case. Finally, Oregon requires a child representative when a minor requests one, and Wisconsin is the only state that requires a child representative in all cases where custody is disputed.

In contrast to divorce cases, statutes governing unmarried parent cases are more likely to require the appointment of a child representative. Twenty-three jurisdictions require courts to appoint a child representative in unmarried parent cases. Of those twenty-three jurisdictions, twelve require that the child have representation whenever he or she is named a party to the case and nine others require child representation in all unmarried parent cases. Additionally, South Carolina requires courts to appoint a child representative if the case is seeking to illegitimate a child, and in West Virginia, courts have to appoint a child representative if the father is the party that brings the action. In only seventeen jurisdictions, however, a child representative is required in cases where there are allegations of child abuse or neglect.

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25 "Child representative" as it is used in this article means an attorney who is appointed or retained as a child’s attorney, a best interests attorney, or a guardian ad litem. The ABA Standards of Practice for Lawyers Representing Children in Custody Cases clarifies the important distinctions among these roles, but for purposes of this article the reference is to any type of lawyer representation or advocacy.

26 AL, AK, AZ, AR, CA, CO, CT, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, ME, MD, MA, MI, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, UT, WA. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org. Only the 50 states and the District of Columbia, not the territories, were included in this section of the research.

27 FL, LA, MN, MS, MO, VA, WV, WY. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.


31 WIS. STAT. § 767.045 (2002).

32 AL, CA, CT, HI, IN, KS, KY, NM, UT, VT, VA, WY. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.

33 MD, MO, MT, NE, NV, NY, NC, ND, WI. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.


jurisdictions does the judge have complete discretion in whether to appoint a child representative.\textsuperscript{36} Finally, eleven jurisdictions do not have statutes that address this issue.\textsuperscript{37}

Jurisdictions also differ on the role the child representative plays when appointed and what kind of training, if any, a child representative must have. Right now, twenty-three jurisdictions appoint a guardian ad litem (GAL), who often operates as a best interests attorney,\textsuperscript{38} and eight jurisdictions appoint a child’s attorney,\textsuperscript{39} with the other twenty jurisdictions appointing either a hybrid model of a GAL or a combination of different kinds of representatives depending on the circumstances of a given case.\textsuperscript{40} Training for a child representative, regardless of the role of the representative, also varies greatly among jurisdictions. Twenty-three jurisdictions have some kind of training that child representatives have to complete, but again the amount and quality of the training varies.\textsuperscript{41} Finally, statutes regarding appointment of a child representative do not distinguish between a custody case with allegations of domestic violence and a custody case without these allegations, even though these two types of cases are very different and should be treated accordingly.

As part of an effort to address these jurisdictional inconsistencies and to establish best practices, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is drafting a Uniform Act to establish more uniform laws regarding child representation in custody cases. NCCUSL is basing this proposed Uniform Act on the ABA Standards of Practice for Lawyers Representing Children in Custody Cases, adopted in August 2003.\textsuperscript{42} This Act will apply to the appointment and performance of lawyers serving as child representatives in custody and visitation decisions that are part of divorce, parentage, and domestic violence cases, to certain adoption and guardianship cases, and to dependency and abuse or neglect cases.\textsuperscript{43}

\textsuperscript{36} CO, DE, FL, GA, IL, IA, MA, MI, MN, MS, NH, NJ, OH, RI, TN, TX, WA. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{37} AK, AZ, AR, DC, ID, LA, ME, OK, OR, PA, SD. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{38} AL, DC, GA, HI, IN, KS, KY, ME, MA, MN, MS, MO, MT, NV, NH, NM, NC, ND, OK, SC, TN, WA, WI. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{39} AZ, AR, ID, IA, LA, OR, PA, SD. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{40} AK, CA, CO, CT, DE, FL, IL, MD, MI, NE, NJ, NY, OH, RI, TX, UT, VT, VA, WV, WY. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{41} AK, DE, FL, IL, KS, KY, ME, MN, MS, MO, NH, NY, ND, OH, PA, RI, SC, TN, TX, UT, VA, WA, WI. The results of the authors’ research on the 51 jurisdictions can be found at www.abachildcustodyproject.org.
\textsuperscript{42} Drafting Commission on the Role of Attorneys Representing Children in Custody Disputes Act, National Conference of Commissioners on Uniform State Laws. For the latest version of the draft Act, see www.nccusl.org/update/committeearcresults.aspx?committee=235.
\textsuperscript{43} Id. The full text of the ABA approved Standards of Practice for Lawyers Representing Children in Custody Cases can be found at www.abachildcustodyproject.org.
D. Current representation for children in civil order of protection cases

Civil order of protection cases are even less likely to require or expressly give the judge discretion to appoint a child representative. In only ten jurisdictions does the protective order statute allow courts discretion to appoint a representative for the child. Of those ten jurisdictions, only a few actually give the court guidance in exercising the discretion to appoint a child representative. California requires the court to consider whether the minor and guardian have divergent interests when deciding whether to appoint a guardian ad litem. Massachusetts allows the court to appoint a child representative, either a guardian ad litem or attorney for the child, when deciding issues of visitation and to determine if visitation will provide for the safety and well being of the child. Missouri allows appointment of a guardian ad litem or court appointed special advocate (CASA) to represent the child’s best interests when both parents are found to be abusive. In Missouri, courts can also appoint a guardian ad litem or CASA if the petitioner alleges that visitation with the respondent will damage the child. In Guam, the court may order the perpetrator to pay a fee for the services of a GAL appointed by the court.

Four states are unclear with regard to child representation in protective order cases. Pennsylvania allows a guardian ad litem to file a petition for a protective order on behalf of a child, but does not mention appointment of a guardian ad litem anywhere else in the protective order act, leaving it unclear where courts get the authority to appoint a guardian ad litem. The District of Columbia, although it does not address appointment of a child representative in its protective order act, does appoint guardian ad litems in some of these cases. Similarly, Florida courts request the appointment of guardian ad litems, although Florida’s civil protective order statute fails to address appointment of a child representative. Finally, Denver, Colorado has its own protective order court where these are the only kinds of cases judges hear. The Rocky Mountain Children’s Law Program is appointed by the protective order court to represent children in some domestic violence cases, although nothing in the statute explicitly allows for

44 AK, CA, IN, MA, MO, MT, NH, ND, WA, see Appendix B.
45 See supra, note 21, CAL. CIV. PROC.
48 Id.
49 7 G.C.A. § 40105
51 D.C. CODE ANN. § 16-1005 (2004). Email from Vivek Sankaran, staff attorney at Children’s Law Center in Washington, D.C., to Annette Gonzalez, intern at the ABA Pro Bono Child Custody Project (June 29, 2004) (on file with the authors).
52 Information from Put Something Back project director Karen Ladis (on file with the authors).
the appointment of a child representative. The other thirty-eight jurisdictions do not address the issue of a child representative anywhere in their respective protective order acts.

Currently, very few programs and attorneys represent children in protective order cases where the child is not the actual petitioner. Part of the reason for this is that only nine states explicitly allow for a child representative to be appointed. Even in those jurisdictions that give courts discretion to appoint counsel, courts may not actually invoke those provisions very often. For example, Alaska allows courts the discretion to appoint a guardian ad litem. However, very rarely do guardian ad litems get appointed in protective order hearings. Instead, guardian ad litems may become involved in protective order cases where there is a divorce or custody action already pending and that court has already appointed the guardian ad litem to that case. The guardian ad litem would then participate in the protective order hearing, but even if there is a guardian ad litem, they may not always get involved in the protective order hearing. Washington also allows for a court to appoint a guardian ad litem at its discretion. Similar to Alaska, a party usually obtains a protective order as part of a pending divorce or custody case and a guardian ad litem is appointed to that case, not just to the protective order case alone. When appointed, though, if the petitioner for the protective order wants the respondent kept away from the child, the court may appoint an agency such as the Family Law CASA of King County, or a private guardian ad litem if the parties can afford it. The guardian ad litem quickly prepares a report and the court holds a review hearing to determine whether the child should be kept away from the respondent.

Fortunately, there are programs beginning to represent children in civil protective order cases. The longest standing program that represents children in protective order cases is the Rocky Mountain Children’s Law Center Pro Bono Attorney Project. The program has operated since 1992, and in the past five years they have represented children in about three hundred cases. Currently the program handles about one hundred cases each year. The program also has approximately fifty active volunteers at any given time. The program represents children in protective order cases and recruits, trains, and

53 Telephone interview with Michelle Roche, program coordinator and staff attorney, Rocky Mountain Children’s Law Center Pro Bono Attorney Project (July 7, 2004).
54 AL, AZ, AR, CT, DE, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MI, MN, MS, NE, NV, NJ, NM, NY, NC, OH, OK, OR, RI, SC, SD, TN, TX, UT, VT, VA, WV, WI, WY, see Appendix B.
55 ALASKA STAT. § 18.66.100 (Michie 2004).
56 Information about Alaska’s appointment process in practice was obtained from an email from supervising attorney at Alaska Legal Services Corporation, to Annette Gonzalez, intern at the AE3A Pro Bono Child Custody Project (June 25, 2004) (on file with the authors).
58 Information about Washington’s appointment process in practice was obtained from an email from attorney at Family Law CASA of King County, to Annette Gonzalez, intern at the AE3A Pro Bono Child Custody Project (June 21, 2004) (on file with the authors).
59 Information about the Rocky Mountain Children’s Law Center Pro Bono Attorney Project was obtained from a telephone interview with Michelle Roche, program coordinator and staff attorney at the program (July 7, 2004). See also the Rocky Mountain Children’s Law Center website at: <www.rockymountainchildrenslawcenter.org>.
refers volunteer attorneys to represent children in these cases. These child representatives take positions on custody and visitation issues, including with whom and where third party exchanges should take place, consequences or altered plans if the child is returned late, and third party communications for phone conversations if plans change. They also can request an order that the parents abstain from alcohol or other substance use. The program holds four-hour trainings for volunteer attorneys every three months, and over the course of a year trains about one hundred new volunteer attorneys. The training consists of four different parts: program information and history, mental health professional information about the effects of domestic violence on both the victim and the children, staff from Project Safe Guard discussing the cycle of violence and the dynamics of violence with a focus on the victim, and finally, the current judge in the protective order court discusses the courtroom process and answers questions. The program also has an extensive training manual that includes information on making appropriate and effective questions to ask children, protective order forms and releases, sample court reports, information on the Domestic Violence Act, and a list of local resources. Once the program is appointed to a case, the program coordinator decides with whom to place the case and the volunteer attorney can accept or reject the program’s request. The program coordinator handles cases, including particularly complex matters. If a case is placed with a first-time volunteer attorney, the program coordinator will meet with the attorney and spend up to two hours going over the specific details of the case and answering questions. After this initial meeting, the program coordinator attends the first court hearing with the volunteer attorney and stays available throughout the first case. All volunteers can contact the program with questions at any time.

An example of a more recently created program to represent children in domestic violence cases is the District of Columbia’s Children’s Law Center (CLC) Pro Bono GAL project. This program gives children a voice in custody and protective order cases involving domestic violence. In addition to representing children in these cases, the program simplifies the referral process for the D.C. Superior Court judges and trains and mentors pro bono attorneys that are recruited to do this work. The program keeps a list of all eligible volunteer attorneys and sends out an email whenever the CLC receives a referral from the D.C. Superior Courts. Once a lawyer responds to the request, he or she is asked to contact the judge directly to accept the case. After a lawyer takes a case, he or she can contact the CLC with any questions, and the CLC also has a website with relevant material. A lawyer must attend a one-day

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60 Project Safe Guard (PSG) is a Colorado organization that assists women who are victims of domestic violence with court preparation and protective order form completion. PSG also stays as a support person with the victim during the hearing (telephone interview with Michelle Roche, program coordinator and staff attorney at Rocky Mountain Children’s Law Center (July 7, 2004)).

61 Information regarding the Children’s Law Center Pro Bono GAL Project was obtained from a project description information sent by Vivek Sankaran, staff attorney at the CLC, and is on file with the authors.
training and carry malpractice insurance. The CLC has at least two trainings a year and each lawyer who attends commits to take at least two cases that year. Training includes education on the substantive laws of domestic violence and custody, the role of a GAL, ethical issues involved in acting as a GAL, and child development. The training manual includes information explaining the role and responsibilities of a GAL, a list of children’s resources, information explaining domestic violence and how it affects children, interview techniques for children, and D.C. laws related to domestic violence. The CLC refers about forty-fifty cases to volunteer attorneys each year.

Another program that does similar work is the Dade County Bar Association Legal Aid Society (LAS). LAS attorneys represent children in about three hundred hearings a year, about forty percent of which involve allegations of child physical or sexual abuse. LAS also has two projects that represent children, the Domestic Violence Project and Put Something Back (PSB). Put Something Back recently expanded its services to include guardian ad litem representation of children in civil protective order cases where the child is either the direct or indirect victim or witness to domestic violence. Child representatives in these cases investigate and meet with all parties, review pertinent documentation, including school and medical records, and attend all court hearings. Their charge is to present to the court what is in the child’s best interest. In the project’s first year, it has trained fifty-nine volunteer attorneys and have served the needs of fifty-one children. The project coordinator recruits and trains new volunteer attorneys. Training includes talks from judges, mental health professionals, and experienced guardian ad litems on topics such as effective guardian ad litem work and laws that regulate the role, the effect of high conflict on children, domestic violence allegations, protective orders, visitation and how to speak with a child. After new volunteers are trained, their names are forwarded to the court. When the court requests a guardian ad litem, a judicial assistant contacts PSB with the request. PSB then refers the case to a volunteer, sending the attorney a packet of information explaining how to accept and represent a case. This packet includes sample forms and ways to obtain free and reduced-fee services for the children. After a volunteer’s initial training, opportunities for additional specialized training and any necessary materials continue to be available.

II. Recommendations for the future

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62 Information about Florida and the Dade County Bar Association Legal Aid Society was obtained from a program description pamphlet, a grant application and update, and a conversation with Silvia Perez, staff attorney, Legal Aid Society of Dade County Bar Association, on June 18, 2004 (all information is on file with the authors).
A. Representation for children in custody and civil protective order cases

Domestic violence harms not only the direct victim of the perpetrator’s abuse but also can harm any children residing in the household. The effects for children who witness domestic violence often are similar to the effects on a child who is abused. Children can have an increased number of health problems ranging from insomnia, headaches, stomachaches, diarrhea, asthma, and peptic ulcers. Children also suffer from behavioral and emotional problems. These children can be more aggressive, fearful, anxious, depressed, and suffer from post-traumatic stress disorder (PTSD). Children who witness domestic violence have more problems with cognitive functioning as well. A child may develop the attitude that violence is a valid way to solve problems. Finally, witnessing domestic violence also can have several long-term effects such as adult depression, lower self-esteem, and lower social adjustment.

Because of the negative effects that witnessing domestic violence can have on a child, all jurisdictions should enact laws requiring courts to consider domestic violence allegations, that have some supporting evidence, as compelling support for appointing a child’s representative in custody cases. States should do this for a variety of reasons. First of all, the child’s wishes will be adverse to at least one of the parents and neither of the parents’ lawyers owes any duty to advocate for the child. Second, parents may hide any issues of domestic violence to avoid child protective services or retaliation by the batterer. Third, perpetrators of domestic violence are likely to use a custody dispute to retain control over the victim, not to advocate for the child’s best interests. In addition, the victim is often suffering

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64 Id.
from the effects of the domestic violence, and in many cases this is represented as PTSD.\textsuperscript{72} Symptoms of PTSD include: a plastic demeanor, inappropriate giggling, and racing speech.\textsuperscript{73} PTSD may make the victim look more incapable than the perpetrator if one does not understand the dynamics of domestic violence and PTSD.\textsuperscript{74} Domestic violence also makes the victim fear for her life at all times, not just when the perpetrator is threatening the victim, and thus allows the perpetrator to retain power over all the family members at all times.\textsuperscript{75} Finally, the child may communicate that he or she wants to live with the perpetrator because he or she fears disagreement with the perpetrator, because the child has learned to associate the violent behavior with successful outcomes and subsequently identify with the perpetrator, or because the child believes that deciding to live with the perpetrator will stop the fighting.\textsuperscript{76} Because of the complicated dynamics and the effect that domestic violence may have had and continues to have on all family members, in many cases it is in the child’s best interests to have his or her own representative.

Although protective order cases are usually much shorter than divorce or paternity proceedings and resources for a child representative are often unavailable currently, a child representative should be appointed when the circumstances warrant. Just as with divorce and custody cases, both the victim and children can be suffering from the same negative consequences of domestic violence and courts should be sensitive to this even in abbreviated protective order hearings. Child representatives can help ensure that any custody or visitation issue decided during the protective order hearing consider the child’s safety. The representatives also can provide more independent argument to the court in support of the order. Also, even where there is a parent acting in the child’s best interest, a child’s representative may be helpful to empowering the child, giving the child an independent voice, and having someone outside the family with whom the child can discuss the case. Also, in the many instances where the victims are not themselves represented by counsel, the presence of a child’s attorney will assist in getting more critical information to the court, and help prevent the batterer from continuing to assert control through the court proceedings.

Statutes should explicitly allow for child representatives in protective order cases. Until jurisdictions change their laws, however, attorneys and judges should use current provisions in the child custody act to encourage the appointment of child representatives. For nine states this would be simple because those nine states’ protective order statutes actually refer the court to the child custody statute for

\textsuperscript{73} \textit{Id}. at 691-92.
\textsuperscript{74} \textit{Id}. at 692.
\textsuperscript{75} \textit{Id}. at 695-96.
Attorneys and judges can make a persuasive argument that if a custody statute is referred to in a protective order statute, then provisions regarding the appointment of a child representative should also be valid under the protective order statute. Other states are encouraged to use the same strategy, although the argument may be somewhat weaker.

When appointing a representative in either a custody or protective order case, some jurisdictions will have the choice of appointing a best interests attorney (sometimes called a GAL) or a child’s attorney. In situations where a judge has discretion to determine the role of the child representative, it is important to take into account the child’s age and maturity level, and in many cases, have a psychological evaluation done on the child to determine the child’s decision-making capacity. In cases where a child is of a proper maturity level and does not have impaired reasoning from witnessing domestic violence, then it is appropriate for a court to appoint a child’s attorney. In cases where the child’s ability to reason is impaired or the child’s maturity level is questionable, however, courts should appoint a best interests attorney who can evaluate the situation as a whole, including the child’s wishes, and present all evidence of what is in the child’s best interests.

A child’s representative, however, will only be effective if that representative has been educated on both the special issues and dynamics of domestic violence and on the particular jurisdiction’s statutory laws. Moreover, the child’s representative, in asking for any kind of evaluation of the child or parents, needs to find adequately trained mental health experts who will understand and address domestic violence issues. Evaluators and treaters in domestic violence cases need to be aware that the victim may still be suffering from the effects of the perpetrator’s violence.

Despite all these apparent reasons to refuse granting custody to the victim, counseling and other services for the victim often minimize and counteract the victim’s current limitations, and in many cases it will be in the child’s best interests to be placed in the victim’s custody. The child is likely to have already “lost” the victimized parent in many ways during the period the abuse was occurring, and completely separating the child from that parent could cause the child to suffer even more loss than he or she already has endured. Furthermore, giving custody to the perpetrator may teach the child that violence wins in the end. Finally, a perpetrator of domestic violence is often not a great parent. The abuser is likely to be an authoritarian parent, trying to control the child to an unhealthy degree, even if

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77 CO, FL, ID, KY, ME, MA, MN, VT, WA, see Appendix B.
79 Id.
80 Meier, supra note 71 at 697-98.
82 Meier, supra note 71, at 698.
direct child abuse is not an issue. Unless experts and child representatives are trained on all issues dealing with the effects of domestic violence, they will not be able to take intelligent, well-reasoned positions.

Finally, there needs to be an increase in the number of legal services and pro bono programs that help children who have witnessed domestic violence. These programs should have close connections to the courts hearing these types of cases, and the courts and programs should work together to help children. Judges also should make connections with community resources and advocate for additional community resources to create more programs such as the Rocky Mountain Children’s Law Center Pro Bono Attorney Project, the CLC’s Pro Bono GAL Project and the Dade County Bar Association Legal Aid Society’s Domestic Violence Project and Put Something Back programs. Although these and other programs exist and are doing many good things, much still needs to be done in the area of child representation when issues of domestic violence are raised.

Regardless of any statutory changes that need to be made, many children will not receive the services they need if child representatives continue to get little, if any, compensation. The Rocky Mountain Children’s Law Center does get a nominal amount of its funding from the city of Denver, but most programs like this exist on private grants and pro bono volunteers alone. Jurisdictions need to form an adequate compensation plan to pay child representatives, and until they do this, children’s needs will continue to be unmet.

B. Non-legal services for children in custody and civil protective order cases

Nationwide, changes need to be made to create more non-legal services for children as well. Therapy and mental health services help reduce both the short-term and long-term effects of domestic violence on children, but only two states have statutes in their respective child custody act that allow courts to order parties and children who are victims of domestic violence to receive counseling. For example, Iowa allows a judge to order professional counseling after a finding that the defendant committed domestic violence. California has a similar statute that allows any party or child involved in

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83 Id. at 706, citing LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 30 (2002).
84 See supra, note 58.
86 Goodmark, supra note 62, at 335, citing Tomkins et al., supra note 67, at 154.
87 IOWA CODE § 236.5 (2003); CAL. FAM. CODE § 3190 (Deering 2004); CAL. FAM. CODE § 3191 (Deering 2004); CAL. FAM. CODE § 3192 (Deering 2004).
88 See supra, note 87, IOWA CODE.
a custody dispute to receive professional counseling if the dispute poses a danger to the child and counseling is thought to be in the child’s best interests.\textsuperscript{89}

Protective order statutes are more likely to provide for professional counseling and treatment to the victim and family members involved in domestic violence than are custody statutes. Still, it is not something provided for in most jurisdictions. Only fifteen states and one territory allow courts to order professional counseling or treatment to the parties and other persons affected by domestic violence.\textsuperscript{90} For example, Oklahoma allows a child who has violated a protective order to receive professional counseling along with his parents or any other parties involved in the domestic violence.\textsuperscript{91} Similarly, Florida, Hawaii, and North Dakota require that the treatment or counseling be at a domestic violence facility that can deal with those specific issues.\textsuperscript{92}

Additionally, although not mandated by statute, some courts do have connections to counseling programs and do refer victims and children to these programs. For example, the Denver, Colorado protective order court refers children for free therapeutic counseling to Project PAVE (Promoting Alternative to Violence through Education).\textsuperscript{93} Similarly, in the District of Columbia, once a civil protective order is issued, a victim is eligible for funds through the Crime Victim’s Compensation Fund.\textsuperscript{94} The fund gives money to victims and their children for professional counseling.\textsuperscript{95} Florida also has a program that allows victims to receive free counseling.\textsuperscript{96} Judges can order University of Miami mental health programs to provide counseling, as well as assistance from non-profit agencies such as the Journey Institute and the Advocate Program.\textsuperscript{97}

Although protective order statutes are more likely than custody statutes to give courts the ability to order counseling and treatment for the parties involved, more jurisdictions should give courts the ability to order these services for parties. The only way this will work, though, is with the creation of more facilities that provide this kind of counseling. Judges and courts need to create connections with community resources that evaluate children and provide therapy, and courts need to use these resources to make referrals for children who have witnessed domestic violence. Regardless of whether a statute allows judges to mandate counseling, though, many children are not even being evaluated for any services

\textsuperscript{89} See \textit{supra}, note 87, \textsc{Cal. Fam. Code}.
\textsuperscript{90} DE, DC, FL, HI, IL, IA, KY, LA, MD, MT, NE, ND, OH, OK, SD, U.S. Virgin Islands, see Appendix B.
\textsuperscript{91} \textsc{Okla. Stat. tit. 22, § 60.6} (2004).
\textsuperscript{92} \textsc{Fla. Stat. Ann. § 741.30} (West 2004); \textsc{Haw. Rev. Stat. § 586-5.5} (2003); \textsc{N.D. Cent. Code 14-07.1-02} (2003).
\textsuperscript{93} See \textit{supra}, note 52.
\textsuperscript{94} Email from Vivek Sankaran, staff attorney at Children’s Law Center in Washington, D.C., to Annette Gonzalez, intern at the ABA Pro Bono Child Custody Project (July 7, 2004) (on file with the authors). See also http://mpdc.dc.gov/serv/victims/cvcp.shtm for more information on the Crime Victim’s Compensation Program.
\textsuperscript{95} Id.
\textsuperscript{96} Telephone interview with Silvia Perez, staff attorney, Legal Aid Society of Dade County Bar Association (June 18, 2004).
\textsuperscript{97} Id.
and in many areas of the country the resources for these services do not exist.\textsuperscript{98} Resources need to be allocated to these efforts. In addition, counseling for the victim can indirectly help the child because as that parent becomes healthy, the child benefits from improvements in the mental, physical, and economic state of the victim. Florida’s protective statute is a good example of this.\textsuperscript{99} It allows courts to refer the petitioner to a domestic violence shelter, although it is silent on the issue of services for children.\textsuperscript{100}

Nebraska’s protective order provisions offer one of the best models of multiple services for children.\textsuperscript{101} They provide for emergency services including housing, food, clothing, and transportation to school.\textsuperscript{102} Nebraska also provides the court with the ability to order that the child receive counseling, educational programs, and child care services.\textsuperscript{103} Nebraska’s statute is a good start to an all-inclusive list of services for children. Statutes that provide for all-around services need to become more common, and courts need to order these services for children and parties in domestic violence cases.

Finally, services that provide relocation assistance to distance the victim and child from the perpetrator can reduce the amount of conflict and injury. Under current custody statutes, there are no provisions for relocation assistance, although twenty-eight protective order statutes do provide for exclusive possession of the residence to one of the parties (usually the petitioner).\textsuperscript{104} In addition, thirteen statutes require the respondent to provide the petitioner and other eligible household members with suitable alternative housing if the respondent remains in the residence.\textsuperscript{105} Although these provisions are helpful, more needs to be done to actually relocate the petitioner and other persons so that respondents who pose a danger to the petitioner or the children do not know of their whereabouts.

\section*{C. Statutory recommendations for custody cases with domestic violence issues}

Although forty-nine states and the District of Columbia have custody statutes that require courts to consider evidence of domestic violence to some degree, many statutes lack both the uniformity and clarity to be effective. For example, every jurisdiction defines domestic violence differently, if it all, thus leaving it unclear what is considered domestic violence in that state.\textsuperscript{106} States need to clarify whether domestic violence refers to just physical abuse or whether threats of abuse and destruction of property

\textsuperscript{98} Goodmark, supra note 62, at 335, citing Tomkins et al., supra note 67, at 141-42.
\textsuperscript{99} See supra, note 92, FLA. STAT. ANN.
\textsuperscript{100} \textit{Id}.
\textsuperscript{101} NEB. REV. STAT. § 42-910 (2003).
\textsuperscript{102} \textit{Id}.
\textsuperscript{103} \textit{Id}.
\textsuperscript{104} AL, AZ, DE, FL, IL, IN, IA, KS, LA, ME, MD, MN, MS, MT, NH, NJ, NM, NC, OH, PA, SC, TN, TX, VT, VA, WV, WY, see Appendix B.
\textsuperscript{105} GA, IA, KS, LA, ME, MS, NM, NC, OH, PA, TN, VA, WY, see Appendix B.
\textsuperscript{106} See Appendix A.
also qualify as domestic violence. Only nine statutes require written findings regarding either the issue of domestic violence or how a custody decision awarding custody to the perpetrator is in the child’s best interest. If more statutes required written findings, judges would have to think more carefully about their decisions. Many statutes also fail to address issues related to the primary aggressor if both parties allege domestic violence against each other. Statutes should address this issue with a list of factors that guides the court in its determination of the primary aggressor, such as the history of violence between the parties, whether one party was more severely injured, and whether there is evidence of self-defense. Many statutes also fail to list both the kinds of evidence that are relevant to domestic violence allegations and the burden of proof on each party to prove or disprove domestic violence. Statutes also need to clarify how far in the past domestic violence can occur and still be relevant to a custody hearing. Only two states do this, and until more do so, judges are left to determine this on a case-by-case basis. Finally, for those states that have rebuttable presumptions against custody to a perpetrator of domestic violence, they need to make sure that they also address the relevance of domestic violence elsewhere in their custody statutes. If not, there is a risk that when the presumption is not activated, courts could ignore domestic violence issues entirely.

D. Statutory recommendations for civil protective order cases

Although forty-five jurisdictions provide courts with the power to make custody decisions during a protective order hearing, all jurisdictions need to grant courts this power. Victims of domestic violence are not likely to enforce a protective order or possibly even seek one out if they know that their children are going to stay with the perpetrator. For the forty-five jurisdictions that do have custody provisions in their protective order statutes, only nine states instruct courts to use the regular custody hearing guidelines to make decisions about custody. Although it is possible that many judges may look to these statutes for guidance even if the statute does not require it, protective order statutes should require courts to follow the custody act guidelines because this will create uniformity among decisions made in different courts. Ohio and Idaho are good examples of efforts to make uniform decisions. Ohio’s statute grants courts the power to make custody decisions only if no other court has determined or is determining these same

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107 Lemon, supra note 77, at 668.
108 CA, DC, MS, NV, NH, NM, NC, ND, WI, see Appendix A.
109 Lemon, supra note 77, at 669-70.
110 Some statutes that address primary aggressor issues: AZ, DE, LA, NV, SC, WI, see Appendix A.
111 Lemon, supra note 77, at 670.
112 Some statutes that list relevant evidence as proof of domestic violence: AZ, CA, IA, KY, TX, see Appendix A.
113 Some statutes that list the burden of proof for both parties: MA, WI, see Appendix A.
114 CAL. FAM. CODE § 3044 (Deering 2004); TEX. FAM. CODE ANN. § 153.004 (Vernon 2004).
115 See supra, note 76.
rights. Similarly, Idaho grants courts the power to make custody decisions so long as the decision is consistent with prior orders. Of course, reference to the domestic relations statutes is only sufficient if domestic violence is adequately addressed in those statutes.

Statutes also need to address visitation and child support in a more uniform way. Forty-three jurisdictions grant courts the power to make visitation decisions during protective order hearings, with sixteen of those requiring that visitation ensures the safety of both the child and the petitioner. New York and Oklahoma allow courts to permit or change an already standing visitation order. All jurisdictions should allow for these visitation decisions, and statutes need to make clear that visitation should be granted only in a way that is safe to all parties involved. Thirty-eight jurisdictions also grant courts the power to order child support, but if forty-three jurisdictions have the power to award custody to a party, all forty-three should also have the power to award child support to the custodial parent.

Among the sixteen jurisdictions that allow a child to petition for a protective order on that child’s own behalf, all require the minor child to fit within one of a list of characteristics, such as being a spouse of the respondent, related by blood or marriage to the respondent, residing with the respondent, having a dating relationship with the respondent, or had a child with the respondent. For the thirty-three jurisdictions that allow someone else to petition on behalf of a minor child, twelve jurisdictions only allow parents, guardians, custodians, or some adult member of the household to petition on a child’s behalf. The other twenty jurisdictions are split, with some fitting more than one of the categories as follows: eleven allow any adult to petition, seven allow any family member to petition, and nine others allow an outside entity to petition. The states that only allow children to petition for a protective order if they are in some kind of intimate relationship with the respondent are inadequate, because they arbitrarily ignore categories of respondents and leave the child without a voice. For the jurisdictions that allow a person to petition on behalf of a child, the best statutes are those that allow people within the

116 OHIO REV. CODE ANN. § 3113.31 (Anderson 2004).
118 AL, AK, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, LA, ME, MD, MA, MN, MS, MO, NV, NH, NJ, NM, NC, ND, OH, OR, PA, SC, SD, TN, TX, UT, VT, VA, WA, WV, WY, Guam, see Appendix B.
119 AL, AK, CA, DC, IL, IA, MD, MA, MN, MO, NJ, NM, UT, VT, WV, WY, see Appendix B.
120 See supra, note 23; see supra, note 14.
121 AL, AK, AR, CA, DE, DC, FL, GA, IL, IA, KS, KY, LA, ME, MA, MN, MS, MO, NV, NH, NJ, NM, NY, NC, ND, OH, PA, RI, SC, SD, TN, UT, VT, WV, WY, the Marianas, Puerto Rico, U.S. Virgin Islands, see Appendix B.
122 See supra, note 13.
124 AZ, CA, ID, NV, NC, OH, OK, SC, VT, WA, the Marianas, U.S. Virgin Islands, see Appendix B.
125 AK, GA, IL, IN, IA, MN, MS, MT, TX, Puerto Rico, see Appendix B. Although D.C. does not address this issue in its protective order statute, the current practice is that a parent or someone else can petition on behalf of a child (email from Vivek Sankaran, staff attorney at the Children’s Law Center in Washington, D.C., to Annette Gonzalez, intern at the ABA Pro Bono Child Custody Project (July 1, 2004), (on file with the authors)).
126 AL, AR, HI, KS, KY, LA, TX, see Appendix B.
127 CO, DE, HI, IN, LA, ME, MD, PA, TX, see Appendix B.
household and people outside of the household to petition. If only those within the household can petition and the only members of the household are the parents or legal guardians, they may be unlikely to petition on behalf of the child because of fear that the state will become involved and take the child away or of redress from the perpetrator. The best model would seem to be one that allowed a minor to petition for a protective order on his or her own behalf if there is a sufficient intimate relationship with the respondent, but also allow either a household member or an outside party to petition on a child’s behalf. Oklahoma, Washington, and Minnesota have such statutes, allowing either a household member to file on behalf of a child or a child age sixteen or older to file a petition on his or her own behalf. Similarly, California also allows either a parent or guardian to petition on a child’s behalf or a child age twelve or older can file a petition on his or her own behalf.

Finally, Massachusetts requires courts to make written findings if they make a custody decision during a protective order hearing, and Nevada allows the appointment of a master to take testimony and recommend orders to the judge. More states should require written findings because written findings require judges to make well thought-out decisions. Although states should not necessarily impose a provision that allows masters to hear these cases, Nevada shows an effort to take more time and care with these cases.

E. Decision-making in custody cases with domestic violence issues

Although many states now have either a rebuttable presumption against custody to a perpetrator of domestic violence or have domestic violence listed as a factor to consider in custody cases, many judicial decisions still do not reflect these laws. For example, North Dakota requires either one serious incident of domestic violence, one incident with a dangerous weapon, or a pattern of domestic violence within a reasonable time proximate to the proceeding. However, in Tulintseff v. Jacobsen, the court found that evidence that a wife was pulled off the bed, had a laundry basket thrown at her, was dragged her by her hair down the street, and that the husband pulled a railing off a stairway and broke a table and two chairs did not constitute a pattern of domestic violence to raise the presumption against custody to the husband. Furthermore, the court found that because these acts occurred three years prior, they were not “proximate to the proceeding.” The appellate court upheld the trial court decision to award sole custody.
to the perpetrator of domestic violence. In another case, this one in Louisiana, the victim presented evidence that the defendant beat her in the face in one incident and kicked her in the face in another, breaking her nose and cheekbone. Both incidents caused her trips to the hospital. She also provided testimony that the children witnessed almost all of these incidents. The trial court decided that the defendant did not have a history of committing domestic violence as required in Louisiana and awarded joint custody to the parties and named the defendant as the domiciliary parent. The appellate court reviewed the evidence and found that the trial court had made a reversible legal error and reversed the custody decision. Even though the appellate court did reverse what was an erroneous trial court decision, many parties do not have the funds to appeal an erroneous decision and even if parties do have the funds, the process takes time and can harm the child in the interim.

The outcomes of these cases highlight some of the shortcomings of courts and their knowledge regarding domestic violence. Some courts have failed to understand the magnitude of the impact that domestic violence has on children. Some courts have separated the issues of domestic violence against one parent from the issue of fitness to be a parent to a child, arguing that since the perpetrator did not abuse the child, there was no harm to the child and no reason to find that the perpetrator was an unfit parent. Given these misperceptions, judges need to understand the dynamic of domestic violence and have the same kind of training as children's representatives and lawyers. Once domestic violence is better understood and that understanding is applied, the courts and child representatives can begin to make decisions that are truly in the child's best interests.

Conclusion

This article demonstrates that while there have been many advancements in domestic violence knowledge during the past ten years, children's issues in civil cases with issues of domestic violence are still being ignored, if not in the statutory language then in the implementation of statutes. More focus needs to be given to these issues if we as a nation are to protect and empower children who are impacted by domestic violence.

135 Id. at 135.
137 Id.
138 Id. at 858.
139 Id. at 860.
140 Lemon, supra note 77, at 674.
142 Meier, supra note 71, at 667-68.
** The views expressed in this article are those of the authors, and, except where otherwise indicated, have not been approved, endorsed, or adopted by the American Bar Association or any of its entities.
Appendix A: Custody Statutes

Alabama
Ala. Code §30-3-131, §30-3-133, §30-3-152, §30-3-132

Alaska
Alaska Stat. §25.24.150, §25.20.090

Arizona

Arkansas

California
Cal. Fam. Code §3044, §3011, §3020, §3080, §3040, §3190, §3191, §3192

Colorado

Connecticut

Delaware

D.C.
D.C. Code §16-914

Florida

Georgia

Hawaii

Idaho
Idaho Code §32-717B, §32-717

Illinois
750 ILCS 5/602

Indiana
Burns Ind. Code Ann. §31-17-2-8

Iowa
Iowa Code Ann. §598.41, §236.5

Kansas

Kentucky

Louisiana

Maine

Maryland

Massachusetts

Michigan

Minnesota

Mississippi
Miss. Code Ann. §93-5-24

Missouri
Mo. Ann. Stat. §455.050, §452.375

Montana
Mont. Code Ann. §40-4-212

Nebraska

Nevada

New Hampshire

New Jersey

New Mexico
N.M. Stat. Ann. §40-4-9.1

New York
N.Y. Dom. Rel. Law §240

North Carolina

North Dakota
N.D. Cent. Code §14-09-06.2

Ohio
Ohio Rev. Code Ann. §3109.04

Oklahoma

Oregon
Or. Rev. Stat. §107.137

Pennsylvania

Rhode Island
R.I. Gen. Laws §15-5-6

South Carolina
S.C. Code Ann. §20-7-1530

South Dakota
S.D. Codified Laws §25-4-45.5, §24-4-45.6

Tennessee
Tenn. Code Ann. §36-6-101, §36-6-106, §36-6-406

Texas

Utah
Utah Code Ann. §30-3-10.2, §30-3-10

Vermont

Virginia

Washington

West Virginia

Wisconsin

Wyoming
### Appendix B: Civil Protective Order Statutes

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<th>Statutes</th>
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</tr>
<tr>
<td>Alaska</td>
<td>Alaska Stat. §18.66.100, §18.66.110</td>
</tr>
<tr>
<td>D.C.</td>
<td>D.C. Code §16-1005, Rules Governing Proceedings in the DV Unit - Rule 11, §16-1003, §16-1004</td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho Code §39-6306, §39-6304</td>
</tr>
<tr>
<td>Illinois</td>
<td>750 ILCS 60/214, 60/201</td>
</tr>
<tr>
<td>Indiana</td>
<td>Burns Ind. Code Ann. §34-26-5-9, §34-26-5-19, §34-26-5-2</td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code §236.5, §236.2</td>
</tr>
<tr>
<td>Maryland</td>
<td>Md. Code Ann. Fam. Law §4-504.1, §4-505, §4-506, §4-501</td>
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<tr>
<td>Michigan</td>
<td>Mich. Comp. Laws Ann. §600.2950</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minn. Stat. Ann. §518B.01</td>
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<tr>
<td>Mississippi</td>
<td>Miss. Code Ann. §93-21-15, §93-21-7</td>
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<td>Missouri</td>
<td>Mo. Ann. Stat. §455.050, §455.045, §455.523, §455.020, §455.010</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. Cent. Code §14-07-1-02, §14-07-1-03, §14-07-1-05.1, §14-07-1-01</td>
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<td>Ohio</td>
<td>Ohio Rev. Code Ann. §3113.31</td>
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<tr>
<td>Oklahoma</td>
<td>Okla. Stat. Ann. tit.22 §60.3, §60.2, §60.4, §60.6</td>
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<tr>
<td>South Carolina</td>
<td>S.C. Code Ann. §20-4-60, §20-4-40</td>
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<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws §§25-10-5, §§25-10-3, §§25-10-1</td>
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<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. §36-3-606, §36-3-601, §36-3-602</td>
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<tr>
<td>Texas</td>
<td>Tex. Fam. Code §85.021, §82.002</td>
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<tr>
<td>Utah</td>
<td>Utah Code Ann. §§30-6-4.2, §§30-6-1, §§30-6-2</td>
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<tr>
<td>Wyoming</td>
<td>Wyo. Stat. §35-21-105</td>
</tr>
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</table>
Appendix A: Custody Statutes

<table>
<thead>
<tr>
<th>State</th>
<th>Statutes</th>
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<tbody>
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<td>750 ILCS 5/602</td>
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<td>Indiana</td>
<td>Burns Ind. Code Ann. §31-17-2-8</td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code Ann. §598.41, §236.5</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Miss. Code Ann. §93-5-24</td>
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<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. §455.050, §452.375</td>
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<tr>
<td>Montana</td>
<td>Mont. Code Ann. §40-4-212</td>
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<td>Nebraska</td>
<td>Neb. Rev. Stat. §42-364</td>
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<td>New Mexico</td>
<td>N.M. Stat. Ann. §40-4-9.1</td>
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<tr>
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<td>Utah Code Ann. §30-3-10.2, §30-3-10</td>
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</table>
Guam      |  19 G.C.A. §8404
The Marianas |  Public Law No. 12-19, Article 3, §301 et seq.
Puerto Rico  |  31 L.P.R.A. §383
Samoa     |  N/A
U.S. Virgin Islands |  N/A

**Appendix B: Civil Protective Order Statutes**

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<tr>
<th>State</th>
<th>Statute(s)</th>
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<tbody>
<tr>
<td>Alabama</td>
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<td>N.Y. Fam. Ct. Act §842, §812</td>
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<tr>
<td>State</td>
<td>Code</td>
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<td>Tennessee</td>
<td>Tenn. Code Ann. §36-3-606, §36-3-601, §36-3-602</td>
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<td>Tex. Fam. Code §85.021, §82.002</td>
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<td>Wyoming</td>
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<td>Guam</td>
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<td>Puerto Rico</td>
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<tr>
<td>State</td>
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<tr>
<td>Alabama</td>
<td>Ala. Code § 30-3-131, § 30-3-133</td>
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<td>Colorado</td>
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<tr>
<td>Connecticut</td>
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<tr>
<td>D.C.</td>
<td>D.C. Code § 16-914</td>
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** See the end of chart for an explanation of columns and terms used in this chart
# Relevant Domestic Violence Statutory Citations

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<th>Statute/Code</th>
<th>Relevant Statute/Code</th>
<th>Note</th>
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<td>Georgia</td>
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<td>Ga. Code Ann. §19-9-1, §19-9-3 (evidence of DV has to be considered - lists special things to look for if DV exists)</td>
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<tr>
<td>Idaho</td>
<td>Idaho Code § 32-717B</td>
<td>Idaho Code §32-717</td>
<td>Idaho Code § 32-717B (with regard to joint custody)</td>
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<td>750 ILCS 5/602</td>
<td>IL ST 750 § 5/602 (a)(8)</td>
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<td>Iowa</td>
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<td>Iowa Code Ann. §598.41</td>
<td>Iowa Code Ann. §598.41(c) - does not apply if DV exists</td>
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</table>
|             |                                                  |                                                           | La. Rev. Stat. Ann. §9:335 (with regard to joint custody) | **See the end of chart for an explanation of columns and terms used in this chart**
<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
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<th>Description</th>
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<tbody>
<tr>
<td>Maine</td>
<td>Me. Rev. Stat. tit. 19-A §1653</td>
<td>Me. Rev. Stat. tit. 19-A §1653 (the court shall make an award of shared parental rights where the parties have agreed or so agree in open court)</td>
<td>ME ST T. 19-A § 1653 (3)(H)</td>
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<tr>
<td>Minnesota</td>
<td>Minn. Stat. Ann. § 518.17</td>
<td>Minn. Stat. Ann. §257.025, § 518.17</td>
<td>Minn. Stat. § 518.17 (presumption that joint legal custody is in the child’s BI if requested by either or both parents</td>
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<tr>
<td>Mississippi</td>
<td>Miss. Code Ann. § 93-5-24</td>
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<td>Miss. Code Ann. § 93-5-24 (where both parties have agreed)</td>
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<tr>
<td>Montana</td>
<td>Mont. Code Ann. § 40-4-212</td>
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<td>Mont. Code Ann. § 40-4-212 - in child's BI to have continuing contact with both parents EXCEPT if DV</td>
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<tr>
<td>Nebraska</td>
<td>Neb. Rev. Stat. §42-364</td>
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<td>North Dakota</td>
<td>N.D. Cent. Code § 14-09-06.2</td>
<td>N.D. Cent. Code § 14-09-06.2</td>
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<td>Ohio</td>
<td>Ohio Rev. Code Ann. §3109.04</td>
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<td>OH ST § 3109.04 (F)(1)(f)</td>
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<td>Rhode Island</td>
<td>R.I. Gen. Laws § 15-5-16</td>
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** See the end of chart for an explanation of columns and terms used in this chart
<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Statutory Citations</th>
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<tbody>
<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws § 25-4-45.5, §24-4-45.6</td>
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<td>S.D. Codified Laws § 25-4-45.5</td>
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<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. § 36-6-101 (only if child abuse or neglect NOT DV against other parent)</td>
</tr>
<tr>
<td></td>
<td>Tenn. Code Ann. §36-6-106 (restricts parenting plans when there is DV)</td>
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<td></td>
<td>Tenn. Code Ann. § 36-6-101 (where parents have agreed or so agree in open court)</td>
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<td>Tenn. Code Ann. §36-6-106</td>
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<tr>
<td>Texas</td>
<td>Tex. Fam. Code §153.004, §153.131</td>
</tr>
<tr>
<td></td>
<td>Tex. Fam. Code §153.004 cannot award joint custody if evidence of DV</td>
</tr>
<tr>
<td></td>
<td>Tex. Fam. Code §153.131</td>
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<tr>
<td></td>
<td>Tex. Fam. Code §153.134 (with regard to joint custody)</td>
</tr>
<tr>
<td>Utah</td>
<td>Utah Code Ann. §30-3-10.2</td>
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<td>UT ST § 30-3-10.2(c), §30-3-10</td>
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<td>Vt. Stat. Ann. tit. 15 §665 - does not apply where there would be real harm to the child or parent</td>
</tr>
<tr>
<td></td>
<td>VA ST § 20-124.3 (6) - does not apply if there is a history of DV</td>
</tr>
</tbody>
</table>

** See the end of chart for an explanation of columns and terms used in this chart **
## Relevant Domestic Violence Statutory Citations

<table>
<thead>
<tr>
<th>State</th>
<th>Code and Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Virginia</td>
<td>W.V. Code Ann. §48-9-201, §48-9-205, §48-9-209</td>
<td>W. Va. Code § 48-9-207 (the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child’s BI if each of the child’s legal parents has been exercising a reasonable share of parenting functions; but presumption overcome if history of DV)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Wis. Stat. Ann. §767.24</td>
<td>Wis. Stat. Ann. § 767.24 (the court shall presume joint legal custody is in the child's BI; but exception where evidence of interspousal battery or DV)</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Wyo. Stat. §20-2-112, §20-2-201</td>
<td>WY ST § 20-2-201(4) and (5)</td>
</tr>
</tbody>
</table>

**DV** - domestic violence - in many states, DV is defined differently or referred to as domestic abuse or family violence. See particular jurisdiction for its definition of DV.

**BI** - abbreviation for best interests

**Column 2** - DV and rebuttable presumption against custody - jurisdictions where there is a rebuttable presumption against custody to a perpetrator of DV

**Column 3** - BI factor test includes DV - jurisdictions where domestic violence is one of a list of best interest factors for courts to consider when making custody decisions.

**Column 4** - Joint custody presumption - jurisdictions where there is a presumption the joint custody is in a child's best interest

**Column 5** - Friendly parent statutes - jurisdictions that give a custody preference to the parent that is more likely to allow the other parent contact with the child

**See the end of chart for an explanation of columns and terms used in this chart**
<table>
<thead>
<tr>
<th>State</th>
<th>How does the court factor in domestic violence?</th>
<th>Domestic Violence Definition</th>
</tr>
</thead>
</table>
| Alabama    | * rebuttable presumption that not in the child's BI to award joint legal, joint physical, or sole custody to the abuser if there is DV  
* only need one instance of DV  
* judge must take into account what effect DV had on the children  
* even if no presumption invoked, DV is a BI factor (one of 5) and it is something the courts shall consider when making a custody determination  
* if both have abused, need to find out who was the perpetrator (case law)                                                                                                                                                                                                                                 | Ala. Code § 30-3-130  
Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is an incident resulting in the abuse, stalking, assault, harassment, or the attempts or threats thereof  
* each offense is further defined by reference to other statutes                                                                                                                                                                                                                               |
| Alaska     | * DV is listed as a BI factor (one of 9) - any evidence of DV, child abuse, or child neglect in the custodial household or a history of violence between the parents                                                                                                                                                                                                                                                                               | Alaska Stat. 25.90.010, 18.66.990  
Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:  
(1) a crime against the person;  
(2) burglary;  
(3) criminal trespass;  
(4) arson or criminally negligent burning;  
(5) criminal mischief;  
(6) terrorist threatening;  
(7) violating a protective order;  
(8) harassment  
* each of these offenses is further defined by reference to other statutes                                                                                                                                                                                                                                           |
| Arizona    | * rebuttable presumption that it is not in the child's BI to award custody to a parent who has committed an act of DV  
* presumption does not apply if both parents have committed acts of violence  
* lists kinds of evidence to rebut the presumption  
* lists kinds of evidence to prove DV  
* even if no presumption invoked, evidence of DV is considered contrary to the child's BI and court required to consider it  
* JC shall not be granted if the court finds that there is significant DV or if the court finds by a preponderance of the evidence that there has been significant DV as defined in 13-3601 or a significant history of DV  
* a person commits an act of DV if that person either:  
(1) intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury;  
(2) places a person in reasonable apprehension of imminent serious physical injury to any person;  
(3) engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings                                                                                                                                                     |
<table>
<thead>
<tr>
<th>Location</th>
<th>Custody Decision Requirements</th>
<th>Reference</th>
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</table>
| Arkansas          | * rebuttable presumption against custody to abusive parent if DV occurred - preponderance of the evidence standard  
* even if no presumption invoked, if one party has committed an act of DV, then the court must consider evidence of it when looking at the child's BI | Ark. Code Ann. § 9-15-103  
Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is either (1) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or (2) any sexual conduct between family or household members, whether minors or adults, which constitutes a crime under the laws of this state |
| California        | * rebuttable presumption against sole or joint or legal custody if DV found within the past 5 years  
* lists kinds of evidence to rebut presumption - preponderance of the evidence standard  
* lists kind of evidence to prove DV  
* written findings and reasons when court grants abusive parent sole or joint custody  
* even if no presumption invoked, DV is a BI factor (one of 5) for the court to consider  
* DV defined in the statute | Cal. Fam. Code § 3044  
* intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue a CPO |
| Colorado          | * DV is listed as a BI factor (one of 11)  
* needs to be supported by credible evidence  
* if credible evidence of DV (statute refers to it as "spouse abuse"), then it is not in the child's BI to grant JC over the objection of the other party unless the court finds that they can make joint decisions in a safe manner with no physical confrontations  
* DV is defined in this statute | Colo. Rev. Stat. Ann. § 14-10-124  
* proven threat of or infliction of physical pain or injury by a spouse or a party on the other party |
| Connecticut       | * no custody statute referring to domestic violence - court just looks to the child's best interests | N/A |
### Custody Decisions in Cases with Domestic Violence Allegations

<table>
<thead>
<tr>
<th>State</th>
<th>Code/Statute</th>
<th>Description</th>
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</table>
| Delaware | 13 Del. C. 705A, 722, 706A | * rebuttable presumption against sole or JC of a child to a perpetrator of DV  
* rebuttable presumption that no child shall reside with a DV perpetrator  
* lists kinds of evidence to rebut presumption  
* if both parties are alleged violent, the case is referred to a Delaware agency for investigation and presentation to the court and then the court makes a custody decision that is in the child’s BI  
* even if no presumption invoked, DV is one of 7 BI factors for the court to consider.  
* court **shall** consider any evidence of DV as it is a relevant factor  

13 Del. C. § 703A  
Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is physical or sexual abuse or threats of physical or sexual abuse and any other offense against the person committed by one parent against the other parent, against any child living in either parent’s home, or against any other adult living in the child’s home  
* DV does not include self-defense  
* perpetrator of DV is one who has been convicted of committing one of a number of criminal offenses in the State, or a comparable offense in another state, against the child at issue in a custody or visitation proceeding, against the other parent of the child, or against any other adult or minor child living in the home (see citation for the list of offenses) |
| D.C. | D.C. Code 16-914 | * rebuttable presumption against JC where there is DV (statute refers to it as an “intrafamily offense”) - preponderance of the evidence standard  
* even if no presumption invoked, DV is listed as a BI factor (one of 17)  
* written findings why it’s in the child’s BI if court grants the abuser custody of the child  
* definition of DV by reference to another statute  |
| D.C. Code Ann. § 16-1001 | * an act punishable as a criminal offense committed by an offender upon one who is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence, or has a romantic relationship |
| Florida | Fla. Stat. Ann. 61.13 | * rebuttable presumption that JC is detrimental to the child if there is evidence that one party has been convicted of a felony of 3rd degree or higher with regard to DV or meets other statutory criteria listed in 39.806(1)(d) (related to parent incarceration)  
* even if no presumption invoked, any evidence of DV **shall** be considered evidence of detriment to the child  |
| Fla. Stat. Ann. § 741.28 | Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member |
| Georgia | Ga. Code Ann. 19-9-1, 19-9-3 | * court **shall** consider evidence of DV (also referred to as “family violence” in the statute)  |
| | not specifically defined in the custody/divorce act  
* look at safety of child and parent and perpetrator's history of causing harm, bodily assault, injury or causing reasonable fear of any of these kinds of harm |
### Custody Decisions in Cases with Domestic Violence Allegations

<table>
<thead>
<tr>
<th>State</th>
<th>Statute/Code</th>
<th>Description</th>
<th>Relevant Statute/Code</th>
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</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Haw. Rev. Stat. 571-46</td>
<td>* rebuttable presumption that it is not in the child's BI to be placed in sole, joint legal, or joint physical custody with the perpetrator if there is a determination of DV (statute refers to it as &quot;family violence&quot;) * lists related things to take into account when looking at DV</td>
<td>Haw. Rev. Stat. Ann. § 571-2</td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho Code 32-717, 32-717B</td>
<td>* rebuttable presumption against JC by one who is found to be a habitual perpetrator of DV * rebut presumption with a preponderance of the evidence * even if no presumption invoked, evidence of DV is listed as a BI factor (one of 7) and whether or not the child actually saw DV does not matter * DV is defined by reference to another statute</td>
<td>Idaho Code § 39-6303</td>
</tr>
<tr>
<td>Illinois</td>
<td>750 ILCS 5/602</td>
<td>* DV is a BI factor (one of 8) - physical violence or threat of violence or the occurrence of &quot;ongoing abuse&quot; * so long as DV is not found (defined under ILDVA of 1986), maximum involvement by both parents is in the child's best interests - this does NOT mean presumption for JC * &quot;ongoing abuse&quot; is defined by reference to another statute</td>
<td>750 Ill. Comp. Stat. Ann. 60/103</td>
</tr>
<tr>
<td>Indiana</td>
<td>Burns Ind. Code Ann. 31-17-2-8</td>
<td>* DV is a BI factor (one of 8) - evidence of a pattern of domestic or family violence</td>
<td>Ind. Code Ann. §§ 31-9-2-42</td>
</tr>
</tbody>
</table>

Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act * DV, except for self defense, is the occurrence of one or more of the following acts committed by a family or household member to family or household members: (1) attempting to cause, threatening to cause, or causing physical harm to another family or household member without legal justification; (2) placing a family or household member in fear of physical harm without legal justification; or (3) causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress
<table>
<thead>
<tr>
<th>State</th>
<th>Code or Statute Details</th>
<th>Relevant Statute/Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>* rebuttable presumption against JC to one who is found to have a history of DV</td>
<td>Iowa Code Ann. § 236.2</td>
<td>* DV means committing assault as defined in section 708.1 when the assault occurs between parties that have or had a certain relationship (see statute for list of 5 relationships)</td>
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<td>* lists the kind of evidence that can be used to show a history of DV</td>
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<td>* even if no presumption invoked, evidence of DV is a BI factor (one of 10)</td>
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<td>* DV is defined by reference to another statute</td>
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<tr>
<td>Kansas</td>
<td>* DV is a BI factor (one of 7) - evidence of spousal abuse</td>
<td>not defined in divorce/custody act</td>
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<tr>
<td>Kentucky</td>
<td>* DV is a BI factor (one of 9) - information, records, and evidence of DV</td>
<td>Ky. Rev. Stat. Ann. § 403.720</td>
<td>* DV means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple</td>
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<td></td>
<td>* DV is defined by reference to another statute</td>
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<tr>
<td>Louisiana</td>
<td>* rebuttable presumption against sole or JC to a party who has a history of perpetrating DV (statute refers to it as “family violence”)</td>
<td>La. Rev. Stat. Ann. § 9:362</td>
<td>Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act</td>
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<tr>
<td></td>
<td>* presumption raised if there is one incident of DV that resulted in serious bodily injury or more than one incident of DV</td>
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<td>* DV includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children</td>
</tr>
<tr>
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<td>* lists kinds of evidence to rebut the presumption - preponderance of the evidence standard</td>
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<td>* does not include self-defense</td>
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<td>* if both parties are violent, custody awarded to the party least likely to continue the violence</td>
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<tr>
<td>State</td>
<td>Law</td>
<td>Custody Decision Criteria</td>
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<tr>
<td>Maine</td>
<td>Me. Rev. Stat. tit. 19-A §1653</td>
<td>* DV is a BI factor (one of 17) - existence of DV and how it affects the child's safety and emotional well-being</td>
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<td>Me. Rev. Stat. tit. 19-A § 1501 &amp; § 4002</td>
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<td></td>
<td>Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act</td>
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<td>* DV is the occurrence of one of the following between family or household members or by a family or household member to a minor child of a family or household member attempting to or actually: (1) causing bodily injury or offensive physical contact, including sexual assault; (2) placing another in fear of bodily injury with threatening, harassing, or tormenting behavior; (3) compelling a person by force, threat of force, or intimidation to engage in or abstain from conduct which the person has no obligation to engage in or abstain from; (4) restricting one's movements; (5) threatening to commit, or causing a dangerous crime, when the probable consequence of the threat, whether or not the crime actually occurs is to place one in fear that the crime will be committed; or (6) repeatedly following the P or being near the P's home, school, business or employment</td>
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<tr>
<td>Maryland</td>
<td>Md. Code Ann. Fam. Law 9-101.1</td>
<td>* evidence of DV shall be looked at by the court in a custody hearing</td>
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<td>* DV is defined by reference to another statute</td>
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<td>Md. Code Ann. § 4-501</td>
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<td>* DV is any of the following acts: (1) one that causes serious bodily harm; (2) one that places a person eligible for relief in fear of imminent serious bodily harm; (3) assault in any degree; (4) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree; or (5) false imprisonment</td>
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<tr>
<td>Massachusetts</td>
<td>ALM GL ch. 208 §31A, ch. 209 §38, 209C §10</td>
<td>* rebuttable presumption against sole, shared legal, or shared physical custody with the perpetrator of DV</td>
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<td>* presumption is raised if there is a pattern of DV or a serious incident of DV - preponderance of the evidence standard</td>
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<td>* rebut with preponderance of the evidence</td>
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<td>* lists certain things that are not considered to be enough proof enough of DV</td>
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<td>* even if no presumption invoked, the court shall look at evidence of past or present DV as a factor that is contrary to the child's BI</td>
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<td>* definition of DV within the statute</td>
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<td>*DV is the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury</td>
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<td>* &quot;serious incident of abuse&quot; is the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress</td>
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<td>* &quot;bodily injury&quot; and &quot;serious bodily injury&quot; are defined in section 13K of chapter 265</td>
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<tr>
<td>State</td>
<td>Statute Reference</td>
<td>DV Description</td>
<td>Explanation or Related Statutes</td>
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<tr>
<td>Michigan</td>
<td>MCLS 722.23</td>
<td>* DV is a BI factor (one of 12)</td>
<td>not defined in divorce/custody act</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minn. Stat. Ann.</td>
<td>* rebuttable presumption against joint legal or physical custody if DV</td>
<td>Minn. Stat. Ann. § 518B.01 * DV means the following, if committed against a family or household</td>
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<tr>
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<td>257.025, 518.17</td>
<td>has occurred between the parents</td>
<td>member by a family or household member: (1) physical harm, bodily injury, or assault; (2) the</td>
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<td>* even if no presumption invoked, DV is a BI factor (one of 12)</td>
<td>infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic</td>
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<td>* DV is defined by reference to another statute</td>
<td>threats, criminal sexual conduct, or interference with an emergency call (all of which are</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Miss. Code Ann.</td>
<td>* rebuttable presumption against sole, joint legal, or joint physical custody</td>
<td>defined by reference to other statutes</td>
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<td>93-5-24</td>
<td>* presumption raised if D has a history of perpetrating DV (statute refers to</td>
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<td>it as &quot;family violence&quot;) (need an incident that resulted in serious</td>
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<td>bodily harm or a pattern of DV) - preponderance of the evidence</td>
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<td>* written findings to document how and why the presumption was or was</td>
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<td>was not triggered</td>
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<td>* lists kinds of evidence that can rebut the presumption</td>
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<td>* if both parents have a history of perpetrating DV, custody goes to the</td>
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<td>party least likely to continue to perpetrate DV</td>
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<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. 455.050, 452.375</td>
<td>* rebuttable presumption against custody to the perpetrator of DV</td>
<td>Mo. Ann. Stat. § 455.010, 455.501 * DV includes but is not limited to the occurrence of any of the</td>
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<td>* if evidence of both parties committing DV, presumption does not apply</td>
<td>following acts, attempts or threats against a person who may be protected pursuant to sections</td>
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<td>and court should apply the BI factors listed in referenced statute - court</td>
<td>455.010 to 455.085: (1) assault; (2) battery; (3) coercion; (4) harassment; (5) sexual</td>
</tr>
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<td>may also appoint a GAL or CASA to represent the child in these cases</td>
<td>assault; (6) unlawful imprisonment - these terms are further defined in the statute</td>
</tr>
<tr>
<td></td>
<td></td>
<td>* even if no presumption invoked, DV is listed as a BI factor (one of 8) -</td>
<td>* DV is also any physical injury, sexual abuse, or emotional abuse inflicted on a child other</td>
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<td>pattern of DV</td>
<td>than by accidental means by an adult household member, or stalking of a child</td>
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<td>* written findings of fact if court finds that custody to the abusive parent</td>
<td>* discipline including spanking, administered in a reasonable manner, shall not be construed to</td>
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<td>is in the child's BI</td>
<td>be abuse</td>
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<td>* DV defined by reference to two other statutes</td>
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<tr>
<td>Montana</td>
<td>Mont. Code Ann. 40-4, 212</td>
<td>* DV is a BI factors (one of 13) - physical abuse or threat of physical abuse</td>
<td>not defined in divorce/custody act</td>
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<td>by one parent against another parent or the child</td>
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<tr>
<td>State</td>
<td>Statute Details</td>
<td>Relevant Statute</td>
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<tr>
<td>Nebraska</td>
<td>* DV is listed as a BI factor (one of 4) - credible evidence of DV</td>
<td>Neb. Rev. Stat. § 42-903</td>
<td></td>
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<tr>
<td></td>
<td>* definition of DV by reference to another statute</td>
<td>* DV is the occurrence of one or more of the following acts between household members: (1) attempting to cause or intentionally, knowingly, or recklessly causing bodily injury with or without a deadly weapon; or (2) placing, by physical menace, another in fear of imminent bodily injury</td>
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<tr>
<td></td>
<td>* presumption raised if one party has engaged in one or more acts of DV</td>
<td>* DV occurs when a person commits one of the following acts against his spouse or former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, or the minor child of any of those persons or his minor child: (1) battery; (2) assault; (3) compelling the other by force or threat of force to perform an act that the party does not have to perform or refrain from an act that he has a right to perform; (4) sexual assault; (5) knowing, purposeful or reckless course of conduct intended to harass the other (lists acts that would fit into this category); (6) false imprisonment; (7) unlawful entry of the other's residence, or forcible entry against the other's will if there is a risk of harm to the other from the entry</td>
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<td>* clear and convincing evidence standard</td>
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<td>* written findings of fact to support presumption being raised and findings that the custody and visitation determination adequately protect both the child and P</td>
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<tr>
<td></td>
<td>* if both parties have committed acts of DV, determine the primary aggressor - list of kinds of evidence to determine who is primary aggressor, and if not possible to determine this then presumption applies to both parties</td>
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<td>* presumption against custody and visitation if party is convicted of 1st degree murder of child's other parent</td>
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<tr>
<td></td>
<td>* even if no presumption invoked , DV still listed as one of 3 BI factors</td>
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<tr>
<td></td>
<td>* defines DV by referring to another statute</td>
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<tr>
<td>New Hampshire</td>
<td>* DV is a factor that is considered harmful to the child and courts shall consider it when determining whether to award joint legal custody (because presumption for joint legal custody)</td>
<td>N.H. Rev. Stat. Ann. § 173-B:1</td>
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<td>* court shall hear evidence of DV and shall determine if joint legal custody is still appropriate</td>
<td>* DV is the commission or attempted commission of one or more of the following acts by a family or household member or current or former sexual or intimate partner and where such conduct constitutes a credible threat to the plaintiff's safety: (1) assault or reckless conduct; (2) criminal threatening; (3) sexual assault; (4) interference with freedom; (5) destruction of property; (6) unauthorized entry, or (7) harassment</td>
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<td></td>
<td>* written findings regarding decision if the court still finds that JC is appropriate when DV is present</td>
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<td></td>
<td>* defines DV by referring to another statute</td>
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<td>New Jersey</td>
<td>* DV is a BI factor for the court to consider (one of 13) - history of DV, if any, and the safety of the child and parent from physical abuse by the other parent</td>
<td>not defined in divorce/custody act</td>
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<tr>
<td>State</td>
<td>Statute/Code</td>
<td>Description</td>
<td>Reference</td>
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| New Mexico    | N.M. Stat. Ann. 40-4-9.1 | * DV is a BI factor for the court to consider (one of 9) - need to engage in one or more acts of DV  
* if the court finds that DV has occurred the court shall set forth findings that the custody and visitation orders will adequately protect the child and victim  
* DV defined in the statute | N.M. Stat. Ann. § 40-4-9.1  
* DV is any incident by a household member against another household member resulting in: (1) physical harm; (2) severe emotional distress; (3) a threat causing imminent fear of physical harm by any household member; (4) criminal trespass; (5) criminal damage to property; (6) stalking or aggravated stalking (further defined in another statute); or (7) harassment (also further defined in another statute) |
| New York      | N.Y. Dom. Rel. Law 240 | * DV is a factor the court shall consider - act of DV against the party making the allegation or a family or household member of either party  
* how DV affects the child's BI along with other facts and circumstances the court deems relevant  
* prove DV with a preponderance of the evidence | not defined in divorce/custody act |
| North Carolina | N.C. Gen. Stat. 50-13.2 | * DV is a factor the court shall consider along with all other relevant factors  
* any order for custody shall contain findings of fact that the order is in the child's BI | not defined in divorce/custody act |
| North Dakota  | N.D. Cent. Code 14-07.1-06.2 | * rebuttable presumption that the perpetrator will not be granted sole or joint custody if there is either (1) a serious instance that resulted in serious bodily harm or where a dangerous weapon was used or (2) a pattern of DV within a reasonable time close to the proceeding - evidence must be credible  
* presumption can be rebutted with clear and convincing evidence that shows it's in the child's BI to have the party participate in the child's life  
* evidence of other DV proceedings are relevant  
* court must make findings of fact that show that the custody arrangement chosen protects the child's BI  
* even if no presumption invoked, DV is a BI factor (one of 13)  
* defines DV by reference to another statute | N.D. Cent. Code § 14-07.1-06  
* DV includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members |
| Ohio          | Ohio Rev. Code Ann. 3109.04 | * DV is a BI factor (one of 15) - a history of or potential for DV or whether the party has been convicted or pleaded guilty to a DV violation to the victim who was or is a household member  
* DV is defined by reference to another statute | Ohio Rev. Code Ann. § 2919.25  
* DV is when a party does one or more of the following acts to a family or household member (1) knowingly cause or attempt to cause physical harm; (2) recklessly cause serious physical harm; or (3) by threat of force, knowingly cause her to believe that the offender will cause imminent physical harm to herself |
<table>
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<tr>
<th>State</th>
<th>Code/Reference</th>
<th>Custody Decision Guidelines</th>
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| Oklahoma      | Okla. Stat. Ann. Tit. 21.1, 43 § 112.2             | * rebuttable presumption that it is not in the child's BI for the perpetrator of ongoing DV to have custody, guardianship, or visitation of the child  
* DV must be proven with clear and convincing evidence  
* even if no presumption invoked, the court must consider evidence of DV  

* not specifically defined under custody/divorce statute but according to case law, DV should be defined in accordance with Okla. Stat. Ann. tit. 22 § 60.1  
* DV is any act of physical harm, or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship |
| Oregon        | Or. Rev. Stat. 107.137                             | * rebuttable presumption that it is not in the child's BI to award sole or JC if a party has committed abuse  
* even if no presumption invoked, DV still a BI factor (one of 6)  
* DV is defined by reference to another statute  

* Or. Rev. Stat. § 107.705  
* DV is the occurrence of one or more of the following acts between family or household members: (1) attempting to cause or intentionally, knowingly or recklessly causing bodily injury; (2) intentionally, knowingly or recklessly placing another in fear of imminent bodily injury; or (3) causing another to engage in involuntary sexual relations by force or threat of force |
| Pennsylvania  | 23 Pa. Cons. Stat. Ann. 5303                       | * DV (past or present) is a factor, along with other relevant factors, that the court shall consider  
* convictions of aggravated assault and other listed crimes must be considered by the court  
* if parent has been convicted of 1st degree murder of the child's other parent, the convicted parent shall not be awarded custody, partial custody, or visitation subject to the wishes of the child if child is of a suitable age  
* defined by reference to another statute, although DV is not limited to that definition alone  

* DV is the occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood: (1) attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon; (2) placing another in fear of imminent serious bodily injury; (3) false imprisonment (defined by reference to another statute); (4) physical or sexual abuse of minor children (also defined by reference to another statute); or (5) knowingly engaging in conduct or repeatedly committing acts toward another person, without proper authority, which place the person in reasonable fear of bodily injury |
| Rhode Island  | R.I. Gen. Laws 15-5-16                             | * DV is a factor that the court shall consider when making custody decisions and any grant of custody shall be made to protect the child and abused parent from harm  
* shall also consider the perpetrator's history of physical harm, bodily injury or assault to another person  
* DV is defined in the statute  

* R.I. Gen. Laws § 15-5-16  
* DV is the occurrence of one or more of the following acts between spouses or people who have a child in common: (1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; (3) causing another to engage involuntarily in sexual relations by force, threat of force, or duress |
<table>
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<tr>
<th>State</th>
<th>Code</th>
<th>Description</th>
<th>Relevant Statutes</th>
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| South Carolina | S.C. Code Ann. §20-7-1530 | * DV is a factor that the court shall consider when making a custody decision.  
* primary aggressor evidence is relevant - defined by reference to another statute  
* DV is defined in statute and by reference to two other statutes, but DV is not limited to those two definitions | S.C. Code Ann. § 20-7-1530, 16-25-20, 16-25-65  
* physical or sexual abuse (from 20-7-1530)  
* (1) physical harm or injury to a person's own household member; or  
(2) an offer or attempt to cause physical harm or injury to a person's own household member which has the ability to create fear of imminent peril (from 16-25-20)  
* (1) intentionally committing an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) intentionally committing an assault, with or without an accompanying battery, which causes a person to fear imminent serious bodily injury or death (from 16-25-65) |
| South Dakota | S.D. Codified Laws 25-4, 45.5, 25-4-45.6 | * rebuttable presumption that awarding custody to a party that has a conviction of DV or assault against a family or household member is not in the child's BI  
* conviction of a parent for the death of another parent (exception of vehicular homicide) creates a rebuttable presumption as well  
* DV is defined by reference to another statute | S.D. Codified Laws § 25-10-1  
* DV is physical harm, bodily injury or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury between family or household members |
| Tennessee | Tenn. Code Ann. 36-6-101, 36-6-106 | * DV is a BI factor (one of 10) - evidence of physical or emotional abuse to the other parent or to any other person  
* rebuttable presumption that sole, joint legal, or joint physical custody is not in the child's BI if there is child abuse (child abuse is defined by reference to other statutes) | not defined in divorce/custody act |
| Texas | Tex. Fam. Code 153.004, 153.131 | * rebuttable presumption against sole custody to perpetrator (statute refers to it as "conservatorship") if there is a history or pattern of past or present abuse - need credible evidence  
* DV has to be committed within 2 year period before suit is filed  
* prove DV with preponderance of evidence - can look at evidence of a protective order as "credible"  
* lists kind of evidence that can rebut presumption  
* court cannot award JC if there is credible evidence that shows a history of past or present DV | Tex. Fam. Code Ann. § 101.0125, 71.004  
Although DV is not defined in the statute or by reference to any other statute, DV is defined elsewhere in the custody/divorce act  
* DV is an act by a member of a family or household against another member of the family or household (1) that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; (2) abuse (defined by reference to another statute); or (3) dating violence (also defined by reference to another statute) |
| Utah | Utah Code Ann. 30-3-10.2 | * DV is a BI factor for the courts to consider (one of 10) - any history of or potential for DV - (statute refers to DV as "spouse abuse")  
*prove DV with a preponderance of the evidence | not defined in divorce/custody act |
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<tr>
<th>State</th>
<th>Statute Reference</th>
<th>Custody Decision Criteria</th>
<th>Legal Reference</th>
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<tbody>
<tr>
<td>Vermont</td>
<td>Vt. Stat. Ann. tit. 15 §665</td>
<td>* DV is a BI factor for the courts to consider (one of 9) - evidence of DV, also impact of DV on the child and between the child and perpetrator&lt;br&gt;* DV defined by reference to a statute</td>
<td>Vt. Stat. Ann. tit. 15 § 1101&lt;br&gt;* DV is the occurrence of one or more of the following acts between family or household members: (1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; or (3) abuse to children (defined by reference to another statute)</td>
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<td>Virginia</td>
<td>Va. Code Ann. 20-124.3</td>
<td>* DV is a BI factor for the courts to consider (one of 10) - any history of DV - (DV is referred to as &quot;family abuse&quot;)&lt;br&gt;* DV is defined by reference to another statute</td>
<td>Va. Code Ann. § 16.1-228&lt;br&gt;* DV is any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member</td>
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<td>Washington</td>
<td>Wash. Rev. Code Ann. 26.09.191</td>
<td>* no JC (statute refers to it as &quot;mutual decision making parenting plan&quot;) and no other forum for resolving the dispute besides the court if there is evidence that one party has a history of DV&lt;br&gt;* DV defined by reference to another statute</td>
<td>Wash. Rev. Code Ann. § 26.50.010&lt;br&gt;* DV is the occurrence of one or more of the following acts between family or household members: (1) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (2) sexual assault of one family or household member by another; or (3) stalking (defined by reference to another statute)&lt;br&gt;* defined as an assault or sexual assault that caused &quot;grievous bodily harm or fear of such harm&quot;</td>
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<td>West Virginia</td>
<td>W.V. Code Ann. 48-9-201, 48-9-205, 48-9-209</td>
<td>* court must have an evidentiary hearing if there is credible evidence that DV occurred&lt;br&gt;* once evidence of credible abuse victim will receive assistance in the form of help complying with statute mandates, referral to safe shelter, counseling, safety planning and information about impact of DV on children and civil and criminal remedies&lt;br&gt;* if DV is found to have occurred, appropriate protective measures must be taken&lt;br&gt;* DV is defined by reference to another statute</td>
<td>W.V. Code Ann. §§ 48-27-202&lt;br&gt;* DV is the occurrence of one or more of the following acts between family or household members: (1) attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons; (2) placing another in reasonable apprehension of physical harm; (3) creating fear of physical harm by harassment, psychological abuse or threatening acts; (4) committing either sexual assault or sexual abuse (both are defined by reference to other statutes); or (5) holding, confining, detaining or abducting another person against that person's will</td>
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### Custody Decisions in Cases with Domestic Violence Allegations

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<tr>
<th>State</th>
<th>Statute Reference</th>
<th>Explanation</th>
<th>Additional Information</th>
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| Wisconsin | Wis. Stat. Ann. 767.24                  | * rebuttable presumption that it is detrimental to child and contrary to child’s BI to award sole or JC if DV or interspousal battery | Wis. Stat. Ann. 813.12 *
|           | * presumption raised if prove one engaged in a pattern or serious incident of DV - preponderance of the evidence standard | interspousal battery is defined in 940.19 and 940.20(1m) * DV is any of the following engaged in by an adult family member or adult household member against another adult family member or adult household member, by an adult caregiver against an adult who is under the caregivers care, by an adult against his or her adult former spouse, by an adult against an adult with whom the individual has or had a dating relationship, or by an adult against an adult with whom the person has a child in common: (1) intentional infliction of physical pain, physical injury or illness; (2) intentional impairment of physical condition; (3) a violation of s. 940.225 (1), (2) or (3); (5) a violation of s. 943.01, involving property that belongs to the individual; or (6) a threat to engage in any of the above-listed conduct (813.12) |
|           | * lists kinds of evidence to rebut presumption - preponderance of the evidence standard | * DV defined by reference to other statutes |
|           | * determine primary aggressor - if none, presumption doesn’t apply - lists factors to determine primary aggressor | * even if no presumption invoked, DV is still a BI factor |
|           | * written findings when presumption is raised as to whether presumption rebutted, what rebutted it, and why order is in child's BI | * DV defined by reference to other statutes |
|           | * DV defined by reference to other statutes | * court shall consider evidence of DV - evidence of spouse abuse - (statute refers to it as "spouse abuse" and "family violence") as contrary to the child's BI |
|           | * party applying for custody order shall notify the court of any known protection or custody orders issued on behalf of the parties from any other court | not defined in divorce/custody act |

* "BI" - abbreviation for best interests.
* "CPO" - abbreviation for civil protective order. CPO includes civil injunctions and civil restraining orders.
* "D" - defendant/respondent in custody hearing.
* "DV" - abbreviation for domestic violence. In many states, there are separate definitions of DV for domestic relations as compared to CPO.
* "JC" - abbreviation for joint custody.
* "not specifically defined under custody/divorce statute" - the custody/divorce act does not explain what DV means in the context of a custody hearing (although there may be a definition of DV under another act in the same jurisdiction.
* "P" - petitioner in custody hearing.
* "primary aggressor" - when both parents are alleging domestic violence against the other, how the courts determine who is the primary aggressor.
Representing the Child

Benefits of Trained, Independent Representation for Children

It is particularly useful to have a lawyer who is experienced in sexual-abuse cases appointed to represent the child where there are allegations of child sexual abuse, especially in domestic-relations cases. This lawyer is in the best position to present unbiased evidence to the court, free from the charge that he or she is manipulating the child one way or another. This is most important in intrafamilial sexual abuse cases.

One of the things that makes litigating such child sexual abuse cases so difficult is that the argument too often becomes a mud-slinging battle between the parents, with the child's interest getting lost in the process. For example, the accusing parent's dysfunction and anger may serve as justification for dismissing the allegation. But children of dysfunctional, angry, and even delusional parents may nonetheless be abused by the other parent. Questions about the protective parent's credibility should not obscure the child's need for protection.

The child's lawyer can be more objective in obtaining and presenting a credible evaluation of the allegations. If the child was really molested, his or her lawyer
is not saddled with the credibility problems of the nonabusing parent. On the other hand, if the child was not molested, the child’s lawyer can give a more accurate context to the court’s desire to protect a child who does not need protecting (or at least does not need protecting from the accused parent).

The court is more likely to be persuaded by the evidence and arguments presented by a properly trained lawyer for the child than by either parent’s lawyer. It is the author’s strong belief that every child in a case involving sexual abuse allegations must have independent and properly trained counsel. The ability for the court to determine the truth and act appropriately is seriously jeopardized if the child is not independently represented by counsel who has the training and experience to deal with the case or who is given access to experts who can provide that training. Further, the child’s lawyer is in the best position to help guide the child through the process of litigation and, if necessary, the task of testifying.¹

On the other hand, a child’s lawyer who is not properly trained can do immense damage to the child by providing merely an illusion of protection. Even a well-meaning lawyer for the child who is not familiar with the various dynamics and presentations of intrafamilial child sexual abuse can easily believe that a molested child has not in fact been molested and join forces with the abuser against the protective parent. Similarly, untrained lawyers may assume that the allegations are true and inappropriate interfere with a healthy parent-child relationship.

**WHO SHOULD BE APPOINTED**

A properly qualified lawyer for the child can be of great assistance to the child. However, an unqualified lawyer can be a “loose cannon,” damaging the child’s case and contributing to an unjust result for all parties. In domestic-relations cases there is a particular need for qualified counsel for the child because there is less likely to be an independent, trained third party involved in the case. Not many domestic-relations lawyers have skill and experience in representing molested children. The court is more likely to find appropriately qualified lawyers among those practicing in child-protective-services cases. Ideally, a lawyer representing the child in a domestic-relations case should have training and experience in child abuse cases as well as in the dynamics of divorce cases. However, if such persons are not available, it is probably most important to have a lawyer with experience in child abuse cases.

The American Bar Association has recommended that judges appointing lawyers for children should, unless impractical, “determine that the lawyer has been trained in representation of children and skilled in litigation (or is working under the supervision of a lawyer who is skilled in litigation). Whenever possible, the trial judge should ensure that the child’s lawyer has had sufficient training in child advocacy and is familiar with [the AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES].”² Minimal training should include:

1. Information about relevant federal and state laws and agency regulations;
2. Information about relevant court decisions and court rules;
3. Overview of the court process and key personnel in child-related litigation;
4. Description of applicable guidelines and standards for representation;
5. Focus on child development, needs, and abilities;
6. Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;

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(7) Information concerning family dynamics and dysfunction including substance abuse, and use of kinship care;

(8) Information on accessible child welfare, family preservation, medical, educational, and mental-health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and

(9) Provision of written material (for example, representation manuals, checklists, sample forms), including listings of useful material available from other sources.3

The Fordham Conference on Ethical Issues in the Legal Representation of Children recommended that children's lawyers have training in at least the following areas:

a. Interviewing, counseling, negotiation.

b. Cultural competence (directed at client population).

c. Role of the lawyer and guardian ad litem (ethical issues).

d. Child development and psychology.

e. The impact on children of the abuse and neglect system.

f. The merits of a professional team approach.

g. Substantive law and procedure (as necessary for effective interviewing and counseling).4

Lawyers who are interested enough in child advocacy to become trained may subscribe to relevant child-abuse journals and newsletters5 and may be members of organizations such as the National Association of Counsel for Children (NACC),6 the International Society on the Prevention of Child Abuse and Neglect (ISPCAN), or the American Professional Society on the Abuse of Children (APSA). These ongoing resources help lawyers to keep abreast of the rapidly advancing state of the art of child advocacy and new empirical data concerning child sexual abuse.

DEVELOPING RESOURCES FOR CHILD ADVOCATES

In domestic-relations cases, unlike child-protection cases, most states do not provide funding to pay for children's lawyers, let alone to provide them with access to independent multidisciplinary resources. Therefore, the child's lawyer is practically limited to using the experts whom the other parties have already involved in the case. Sometimes these experts are not well qualified, have misinterpreted or overinterpreted the data, or are otherwise biased advocates for one party or the other. In such cases, it would be extremely beneficial for the child's lawyer to have access to independent experts for consultation, review, and evaluation.

The author created a program in Pima County, Ariz., to address this need. The program can be easily replicated elsewhere. With the assistance of then Presiding Domestic Relations Judge Margaret M. Houghton, the Arizona Association of Counsel for Children, and the Pima County Bar Association, in 1992 the court created a training program for lawyers who wanted to represent children in domestic-relations cases. Only lawyers who completed the training would be eligible to be appointed to represent children. Allegations of sexual abuse constituted one category of case warranting appointment of such a lawyer for a child. Lawyers agreed to take cases on a sliding scale, including pro bono appointments. If the parents' lawyers were charging their standard hourly rates, the court would generally order that the child's lawyer be permitted to charge standard rates. However, if the parents were unrepresented or repre-

5. For example, the ABA Center on Children and the Law publishes a monthly newsletter, Child Law Practice, which includes articles, case digests, and legislative news. For subscription information or a sample copy, contact the ABA Center at 401 N. W., 9th Floor, Washington, D.C. 20005-1022.
6. The NACC is the country's largest bar association for children's lawyers. The organization can provide referrals to members throughout the United States. For information on local affiliates, membership, referrals, or child advocacy resources, contact the NACC at 1825 Marion Street, Denver, Colo. 80218, telephone (303) 864-5320, fax (303) 864-5351.
sented by pro bono counsel, the child's lawyer would generally be expected to serve pro bono as well. Initial appointment orders state the hourly rate to be charged, allocate payment for the fees between the parties, and provide for an advance retainer. The lawyers billed the parties as directed by the order, and a judgment for any unpaid fees and costs was entered at the end of the case, facilitating collection if necessary.

Once the panel of lawyers was created, a panel of experts was also recruited to serve on a sliding-fee scale. These experts included pediatricians, psychologists, psychiatrists, and social workers. The experts agreed to act as consultants or evaluators for court-appointed lawyers for children. The lawyer would submit a request to the court, and the court would enter an order appointing the expert. The appointment order would be similar to that for the child's lawyer, indicating the hourly rate to be charged (if any), an initial retainer amount, and allocation of payment. The experts billed the parties as directed by the order, and a judgment for any unpaid fees and costs was entered at the end of the case. Experts serving as consultants to the child's lawyer would be covered by the attorney–work-product privilege. Experts conducting evaluations would be subject to the same rules as other testifying experts.

Having such a panel of experts assists the child's lawyer in many ways. For example, the lawyer can ask an expert to review the reports, recommendations, and raw data of the other experts involved to determine whether or not those evaluations were flawed in any way. The expert might assist the child's lawyer in reviewing or developing discovery directed to other experts in the case or to point out areas where further information should be sought. If necessary, an independent evaluation can be performed by the child's expert. Especially where the parties are unrepresented and the court does not have independent evaluators available to it, this may be the only evaluation to provide information to the court. Where such resources are not available, lawyers may be able to arrange such services by motion on a case-by-case basis or establish a similar program to the one in Pima County in their own communities.

The Role of the Child's Attorney

The role of the lawyer for the child has been debated for decades, generally focusing on whether the lawyer is a guardian ad litem, representing the best interests of the child, or a traditional lawyer, representing the expressed position of the child. The national trend in the 1990s has been towards greater autonomy for child clients and greater recognition of their right to have their positions represented. Some lawyers for children have little understanding of their role and may attempt to act primarily as facilitators and mediators between the parents or between the parents and child protective services. While a child's lawyer who is effective often serves as a catalyst for settlement with the cooperation of the parents' lawyers, he or she should not seek settlement merely for settlement's sake. The lawyer should not sabotage the child's position merely to achieve an agreement. Indeed, one of the major reasons why children need independent counsel is to protect them from having their interests bargained away.

In February 1996 the ABA House of Delegates adopted standards of practice [hereafter Standards] for lawyers representing children in abuse and neglect cases. The Standards are not binding on lawyers but represent the aspirational recommendations of the largest bar association in the world. State and local bar associations and courts may choose to hold children's lawyers to the Standards, and the Standards may become the de facto standard of practice in the field. The Standards were developed by a committee within the ABA's Family Law Section in an attempt to provide the guidance

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7. The author, as coordinator of the program, personally telephoned the experts to invite them to participate. Every professional contacted, except for one who no longer practiced in the area, agreed to be on the panel. Some experts who had stopped providing forensic evaluations in abuse cases agreed to do so on behalf of the child's lawyer. The experts appreciated the opportunity to serve as experts directly for the child, to be paid on the same basis as the child's lawyer, including their willingness to serve pro bono where appropriate, to have the liability protection of the court appointment, and to have a judgment without the need to file suit in the event that their fees were not paid in full. The experts were assured that they could decline specific cases and that cases would be distributed so as not to overwork particular experts.


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expected to serve pro bono as well. Initial appointment orders state
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experts agreed to act as consultants or evaluators for court-
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to the court, and the court would enter an order appointing the
expert. The appointment order would be similar to that for the
child's lawyer, indicating the hourly rate to be charged (if any), an
initial retainer amount, and allocation of payment. The experts
directed the parties as directed by the order, and a judgment for any
unpaid fees and costs was entered at the end of the case. Experts
serving as consultants to the child's lawyer would be covered by the
testimony-work-product privilege. Experts conducting evaluations
would be subject to the same rules as other testifying experts.

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ways. For example, the lawyer can ask an expert to review the
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involved to determine whether or not those evaluations were flawed
in any way. The expert might assist the child's lawyer in reviewing or
developing discovery directed to other experts in the case or to point
out areas where further information should be sought. If necessary,
an independent evaluation can be performed by the child's expert.

Especially where the parties are unrepresented and the court does
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7. The author, as coordinator of the program, personally telephoned the experts to invite them to participate. Every professional contacted, except for one who no longer practiced in the area, agreed to be on the panel. Some experts who had stopped providing forensic evaluations in abuse cases agreed to do so on the
demand of the child's lawyer. The experts appreciated the opportunity to serve as experts directly for the
child, to be paid on the same basis as the child's lawyer, including their willingness to serve pro bono where
appropriate, to have the liability protection of the court commitment, and to have a judgment without the
need to file suit in the event that their fees were not paid in full. The experts were assured that they could
decline specific cases and that cases would be distributed so as not to over-work particular experts.

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8. See generally, ANN M. HARRAMBLE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN
IN CUSTODY, ADOPTION, AND PROTECTION CASES ch. 1 (American Bar Association 1993). See also ANN M. Har-

9. AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUS

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evaluation to provide information to the court. Where such
resources are not available, lawyers may be able to arrange such
services by motion on a case-by-case basis or establish a similar pro-
gram to the one in Pima County in their own communities.

THE ROLE OF THE CHILD'S ATTORNEY

The role of the lawyer for the child has been debated for decades,
generally focusing on whether the lawyer is a guardian ad litem,
representing the best interests of the child, or a traditional lawyer,
representing the expressed position of the child. The national trend in
the 1990s has been towards greater autonomy for child clients and
greater recognition of their right to have their positions represented.

Some lawyers for children have little understanding of their role and
may attempt to act primarily as facilitators and mediators between
the parents or between the parents and child protective services.
While a child's lawyer who is effective often serves as a catalyst for
settlement with the cooperation of the parents' lawyers, he or she
should not seek settlement merely for settlement's sake. The lawyer
should not sabotage the child's position merely to achieve an agree-
ment. Indeed, one of the major reasons why children need inde-
pendent counsel is to protect them from having their interests bar-
gained away.

In February 1996 the ABA House of Delegates adopted stand-
ards of practice [hereafter Standards] for lawyers representing
children in abuse and neglect cases. The Standards are not binding on
lawyers but represent the aspirational recommendations of the
largest bar association in the world. State and local bar associations
and courts may choose to hold children's lawyers to the Standards,
and the Standards may become the de facto standard of practice in
the field. The Standards were developed by a committee within the
ABAs Family Law Section in an attempt to provide the guidance
that Model Rule of Professional Conduct ER 1.14 lacked. The Standards emphasize the need for the child’s lawyer to be specially trained and to make use of multidisciplinary resources, particularly regarding issues of child development.

The Standards provide that the child’s lawyer owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client, including the duty to advocate the child’s articulated wishes. In all but the exceptional case, such as with a preverbal child, the child’s lawyer is to maintain this traditional relationship with the client. It is important to understand that the traditional role of a lawyer includes the duty to counsel the client. This is no less true with a child client. Therefore, the lawyer does not merely parrot the child’s uninformed position. If the lawyer takes the time to develop a relationship with the child, to understand what Yale Professor Jean Koh Peters refers to as “the child-in-context,” and to advise the child about the available options and their ramifications, most children will authorize the lawyer to advocate reasonable positions on their behalf.

While the Standards express a clear preference for lawyers being appointed in this traditional role, they do recognize the guardian ad litem role, in which case the lawyer is not bound by the child’s articulated preference, irrespective of exceptions provided with respect to lawyers acting as traditional lawyer.

The Commentary to the Standards rejects the concepts that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation and that disability must be globally determined. The Comment to Standard B-3 provides: “Rather, disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children.” While this view of child representation provides a great deal of flexibility, it also requires that the child’s lawyer be adequately trained and make appropriate use of professionals in other disciplines to determine when the lawyer is and is not directed by the child client.

In December 1995 a symposium was held at the Fordham Law School to discuss the ethical issues involved in representing children in maltreatment cases. During the three days of the symposium, invited participants tackled some of the practical problems raised by the ABA Standards. Individual working groups made recommendations, which were then voted on by the group as a whole on the last day, [hereafter Recommendations]. An extraordinary degree of consensus was achieved despite the different perspectives represented by the participants, many of whom were the leading scholars and practitioners on both sides of the traditional child’s wishes/best-interest debate.

The symposium participants rejected the entire category of lawyer guardians ad litem to the extent that the role “includes responsibilities inconsistent with those of a lawyer for the child.” Participants recommended that laws currently allowing lawyers to be appointed as guardians ad litem be amended to authorize instead appointment of a lawyer to represent the child. Recommendations were made, however, to guide lawyers appointed as traditional guardians ad litem pending changes in state law.

The Recommendations for practice guidelines encompass legal representation of even nonverbal children. The lawyer is advised to “make extensive use of experts (e.g., social workers, psychologists) as well as other interested persons (e.g., family members) in assessing the child’s circumstances.”


12. See also Ann M. Haralambie & Deborah L. Glaser, Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children, 13/1 J. AM. ACD. MATER. LAWYERS 57 (1995). The ABA Standards commentary referred to was based primarily on this article.


15. Id.

16. Id. at 1314-16.

17. Id. at 1304.
where there is evidence that “the child is unable to express a rea-
soned choice,” the lawyer “must engage in additional fact finding to
determine whether the child has or may develop the capacity to
direct the lawyer’s action.”18 This factual determination may be
aided by information from various professionals and other con-
cerned parties, with consideration of culture, race, ethnicity, and
class, as well as of the child’s individual life experiences, family back-
ground, and medical history.19

However, in construing the flexibility accorded by Model Rule
of Professional Conduct Rule ER 1.14 and the ABA Standards, the
Recommendations did provide for the lawyer to determine the
child’s best interests under certain circumstances.20 Of particular
assistance were the recommendations concerning how to make an
objective determination of the child’s best interests, which are set
forth here in their entirety. Recommendation IV(B)(3) provides:

3. Lawyers for children who must identify, determine, and advo-
cate for their client’s interests at any given moment in the represen-
tation should employ the following process. This process is
intended to assist the child’s lawyer in identifying the legal inter-
est or interests to be pursued. The process by which a lawyer
acquires understanding of a child’s interests and needs is not lin-
ear but should be dynamic and evolving over the course of the
case or relationship. This process of inquiry always begins and
ends with the child-in-context. It is critical to note that, at
almost any point in the analysis, this process may leave only one
legal interest, at which point the lawyer is constrained to pursue
that legal interest.

a. The child client has a universe of possible needs and interests,
as defined by any and all persons involved in the child’s life. The
lawyer must first narrow the area of inquiry by determining the
legal interests of the child. A legal interest is any interest that
the legal proceeding has authority to address. Even when many

18. Id. at 1312.
19. Id. at 1313.
20. Id. at 1308-13.

statutes and decisions require the lawyer to address a child
client’s best interests, these guidelines require a lawyer in those
circumstances to address something that can be more appropri-
ately characterized as a child’s legal interests. In other contexts, a
child’s legal interests could include, for instance, a child’s right to
“appropriate education,” “least restrictive alternative,” “least
detrimental alternative,” as well as children’s interests in proce-
dural rights.

b. The process must then focus on the child in her context. It is
the lawyer’s responsibility to carry out a full, efficient, and
speedy factual investigation with the goal of achieving a detailed
understanding of the child client’s unique personality, her family
system, history, and daily life. This process should include the
client’s own words, stories, and desires at every possible point.
Even where the lawyer has determined that the child cannot
fully understand or express desires about the legal issues of the
case, there will be very few verbal children who cannot express
some views about their own lives. As the lawyer gathers infor-
mation from her client and other sources, the lawyer should organ-
ize those facts using devices such as genograms, chronologies,
and daily schedules to ensure that the lawyer is working from a
thickly detailed view of the child client as a unique individual.

c. Essential to the process is also a snapshot of the child at the
moment of the determination. How is the child developing?
How is the child behaving? How is the child benefitting or suf-
ferring from her current living arrangement? A lawyer should
generally obtain this snapshot in part through ongoing current
contact with the client.

d. The lawyer must go further and consider the actual alterna-
tive options available to the child. The lawyer should understand
these options concretely and understand as specifically as possi-
ble how that option will be experienced by the child.

i. These options must include all legally available options,
including good faith options for seeking modification of the
law. The lawyer must continually reevaluate, however,
whether these options for law reform are actually attainable
given the current legal climate.
ii. These options must also include all options available in the community to the child. These options should be realistically available or obtainable through advocacy, however, and not based on speculation of what the system might some day be able to make available.

e. In considering the actually available options that the lawyer and client have identified, the lawyer should examine each option in light of important paradigms that directly related non-legal disciplines are considering. These paradigms should be determined through interdisciplinary research identified in the Recommendations for Further Study.

f. There will be some cases in which the analysis becomes too complex and lawyers should consult experts for guidance. Lawyers may need to retain experts to aid them in deciding whether any of the remaining legal interests to pursue. Since much of the data upon which the decision is based will be confidential lawyer-client information, the retained consultant is sometimes the optimal, and only ethically acceptable, guide. When lack of resources or other factors make such a consultant impractical, the lawyer may look to experts already involved with the client, experts retained by other parties, or occasionally court-appointed experts. These latter experts, however, do not share the lawyer’s duty of advocacy with respect to the child client’s wishes and perspectives, often have other institutional loyalties, may have important ongoing relationships with the child that must not be damaged, or may not offer opinions to the lawyer in a timely fashion.

g. At this point in the process of determining which legal interest to pursue, there still may be no definitively preferable option for the child.

i. At this point the lawyer should return to the thickly detailed understanding of the child, with reference to the child’s needs and interests as outlined in the proposed ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Section B-5 and its Commentary. The lawyer again should seek any information or opinions the child can offer about the options remaining.

ii. The lawyer then should ensure that evidence is presented on the remaining options to the court, and in opposition to all options that were actually available but that have been eliminated from the child’s legal interest through the preceding analysis.\(^{21}\)

By far the most sophisticated and thoughtful model of child representation is that formulated by Professor Jean Koh Peters.\(^{22}\) She takes the ABA Standards and Fordham Recommendations one step further, finally resolving the wishes versus best interests dichotomy that has plagued the debate on what lawyers for children are supposed to do. Peters was the intellectual architect of the Fordham Symposium’s Working Group on Determining the Best Interests of the Child, whose recommendations were adopted unanimously and without change by all members of the Symposium.

As one of the drafters of the ABA Standards and the Fordham Recommendations, I am of the opinion that the model of representation presented by Peters would have been adopted by both groups and is consistent with the ethical guidelines provided by those documents. But her model is more refined and workable, providing a continuum and context that allows the lawyer to fully act as a lawyer while recognizing those areas where the child cannot provide guidance. The Peters model posits “three defaults, three umbrella principles, and seven questions to keep us honest,” all of which restrict the child’s lawyer’s subjective discretion and require development of a “thickly detailed” understanding of the “child-in-context.” As a result, the representation is more objective and principled.

The defaults represent a starting place from which the child’s lawyer must individualize the representation to maximize the child’s participation, reflecting the client’s uniqueness. The “relationship default” requires the lawyer to meet and get to know the child unless there is “weighty independent evidence that the meeting would serve the client no purpose or would yield such a minimal benefit to the client that it is outweighed by the costs to the client of planning such a visit.”\(^{23}\) The competency default views the child’s competency

\(^{21}\) Id. at 1109-11.

\(^{22}\) See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997).

\(^{23}\) Id. at § 3-2(b)(1).
along a spectrum within which the child can contribute as much as possible to the representation. The advocacy default requires the lawyer to represent the child’s expressed preferences about issues in the case unless the child cannot adequately do so in his or her own interest. An alternative to the advocacy default is provided to cover situations where the lawyer is functioning as a traditional guardian ad litem, required to represent the child’s best interests. Under the alternate default, the lawyer is still required to make the child’s voice, not the lawyer’s, a major focus.

The principles are designed to keep the lawyer focused on the child’s perspective and to reduce the likelihood that the lawyer’s subjective views will overshadow the child’s interests. Principle One is to “revolve one’s actions around one’s developing view of both the child-in-context and the theory of the case.” Principle Two is to “respect one’s client, whether present or absent.” Principle Three is to “cultivate right relationships with other people in the child’s world, keeping in mind the ways in which the child values each of these relationships.”

The questions serve as a checklist to keep the representation true to the client:

1. In making decisions about the representation, am I making the best effort to [see] the case, from my client’s subjective point of view, rather than from an adult’s point of view?
2. Does the child understand as much as I can explain about what is happening in his case?
3. If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?
4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

5. Is it possible that I am making decisions in the case for the gratification of the adults in the case and not for the child?
6. Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

The Peters model allows lawyers to exercise an objective type of discretion in determining the child’s position under limited circumstances. The reader is referred to Peters’ book for a more detailed explanation of how to implement her model.

It is essential that the lawyer, all parties and their counsel, and the judge understand what the role of the child’s lawyer is in a given case. Therefore, the lawyer is well advised to seek clarification from the judge on the case unless there is clear local law or a clear description of the role in the order appointing the lawyer. Child sexual abuse cases have spawned an increasing number of tort actions against a variety of defendants, including malpractice actions against children’s lawyers. Clarification of the lawyer’s role should be considered a major risk-management issue.

**The Ethical Dilemma**

One of the most often cited examples of a dilemma for children’s lawyers involves the representation of a molested child who does not want the molestation revealed or wants to be in the custody of or allowed unfettered visitation with a molester. The ABA Standards specifically address this issue in Standard B-4(3) and its commentary:

(3) If the child’s attorney determines that the child’s expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer’s opinion of what would be in the child’s interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child’s expressed preference, unless the child’s position is prohibited by law or without any factual

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24. Id. at § 3-2(b)(2).
25. Id. at § 3-2(b)(3)(a).
26. Id. at § 3-2(b)(3)(b).
27. Id. at § 3-2(c)(1).
28. Id. at § 3-2(c)(2).
29. Id. at § 3-2(c)(3).
30. Id. at § 3-2(d).
31. See Chapter 5.
foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary—
One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules require the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, is a crime, the child is presumably the victim, rather than the perpetrator of that crime. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.32

The Fordham Symposium's working group on confidentiality also identified the ethical dilemma in representing a child who may be at risk of harm but who refuses to authorize disclosure of confidential information concerning the risk, recognizing that the current ethical rules would prohibit a lawyer from breaching the client's confidences.33 The working group proposed that Rule 1.6, Model Rules of Professional Conduct, be amended to permit some minimal disclosure of confidential information when necessary to protect the child.34 The members of the working group did not agree on the level of risked harm necessary to permit disclosure.35 The recommendations from that working group that were ultimately adopted by the symposium members recommended further study on whether Rule 1.6 "should be amended to permit the lawyer for a child to dis-

34. Id. at 1371.
35. Id.
close confidences to the limited extent necessary to prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the client."

CONCLUSION

A lawyer who undertakes the representation of an allegedly molested child has a duty to be competent, to become qualified, or to associate with a qualified lawyer. It is an enormous responsibility and a difficult task to be the lawyer for such a child. While the ethical guidelines involved in representing abused children are not yet clear, the emerging national consensus, reflected in the ABA Standards, Fordham Recommendations, and Peters’ book, does provide guidance.

Children may side with one of their parents when parents divorce. More recently, a somewhat different phenomenon, the parental alienation syndrome, has been proposed. The parental alienation syndrome offers an explanation for reports of sexual abuse when parents are divorcing or are divorced. It has received consideration by professionals, some acclaim in the media, and attention in the courtroom. It deserves and requires our critical examination. This article will describe the parental alienation syndrome, specifically its definition, hypothesized characteristics, proposed underlying dynamics, and related evaluation strategies. The article will also discuss research applicable to the parental alienation syndrome and will evaluate its utility in making decisions about sexual abuse.

THE PARENTAL ALIENATION SYNDROME

The essence of the parental alienation syndrome is a circumstance in which a child demonstrates a strong affinity for one parent and alienation from the other, usually when parents are divorcing or are divorced. In addition, the negative behaviors the child attributes to the alienated parent are trivial, highly exaggerated, or totally untrue. In most cases, these behaviors include an allegation of sexual abuse.

Richard A. Gardner is the professional who invented the term, parental alienation syndrome. Gardner has written extensively about the parental alienation syndrome and about companion strategies for assessing allegations of sexual abuse. In his handout Qualifications of Richard A. Gardner, M.D. for Providing Court Testimony, Gardner (1992b) states that as he worked on child custody disputes in divorce in the early 1980s, he began seeing a "new psychiatric disorder," for which he coined the term "Parental Alienation Syndrome." He adds that he wrote his first article on it in 1985 and published his first book about the syndrome, The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse, in 1987 (Gardner, 1992b, p. 2).

Important concepts for understanding the parental alienation syndrome are its characteristics, including Gardner's definition of its usual product, a false allegation of sexual abuse; Gardner's view about how this syndrome develops; and his beliefs about other human characteristics not specific to the parental alienation syndrome. These concepts and two procedures that Gardner has developed for evaluating sexual abuse accusations will be discussed in this section.

Elements of the Parental Alienation Syndrome

According to Gardner, the two moving parties in the parental alienation syndrome are the child and the parent to whom the child is cathetered (i.e., concentrating psychic energy, attached), described as "the accusing parent." According to Gardner, acts of the alienated or "accused parent" have little or nothing to do with the child's negative feelings about the parent and allegations against him or her. Specifically, Gardner says the alienated parent has "provided nor-
mal loving parenting or, at worst, exhibited minimal impairments in parenting capacity" (Gardner, 1992b, pp. xviii; repeated verbatim on p. 61). In fact, he makes a point in his 1992 book that the parental alienation syndrome only applies to false allegations (Gardner, 1992a). If a child is alienated from a parent who has actually maltreated the child, this is not the parental alienation syndrome. It is something else.

Gardner (1992a) regards this "psychiatric disorder" to be on the rise, stating that he finds it in 90% of the children he sees who are involved in custody litigation (p. 59). He also says that 90% of the time, the accusing parent is the child's mother, the accused then being the child's father. However, in the remaining cases, these roles are reversed (Gardner, p. 106).1

Gardner differentiates the parental alienation syndrome from ordinary programming or brainwashing. He says the phenomenon is initiated by the accusing parent who programs the child, but the child actually adds his or her own material—that is, specific complaints such as an allegation of sexual abuse. In his 1992 book about the syndrome, Gardner (1992a) states that he has identified three different types of this disorder: severe, moderate, and mild parental alienation syndrome.

Characteristics of the Parental Alienation Syndrome

The major components of the parental alienation syndrome are found in characteristics of the child, the accuser, and the allegation of sexual abuse.

The child. Characteristics found in the child are the following: The child exhibits obsessive hatred of the alienated parent, based on "weak, frivolous, or absurd" complaints (Gardner, 1992a, p. 68). Moreover, these complaints may be characterized by "borrowed scenarios," presumably borrowed from the loved parent (Gardner, 1992a, pp. 77-80). In addition, there is a lack of ambivalence regarding feelings for either the loved or hated parent, an absence of guilt about hating the alienated parent, and reflexive support for the loved parent. Finally, the child also expresses animosity toward other members of the alienated parent's family. For example the child says, "I don't want to see Uncle Ted because he made me feel bad about not seeing my father" (Gardner, pp. 80-81).

The accusing parent. The primary characteristics of the falsely accusing parent or mother are efforts to program or brainwash. Gardner says that motives for these acts range from the entirely conscious to the deeply unconscious.

Conscious strategies include calling the father names, presumably in the child's presence; destroying items in the house that are memos of him; and tearing up photographs of his relatives. In addition, she may blame him entirely for the marital demise and take no responsibility for her own failings. Gardner (1992a) cites the following as conscious brainwashing strategies: requiring the father "to park in front the house and blow the horn" when he comes to get the child for visits (p. 86), obtaining "restraining orders...[as a] result of fabricated and even delusional complaints about...violence" (p. 87), choosing persons other than the father as babysitters, and not sending the child for visits when sick. Gardner also describes a variety of maneuvers to interfere with the father's visits and phone contacts with the child as programming. In addition, the mother may begin with "luring" the oldest child into alienation and then progress to younger children (p. 98).

Among unconscious programming maneuvers are the following: If the mother is neutral regarding visits, Gardner (1992b) says she is "communicating criticism of the father," and likewise, if she lets the child decide whether to visit, this is unconscious brainwashing (p. 100). Saying things such as "You have to go see your father. If you don't he'll take us to court" (p. 101) is another example. In addition, Gardner states that the mother calling the child during a visit to query what the child and father have been doing and asking if the child is all right when he or she returns are examples of unconscious brainwashing. Other examples include failing to talk about the father and moving to a distant city. The latter communicates to the child that visits are not important.

The false allegation. In discussing what he means by the term "false allegation of sex abuse," Gardner (1992c) says that subsumed under this rubric are cases in which the allegation is a fabrication as well as cases in which the accuser is delusional. He further states that an accusation may begin as a fabrication but come to be believed by the accuser, in which case, the accuser is then delusional. In fact, he says that false allegations appear along a continuum from complete fabrication to complete delusion.

There does not appear to be any room in Gardner's definition for honest mistakes or misinterpretations of information. Nor does he consider cases that might involve exaggeration or some factual material and some nonfactual material.

Causes of the Parental Alienation Syndrome

Obviously, an important issue is why the mother and the child behave this way. Gardner describes the psychodynamics and motivation that lead children
and their mothers to become involved in this alienation and to make false allegations of maltreatment.

The child. Gardner identifies seven psychodynamic factors and one motivational factor that result in children's negative feelings and false allegations. The psychodynamic factors are maintenance of the primary psychological bond, fear of alienating the preferred parent, reaction formation, identification with the aggressor, identification with the idealized person, release of hostility, and sexual rivalry (Gardner, 1992a, 1992c). The motivational factor is shame over recanting (Gardner, 1992d). Each of these will be discussed briefly.

In speaking of maintenance of the psychological bond, Gardner says that the mother-child bond is stronger than the father-child bond. To assure a continued bond with the mother, the child makes negative statements about the father including, and perhaps most important, that the father has sexually abused the child. The child believes that the mother is pleased by negative statements about her ex-spouse and so makes progressively more serious ones.

Apparent closely related is the second factor, fear of alienating the preferred parent. The accused parent has already deserted the child because he has left the home during divorce. To prevent the remaining parent from deserting him or her, the child will make a position supporting the preferred parent. The child joins the mother "in her campaign of vengeance and vilification of the father" (Gardner, 1992c, p. 128).

The third psychodynamic factor cited by Gardner (1992c) is reaction formation. His argument is that the hatred of the father is in fact "a thin disguise for deep love" (p. 128). Furthermore, he asserts that the child's description of unpleasant sexual activities with the father is a reaction formation to cope with wishes for sexual activity with the father. It is the child's way of saying, "It is not I who want him to rape me, it is he who wants to rape me." This assuages the child's guilt about desire for sex with the father (Gardner, 1992c, p. 129).

The fourth factor is another defense mechanism, identification with the aggressor. The aggressor is the mother who is attacking the father. The child is getting "on the bandwagon of the stronger party" (Gardner, 1992c, p. 129). Gardner does not see the father as an aggressor, nor as the stronger of the two parents.

The fifth factor is described by Gardner (1992c) as closely related to the fourth. It is identification with the idealized person. As the mother "denigrates the father, she is likely to whitewash herself" (p. 130). Gardner says that a psychological fusion between mother and child forms, which contributes to the formation of folie à deux. Thus, the child and the mother are both delusional with regard to the father's negative traits and behaviors.

Not only may these delusions encompass mother and child but others may also become incorporated. For example, if there is more than one child, the delusion becomes folie à trois or quatre. Gardner (1992b) is also "convinced that . . . a widespread phenomenon" is the mother's or child's psychotherapist joining the delusion. He states, "Parental Alienation Syndrome mothers have a way of finding therapists, almost invariably women, who reflexively join them in their campaign of denigration of the father . . . [who] in some cases even join the mother's paranoid delusional system." Furthermore, he states, "Some of these therapists are paranoid themselves. Others harbor deep-seated hostility toward men, hostility so strong that they will seize upon every opportunity to vent their rage on them" (p. 147).

Sixth, Gardner sees the etiology of parental alienation syndrome as deriving from the release of hostility. His argument is that the child is angry for reasons other than any harmful paternal behavior. These include abandonment by the father, financial hardship consequent of the marital demise, lack of attention from parents who are consumed with their divorce, the presence of new partners, and the fact that parents are not reconciling. Anger from these diverse sources is focused on the father and leads to false accusations against him.

The final psychodynamic factor cited by Gardner is sexual rivalry. This seems only to be a factor for daughters. Gardner (1992c) says that the daughter "has a seductive and romanticized relationship with her father" (p. 131). When the father develops a relationship with a new woman, the daughter says, "You've got to choose between her and me," thereby sabotaging the father's relationship with his new partner (Gardner, 1992c, p. 131). Mothers are said sometimes to encourage their daughters in these manipulations because "it serves well their desire for vengeance" (Gardner, 1992c, p. 131).

In addition, Gardner (1992c) states that children may experience shame over recanting, which in fact prevents them from recanting. He enumerates several sources of motivation to retract the allegation of sexual abuse, but "the prospect of being called a liar by the horde of individuals who have jumped on the child's bandwagon is terrible to behold" (p. 132).

Thus, the child does not recant despite concern over the consequences of the false allegation to the accused parent.

The accuser. Gardner (1992a) says that mothers feel compelled to alienate their children from the fathers during divorce because they are presently at a disad-
vantage in obtaining custody. He says this is so because custody decisions are now made based on the "best interests of the child presumption" rather than on the "tender years presumption" (pp. 52-54). He describes the tender years presumption as the presumption that children will be better cared for by their mothers, especially when they are younger. He states this is no longer social policy.

A review of child custody statutes and the actual data about which parent obtains custody raises questions about this hypothesis. Best interests criteria in child custody statutes consist of a range of factors, including some on which mothers are likely to perform better. Even though it is more common than in the recent past for fathers to seek custody or joint custody, in approximately 85% of the cases, it is still the mother who receives custody (Bogolub, 1997).

In any case, Gardner (1992c) theorizes that mothers are threatened by the prospect that their husbands may gain custody and so engage in "a whole series of exclusionary maneuvers." When these "have not proven successful," they then use the "ultimate weapon" and make allegations of sexual abuse (p. 198). Thus, according to Gardner, the sexual abuse charge is made later rather than earlier in situations of the parental alienation syndrome.

Gardner (1992a) indicates that the mother's expressed concerns about the father's behavior are based on the following underlying factors: desire to maintain the primary psychological bond, fury of the scorned woman, economic disparity, reaction formation, and projection. He also postulates that her exclusionary maneuvers may precede the marital breakup and observes that there is a relationship between maternal overprotectiveness and the parental alienation syndrome. The roles of these factors require further explanation.

Maintenance of the primary psychological bond derives from the "proverbial 'maternal instinct.'" When a custody dispute threatens this bond, the mother resorts to a program of "vilification" of the father (Gardner, 1992a, p. 121).

The dynamic that Gardner (1992a) calls the fury of the scorned woman is explained as follows. The mother cannot retaliate directly against the father for divorcing her because he is not there. She does so indirectly by attempting to deprive him of "his most treasured possessions, the children" (p. 122).

The role of economic disparity refers to the resentment the mother feels because not only does her economic position deteriorate with the divorce, but it does more so than the father's. In addition, because she cannot afford high-powered, expensive lawyers, as he can, she must resort to programming the child to hate the father to assure custody (Gardner, 1992a, p. 122).

Gardner (1992a) explains the function of reaction formation in two ways. Like its role with children, hatred is a disguise for love of the ex-spouse. However, reaction formation also operates in relationship to the children. Mothers' "obsessive love of their children is often a cover-up for their underlying hostility" (p. 124).

Projection is often manifested in the allegation of sexual abuse that Gardner (1992a) describes as "the common addition to the Parental Alienation Syndrome." He goes on to state that "many of these allegations are conscious and deliberate." However, in other allegations, the mother's own suppressed and repressed sexual fantasies are projected onto the child and the father. By visualizing the father having a sexual experience with the child, the mother is satisfying vicariously her own desires to be a recipient of such overtures and activities. (p. 126)

Furthermore, Gardner (1992a) asserts that in some cases, the mother's exclusionary maneuvers predate the divorce, sometimes as early as the birth of the child. For example, the mother restricts the father's role in child care. Her behavior may arise because she is engaged in competition with him for a relationship with the child or to enhance her self-esteem. Alternatively, she may see the father as a danger to the child because of her "own unconscious desires to inflict harm on the baby" (p. 128).

Gardner (1992a) elaborates this theme further under the heading of overprotectiveness. He asserts that there is considerable overlap between maternal overprotectiveness and the development of the parental alienation syndrome. The "overprotective mother is a high risk candidate for providing the kind of programming that may result in a Parental Alienation Syndrome." (p. 131).

Finally, the mother's campaign against the child's father may expand to include attempts to ruin him and/or his reputation and to have him criminally prosecuted. Moreover, in addition to making her own false assertions about his abusive behavior, she "programs" the children to lie about him as well (Gardner, 1992a, p. 193).

**Assumptions Underlying the Parental Alienation Syndrome**

Gardner (1991) states that he believes that "perhaps 95% or more" of all allegations of child sexual abuse are true (p. 7). Furthermore, he is of the opinion that "sexual abuse allegations that arise in the
intrafamilial situation have a high likelihood of being valid. Incest is probably quite common, especially father [or stepfather]-daughter [or stepdaughter] relations" (p. 3). Nevertheless, he says that he is convinced that "the vast majority of allegations in this category [divorce cases with custody disputes] are false" (p. 4).

Gardner never states directly why he is so convinced. Nor, apparently, does he see a contradiction between his position on incest in intact families and incest in divorced or divorcing families. He evidently does not consider that a likely outcome of the discovery of incest is a decision by the mother to divorce the offending father.

Although Gardner gives his opinion that allegations of sexual abuse in divorce are untrue and explains how he believes these false accusations come about, the reader may still have questions. The reader may be wondering how a child who has not been sexually victimized could generate a detailed account of sexual abuse. In addition, Gardner’s explanations may leave many readers bewildered as to why a child would do such an unspeakable thing to a parent. Finally, some readers may harbor skepticism that so many mothers could be so disturbed and vindictive and so insensitive to the needs of their children.

Understanding Gardner’s perspectives on sexuality and human nature more generally may assist the reader in understanding why he holds the views he does. Again, the focus is on children and adults making accusations of sexual abuse; the focus is not on the accused.

The child. Gardner makes a number of assertions about children in general that he sees as explaining children’s false allegations of sexual abuse. These characteristics are not specific to children exhibiting the parental alienation syndrome.

First, children are “polymorphous perverse” (Gardner, 1991, pp. 9-15; repeated verbatim in Gardner, 1992c, pp. 121-125). He states that “children normally exhibit just about any kind of sexual behavior imaginable: heterosexual, homosexual, bisexual, and autosexual.” In his opinion, “the normal child experiences and exhibits a wide variety of sexual fantasies and behaviors” (Gardner, 1991, p. 12; Gardner, 1992c, p. 124). To again quote Gardner (1992c), “A four year-old girl, for example, may harbor, among her collection of polymorphous perverse fantasies, thoughts of some kinds of sexual encounters with her father” (p. 125). Therefore, in explaining how children make false allegations, Gardner considers sexualized behavior and statements indicating advanced sexual knowledge, which are regarded as markers of possible sexual abuse by most profession-
sexually abused in day care. Gardner (1991) states that "the vast majority of allegations" in day care are false, but that "child sex abuse is a common phenomenon in boarding schools, orphanages, and other settings where children live together with adults" (p. 4). Like his views about different manifestations of father-child incest, there is a degree of contradiction here that Gardner does not seem to recognize.

The problem of false allegations motivated by arousal to children and vicarious gratification is not limited to parents. Gardner believes that these dynamics also operate among professionals who are involved in the investigation, treatment, and litigation of sexual abuse cases, whom he calls "validators," which is for him a pejorative term. In addition to satisfying their sexual needs by making false allegations of sexual abuse, they are also motivated by greed. They make money by substantiating and treating sexual abuse cases. According to Gardner (1991, 1992c), these people are poorly educated and poorly trained. Their incompetence and use of flawed techniques lead hundreds of children to falsely claim or affirm sexual victimization.

**Strategies for Assessing for the Presence of the Parental Alienation Syndrome**

Although not the primary focus of this article, two methodologies proposed by Gardner for evaluating allegations of sexual abuse that are usually employed to substantiate the existence of parental alienation syndrome will be briefly discussed.

**The Sexual Abuse Legitimacy Scale (SALS):** The SALS has been used by Gardner and others who accept his ideas, in conjunction with the parental alienation syndrome. In fact, the presence of a custody dispute and the presence of the parental alienation syndrome are two factors in the SALS that indicate high likelihood that the allegation of sexual abuse is false, according to Gardner (1992c).

Although Gardner (1992c) states that the SALS is broadly applicable, the fact that the 84 factors included in it relate to the child, the mother (accuser), and the father (accused of sexual abuse) indicates its primary focus is on father-child incest. Moreover, factors related to the mother, such as "the utilization of exclusionary maneuvers" (p. 191), "direct programming of the child in the sex-abuse realm" (p. 193), "enlistment of the services of a 'hired gun' attorney or mental health professional" (p. 196), a "history of attempts to destroy, humiliate, or wreak vengeance on the accused" (p. 199), and "paranoia," are an integral part of Gardner's description of the parental alienation syndrome. Further examination of the 84 factors in the SALS indicates that its primary function is to diagnose the parental alienation syndrome.

When the SALS was first published by Gardner, factors were differentiated into (a) very valuable differentiating criteria, (b) moderately valuable differentiating criteria, and (c) differentiating criteria of low but potentially higher value. The SALS was published as a separate instrument and had numerical values attached to each factor. A higher score increased the likelihood of sexual abuse. Gardner urged users to be conservative about endorsing items indicative of sexual abuse and said that a score of 50% of the maximum was "strongly suggestive of sexual abuse." A score of 10% of the maximum meant that the allegation was false (Gardner, 1987, 1989).

Because the SALS had not been validated and, in fact, had not been the subject of any research; because it was based on Gardner's assumptions about divorce allegations; and because its language lacked neutrality, it was the subject of considerable criticism (e.g., Berliner & Conte, 1993; Faller, Olafson, & Corwin, 1993). Eventually, Gardner (1992c) repudiated the numbers but not the factors (pp. xxxiv-xxxv). The SALS as a separate publication no longer is listed in the catalogue for Creative Therapeutics, Gardner's press. Its latest iteration, which appears in *True and False Accusations of Child Sex Abuse* (1992c) is not a numerical scale. Rather, it is a list of 84 factors, 30 related to the child, 30 related to the mother, and 24 related to the father.

**Protocols for Sex-Abuse Evaluation.** Gardner's 1995 book, titled *Protocols for Sex-Abuse Evaluation*, is an expansion of the SALS, although the term *Sexual Abuse Legitimacy Scale does not appear in the book. The 1995 book includes six protocols. Thus, to the protocols of the alleged child victim, the accused male (usually the father), and the accusing parent (usually the mother) in intrafamilial cases, it adds three new protocols: the accused female, the accusing parent (usually the mother) in extrafamilial cases, and the adult female victim/belated accuser (also know as an adult survivor of sexual abuse).

Gardner's (1995) book also represents a shift from attributing false allegations to the polymorphous perversion of the child and others to blaming (a) hysteria about sexual abuse (pp. 26-28; repeated verbatim on pp. 332-336) and (b) "interrogations and 'therapy'" (p. 29). Problematic interrogations and "therapy" result in "legal process/'therapy' trauma." This trauma is instigated by "one or more of the following: the police, detectives, prosecutors, social workers, 'validators', child advocates, psychiatrists, psychologists, social workers [sic], 'therapists' (often self styled and unlicensed), lawyers, guardians-ad-litem [sic], judges,
and unfortunately parents" (p. 29). Gardner has developed a series of rather complex timelines that are to be used in differentiating whether the child's symptoms derive from abuse or from "legal processes" therapy. These are shown to the child so that the child can designate when his or her symptoms began.

Despite the substitution of the term Protocols for Sex Abuse Evaluation for the SALS, the expansion of the number of actors involved, and the modest shift of blame, virtually all SALS factors are included in the Protocols, and the parental alienation syndrome figures prominently in the Protocols as a signal that the allegation of sexual abuse is false (Gardner, 1995, pp. 316-317). Of the 30 factors related to the accusing mother in the SALS, 28 are found in 32 factors related to the accusing mother in intrafamilial cases in the Protocols (Gardner, 1995, pp. 265-328). Similarly, all of the 24 "indicators of pedophilia in the male" (accused father) are included in the same order and verbatim in the chapter "Evaluation of the Accused Male" in Gardner's 1995 book. Two are added, "utilization of seducitivity [sic]" and "numerous victims" (Gardner, 1995, pp. 193-233). Finally, 29 of the 30 factors related to the alleged child victim appear in the Protocols, but there are an additional 35 factors, making a total of 64. The added factors are largely techniques for child interviewing, such as the use of doll play and picture drawing, and symptoms of trauma, such as dissociation and preoccupation with the trauma (Gardner, 1995, pp. 56-157).

Gardner (1995) provides questions for assessing each of these factors and guidance about the significance of the findings regarding the truth or falsity of the allegation. Each factor is scored T (true), F (false), or E (equivocal if the evaluator cannot make a determination).

RESEARCH FINDINGS

Gardner does not provide any research findings to substantiate his assertions about the proposed characteristics and dynamics of the parental alienation syndrome. When Gardner gives percentages, such as 90% of false accusers are women, and makes statements, such as the vast majority of allegations of sexual abuse in divorce are false, he does not provide statistics or references to professional literature to support these claims. Rather, he states that he is convinced that a particular finding is a widespread phenomenon. He makes this assertion, for example, regarding his belief that female therapists, who are either man haters or paranoids, partake of fait à trois with mothers and contribute to their campaigns of vilification and vengeance against fathers (Gardner, 1992a, p. 147).

It is important to appreciate a consequence of the fact that Gardner publishes the vast majority of his work himself. His own press, Creative Therapeutics, only publishes his material and no works of other writers. The present selections consist of approximately 100 of his lectures, books, manuals, games, videos, and audiotapes (Gardner, 1996). This means that his work does not have to meet the standards of peer review. Thus, his ideas are not critically evaluated by others knowledgeable in the field before they appear in print.

Furthermore, Gardner appears to have a low regard for the research in this field. In Sex Abuse Hysteria: The Salem Witch Trials Revisited (1991), he states, "The term scientific proof is not applicable to most of the issues discussed here." He goes on to refer to the standard and accepted practice of citing support for professional opinions in existing literature as "spurious buttressing" (p. 2).

Nevertheless, there is a body of research that is relevant to some of Gardner's theories. Research findings relevant to the issue of false allegations of sexual abuse in divorce, polymorphous perversity of children, the role of prevention programs and sexual stimuli in the environment, and polymorphous perversity of adults will be covered in the next section.

Research Findings Relevant to the Parental Alienation Syndrome

There is a body of literature on false allegations of sexual abuse in divorce (see Faller et al., 1993, for a critical review of these studies). It is surprising that none of this work is referenced in Gardner's (1992a) book, The Parental Alienation Syndrome, although most of the studies predate the publication of the book. In fact, this book of almost 350 pages has only 60 references, 18 of which are to Gardner's writings. Gardner published his first book on the parental alienation syndrome in 1987 and seems to have incorporated or considered little of the work done since then in his 1992 book on this topic. It contains only four references later than 1987, aside from his own works: One is a newspaper article, the second a personal communication, the third a definition from a dictionary, and the fourth an article published in Accusations of Child Abuse, a nonjuried journal published by Ralph Underwager. His 1995 book is better referenced but ignores a large body of recent research on children's memory and suggestibility, on repressed memories, and on child sexual abuse more generally.

The research on false allegations of sexual abuse in divorce contains findings related to the following of Gardner's assertions: that 90% of disputed custody cases exhibit the parental alienation syndrome, that
the vast majority of allegations in divorce are false, that 90% of allegations are made by mothers, and that these allegations are vindictively made (Faller et al., 1993).

In reviewing this research, it is important to attend to the following issues: (a) sample size, (b) sample bias, and (c) how a false allegation is determined (Faller et al., 1993). Many studies involve few cases and/or come from the practices of those who report on them, which introduces biases: Benedek and Schetky (1985)—18 cases, Green (1986)—11 cases, Kaplan and Kaplan (1981)—1 case, and Schuman (1986)—7 cases. Also, definitions of false allegations in these studies derive from opinions of the clinicians conducting them. Because of these limitations, these studies should be given less weight than those with larger numbers, less bias, and consensual definitions of true and false allegations.

The parental alienation syndrome (and accompanying allegations of abuse) are very common in custody disputes. Gardner (1992a) says that "the frequency of false accusations of sexual abuse is quite high" when the parental alienation syndrome is present (p. 126). As already noted, he finds the parental alienation syndrome in 90% of custody disputes.

Thoennes and Tjaden (1990) and Thoennes, Pearson, and Tjaden (1988) examined 9,000 cases from domestic relations courts involving custody or visitation disputes. These cases came from 12 jurisdictions in the United States. Of these 9,000 cases, 1.9% (169 cases) involved allegations of sexual abuse. Obviously, this is a more representative sample of disputed custody cases than those Gardner sees in his private practice. Although this research does not speak directly to the presence of the parental alienation syndrome, the very small number of custody disputes involving sexual abuse allegations (half of which were deemed likely) certainly undermines Gardner's (1991) claim of the widespread presence of false allegations of sexual abuse as part of the parental alienation syndrome.

The vast majority of allegations of sexual abuse in contested divorce are false. None of the research supports Gardner's (1991, 1992c) opinion that the vast majority of allegations in divorce are false. The study that comes the closest is that of Benedek and Schetky (1985), which contained 18 cases, 10 of which they thought were false. However, not only is the sample rather small but 4 of the cases did not involve custody disputes related to divorce. In addition, Benedek has stated that because she often serves as an expert witness for the accused in these cases and does not wish to support actual offenders, she reviews case materials before agreeing to be the expert and refuses the case if she believes the allegation is true (see Morgan v. Fortich, Fortich, & Fortich, 1987). This practice screens out true allegations of sexual abuse. Therefore, results from this study cannot be representative of actual proportions of true and false allegations in divorce. Other studies find a false allegation rate of about one third or less (Faller, 1991; Faller & DeVoe, 1995; Green, 1986; Jones & Seig, 1988; Paradise, Rostain, & Nathanson, 1988; Thoennes & Tjaden, 1990).

Two studies with large samples, the Thoennes and Tjaden (1990) study and that of Faller and DeVoe (1995), illustrate the impact of definition of false allegations on findings. Using as a measure of the veracity of the allegation the disposition of child protective services and/or the opinion of a court-appointed evaluator, Thoennes and Tjaden (1990) found one third of cases unlikely, half likely, and the remainder uncertain.

Faller and DeVoe (1995) examined 215 allegations of sexual abuse seen at a university-based multidisciplinary clinic. The determination of this team of experts was used to decide the likelihood of the allegation. A higher percentage was deemed likely, 72.6%, with 20% considered unlikely and 7.4% uncertain. These proportions are similar to those of Jones and Seig (1988), who had a smaller sample, 20 cases, but who used a similar multidisciplinary procedure for decision making. They found 70% likely, 20% unlikely, and 10% uncertain.

Arguably, multidisciplinary teams have the opportunity to assess accusations of sexual abuse in greater depth than do child protection workers, who have high caseloads, or court-appointed experts, who may be looking at a range of issues. In addition, multidisciplinary teams have the advantage of "two or more heads, which are better than one," and of greater expertise than either child protective services workers, with their high rate of turnover, and court experts, whose skills may be in custody/visitation decisions rather than in sexual abuse. Therefore, the higher rate of likely cases found by Faller and DeVoe (1995) and by Jones and Seig (1988) may be more accurate than the rate found by Thoennes and Tjaden (1990), whose sample was more representative. If this is so, then Gardner's (1991) assertions that the vast majority of these accusations are false are even less congruent with research findings.

Of the false allegations in divorces, 90% are made by mothers against fathers. Most studies examine who is accused rather than who makes the accusation. They also look at cases deemed true as well as those deemed false. One study that did look at accuser role is that of
Benedek and Schetky (1985). They report that 9 of the 10 cases they considered false were made by mothers. However, as already noted, their sample was small, so generalizations cannot be made from it. Thoennes and Tjaden (1990) found that 67% of the 169 allegations in their study were made by mothers and 28% by fathers. Less than half of cases were allegations by mothers against fathers. When the researchers looked at the proportion of reports by mothers judged unlikely, it was 35%, the same percentage as that for the sample as a whole (Thoennes et al., 1988, p. 7 of tables).

Of course, the gender of complainants and alleged offenders needs to be interpreted in light of current knowledge of offender gender. The vast majority of sexual abusers are male. Mothers consciously fabricate false allegations or are delusional. Although researchers may conclude that an accusation of sexual abuse is not true, very few have looked at the etiology of false allegations. Benedek and Schetky (1985) gave psychiatric diagnoses, usually paranoia, to the adults whom they decided had made false accusations. They also made observations about the motivation of the accuser. They report the following three motivations: a desire to get their ex-spouses out of their lives, vindictiveness, and “crying wolf.” However, these two different etiologies are not integrated in the article, and the series of motivations seem more impressionistic than scientific.

Thoennes and Tjaden (1990) examined the narratives in their cases to see if the professionals forming the opinions offered an explanation for their etiologies. There was relevant information in 58 of 169 cases. They found 8 cases in which the false allegation appeared to be maliciously made and 5 cases in which the accuser’s psychological problems caused the accusation. They do not indicate who made these reports. In Faller and DeVoe’s (1995) sample of 215 cases, 10 appeared to be calculated false allegations. Of these, 6 were made by men. However, one male made 4 of them.

Again, research findings from large samples with defined methodology do not support Gardner’s assertion that large numbers of mothers (or others) involved in divorce make false allegations either by design or because they are mentally ill.

Research Findings Relevant to the Polymorphous Perversity of Children.

Gardner (1992c) bases his assertions that children are polymorphous pervers and are capable of generating sexual fantasies without sexual experience on Freud’s theory of infantile sexuality. He says that he agrees with Freud that children have fantasies but does not think the fantasies only involve sexual intercourse. Especially when young children have them, these wishes may involve the touching of various parts of the body with other parts (p. 125). Gardner’s assertions about the polymorphous perversity of children will be considered from three perspectives: the evolution of and current views about Freud’s theory of infantile sexuality, the research on children’s sexualized behavior, and the criteria used to substantiate sexual abuse.

Freud’s theory of infantile sexuality. A consideration of the evolution of Freud’s theory and current views about it are instructive in determining the validity of this explanation of sexualized behavior and sexual knowledge. As Freud was psychoanalyzing young women with hysteria, he found that they related childhood histories of sexual victimization. He concluded that the etiology of hysteria was a childhood experience of sexual abuse. He was severely criticized by his colleagues and eventually altered his theory. It is not clear the extent to which his inability to believe that incest could be so widespread and/or that concerns about incest in his own family led to this change of heart (Masson, 1987). Nevertheless, he recanted his earlier belief in the pivotal role of sexual victimization. He decided it was not actual incest but incestuous fantasies or wishes that were being reported by his female patients. Thus, what Freud initially viewed as a phenomenon derived from adults’ behaviors became a consequence of children’s thoughts.

Recent advances in knowledge about the prevalence of sexual abuse and its impact have led professionals to reconsider Freud’s theories. It is estimated that 1 in 3 or 4 women and 1 in 6 to 10 men are sexually abused during childhood (Faller, 1990). A more widely held view than that propounded by Gardner is that Freud was right in the first instance and wrong in his revisions (e.g., Faller, 1988a; Herman, 1979; Masson, 1987; Miller, 1984; Rush, 1977; Ward, 1985).

Research on children’s sexual knowledge and sexualized behavior. In many of his writings (e.g., his 1991 and 1992 books), Gardner indicates that sexual statements and behaviors in children are not indexes of sexual victimization. For example, he says, “Each child is likely to have a ‘favorite’ list of sexual activities that provide interest and pleasure” (Gardner, 1991, p. 12). He further asserts that persons who consider statements indicating sexual thoughts or knowledge and sexualized behavior as “‘proof’ that children have been sexually abused have caused many truly innocent individuals an enormous amount of harm, even to the point of long prison sentences” (Gardner, 1991,
In his 1995 book, Gardner's position has shifted somewhat. He says that in false allegations, the child incorporates fantasy of sexual activities that are ludicrous or pointless (for the offender), citing as illustrative a child alleging that the offender put his penis in his or her mouth and did not move it as having the hallmarks of a false allegation (p. 61).

An opinion that advanced sexual knowledge and explicit sexual behavior can be self-generated is not supported by research findings. Not all sexually abused children exhibit sexualized behavior nor manifest advanced sexual knowledge. In addition, children may learn about sex from sources other than sexual victimization, a finding that will be discussed below. Nevertheless, sexualized behavior is the marker most likely to distinguish sexually abused from nonabused children (Friedrich, 1994). For example, Waterman and Lukas (1993) report on 11 studies using the Achenbach Child Behavior Checklist (CBCL) to compare children disclosing sexual abuse and children without such a history. Sexually abused children had significantly higher scores on the Sexual Problems subscale of the CBCL than did nonabused children.

Friedrich, from the Mayo Clinic, is the researcher who has explored the issue of sexualized behavior in the greatest depth. Over a period of years, he has developed a standardized measure, the Child Sexual Behavior Inventory (CSBI), that reliably differentiates children, ages 2 to 12, with a history of sexual abuse from children without a sexual abuse history (Friedrich, 1990, 1993, 1994). Friedrich and colleagues have conducted a number of studies comparing CSBI results for children with a history of sexual abuse and those without, using children from several sites in the United States. The instrument continues to be refined (Friedrich et al., 1996a, 1996b).

Illustrative of findings regarding the low rates of sexualized behavior by children without a history of sexual abuse are the following data: Less than 1% of the children were reported by their caretakers to put their mouths on another's sex parts, and the rate is zero for children ages 7 to 12. Similarly, less than 1% of nonabused children asked others to engage in sex acts (Friedrich, Grambsch, Broughton, Kuiper, & Beilke, 1991; Friedrich et al., 1996b). In contrast, a substantial minority of children with a history of sexual abuse engage in these behaviors.

Studies using anatomical dolls (which Gardner disapproves of; see Gardner, 1995, p. 158) also support the importance of sexualized behavior as a differentiating characteristic of sexually abused children. These studies are of two types: those that ascertain the reaction of nonabused children to anatomical dolls (Boat & Everson, 1994; Everson & Boat, 1990; Sivan, Schor, Koeppel, & Nobel, 1988) and those that compare the responses to the dolls of children with a sexual abuse history to those without such a history (August & Foreman, 1989; Cohen, 1991; Jampole & Webber, 1987; White, Strom, Santilli, & Halpin, 1986). Studies of nonabused children generally indicate that anatomical dolls do not elicit explicit sexual behavior from sexually naive children but, as will be discussed below, serve as a stimulus for sexually knowledgeable children. Comparative studies of reportedly abused and not abused children generally show that sexually abused children are significantly more likely than nonabused children to demonstrate explicit sexual behavior with anatomical dolls. However, not all abused children do this, and in some studies, a small number of children without a diagnosis of sexual abuse showed sexual behavior with the dolls (Cohen, 1991; Jampole & Webber, 1987).

Criteria for substantiating sexual abuse. A number of researchers and clinicians working in the field of sexual abuse have developed or have studied strategies for deciding whether a child has been sexually abused. Some of this work is data based (Conte, Sorenson, Fogarty, & Dalla Rosa, 1991; Faller, 1988b; Jones & McGraw, 1987; Raskin & Esplin, 1991). Faller (1994) reviewed 11 of these works, noting the commonalities and differences among the criteria different writers present for decision making. Of relevance here is that all of the 11 include the child's description of sexual abuse as a positive indicator of sexual abuse (Benedek & Schetky, 1987; Conte et al., 1991; Corwin, 1988; De Young, 1986; Faller, 1988b; Heiman, 1992; Jones & McGraw, 1987; Klijner-Diamond, Wehrspann, & Steinhauser, 1987; Raskin & Esplin, 1991; Sgroi, 1982; Sink, 1988). In addition, 8 include detail about the sexual abuse (De Young, 1986; Faller, 1988b; Heiman, 1992; Jones & McGraw, 1987; Klijner-Diamond, Wehrspann, & Steinhauser, 1987; Raskin & Esplin, 1991; Sgroi, 1982; Sink, 1988); 6 include advanced sexual knowledge (Benedek & Schetky, 1987; Conte et al., 1991; Corwin, 1988; Faller, 1988b; Heiman, 1992; Jones & McGraw, 1987; Raskin & Esplin, 1991; Sgroi, 1982); and 5 include sexualized behavior, as reported by others (Conte et al., 1991; Corwin, 1988; Heiman, 1992; Jones & McGraw, 1987; Klijner-Diamond et al., 1987; Sgroi, 1982), as markers of sexual victimization.

Therefore, it appears that experts in sexual abuse disagree with Gardner's (1991) assertion that sexual statements and sexualized behavior are characteristic of nonabused children and can be spontaneously generated by sexual fantasies.
Research Findings Related to False Allegations, Prevention Programs, and "the ubiquity of environmental sexual stimuli"  
(Gardner, 1991, pp. 19-20)

As noted earlier, Gardner believes that sexual abuse prevention programs and sexual material in the media can result in false allegations of sexual abuse. As with other assertions, he presents no data. Rather, Gardner conjectures that the impact of prevention programs is that they will generate fantasies of touching private parts and, subsequently, accusations by the programs' recipients that adults are doing this to them. Others who have raised concerns about prevention programs have viewed the risk somewhat differently. They worry that children will assume all touching of the genitals is "bad touching" and will mistakenly assume such contact that occurs as part of child care or medical care is sexual abuse. To guard against this, many sexual abuse prevention programs point out these exceptions.

To date, evaluations of sexual abuse prevention programs do not indicate that they are the source of false allegations of sexual abuse (Kolko, 1988; Wurtele & Miller-Perrin, 1992). However, such programs may generate disclosures of what are determined to be actual cases of sexual abuse (Hazzard, Webb, Kleemeier, Angert, & Pohl, 1986; Plummer, 1986; Wurtele & Miller-Perrin, 1992).

Gardner is right that there is more sexual material in the media than there was in the past; there are also more types of media (e.g., television and videotapes). Indeed, children can learn about sex from these sources, as well as from observation of sex acts, communication with peers, and sex-education programs. That some children without a history of sexual abuse demonstrate sexualized behavior with anatomical dolls is a case in point. In an anatomical doll study of 223 2- to 5-year-olds without a history of sexual abuse, Boas and Everson introduced the dolls, disrobed them, and asked the children to "show me what the dolls do together." Of these children, 6% demonstrated intercourse behavior using the dolls. None of the 2-year-olds did, but approximately a fourth of older males of lower socioeconomic status did. When the researchers followed up on the sexually knowledgeable children, they ascertained that they had been exposed to sex but not abused (Boas & Everson, 1994; Everson & Boas, 1990).

In addition, research indicates that children ages 2 to 12 are curious about private body parts and persons of the opposite sex. For example, Friedrich et al. (1991) found that 23% of children without a history of sexual abuse were interested in the opposite sex, 28% of them tried to observe people undressing, and almost 31% touched breasts. Similarly, Rosenfeld and colleagues found that 55% of boys up to age 10 and 70% of girls had touched the private parts of the parent of the opposite sex at least once (Rosenfeld, Bailey, Siegel, & Bailey, 1986).

More research is needed on nonabused children's sexual knowledge. Work has begun in this area (Gordon, Schroeder, & Abrams, 1990; Phipps-Yonas, Yonas, Turner, & Kauger, 1993). However, one of the challenges is constructing studies that include material that sexually abused children might know but that nonabused children will not.

Most guidelines for sexual abuse evaluation advise interviewers to explore for sources of sexual knowledge and behavior other than abuse and, if found, to determine any relationship between the knowledge and the abuse allegations. However, there are no data that support a conclusion that because children have sexual knowledge, they will use this information to make a false accusation of sexual abuse.

Adults Experience Sexual Arousal and Gratification When They Make False Allegations of Sexual Abuse

Gardner's views about the pedophilic nature of all of us, including professionals working in sexual abuse, and his opinion that we achieve sexual gratification every time we consider the sexual acts involved in an allegation are rather astonishing. A more prevalent assumption is that exposure to sexual abuse has a dampening effect on sexual desire. Recently, this assumption and the possibility that, for some, involvement in sexual abuse may lead to involuntary, inappropriate sexual response have been addressed by professionals working in the sexual abuse field (Bays & Bays, 1995; Maltz, 1992). These issues are just beginning to be researched. Bays and Bays (1995) are involved in two studies; the first is a survey of 142 participants in a national conference of professionals working in child maltreatment, and the second is of participants attending a conference on working with sex offenders (J. Bays, 1995).

Preliminary data are available from the first study (Bays & Bays, 1995). About a fourth of respondents were male. On average, they were 40 years of age with a mean of 8 years of work in the sexual violence field. Although on average these professionals report moderate satisfaction with their sex lives, 21% report sexual problems that would cause them to refer a client to a professional. The researchers asked respondents about a range of possible effects of working in the field of sexual abuse, for example, intrusive thoughts about sexual violence. With regard to most of these, the
study participants report no change because of their work. However, there is a tendency for respondents to report increases in intrusive, unwanted sexual imagery; an increased fear of rape; an increased sensitivity to sexual violence; and a decrease in the use of erotica and sexual devices. Women are more likely than men to report that working in this field has a negative effect on their sexuality. Therefore, findings so far provide no support for Gardner’s (1991) assertion that sexual gratification is associated with eliciting and hearing descriptions of sexual abuse.

THE PARENTAL ALIENATION SYNDROME’S
UTILITY AS A SYNDROME

In this section, there will be a discussion of definitions of syndromes and their relationship to the parental alienation syndrome and the utility of the parental alienation syndrome.

What Sort of a Syndrome Is the Parental Alienation Syndrome?

A syndrome is defined in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 1994) as a “group of symptoms that occur together and that constitute a recognizable condition.” Myers (1993) notes that there is a difference between a disease, whose cause is quite likely to be known (e.g., a virus), and a syndrome, whose etiology is less certain but assumed to be present when a group of symptoms are found. Moreover, he states that some syndromes are diagnostic and others are nondiagnostic.

A syndrome is diagnostic when the symptoms relate directly to the pathological condition. Myers (1993) cites as an example the battered child syndrome, whose symptoms consist of multiple nonaccidental injuries at various stages of healing. The presence of these injuries indicates very likely that the child has been battered. He uses the term nondiagnostic syndrome to refer to syndromes whose symptoms are not directly related to the relevant diagnoses, citing as an example the child sexual abuse accommodation syndrome. Its symptoms do not tell the professional whether the child has been sexually abused. They only explain the child’s symptoms, if the child has been sexually abused. The parental alienation syndrome is a nondiagnostic syndrome. It only explains the behavior of the child and the mother, if the child has not been sexually abused.

The Utility of the Parental Alienation Syndrome for Mental Health Professionals and the Courts

Because the parental alienation syndrome is a nondiagnostic syndrome, it is only useful for mental health professionals in explaining the symptom presentation if they know from other information that an abuse allegation is a deliberately made, false accusation. The syndrome cannot be used to decide whether the child has been sexually abused. As a consequence, it is of little probative value to courts making decisions about the presence or absence of sexual abuse.

Researchers and clinicians (e.g., Berliner, 1988; Faller, 1994; Jones & McGraw, 1987; Jones & Seig, 1988) studying false allegations have pointed out that it is extremely difficult to be certain that sexual abuse did not happen. The only way to be absolutely sure is when there has been no opportunity for the sexual contact. Unfortunately, with incest, in both intact and divorced families, adults have many opportunities for unobserved access to children. This is especially the case in divorce, in that both custodial or noncustodial parents may spend significant periods of time alone with their children.

An additional problem with the parental alienation syndrome is that virtually every symptom described by Gardner as evidence of its presence, and consequent false charges against the accused parent, is open to opposing interpretations. For example, the child’s affinity for one parent and dislike of the other could have a range of causes. The child may prefer the parent who does not mistreat him or her and feel hostility toward the parent who does. The child may feel abandoned by the noncustodial parent and fear abandonment by the other parent. These feelings can result in anger toward the former and a strong cathexis to the latter.

Similarly, the mother’s behavior described by Gardner as vindictive may be based on actual sexual or other abuse and therefore be better described as protective. Alternatively, she may genuinely believe that the accused parent abused the child when he did not. Then, her behavior is misguided but not vindictive.

Moreover, parental alienation syndrome lacks parsimony. Elaborated explanations and complex dynamics are proposed for the child’s and the accuser’s
behavior, including a range of defense mechanisms, sexual perversion, and wickedness. Arguably, more parsimonious and likely explanations are that there is substance to the complaints of the child and the mother or that they are mistaken but not perverse, evil, and crazy.

Because of the possibility of multiple interpretations of a given symptom or series of symptoms, the parental alienation syndrome is very vulnerable to problems of interrater reliability. One expert's indicator of a false allegation may be another's indicator of a true one.

In addition, clinically, the parental alienation syndrome is not enlightening because it does not take into account the variability and range of behaviors and reactions of child, mother, and father in true and false allegations of child abuse. For example, it does not accommodate the spectrum of children's responses to an abusive parent, which may include hatred, affection, or ambivalence. Moreover, it does not acknowledge that the same child may express quite different emotions toward an abusive parent at various points in time and in various circumstances. Children may also have a range of reactions to an accused but nonabusive parent. Mothers can have a spectrum of responses to an allegation of abuse, from disbelief to belief, regardless of its veracity. The extent to which she protects the child from possible future abuse may also vary, as may her feelings about the alleged offender, regardless of the truth of the allegations. For instance, a mother may believe that her child is being maltreated but may fail to protect the child because she fears the consequences of reacting protectively.

In *True and False Accusations of Child Sex Abuse*, Gardner (1992c) declares that there is no such thing as a "child sex abuse syndrome" because children who have been sexually abused exhibit such a wide variety of symptoms (p. 93). Comparable criticisms regarding the uselessness of the parental alienation syndrome can also be made.

CONCLUSION

As stated in the introduction, it is important to consider and critically examine alternative explanations when children are said to have been sexually abused, including theories such as the parental alienation syndrome. Nevertheless, because the parental alienation syndrome does not directly address the ultimate issue, whether or not the child has been sexually abused, it is of little use in deciding this issue. Its only possible utility may be in understanding the behavior of the child and mother in some cases in which the allegation of mistreatment by the father is determined by other means to be false.

A fundamental flaw in the syndrome, as described by Gardner (1992a, 1992c), is that it fails to take into account alternative explanations for the child's and mother's behavior, including the veracity of the allegation or that the mother has made an honest mistake. Even in false cases, it does not take into account the full range of motivations and behaviors of children, mothers, and fathers.

No data are provided by Gardner to support the existence of the syndrome and its proposed dynamics. In fact, the research and clinical writing of other professionals leads to a conclusion that some of its tenets are wrong and that other tenets represent a minority view.

APENDIX

Factors in the Sexual Abuse
Legitimacy Scale (Gardner, 1992c)

Factors in the Sexual Abuse Legitimacy Scale (SALS) are marked as follows: Those indicating the allegation is true are marked T, and those indicating the allegation is false are marked F. There are also clarifications in parentheses for factors whose meanings are obscure.

Gardner usually interviews the mother, the child, and the father, in various combinations, to gather information about these factors. He also asks to interview others, for example, relatives, friends, and therapists. Through this process, he says he collects confirming and disconfirming data and rates each factor. Note that factors vary considerably in their relevance to allegations of sexual abuse and in the degree of subjective judgment that they require. Some are quite subjective, for example, No. 14 for children, the litany. Others are more objective, for example, No. 27, school attendance and performance.

The absence of findings leads to an F rating. For example, if a 6-year-old has no history of running away, this is rated as disconfirming of a true allegation. If the child does not feel guilty over participation in the abuse, this is supportive of a false allegation. Similarly, if the father reports no child pornography and has no history of substance abuse, these findings are recorded as disconfirming of the abuse accusation.

Indicators of the falsely accusing parent (usually a mother)

Indicators from earlier life:

1. Childhood history of having been sexually abused herself—T
2. History of poor impulse control—F
3. Passivity and/or Inadequacy—T
4. Social isolation—T

(continued)
APPENDIX Continued

Indicators from events preceding the evaluation
5. Exposure of the child to sex-abuse “educational materials”—F
6. Moralism—F
7. The utilization of exclusionary maneuvers—F
8. The presence of a child custody dispute and/or litigation—F
9. The presence of the Parental Alienation Syndrome—F
10. Direct programming of the child in the sex abuse realm—F
11. Initial denial and/or downplay of the abuse—T
12. Failure to notify the father before reporting the alleged abuse to outside authorities—F
13. Enlistment of the services of a “hired gun” attorney or mental health professional—F
14. History of attempts to destroy, humiliate, or wreak vengeance on the accused—F
15. Attitude toward medical findings related to the sex abuse—F (i.e., she gives weight to minor findings)
16. Failure to appreciate the psychological trauma to the child of repeated interrogations—F
17. The acquisition of a coterie of supporters and enablers—F
18. Deep commitment to the opinions of “experts”—F (i.e., experts Gardner disagrees with)

Indicators obtained during the course of the evaluation
19. Shame over the revelation of the abuse—T
20. Attitude toward taking a lie detector test—F (i.e., reluctance to take one)
21. Appreciation of the importance of maintenance of the child’s relationship with the accused—T
22. The use of the code-term “the truth” to refer to the sex-abuse scenario—F
23. Hysterical and/or exhibitionistic personality—F
24. Paranola—F
25. Enthusiastic commitment to the data collection process—F
26. Corroboration of the child’s sex-abuse description in joint interview(s)—F
27. Cooperation during the course of the evaluation—T (i.e., Gardner’s evaluation)
28. Belief in the preposterous—F
29. Expansion of the sex-abuse danger to the extended family of the accused—F
30. Duplicity in aspects of the evaluation not directly related to the sex-abuse accusation—F

The differentiating criteria in the child
1. Degree of hesitancy regarding divulgence of the sexual abuse—T (i.e., hesitant children have been abused)
2. Degree of fear of retaliation by the accused—T (i.e., fearful children have been abused)
3. Degree of guilt over the consequences of the divulgence to the accused—T (i.e., children who feel guilty have been abused)
4. Degree of guilt over participation in the sexual acts—T (i.e., children who feel guilty have been abused)
5. Degree of specificity of the details of the sexual abuse—T (i.e., children who give details have been abused)
6. Credibility of the description—T
7. Variations in the description—T
8. Advanced sexual knowledge for age—T
9. Sexual excitation—T
10. Attitude toward one’s genitals—T (i.e., children with negative feelings toward genitals have been abused)
11. Desensitization play—T
12. Threats and bribes—T
13. Custody/visitation disputes—F
14. The litany—F
15. The borrowed scenario—F
16. Depression—T
17. Withdrawal—T
18. Pathological compliance—T
19. Psychosomatic disorders—T
20. Regressive behavior—T
21. Sense of betrayal—T
22. Sleep disturbances—T
23. Chronicity of abuse—T
24. Seductive behavior (primarily girls)—T
25. Pseudomaturity (primarily girls)—T
26. Antisocial acting out—T
27. School attendance and performance—T (i.e., poor attendance and performance)
28. Fears, tension, and anxiety—T
29. Running away from home—T
30. Severe psychopathology—T

Indicators of pedophilia in the male
1. History of family influence conductive to the development of significant psychopathology—T
2. Long-standing history of emotional deprivation—T
3. Intellectual impairment—T
4. History of childhood sex abuse—T
5. Long-standing history of very strong sexual urges—T
6. Impulsivity—T
7. Feelings of inadequacy and compensatory narcissism—T
8. Coercive-dominating behavior—T
9. Passivity and impaired self-assertion—T
10. History of substance abuse—T
11. Poor judgment—T
12. Impaired sexual interest in age-appropriate women—T

(continual)
APPENDIX Continued

13. Presence of other sexual deviations—T
14. Psychosis—T
15. Immaturity and/or regression—T
16. Large collection of child pornographic materials—T
17. Career choice that brings him in contact with children—T
18. Recent rejection by a peer or dysfunctional hetero-
sexual relationship—T
19. Unconvincing denial—T
20. Use of rationalizations and cognitive distortions that
justify pedophilia—T
21. Resistance to taking a lie detector test—T
22. Lack of cooperation in the evaluative examination—T
23. Duplicity unrelated to sex abuse denial and psychopathic tendencies—T
24. Excessively moralistic attitudes—T

NOTES
1. Although, according to Gardner (1992a), 10% of accusing
parents are fathers, his work focuses on accusing mothers.
Therefore, throughout this article, the accusing parent is referred to as
"he" or "the mother."
2. However, Gardner includes advanced sexual knowledge and
seductive behavior in the Sexual Abuse Legitimacy Scale (SALS)
and in his list of factors in Protocols for the Sex Abuse Evaluation
as indicating the child is telling the truth about sexual abuse. Thus,
he is inconsistent in his views about children’s sexual knowledge
and behavior.
3. Gardner’s fees can be as high as $400 per hour.
4. The B factors in the SALS appear in the appendix.
5. As Note 3 indicates, these positions are not consistent with his
inclusion of sexual knowledge and sexualized behavior as children’s
indicators of the likelihood of sexual abuse.

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Glossary of ADR terms

ADR
Alternative Dispute Resolution is a term that used to describe any type of resolution process that does not include litigation. Due to the extensive nature of proceedings and the general acceptance of these proceedings, it is sometimes referred to as Appropriate Dispute Resolution.

Arbitration
Arbitration is the process where a dispute is submitted to one or more impartial persons for either an advisory or a final and binding decision. The court that submits a case to arbitration, the contract under which arbitration is sought or the parties will set the terms of the arbitration including the range of issues to be resolved by arbitration, the scope of the relief to be awarded, and many of the procedural aspects of the process. Arbitration is less formal than litigation, the rules of evidence are not formalized and the decisions may be harder to appeal.

Collaborative Law
Collaborative law offers parents a structured, non-adversarial alternative to litigation in their divorce. Parties and their attorneys agree that they will not pursue a court case in these matters. Attorneys and other experts will work together to represent their clients and pursue a fair and reasonable settlement for both parties.

Conciliation
Conciliation is a term for a collaborative problem solving process that is similar to mediation. Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and work towards an agreement. The conciliator may or may not advise the parties on the content of the dispute or the outcome of the dispute, but is not a decision-maker in the dispute. The conciliator usually meets with the parties separately. This is different than most mediations where the parties are usually together for some if not all of the process.
ENE
Early Neutral Evaluation. An expert is appointed by the parties or the court to review the case and tell the parties what the outcome would be if they went to trial. ENE is an advisory not binding process that enables the parties to negotiate a settlement in an informed manner.

Med-Arb
This process potentially includes both mediation and arbitration. If no settlement is reached in the mediation component the parties enter into a binding arbitration process. This process works best if the arbitrator is a different individual than the mediator. Otherwise parties may not be forthcoming with information in mediation that they do not want the arbitrator to know.

Arb-Med
This process involves one or more neutrals and potentially two processes. Here, the parties go through arbitration and the arbitrator makes a decision which is sealed pending the result of the mediation. The parties then attempt to work out their differences with the help of the facilitator. If they are unable to reach an agreement the arbitrator’s decision will be shown, and depending upon the rules of the process, it may be binding or advisory.

Mediation
A voluntary, guided negotiation process where the parties are assisted in their negotiations by an impartial third party who has no interest in the dispute. The process is not binding unless or until the parties reach agreement, after which the final agreement can be enforced as a contract or made part of a court order. Facilitative, Evaluative and Transformative are the titles of the three main types of mediation. Typically the facilitative mediator solely facilitates the discussion and does not offer opinions or suggestions on the content of the mediation. Resolution of the dispute rests with the parties themselves. Evaluative mediation may involve suggestions from the mediator or what will happen if the parties do not reach an agreement. Transformative mediation does not usually attempt to resolve the immediate problem, but rather to engage the participants to seek the empowerment and mutual recognition of each other and themselves in order to help them resolve many issues. Mediation proceedings are confidential. Many states now have statutory guidelines defining mediation and its process.
Settlement Conference

Settlement conferences are confidential proceedings where a skilled impartial expert conducts discussions between parties and their representatives. The expert assists the parties in their attempts to reach a mutually acceptable and appropriate resolution of their issues. Settlement conferences usually occur by court order prior to or in the midst of court proceedings.
A Guide to Dispute Resolution Processes

♦ What Is Dispute Resolution?
Dispute resolution is a term that refers to a number of processes that can be used to resolve a claim or dispute. Dispute resolution may also be referred to as alternative dispute resolution, appropriate dispute resolution, or ADR for short. Dispute resolution processes are alternatives to having a state or federal judge or jury decide the dispute in a trial. Dispute resolution processes can be used to resolve any type of dispute including family, neighborhood, employment, business, housing, personal injury, consumer, and environmental disputes.

♦ Why Use Dispute Resolution?
Dispute resolution processes have several advantages. For instance, many dispute resolution processes are cheaper and faster than the traditional legal process. Certain processes can provide the parties involved with greater participation in reaching a solution, as well as more control over the outcome of the dispute. In addition, dispute resolution processes are less formal and have more flexible rules than the trial court.

♦ What Are the Different Types of Dispute Resolution Processes?
Dispute resolution takes a number of different forms. Here are brief descriptions of the most common dispute resolution processes:

Arbitration
Arbitration is a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from mediation because the neutral arbitrator has the authority to make a decision about the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. Compared to traditional trials, arbitration can usually be completed more quickly and is less formal. For example, often the parties do not have to follow state or federal rules of evidence and, in some cases, the arbitrator is not required to apply the governing law.

After the hearing, the arbitrator issues an award. Some awards simply announce the decision (a "bare bones" award), and others give reasons (a "reasoned" award). The arbitration process may be either binding or non-binding. When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. When arbitration is non-binding, the arbitrator's award is advisory and can be final only if accepted by the parties.

Early Neutral Evaluation
Early neutral evaluation is a process that may take place soon after a case has been filed in court. The case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. The parties either submit written comments or meet in person with the expert. The expert identifies each side's strengths and weaknesses and provides an evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement.
APPENDIX Q: THE GUIDE TO DISPUTE RESOLUTION PROCESSES

**Mediation**
Mediation is a private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute. The parties have the opportunity to describe the issues, discuss their interests, understandings, and feelings, provide each other with information and explore ideas for the resolution of the dispute. While courts can mandate that certain cases go to mediation, the process remains "voluntary" in that parties are not required to come to agreement. The mediator does not have the power to make a decision for the parties, but can help the parties find a resolution that is mutually acceptable. The only people who can resolve the dispute in mediation are the parties themselves.

There are a number of different ways that a mediation can proceed. Most mediations start with the parties together in a joint session. The mediator will describe how the process works, will explain the mediator's role and will help establish ground rules and an agenda for the session. Generally, parties then make opening statements. Some mediators conduct the entire process in a joint session. However, other mediators will move to separate sessions, shuttling back and forth between the parties. If the parties reach an agreement, the mediator can help reduce the agreement to a written contract, which may be enforceable in court.

**Mini-Trial**
A mini-trial is a private, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial. The presentations are observed by a neutral advisor and by representatives (usually high-level business executives) from each side who have authority to settle the dispute. At the end of the presentations, the representatives attempt to settle the dispute. If the representatives fail to settle the dispute, the neutral advisor, at the request of the parties, may serve as a mediator or may issue a non-binding opinion as to the likely outcome in court.

**Negotiation**
Negotiation is a voluntary and usually informal process in which parties identify issues of concern, explore options for the resolution of the issues, and search for a mutually acceptable agreement to resolve the issues raised. The disputing parties may be represented by attorneys in negotiation. Negotiation is different from mediation in that there is no neutral individual to assist the parties negotiate.

**Neutral Fact-Finding**
Neutral fact-finding is a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.

**Ombuds**
An ombuds is a third party selected by an institution—for example, a university, hospital or governmental agency—to investigate complaints by employees, clients or constituents. The ombuds works within the institution to investigate the complaints independently and impartially. The process is voluntary, private and non-binding.
APPENDIX Q: THE GUIDE TO DISPUTE RESOLUTION PROCESSES

Private Judging
Private judging is a process where the disputing parties agree to retain a neutral person as a private judge. The private judge, who is often a former judge with expertise in the area of the dispute, hears the case and makes a decision in a manner similar to a judge. Depending on court rules, the decision of the private judge may be appealable in the public courts.

Settlement Conferences
A settlement conference is a meeting in which a judge or magistrate assigned to the case presides over the process. The purpose of the settlement conference is to try to settle a case before the hearing or trial. Settlement conferencing is similar to mediation in that a third party neutral assists the parties in exploring settlement options. Settlement conferences are different from mediation in that settlement conferences are usually shorter and typically have fewer roles for participation of the parties or for consideration of non-legal interests.

Summary Jury Trial
In summary jury trials, attorneys for each party make abbreviated case presentations to a mock six member jury (drawn from a pool of real jurors), the party representatives and a presiding judge or magistrate. The mock jury renders an advisory verdict. The verdict is frequently helpful in getting a settlement, particularly where one of the parties has an unrealistic assessment of their case.

✦ If I Participate in Dispute Resolution, Can I Later File a Lawsuit?
In most instances, dispute resolution processes do not preclude parties from later pursuing their case in court if they fail to reach a resolution. Parties can use dispute resolution before, or even after, they have filed a case in court. However, binding arbitration is final and prevents a party from bringing a court action.

✦ Do I Need an Attorney to Participate in Dispute Resolution?
In many processes, you are not required to have an attorney to participate. In cases where the court or judge has referred the case to a dispute resolution process, attorneys often participate. The role of an attorney in a dispute resolution process varies depending upon the nature of the dispute and the type of dispute resolution process. In many dispute resolution processes, attorneys accompany their clients and participate either as counselors or as advocates.
APPENDIX Q: THE GUIDE TO DISPUTE RESOLUTION PROCESSES

For more information:

ABA Section of Dispute Resolution
http://www.abanet.org/dispute

American Arbitration Association
http://www.adr.org

Association of Family and Conciliation Courts
http://www.afccnet.org

Association for Conflict Resolution
http://www.acresolution.org

Center for Analysis of ADR Systems
http://www.caadrs.org

Conflict Resolution and Information Network
http://www.CRInfo.org

CPR Institute for Dispute Resolution
http://www.cpradr.org

JAMS

Mediation Information and Resource Center
http://www.mediate.com

National Arbitration Forum
www.arbitration-forum.com

National Association for Community Mediation
http://www.nafcm.org

Network of Communities for Peacemaking and Conflict Resolution
http://www.apeacemaker.net

Policy Consensus Initiative
http://www.policyconsensus.org

U.S. Department of Justice Office of Dispute Resolution
http://www.usdoj.gov/odr

Victim Offender Mediation Association
http://www.voma.org/

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WORKING WITH LAWYERS AND COURTS is not the only way of resolving disputes. As people tire of the time, expense, and adversarial nature of litigation, both non-lawyers and lawyers have sought other means of solving problems. Methods of solving problems that do not involve going to court to have a judge decide the issue are referred to as alternative dispute resolution (ADR).

Many methods of ADR are used in conjunction with court proceedings. For example, if a couple seeks a divorce, they may use a mediator to help them resolve issues of custody, property, and support, but the couple still will need to go to court to have a judge enter an order officially ending the marriage.

There are several alternative ways of resolving family law disputes. Mediation is the most common. It will be discussed first, followed by advisory opinions, and arbitration.

**Mediation**

Mediation is a process by which the parties to a divorce (or some other dispute) try to resolve their disagreements outside of court with the help of a mediator. The mediator cannot force a settlement, but tries to assist the parties to clarify their interests and work out their own solution.

In divorce actions, mediators often are involved in custody and visitation disputes. In some jurisdictions (particularly large urban areas), courts require
mediation of custody and visitation disputes. The mother and father must talk with a court-appointed mediator to try to resolve the problem before putting their case before a judge. The mediator cannot force a resolution, but the parties can be told to try mediation before coming to court to ask a judge to decide the issue.

Court-ordered mediation usually is provided at no cost or at low cost to the parties (other than the cost of the filing fees required to initiate the court action).

Mediators also can handle property disputes and support disputes. A couple seeking mediation of disputes on financial issues probably will have to seek a private mediator since most court-affiliated mediators deal with only custody and visitation issues.

If the parties resolve their disagreements through mediation, the attorneys for one or both of the parties still may be involved in finalizing and approving the agreement. Alternatively, if the parties feel comfortable working without attorneys and if they can get the paper work right, they may draft their mediated settlement as an agreed order and take it to a judge for approval.

Most mediators are either mental health professionals or attorneys. Many mediators, particularly those associated with court mediation services, have degrees in social work or psychology. Private mediators (which the parties hire on their own) often are attorneys, although many are mental health professionals.
Mediators who are mental health professionals are not serving as therapists, and mediators who are attorneys are not serving as attorneys. Instead, they are professionals who are trying to help two (or more) people work out their differences.

Mediation often has the advantage of being cheaper and quicker than prolonged negotiations by attorneys or resolution of a case by a judge after a contested trial. A good mediator can help the parties build their problem-solving skills, and that can help them avoid later disputes. Most people who settle their cases through mediation leave the process feeling better than they would have felt if they had gone through a bitter court fight.

Mediation can have disadvantages—at least in certain cases. If, for example, the purpose of a mediation is to settle financial issues and one party is hiding assets or income, the other party might be better off with an attorney who can vigorously investigate the matter. Mediators usually are good at exploring the parties’ needs, goals, and possible solutions, but they do not have the legal resources of an attorney to look for hidden information. A mediator, for example, cannot subpoena documents or witnesses to gather information.

Another problem with mediation can arise if one party is very passive and likely to be bulldozed by the other. In that situation, the mediated agreement might be lopsided in favor of the stronger party. A good mediator, however, will see to it that a weaker party’s needs are expressed and protected. Some mediators may refuse to proceed with mediation if it looks as though one side will take improper advantage of the other.
Some legal and mental health professionals think that mediation is not appropriate if the case involves domestic violence. One concern is that mediation will give the abuser the opportunity to harm the victim again. Another concern is that victims of physical abuse are not able to adequately express and protect their own interests. However, other professionals believe that disputes in families with a history of domestic violence still can be mediated, particularly if the person who was abused does not feel significantly intimidated by the other party at the time of mediation or if the mediator is adept at making sure the abused party’s needs are explored and met.

A final potential disadvantage of mediation is that if the mediation does not succeed, the parties may have wasted time and money on mediation and still face the expense of a trial.

There are not firm, nationwide figures regarding the percentage of cases that are resolved through mediation, but studies of mediation of custody disputes in several large cities report that between 50 and 90 percent of cases settle through mediation.

Advisory Opinions

Instead of going to a formal trial before a judge, the parties and their attorneys may submit their cases to one or more experienced family law attorneys for an advisory opinion about how the case probably would be decided if it went to a court in the state. In effect, this is a mini-trial that is not binding.
The attorneys for the husband and wife submit their cases to the family law attorney. With the clients present, the attorneys for the husband and wife make oral presentations and submit documents. The amount of time for this “mini-trial” is set by agreement, but one to four hours is common amount of time. After submission of “evidence”, the experienced family law attorney issues an opinion and the reasons for it. In many cases, the advisory opinion induces the parties to settle the case, although they still have the right to proceed to a trial before a judge.

In some cities, there is an established panel of attorneys who issue advisory opinions. The attorneys may hear cases and issue opinions at no charge or at a specified rate, depending on local custom. If there is not an established panel of family law attorneys to issue advisory opinions, clients and their attorneys still could seek out an attorney who would be willing to serve in such a capacity.

A variation on this approach is for the attorneys to talk to a judge before trial. The attorneys will lay out the essential facts and arguments of their case and ask the judge for an informal opinion. If the judge is willing, the judge may say something along the lines of, “If these are the facts that are proven at trial, here is how I am likely to decide. . . . On the other hand, if this fact is different, my decision will be different.”

Some judges will allow clients to sit in on these meetings; others will not. The judge’s decision to allow a client to sit in on such a meeting (sometimes called a settlement conference) may turn on the judge’s perception of whether
it will help the case or not. Judges do not want clients to become disruptive or emotionally upset at settlement conferences. In addition, some judges are concerned that if the client hears the judge say, “Here is how I am likely to decide the case (based on certain facts)”, the client will assume the judge is prejudiced. In fact, a judge’s comments at a settlement conference do not necessarily mean the judge is prejudiced. It usually just means that if the parties prove a certain set of facts, a certain result can be expected. If different facts are proven, there would be a different result.

**Arbitration**

Another form of alternative dispute resolution is *arbitration*. Arbitration is not widely used in family law cases, but it is an option.

In arbitration, the parties agree to submit their dispute to a third party (other than a judge) for a binding decision. The arbitrator often is an attorney or a retired judge who is usually able to hear the case in a more expedited manner than a court would hear the case. Arbitration may be expedited in two respects. First, the arbitrator may be able to hold a hearing in the case more quickly than a trial judge, particularly if the trial judge has a calendar crowded with many cases. Second, arbitrations may take fewer days than a trial since arbitration procedures often are more informal than trials and the attorneys proceed more quickly. If the arbitration proceeds more quickly than a trial would proceed, arbitration will save time and costs.
Costs of arbitration vary, but are usually similar to attorneys’ hourly rates (see chapter 14 of this book).

In most states, husbands and wives are allowed to arbitrate issues of property and alimony, although this is not an area of law in which there are many court opinions specifically approving or disapproving the practice. In most states, however, courts are not likely to approve binding arbitration of custody and child support. Courts usually view themselves as ultimately responsible for protecting a child’s welfare, and courts in most states are reluctant to yield authority to an outside arbitrator.

In a New York case, for example, the mother and father agreed to have their marital disputes settled by a three-member rabbinical court that was serving as an arbitrator. The rabbinical court gave joint custody to the father and mother, but the state court declined to follow the decision because it viewed joint custody as not in the best interest of the children because of the “extreme antagonism” between the parents. The state court, however, confirmed (upheld) the rabbinical court’s determination of maintenance.

Click here to go to Where to Get More Information
In Family Law, How is Mediation Different from a Settlement Meeting

by Norman Pickell

"I arrange Settlement Meetings for clients. My success rate of settling the case at or shortly after the Settlement Meeting is pretty good. Therefore, I don't need to worry about Mediation! Besides, Mediation would just add more cost to my client's separation/divorce." Does that sound familiar?

Sometimes I hear lawyers make the above comment when the possibility of Family Mediation is raised. But there are several differences between Settlement Meetings and Family Mediation. (Since the procedure used in Family Mediation is much different from that used in non-family situations, I am confining this article to mediation of family law issues.)

In a typical Settlement Meeting, the clients and their lawyers meet in a neutral place. Usually Client #1 is in one room, Client #2 is in another room, and the lawyers meet in a third room. Lawyer #1 talks to Client #1. Lawyer #2 talks to Client #2. Lawyer #1 then talks to Lawyer #2. Each lawyer then talks to his or her own client, and so on. There is never any direct communication between the clients.

Family Mediation, on the other hand, has the clients meet face-to-face, usually in the absence of their lawyers, with a trained family mediator present. Of course, this only happens after some pre-mediation screening has been done by the family mediator to make sure that the couple are suitable for mediation and that neither party is put in danger by such a face-to-face meeting.

Before proceeding further, let me make one thing clear. Lawyers still have a very important role to play in Family Mediation. Mediation does not eliminate the need for each party to have her or his own lawyer. (More will be said later about the lawyer’s role.)

Divorce is ranked at the top of the list of stressful events in one's life. However, Settlement Meetings have one purpose - to effect a settlement of the outstanding legal issues involving the clients. Emotions and post-separation/divorce dynamics are rarely factored into Settlement Meetings.

But if the parties have children of any age, the parties must consider more than just reaching a settlement. The parties need to recognize that a relationship will exist between them after the divorce. This relationship will be tested time and again, even after the children have left the nest and are out on their own. There will be birthdays, graduations and other school-related activities, weddings, grandchildren, funerals and other important events that will require some contact between the parties. Co-operation between the parents will go a long way in reducing the stress and anxiety in the lives of their children. As parents cope better,
their children do so as well.

Even when there are not any children, Family Mediation can still assist the parties to dissolve their relationship where there has been a decision made to separate.

Constant fighting, arguing and blaming in a marriage or similarly committed relationship generally leads to more of the same while dissolving it. Unfortunately, the consequences of continuing this behaviour can be dramatic, including protracted litigation, escalating costs, and significant damage to the parties' children's emotional well-being. By the time the parties are in their lawyers' offices, they usually dislike each other, are very poor communicators, are highly distrustful, and are fearful of being hurt again.

But it does not have to be this way. People do have a choice about how to separate! Solving disputes through negotiation is a part of everyday life. However, Family Mediation is more than just bringing in a neutral third person, ie. a mediator, to help the parties reach a settlement.

What is "mediation"? There are many definitions. One of the better ones that I like is found in the State of Louisiana Mediation Act:

"...a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores the possible solutions to promote reconciliation, understanding and settlement."

Thus, "settlement" is only one of the purposes of mediation. "Reconciliation" does not mean "getting back together." It means helping the parties negotiate a workable way of living apart.

Mediation is a process - a voluntary, non-adversarial, process involving a trained, impartial third party. The parties, not the mediator, make the decision. The mediator has no power to render a decision or to force the parties to accept a settlement. Because the voluntary settlement that the parties reach is designed by the parties themselves, it is more likely to be carried out without the need for external enforcement or further litigation.

**Steps in Family Mediation:**

Generally, my family mediation is conducted as follows:

1. After I pre-screen the parties, I encourage them to each have separate lawyers (if they don't already).

2. Following my initial meeting with their lawyers in the absence of their clients, I have my first joint meeting with the parties.

3. I then have an individual meeting with each party separately, following which I have
further joint meetings with the parties.

4. In some cases, I interview the children separately from their parents.

5. In appropriate cases, I will meet with new partners.

6. I meet with both lawyers from time to time as needed.

7. When the parties reach an agreement, I prepare a Memorandum of Understanding. After I have reviewed the draft with the parties, I send it to their lawyers to review with the clients. Once everyone is content with the Memorandum of Understanding, it becomes the Separation Agreement.

**Lawyer's Role in Family Mediation:**

Unlike other types of mediation, lawyers do not usually attend mediation sessions with their clients in Family Mediation. Mediation changes the role of lawyers from adversarial negotiators to legal consultants. The parties become the primary negotiators in mediation.

The role of the lawyers is to advise their clients throughout the mediation process on their legal rights and obligations. (Even if the mediator is a lawyer, the mediator does not provide legal advice to the parties.) The parties cannot make competent and informed decisions without sufficient legal advice. The lawyers will also review the Memorandum of Understanding and see their clients sign the Separation Agreement.

**Mediator's Role in Family Mediation:**

A mediator is a neutral person who is trained to help people talk so that the parties can better understand their problems and reach an agreement. A mediator does not take the side of either party, and does not pass judgment on the parties or their problems.

The function of the mediator is to manage the process for the parties, to get them talking, to help them better understand the problems and to help them reach a solution that meets their needs. The mediator keeps the conversations going and focused. Where there is a will to address conflicts constructively and creatively, mediators provide the necessary skill.

The mediator sets the tone for the negotiations. Right from the beginning, the mediator tries to create an atmosphere conducive to discussion. In Settlement Meetings, there is usually a certain amount of "posturing." On the other hand, the mediator will discourage intimidation, threats or bottom-lining. The mediator can remind the parties to take a more co-operative and less competitive approach. Because the parties have usually experienced a significant breach of trust, responding to trust issues is one of the most challenging tasks for a mediator.

The emotional consequences of the breakdown of relationships in family disputes cannot be overstated. Lawyers who are working hard to advocate for their clients may miss the
emotional significance of some of the matters that cause the most grief and about which a
person becomes most intransigent. Family mediators consider the emotions and the feelings
that the parties are experiencing which can be a significant obstacle to settlement.

Mediation does not mean "giving in" or "giving up". Mediation clients are no "nicer" than
the ones who go to court. The difference is the process: in a positive environment, the
parties find practical solutions that work for both of them.

Mediation can be effective even when conflict and anger is high, and communication has
broken down. Some people are concerned that they will not be able to negotiate effectively
with the other party and then they will lose. But with a trained mediator, the parties can trust
that they are not going to be abused or taken advantage of by the other party.

**Communication:**

Settlement Meetings do not usually involve communication directly between the parties. In
mediation, on the other hand, the parties talk to each other, with the mediator present. Direct
negotiation between the parties generally expedites the resolution of issues.

One of the most common complaints from parties entering mediation is that they cannot
communicate with each other. Therefore, the trained family mediator will focus on
communications and improved understanding. The more people understand each other, the
more likely they can begin the process of talking **constructively** about the issues in dispute.

**Exchanging Positions:**

It is important for each party to understand the position of the other, even if he/she does not
agree with it. Therefore, in mediation, each party relates the issue as she/he sees it. The
mediator probes into the underlying and often unspoken issues. The underlying issues may
be the deep-rooted reason for the party's stand. The mediator encourages the parties to talk
about their feelings. This is not done in Settlement Meetings. When the feelings have been
expressed **and heard**, the parties may be more willing to talk about a way to resolve the
issues.

The aim of Settlement Meetings is to make a determination of rights. Usually a settlement is
reached based on the law and the lawyers' interpretation of the facts. The law is not trying to
have each side understand the position of the other. Very little is said in Settlement Meetings
about underlying issues.

**Exploring Interests and Needs:**

A position is what a party wants or demands. An interest is why a party has taken a
particular position. Much of the mediation process is devoted to exploring the parties'

respective interests, rather than a positional approach to negotiation. The focus on interests in mediation changes the way in which the dispute is characterized, analyzed and processed. An agreement is unlikely to result from a consensual process unless the discussion can be moved beyond positions stated in rights-based terms, and explore how the conflict arose, the expectations of either side, and uncover what is critical to each side in seeking a resolution.

**Generating Options:**

Lawyers often excel in developing facts that support their positions, but bog down when it comes to developing settlement options.

Mediation recognizes that both parties have legitimate needs and helps develop options that will successfully reconcile those needs to the satisfaction of both parties. A mediator can explore suggestions as to available options that have not been previously considered.

Once the parties have identified their options, they can assess their merit and begin to negotiate their acceptance. Here the mediator often serves to facilitate communication, test realities and offers encouragement to the parties.

**Children:**

Family mediation focuses on plans for the future of the children, rather than on the parents' conflicts and grievances. The mediator can emphasize a co-operative parenting approach.

In Settlement Meetings involving custody and access, for example, agreements generally focus on legal rights. Negotiations between lawyers do very little to clarify ongoing parental responsibilities. On the other hand, mediation provides a forum for parents to structure their own unique parenting plan.

While Settlement Meetings do not usually include the children, often the mediator will meet privately with the children (but only with the approval of both parents). Children may have their own questions and concerns, and have needs that are quite different from their parents' needs.

Mediation can also help the parties explain the situation of their separation to their children in a constructive fashion. This is not done in a Settlement Meeting.

**New Partners:**

New partners are not usually included in Settlement Meetings. This can be a highly explosive subject (for the parties and for their children) if it is not dealt with. Often this topic is discussed in mediation.

**Results:**
The legal system concerns itself with the facts, and the results will often be black and white. In mediation, on the other hand, the parties are sometimes able to reach a solution that is more creative than that which a court would impose.

You need to consider the future relationship of the parties. This is where mediation can be a big help. In situations where the parties wish to preserve or improve their relationships, mediation is more likely to create a forum for frank exchange leading to a better working association, rather than either ignoring issues or using more formal approaches.

**Benefits of Family Mediation not found in Settlement Meetings:**

- negotiations take place with the assistance of a third party mediator
- both parties are made to feel safe and comfortable in each other's presence
- allows the parties to take charge of their lives and design a plan for their future that would be good for themselves and for their children
- facilitates, promotes and improves communication between the parties
- hard bargaining tactics are avoided
- helps the parties to exchange views and information
- helps to reduce conflict and hostility between the parties
- encourages co-operation and trust
- allows the parties the opportunity to express their feelings associated with ending the marriage
- the position of the other party is not filtered through lawyers
- the parties have more control over the outcome
- increases potential for solutions that may go beyond remedies which can be ordered by the court
- mediated settlements generally work better because of the fact that the parties worked co-operatively to arrive at the agreement, rather than having it negotiated back and forth between their lawyers
- preserves family relationships; a Settlement Meeting will not tell the parties how to do that
• can make termination of a relationship more amicable and less traumatic

• empowers the parties to solve their own dispute and find a compromise that works for both of them

• a mutually acceptable solution lets both parties be winners and respect each other

• the parties can deal with the issue of new partners

• can and should make post-divorce relations easier among the parties and extended family

• provides a way for families who are splitting into parts to learn to deal with the changes in roles, duties and opportunities and to face those changes with emotional balance

**Added Benefits of Mediation Where There are Children:**

• focuses attention on the children and in doing what is best for the children

• minimizes the harmful effects of divorce and separation on children

• courts deal with custody and access; mediators deal with parenting plans; parenting is a lifelong commitment that transcends court orders; children need both parents

• agreements reached through mediation can take into account the personal needs of children in much more detail than other kinds of agreements

• may involve children when their input is appropriate and helpful

• children of parents who mediate adjust better to their parent's divorce than do children of parents who simply go through the Settlement Meeting or litigation process; the children are happier, more secure, more reassured, and less distressed

• presents a co-operative model for addressing future changes in the lives of the children

• establishes a sound foundation for post-separation parenting arrangements

**Advantages of Family Mediation for Lawyers:**

We have talked about the benefits of mediation for the parties. There are also advantages of Family Mediation for their lawyers. Lawyers will have clients who are generally more satisfied by the experience of crafting their own resolution. Satisfied clients are more appreciative of the lawyer's services and spread the word. This causes more clients to seek
out that lawyer for similarly satisfactory results. Lawyers representing clients in mediation are more likely to be paid their full fee. On the other hand, the lawyers who go the traditional route of settlement meetings and litigation often do not bill their full fee, or they often do not collect all the money that they do bill their clients. Thus, while lawyers may bill fewer gross dollars to an individual client, they collect a higher percentage of what is billed and get more business as a result of satisfied clients.

So You Now Think Mediation Might Just Be Worth a Try:

Statistics indicate that over 80% of all mediations result in settlement. This is true even where all prior attempts at settlement have failed, where the parties were pessimistic about the prospects of settlement, and where the parties have spent substantial amounts of time and money preparing for trial.

With such a success rate, it is wise and relatively inexpensive to try mediation. You have little to lose.

In those few cases where no agreement is reached, the parties still retain the flexibility to walk away from mediation and go to, or continue with, court.

For those who want to learn more about mediation in the context of separation and divorce, there are two excellent books available. One is entitled *Family Mediation: A Guide for Lawyers* by Cinnie Noble, published in 1999 by Canada Law Book Inc. The other is *Family Mediation Handbook, 2nd Edition*, by Dr. Barbara Landau, Dr. Mario Bartoletti and Ruth Mesbur and published in 1997 by Butterworths Canada Ltd.

**Biography**

**Norman Pickell** is a mediator and lawyer based in Goderich, Ontario, Canada. He received his law degree in 1972 and was called to the Bar of Ontario in 1974. Although Norman carries on a general law practice as well as a general mediation practice, he has extensive experience in family law. Norman is also a part-time Judge of the Small Claims Court in Ontario.

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Arbitration, Mediation, or Settlement Conference - Which is Best for You?

by Nicholas Martin, The Center for Accord, Roanoke, Texas

In recent years, the terms *arbitration* and *mediation* have become familiar to most of us. Yet what they really involve, how greatly they differ, and how (or whether) they apply to each of us may be far from clear.

Arbitration and mediation are among a wide range of problem-solving approaches that fall under the heading of "ADR" (alternative dispute resolution) - in the sense of alternatives to resolving disputes by trial or hearing in court. Although there is a long list of such options, only three are commonly used: mediation, arbitration, and settlement conferences.

Settlement conferences involve an impartial legal expert who serves as a forecaster of how a case would play before a judge or jury in court. This legal expert is usually an experienced trial attorney or retired judge. Such conferences may also serve to streamline a case by clarifying points of agreement which may not, therefore, need to be argued at trial. They also usually involve efforts to settle the case, not just to give advice, and are often referred to imprecisely as "mediation."

In arbitration, an impartial expert or panel of experts (again, usually an experienced attorney or retired judge) hears the allegations and evidence of both sides and makes a decision *for* the parties. The focus is usually limited to the implications of relevant law, and the award will generally be for one party or the other. Whether the arbitration will be legally binding or not is usually based on the prior agreement of the parties, and the arbitrator may not be bound by the same legal constraints that govern a judge's verdict in court.

In mediation, an impartial "mediator" assists the parties to share their perspectives and design a mutually acceptable solution to their conflict. Decisions are made only by the parties themselves, and mediated agreements become legally binding only when the parties agree that they will. The mediator's role is to facilitate communication and the exploration of settlement options, not to give advice or make decisions.

The fact that ADR approaches are alternatives does not necessarily
mean that they involve free choice: in certain cases and in some jurisdictions, the use of ADR may even be required, either by statute or local court rule. Some require arbitration, some mediation, and some have no such requirements. There is great variation from state to state and from one county or jurisdiction to another. One can call the local courthouse to find out what ADR requirements and programs may be in effect in a particular area.

In addition to the court-related applications just described, ADR may be used as an option before even filing a lawsuit. Thus, mediation or arbitration clauses are commonly included in loan agreements, bank card applications, and real estate contracts. The purpose is to assure that one of these approaches is employed either prior to or in lieu of litigation, primarily to avoid the high costs and lengthy delays generally associated with settlement in court.

ADR approaches (usually mediation) may also be used in matters that do not involve lawsuits at all, such as staff relations, customer dissatisfaction, and community concerns - when disputes arise that do not necessarily involve violations of law. Mediation may also be used prior to arbitration as a means of resolving disputes by mutual design and agreement, with arbitration reserved as a next resort.

When conflicts arise, consider that you have options with significant differences in terms of:

1) the time and expense involved (whether or not a case must be prepared as if proceeding to trial);

2) who the decision makers will be (judge, jury, arbitrator, or the parties themselves);

3) the basis for decision making (relevant law or the broader interests of the parties);

4) the range of options (you win/you lose and prescriptions of law, or whatever the parties freely agree); and;

5) the implications for mutual satisfaction and future working relationships (whether a solution is designed by mutual agreement, or imposed from outside - like it or not).

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Early Neutral Evaluation

by Doneldon M. Dennis, Supervisor
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One day last spring two parents, who were disputing custody of their children, arrived for their first appearance in family court in Hennepin County (Minneapolis), Minnesota. They were not there for a formal hearing. Rather, they participated in a judicial management conference during which the judge, the parties and their attorneys discussed the scope of their case and what interventions might help settle disputed issues. Soon it became clear that this custody question turned on just two or three matters, not the up to 19 statutory best interests factors that are addressed in a conventional Minnesota custody evaluation. The attorneys had discussed this with their clients, of course, but the parties still wanted their day in court, with expert witnesses and the whole show.

The judge, with the agreement of the parties and their attorneys, referred them to the Early Neutral Evaluation program at Hennepin County Family Court Services. Later that day, the parties and attorneys met for two hours with two experienced family court professionals, a man and a woman. At the session, the professionals listened as each side described their position, stated what they wanted and explained why they felt their plan was best for the children. The professionals asked clarifying questions, gave each side a chance for rebuttal, and ensured that each had a full opportunity to present his or her case. The professionals then adjourned to consult with one another. They discussed the merits of each party’s case and expressed what they believed to be the critical issues. They then reconvened the session and shared what they had discussed. More important, they explained how they believed an evaluator would view the case and why, complete with predictions of what an evaluator would tell a judge what they learned or what opinions they formed. All they do is summarize agreements and suggest whether further services are needed. Such a recommendation might focus sub-sequent services on explicit issues. Should additional services be ordered, the matter will be assigned to different family court services professionals.

This is Hennepin County Family Court Services’ Early Neutral Evaluation Program, an effort started by a group of six experienced mediator/evaluators last January. During the pilot program, only one judicial team and these six court services professionals were involved. Cases were hand selected by the judicial officers and everyone had to agree to participate. Consequently, the results may be better than what is seen when a cross section of families is referred. So far, however, more than half of the cases have settled at the first session, and over three-fourths have reached at least a partial agreement about the referral question. The average case requires two staff for about seven hours each (some cases require services well beyond the initial two-to-three-hour meeting) as opposed to 30 to 40 hours of staff time for a conventional study.

Why is this so effective? So far we have identified several reasons, and we are still learning. One obvious reason is that only professionals with an average tenure at Family Court Services over 13 years have been involved. Second, the male/female teams help both parties feel understood and heard. Third, the parties welcome the quick read about their case and can often make better use of the feedback from the male-female team of experienced professionals than when they heard the same information from their attorney or someone else. Too, they may feel more confident about an early settlement when it stems from an assessment than if they have only their own instincts to guide them. Fourth, these cases are seen before they are deeply polarized by the adversarial system. Fifth, the workers can be very direct with their feedback. They are not blunt or cruel, but not needing to sustain ongoing rapport gives them greater freedom of expression. And last, of course, the court has specially selected these clients and they have agreed to use this program to try to settle their case quickly.

For additional information, please contact doneldon.dennis@co.hennepin.mn.us.
Collaborative law is a new way to resolve disputes by removing the disputed matter from the litigious court room setting and treating the process as a way to "trouble shoot and problem solve" rather than to fight and win.

As part of the collaborative law method, both parties retain separate attorneys whose job it is to help them settle the dispute. No one may go to court. If that should occur, the collaborative law process terminates and both attorneys are disqualified from any further involvement in the case.

Each party in the Collaborative law process signs a contractual agreement which include the following terms:

**Disclosure of Documents.**
Each party agrees to honestly and openly disclose all documents and information relating to the issues. Neither spouse may take advantage of a miscalculation or an inadvertent mistake. Instead, such errors are identified and corrected.

**Respect.**
Each party agrees to act respectfully and avoid disparaging or vilifying any of the participants.

**Insulating Children.**
As part of the process all participants agree to insulate the children from the proceeding and to act in such a way as to minimize the impact of the divorce on them.

**Sharing Experts.**
The parties agree to implement outside experts where necessary in a cooperative fashion and share the costs related to those experts. (e.g. real estate appraisers, business appraisers, parenting consultants, vocational evaluators, or accountants)

**Win-Win Solutions.**
The primary goal of the process is to work toward an amicable solution and to create a "win-win" situation for all.

**No Court.**
Neither party may seek or threaten court action to resolve disputes. If the parties decide to go to court, the attorneys must withdraw and the process begins anew in the court system.

One of the biggest differences in the Collaborative law process is that it recognizes that
emotional issues exist that cannot be addressed by the legal system. How often have you heard stories of divorcing parties spending thousands of dollars in legal fees to argue about pets or furniture that has limited monetary value. Generally speaking, the parties in such cases are not arguing about dogs, cats or furniture. Instead, they are reacting to psychological pains that they experiencing. These emotional issues that are ignored in the Court process. By contrast, the collaborative law process specifically addresses these issues by bringing them to the forefront and using professionals as part of team approach to find solutions.

A team of professionals is assembled to help the parties understand and resolve their disputes in many different contexts. The disputes maybe legal disputes or emotional and include: mental health counselors/ coaches for each party, neutral financial advisors, accountants, parenting specialists, child specialists, vocational experts, and appraisers, if needed.

A child specialist may play a very important role in the collaborative process. So often, children become the unintended victims in divorce proceedings. They internalize the conflict and often blame themselves for the break up of their family. The child specialist works with children of divorcing parents. It is their job to assist the children in understanding that the parental dispute is not their fault and to teach them how to cope and communicate with their parents. In this way, the children have a voice in the proceedings and become part of the team process.

Financial professionals may be used to help define values of assets. In the litigious court process often redundant appraisals are performed by one expert for each party. The end result is a duplication of services at greater cost and with increased distrust. This often results in an expensive war of experts at trial where each expert testifies regarding their different valuations. In the collaborative process, the parties choose a neutral appraiser that is not associated with either party. With a trust relationship established, the parties agree on some division of cost and agree to be bound by the appraised value.

Most Cases Settle.
The Statistics state that more than 90% of all divorce cases are resolved without a trial. In the Court system that resolution often comes more than a year after the divorce was commenced and after many hurtful statements have been made part of the public record in the form of affidavits and motions. Doesn't it make more sense to seek that resolution before the bridges are burned and the missiles are launched in a courtroom?

Certainly, collaborative law will not work in every case. After all, it takes two to tango and it takes two willing participants to effectively use the collaborative law process. However, in the cases where collaborative law has been used, even if reluctantly, there have been more rapid settlements at a fraction of the normal cost associated with divorce.
Biography

Maury Beaulier is the founder of the Beaulier Law Office and Action Mediation. A family law practitioner for more than ten years and a mediator, Maury has been recognized by the International Who's Who of Professionals (1996), Minnesota Law & Politics Magazine (February, 1999) and more recently featured in Lawyers Weekly USA (March, 2000) and on the CBS New Program "Eye on America" with Dan Rather as an expert in the area of mediation and collaborative law.

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The Parenting Coordinator Role
Robin M. Deutsch, Ph.D.
Children and the Law Program
Massachusetts General Hospital

Objectives of a PC model
- Reduce conflict between parents
- Reduce chronic litigation (preserve family resources)
- Raise parents' skill level in collaborative planning and decision making for their children
- Assist parents to coparent in a way that promotes well being of the children
- Maintain, modify, mediate viable parenting plans

Range of disputes resolved
- Detailed Court order contains areas of decision making
- The PC shall not make any decision which alters award of legal or physical custody

The Parenting Coordinator
- Court ordered neutral to assist the parties to implement safe and workable parenting plans.
- May be necessary when parental communication is conflictual or ineffective, or to promote safety of vulnerable parties, including children and parents.

When should a PC be appointed?
- Ongoing disagreements between the parents about implementation of parenting plan
- Parties agree to decision maker outside of the Court to reduce cost and burden of continued litigation
- Some states: if history of extreme or unremitting conflict that affects welfare of the children, court can appoint without parties’ agreement

Relationship to the Court
- Court appointment
- Quasi-judicial officer of the court with continuing authority to act during designated term of service
- Absent agreement between parties, decision-making authority delegated by statute or legislation (e.g. Guardian ad litem, evaluator, mediation, court expert statutes)
- PC actions legally binding but subject to judicial review
**Parental Informed Consent**

- Most states PC process is not confidential
- PC can be called as a witness to testify to the court
- Massachusetts PC cannot testify. Any judicial review is de novo
- In California PC can only testify upon agreement of parties and PC

**Statutory Authority**

- Statutes in Idaho, Oklahoma, and Oregon. Pending in Massachusetts and Florida
- Authorized through related statute in Arizona, California, Colorado, Georgia, Kansas, New Mexico, Ohio, North Carolina, Vermont

Report of the AFCC Task Force on Parenting Coordination and Special Masters, 12/30/02

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**Role Definition**

- PC is NOT:
  - Therapist
  - Advocate for one party
  - Parenting Coach
  - Counsel
  - Mediator
  - Custody Evaluator
  - Judge

**Distinct Role of Parenting Coordinator**

- Hybrid role: help implement, modify, mediate parenting plans
- Assess impasses to coparenting
- Educate about child development, communication, conflict resolution
- Mediate disputes
- Arbitrate

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**Qualifications of the Parent Coordinator**

- Legal, mental health or mediation professional
- Training and experience with family law, conflict resolution, dynamics of power and control, high conflict divorce, child development, systems theory, impact of divorce on children
- ADR or mediation training
Selected ABA Standards of Representation
For Lawyers Representing Children in Custody Cases

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II. SCOPE AND DEFINITIONS

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B. Definitions
1. “Child’s Attorney”: A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
2. “Best Interests Attorney”: A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

....

III. DUTIES OF ALL LAWYERS FOR CHILDREN

....

F. Pretrial Responsibilities
The lawyer should:

....

4. Attend meetings involving issues within the scope of appointment.
5. Take any necessary and appropriate action to expedite the proceedings
6. Participate in depositions, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in mediation should be bound by the confidentiality and privilege rules governing the mediation.

Commentary

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By attending relevant meetings, the lawyer can present the child’s perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child’s perspective, or when the meeting will not be materially relevant to any issue in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer’s role is to advocate the child’s interest and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party’s lawyer.

....
V. BEST INTERESTS ATTORNEYS

F. Advocating the Child’s Best Interests

1. Any assessment of, or argument on, the child’s best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.

2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

3. At hearings on custody or parenting time, Best Interests Attorneys should present the child’s expressed desires (if any) to the court, except for those that the child expressly does not want presented.

Commentary

Determining a child’s best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child’s interests will generally be stated in a state’s statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child’s desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

A Best Interests Attorney is functioning in a nontraditional role by determine the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child’s needs and interests, and not merely on the lawyer’s personal values, philosophies and experiences. A best interests case should be based on the state’s governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child’s individual needs. The child’s various needs and interests may be in conflict and must be weighed against each other. The child’s developmental level, including his sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court’s attention. This should not be done by an ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.
§ 5.13 Conciliatory Phase

[1]—Introduction

Over the past several decades, the legal profession has expanded to include alternative methods of dispute resolution. The conciliatory phase of the lawsuit focuses upon these alternative methods to enable the parties to resolve their dispute in a non-adversarial manner and to address the issues that underlie the litigation. It includes settlement conferencing, mediation, collaborative law, therapeutic counseling, and consultation with a mental health or other third party professional for the purpose of building consensus and resolving the lawsuit in a non-adversarial setting.

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This phase of the lawsuit is particularly important in family law cases that involve children. Because the legal process has the potential of creating greater stress and trauma for the child and family, it is important that the court-appointed lawyer initiate this phase as soon as possible after he or she has developed an understanding of the situation and the child’s needs. Since this phase also provides the parties an opportunity to address concerns that underlie the dispute, issues collateral to the actual legal controversy (such as substance abuse, domestic violence, unresolved anger, fear of losing a child, lack of concern for the child’s need for contact with both parents) should be dealt with to the greatest extent possible.

Although this phase has the greatest potential for addressing that the child’s needs and concerns in a manner that does not further traumatize the child, it has been largely overlooked by the legal profession in terms of involving the child in the process. Only recently has the system begun to encourage the court-appointed lawyer for the child to focus on this phase of the lawsuit as a means to address the child’s interests. Its significance cannot be over-emphasized in terms of: 1) providing a non-adversarial mechanism for the child to be involved, either directly or indirectly, and 2) promoting the amicable resolution of the dispute, so that the process does not add to the conflict that the child experiences.

[2]—Step 1: Encourage Settlement and Alternative Forms of Dispute Resolution

[a]—Duty to Reduce Litigation Trauma for Child

The court-appointed lawyer’s duty to the child includes more than advocating a particular position or assisting the court in rendering a proper decision. Unlike a lawyer’s responsibility to an adult client, the duty to a child includes advancing the interests of the child by protecting him or her from unnecessary conflict.

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597 AAML Custody Standards, supra, note 12 at Comment to 1.2 (states that training for court-appointed lawyers for children “should include methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of family breakup on children, and techniques for helping the parties de-escalate conflict. It would be appropriate if these materials included an interdisciplinary focus on children. This specialized training will prepare representatives, as these Standards require, to protect children from harms attendant with litigation and to facilitate expeditious resolution of the dispute in accordance with the child’s best interests”); ABA Abuse & Neglect Standards, supra, note 6, at Comment to C-2 (8) (states that the lawyer “can be pivotal in achieving a negotiated settlement of all or some issues”).

598 AAML Custody Standards, supra, note 12 at Comment to 2.6 (states that litigation “involving dissolution of the family can be particularly acrimonious. All persons involved can suffer greatly as a result of this hostility and conflict. Children are especially vulnerable to the harms commonly associated with custody and visitation litigation. The Standards for Matrimonial Lawyers endorsed by the American Academy of Matrimonial Lawyers already go further that the Model Rules of Professional Conduct by requiring counsel to ‘encourage the settlement of marital disputes through
It includes encouraging the parties to understand that the legal system itself can be a source of stress and trauma for the child, and that attempts should be made to resolve the dispute expeditiously and in the least adversarial manner possible.\footnote{A critical objective of representation for court-appointed lawyers for all children is to attempt to reduce the trauma that the child is experiencing and to ensure that the legal process does not add to the child’s difficulties.}\footnote{AAML Custody Standards, supra, note 12 at 2.6 (states that “counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation”); AAML Custody Standards, supra, note 12 at 2.10 (contains similar language directed to an attorney for an “impaired child”); ABA Custody Standards, supra, note 36 at Comment to III-F (states that the “lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate”).}

[b]—Duty to Mitigate Conflict

This duty to attempt to mitigate the conflict is arguably the most important function that the court-appointed attorney provides. Undoubtedly, the lawyer's actions during this phase of the lawsuit have the greatest potential for truly improving the child’s situation. The Texas statute codifies this duty by requiring the lawyer to: 1) take action to expedite the proceedings and 2) to encourage settlement and the use of alternative forms of dispute resolution.\footnote{Fam. C. § 107.003(1)(E) (provides that all court-appointed lawyers for children shall “take any action consistent with the child’s interests that the attorney considers necessary to expedite the proceedings”); Fam. C. § 107.003(1)(F) (provides that they shall “encourage settlement and the use of alternative forms of dispute resolution”).}

The AAML Custody Standards offer the following guidance regarding the court-appointed lawyer's duty to take action to mitigate conflict. These standards require counsel to:

[T]ake appropriate steps to de-escalate all conflict in the litigation. Counsel should try . . . :

(a) to resolve the dispute in the least contentious manner;
(b) to resolve the dispute in the most expeditious manner; and

negotiation, mediation, or arbitration.\footnote{AAML Custody Standards, supra, note 12 at 2.6 (states that “counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation”); AAML Custody Standards, supra, note 12 at 2.10 (contains similar language directed to an attorney for an “impaired child”); ABA Custody Standards, supra, note 36 at Comment to III-F (states that the “lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate”).}

\footnote{AAML Custody Standards, supra, note 12, at Comment to 2.6 (states that “it is appropriate for counsel to advance the interests of the child by protecting him or her from unnecessary conflict. Counsel should be ever mindful that the prosecution of the litigation often can be harmful to children of any age. For example, counsel should try to minimize the number of interviews to which a child may be exposed as a result of the investigations or expert evaluations”).}
(c) to expose the child to as little of the controversy as possible.

To accomplish this, counsel should attempt to negotiate disputes that have the potential to escalate into harmful conflict. Counsel should also urge the parties and their lawyers to keep the interest of the child paramount, reminding them at various stages of the proceedings how particular actions may affect the child and recommending alternative actions that would better serve the child's interests.602

A settlement conference should therefore be scheduled (between the parties and their lawyers and the court-appointed lawyer for the child) as soon as possible, after a legal theory of the case has been developed.603 If the parties are not able to resolve the dispute in this manner, a third party should usually be brought in to facilitate resolution.604 Mediation should be discussed and encouraged early in the lawsuit, before the parties become more alienated and entrenched in their positions. If the court-appointed lawyer determines that the case should be mediated but the parties will not agree, he or she should file a motion seeking court ordered mediation.605

[3]—Step 2: Participate in Settlement Negotiations

It is imperative that the court-appointed lawyer participates in all settlement conferences and mediations that involve issues regarding the child.606 One of

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602 See AAML Custody Standards, supra, note 12 at Comment to 2.6.
603 See Fam. C. § 107.003(1)(E) and Fam. C. § 107.003(1)(F).
604 ABA Abuse & Neglect Standards, supra, note 6, at C-6 (states that the lawyer “should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child’s attorney should use suitable mediation resources.” ABA Custody Standard III-F (6) states that the lawyer should “[p]articipate in, and, when appropriate, initiate, negotiations and mediation”).
605 AAML Custody Standards, supra, note 12 at 2.6 (states that counsel “should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation’’); AAML Custody Standards, supra, note 12 at Comment to 2.6 goes on to say that litigation “[i]t is appropriate for counsel to advance the interests of the child by protecting him or her from unnecessary conflict. Counsel should be ever mindful that the prosecution of the litigation often can be harmful to children of any age... This Standard requires counsel to take appropriate steps to de-escalate all conflict in the litigation. Counsel should try... a) to resolve the dispute in the least contentious manner, b) to resolve the dispute in the most expeditious manner, and c) to expose the child to as little of the controversy as possible. To accomplish this, counsel should attempt to negotiate disputes that have the potential to escalate into harmful conflict”).
606 Fam. C. § 107.003(1) (F) (provides that the amicus attorney shall “encourage settlement and the use of alternative forms of dispute resolution”); Fam. C. § 107.003(1) (D) (provides that the amicus attorney shall “participate in the conduct of the litigation to the same extent as an attorney for a party”); ABA Custody Standards, supra, note 36, at III-F (6) (states that the lawyer should “[p]articipate in, and, when appropriate, initiate, (sic) negotiations and mediation”).
the most important functions that the court-appointed lawyer for the child provides is to keep the adult participants focused upon the needs and concerns of the child. The lawyer plays a critical role by ensuring that the parties do not lose sight of the child and that they remain focused upon the child’s interests during all negotiations. For example, in a custody case that involves allegations that one parent has committed adultery during the marriage, the lawyer should direct the parties to consider whether this type of behavior has impacted the child. Rather than dwell on the past, the lawyer should attempt to get the parties to develop a workable plan for the present and future.

Another reason for the lawyer to be present during negotiations is to ensure that the child’s point of view is taken into account with regard to all agreements that are reached. If the lawyer observes that the parties are negotiating towards a settlement that does not support the child’s interests, he or she should redirect the conversation so that the child’s needs are put at the forefront of the discussions.

[4]—Step 3: Determine Whether to Approve Agreed Settlement

It is not completely clear whether court-appointed lawyers for children must also consent to settlements that are agreed upon by the named parties. It is arguable that, because all court-appointed lawyers for children are required to “participate in the conduct of the litigation to the same extent as an attorney for a party,” the lawyer must sign off on any agreement that is entered between the parties before it is presented to the court. As discussed in § 5.24, an amicus attorney is specifically required by statute to “review and sign or decline to sign, an agreed order affecting the child” and to “explain the basis for the amicus attorney’s opposition to the agreed order if the amicus attorney does not agree to the terms of the proposed order.” However, because these court-appointed lawyers do not represent named parties, and because the children (and their

607 ABA Custody Standards, supra, note 36, at Comment to III-F (states that the “lawyer’s role is to advocate the child’s interests and point of view in the negotiation process”).

608 While settlement frequently provides a measure of relief for the parties and is generally the best method of resolving a case, the court-appointed lawyer should not merely be a facilitator to the parties reaching a negotiated settlement. The child’s best interests should always be the focal point of any settlement agreement. ABA Abuse & Neglect Standards, supra, note 6, at Comment to C-6 (states that “[p]articularly in contentious cases, the child’s attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. . . . Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. The child’s attorney, however, should not become merely a facilitator to the parties’ reaching a negotiated settlement. As developmentally appropriate, the child’s attorney should consult the child prior to any settlement becoming binding”).

609 See Fam. C. § 107.003 (1)(D).

610 See Fam. C. § 107.005 (b)(4), (5).
parents) are frequently not able to direct these lawyers, questions remain about their authority to veto settlements. This is discussed in greater depth in §§ 5.20 et seq., 5.30 et seq., and 5.40 et seq., dealing specifically with amicus attorneys, attorneys ad litem and attorneys appointed in the dual role.\footnote{While guardians ad litem are also authorized to “review and sign or decline to sign, an agreed order affecting the child” and to “explain the basis for the guardian ad litem’s opposition to the agreed order if the guardian ad litem does not agree to the terms of the proposed order,” they are not \textit{required} to do so. \textit{See Fam. C. § 107.002 (c)(5),(6)}.}

Any decision not to approve an agreed settlement must be carefully considered by the court-appointed lawyer. If the named parties enter an agreement that would be detrimental to the child, the lawyer should not approve of the agreement, should initiate further settlement negotiations and set the case for trial.\footnote{The court-appointed lawyer for the child should set the case for trial so the case will not languish; cases that are set for trial usually settle. All court-appointed lawyers for children are authorized to set the case for trial, particularly if they have named the child as a party to the lawsuit and requested affirmative relief in the child’s name. \textit{See Fam. C. § 107.003 (I)(D) (which provides that both attorneys ad litem and amicus attorneys shall “participate in the conduct of the litigation to the same extent as an attorney for a party”).}}\footnote{ABA \textit{Custody Standards, supra, note 36, at Comment to V-F (states that as “a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement if it were aware of certain facts, the Best Interests Attorney should bring those facts to the court’s attention. This should not be done by ex parte communication. The Best Interest Attorney should ordinarily discuss his or her concerns with the parties and counsel in an attempt to change the settlement, before involving the judge”).}} For example, the attorney should carefully scrutinize an agreement that a parent terminate his or her parental rights in order to avoid paying child support or to appease a parent who wants to exclude the other parent from the child’s life.\footnote{While guardians ad litem are also authorized to “review and sign or decline to sign, an agreed order affecting the child” and to “explain the basis for the guardian ad litem’s opposition to the agreed order if the guardian ad litem does not agree to the terms of the proposed order,” they are not \textit{required} to do so. \textit{See Fam. C. § 107.002 (c)(5),(6)}.} However, the lawyer should also bear in mind that settlement of the dispute in a non-adversarial manner is usually best for the subject child. The lawyer should therefore approve agreed settlements, unless the attorney determines that the agreement is likely to harm the child.

The lawyer should be careful that he or she is not allowing his or her personal opinions or biases influence the decision about whether to approve of the agreement. For example, a lawyer may believe that alternating week-to-week access schedules are not good for children. The lawyer should take care to ensure that his or her opinion about this issue does not affect the lawyer’s decision about whether to approve of a settlement for the child to live with each parent during alternate weeks. Rather, any decision not to approve an agreed settlement should be based upon the particular facts involved in a specific case. The effect of the child’s opinion about whether to approve of the settlement depends upon whether...
the lawyer has been appointed as an amicus attorney, as an attorney ad litem or in the dual role, and is discussed below.

Illustration (Divorce With Suit Affecting Parent-Child Relationship). Mother and Father enter into an agreement that their two children will spend alternating weeks with each parent (who live a forty-five minutes drive from each other). The children attend school within walking distance from the Father’s home. However, because of the work schedules of the parents (Father must leave for work at 7:00 A.M. and returns at 6:00 P.M., and Mother works out of the home), during the weeks that the children are with their Father, the Mother drives the children to and from school. During the Father’s weeks, the Mother takes the children to her home after school to help them with their homework and the Father picks them up at 6:00 P.M. Because of this schedule (and the distance between the Mother’s home and the children’s school) the children spend approximately ninety minutes in the car per day during the weeks that they are with their Mother, and one hundred and thirty five minutes per day during the weeks they are with their Father.

The lawyer believes that this agreement is not in the children’s best interests, because of the distance between homes and the belief that the child should have a more stable primary residence. The parties separated several years before filing suit for divorce and have operated under this schedule for several years, without negative repercussions.

The older child, who is twelve years of age indicates that the time spent in the car (driving from home to home) is difficult for him, but he realizes he needs to spend time with each parent. The other child, who is seven years old, expresses no opinion about the custodial arrangement, other than a desire to live with his brother. The lawyer schedules a meeting with the parties and their lawyers to discuss the children’s concerns. After serious negotiations about how to address the older child’s need to spend less time in the car, the parties agree that they should stick to the week-to-week schedule, in spite of this child’s concerns. Should the court-appointed lawyer approve of this settlement?

The answer depends, in part, upon whether the lawyer has been appointed as an amicus attorney or as an attorney ad litem. An amicus attorney should consider the child’s views, but is not bound by them. An attorney ad litem, who does not use substituted judgment, must follow the child’s directives about whether to approve of the agreement. In this hypothetical, it is not clear whether the child would approve of the agreement entered between the parents. An attorney ad litem who uses substituted judgment should consider the child’s views, but is not bound by them.
All court-appointed lawyers should take care to ensure that his or her personal opinion about a week-to-week custodial arrangement does not influence his or her decision about whether to approve of the settlement. The lawyer must make a judgment call about whether this particular child is likely to be harmed by the entry of such an agreed settlement.

The following chart summarizes the authority of various court-appointed representatives to approve or disapprove agreement settlements:

Authority to Approve or Disapprove Agreed Settlements 614

1. Amicus Attorney — yes
2. Attorney Ad Litem — to be directed by competent child
3. Attorney Ad Litem who uses substituted judgment — to be directed by separate guardian ad litem, if one has been appointed
4. Dual Role — to be directed by competent child
5. Dual Role—when attorney uses substituted judgment — yes

[5]—Step 4: Determine Whether Child Should be Directly Involved in Conciliatory Phase

At the outset of the representation, the court-appointed attorney should begin to determine whether a child who wants to be directly included in the process should be involved during the conciliatory phase of the litigation. Although subject children have traditionally been excluded from this phase of the lawsuit, the profession has recently started to recognize the potential for children to be benefited by such participation. Because the conciliatory phase is generally less contentious than the adversarial phase, the child may be more apt to benefit from participating in limited portions of this phase of the lawsuit. The court-appointed lawyer should therefore consider this alternative for involving the child, particularly if the child expresses a desire to be directly involved. However, caution should be exercised to reduce the possibility that the child will be harmed by such involvement. As is always the case, the lawyer should take steps to ensure that the child is not brought into the lawsuit for the purpose of promoting one of the parties’ positions.

When deciding whether to directly involve the child in this phase of the litigation, all parties and the mediator or facilitator should be consulted. An opinion by any therapist for the child about whether the child should be so involved should be carefully considered. Upon a decision that the child should participate, care should be taken to ensure that the process is child-focused.

614 Court-appointed lawyers have veto authority over agreed settlements because they are required to “participate in the conduct of the litigation to the same extent as an attorney for a party.” See Fam. C. § 107.003 (1)(D). Non-lawyer guardians ad litem have no such authority.
The court-appointed lawyer should first consider whether the child is likely to be helped by simply sitting down with both parents (with the permission of their lawyers) and the court-appointed lawyer to discuss the child's concerns. Upon a determination that the child should be included in formal mediation, the court-appointed lawyer should participate in choosing the mediator. The facilitator or mediator who conducts the sessions should be trained to deal with children in this type of setting and should be instructed to take a child-centered approach. Whether or not the child's involvement has the potential of helping the child depends largely upon the skill of the individual in charge and the methodology employed to involve the child.615

Possible Benefits of Including Child in Mediation616

By Gay Cox, J.D.

1) Provides the child the opportunity to speak, be heard and gain perspective,
2) Gives the child a voice in the process of determining the child’s future,
3) Lessens or relieve the child’s emotional burden,
4) Fortifies the child for the future, or
5) Helps reduce the emotionally damaging conflict by focusing the parties on the child’s needs and desires, rather than on the parties’ positions.

Possible Negatives of Including Child in Mediation617

By Gay Cox, J.D.

1) Overly empowers the child,
2) Unrealistically raises the child’s expectation that his or her opinion will be determinative, thereby setting the child up for frustration and anger if it is not followed,
3) Causes the child to miss school or other activities, in order to participate,
4) Exposes child to issues that are not appropriate for child to be involved in,
5) Stimulates retaliation against child if child’s position is contrary to one of the parties,

616 Id.
617 Id. Copyright Gay Cox, J.D. Reprinted with author’s permission.
6) Raises the child’s awareness about how callous a party may be to his or her needs,
7) Causes the child to feel guilty because of taking a position, or
8) Upsets an emotionally fragile child.

[6]—Step 5: Identify Appropriate Community and Professional Resources

[a]—Introduction

The attorney should now give thought to whether the family or the child could benefit from extra judicial services, such as therapeutic counseling, educational instruction, anger management classes, health services, or substance abuse treatment programs.\footnote{618} The court-appointed lawyer should become familiar with the community and court services that are available, and develop an informal service plan for the family and child. If informal attempts to refer the family to appropriate services fail, the lawyer should request, by proper motion, that such services be court-ordered.\footnote{619}

[b]—Services for Child

The court-appointed lawyer should seek such services for the child as are necessary to protect the child’s interests and address the child’s needs. These services may include therapeutic counseling, play therapy and support group interaction. Mentoring programs, such as Big Brothers/Big Sisters, recreational opportunities that develop social skills and self-esteem, educational support programs, and volunteer opportunities should be also identified. The lawyer should also identify family members, friends, neighbors, or teachers with whom the child should maintain contact. This is particularly important in child protective cases that may result or have resulted in the child’s removal from the home.\footnote{620}

\footnote{618}ABA Abuse & Neglect Standards, supra, note 6, at B-1 (7) (requires the lawyer to “Identify appropriate family and professional resources for the child”).\footnote{619}ABA Abuse & Neglect Standards, supra, note 6, at C-4 (directs the lawyer to “seek appropriate services (by court order if necessary) to access entitlements, to protect the child’s interests and to implement a service plan”); ABA Abuse & Neglect Standards, supra, note 6, at Comment to C-4 (states that the “lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court”).\footnote{620}ABA Abuse & Neglect Standards, supra, note 6, at Comment to B-1 (7) (states that the lawyer should “identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/Big Sister; recreational opportunities that develop social skills and self esteem; educational support programs; and volunteer opportunities which can enhance a child’s self-esteem”).
While the DFPS/CPS case worker is primarily responsible to investigate and initiate services for the child, the court-appointed lawyer for the child should monitor this activity to ensure that the child’s interests are being adequately protected in this regard.\textsuperscript{621}

Particular attention should be paid to ensure that a child with special needs receives appropriate services to address his or her disabilities. These services may include special education, residential or outpatient psychiatric treatment, and therapeutic foster or group home care. Many services are available for these children. The court-appointed lawyer should become familiar with them and determine how to ensure their availability for the child.\textsuperscript{622} Requests for such services should be made to the child’s conservators, through their lawyers, or by motion to the court.

[c]—Services for Family

In the majority of cases, the most effective way to address the child’s needs is by focusing upon the needs of their parents. In child protective cases, DFPS/CPS will develop a service plan for the family, if the agency determines that such a plan is necessary. The court-appointed lawyer should work with each member of the family (upon the consent of each party’s lawyer) to assist them in implementing this plan and with the caseworker to incorporate other services into the plan, as necessary. The lawyer should also refer the family to appropriate agencies for housing, supplemental security income or other forms of material assistance, if necessary.

In custody cases, the court-appointed lawyer should develop his or her own informal service plan for the family. In high conflict cases, the family should be referred to parenting classes and counseling services to assist them in learning to work together for their children’s benefit. Substance abuse, anger management and other counseling services should be incorporated into this plan, as necessary.\textsuperscript{623} As is always the case, the court-appointed lawyer must obtain consent from each party’s lawyer before dealing directly with that party. Absent agreement of the parties (through their lawyers), the court-appointed attorney should

\textsuperscript{621} Id.

\textsuperscript{622} ABA Abuse & Neglect Standards, supra, note 6, at C-5 (states that the lawyer “should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities [of the child]. These services may include, but should not be limited to: (1) Special education and related services; (2) Supplemental security income (SSI) to help support needed services; (3) Therapeutic foster or group home care; and (4) Residential/in-patient and out-patient psychiatric treatment”).

\textsuperscript{623} ABA Abuse & Neglect Standards, supra, note 6, at Comment to B-1 (7) (states that the lawyer should “identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law”).
file appropriate pleadings requesting that the court order that the parties participate in such services.

[d]—Co-Parenting Education

Co-parenting education is generally advisable for parents involved in custody litigation. These programs have received high marks from families, regardless of whether the situation is highly contentious. A major goal of this type of education is to encourage the parties to view the situation in terms of "how are we going to co-parent this child," rather than "how can I prove that I am the better parent." The parties should be required to attend such a program at the outset of the litigation, in an attempt to diffuse emotions before the parties become more alienated by the process.

[e]—Therapeutic Services

The court-appointed lawyer should consider whether the parties or the child should be sent to a mental health professional for therapeutic counseling. Parties to this type of litigation often are in need of outside assistance to help them cope with the situation and deal with their underlying issues. In custody cases, where the parents must work together after the lawsuit is resolved, family counseling may assist the parties learn to put their child's needs first. A child who has been traumatized or alienated from a parent may also benefit from therapy. Absent an agreement, the court-appointed lawyer should request that such services be ordered, upon proper motion to the court.624

§ 5.14 Adversarial Phase

[1]—Introduction

Traditional notions of zealous advocacy focus upon this phase of the lawsuit, which is aimed towards preparing for and participating in trial. Although the expense to the parties, both emotionally and financially, is great at this stage, it is sometimes necessary for the case to proceed to trial. When this is the case, the court-appointed lawyer should take an active and vigorous role in advocating for the child throughout this portion of the case.625

See ABA Custody Standards, supra, note 36, at III-F and ABA Custody Standards, supra, note 36, at Comment to III-F.

ABA Abuse & Neglect Standards, supra, note 6, at Comment to B-1 (states that the lawyer "should not merely be a fact-finder, but rather, should zealously advocate a position on behalf of the child." It is important for the court-appointed lawyer to maintain an air of objectivity, while advocating a position for the child. It is particularly important to maintain this delicate balance during the adversarial phase of the lawsuit. A lawyer who appears to be biased towards one party in the lawsuit is not able to effectively advocate for the child).
§ 5.23[3][b]  
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[b]—What to Tell Child

It is imperative that the child whose position is in conflict with the lawyer’s determination of what is in the child’s best interests is not made to feel that his or her concerns and views have been ignored. This will take some thought and commitment on the part of the lawyer. Recall that the amicus attorney is statutorily required to explain to the child that his or her role is to advocate what he or she determines to be in the child’s best interests. The lawyer should make it clear to the child that the child’s concerns and desires were seriously considered when the lawyer made his or her assessment of what was in the child’s best interests. The amicus attorney is also required to present the child’s position to the court, if the child so desires, and to consider the impact upon the child when deciding how to make this presentation. This should be discussed with the child.

§ 5.24 Conciliatory Phase

[1]—Introduction

During this phase of the lawsuit, the amicus attorney should follow the steps set out in Part (a), which deals with duties of all court-appointed lawyers for children. As is always the case, it is extremely important that the amicus attorney encourage that the conciliatory phase of the lawsuit be commenced as soon as possible.

[2]—Step 1: Determine Whether to Approve Agreed Settlement

Although the amicus attorney does not represent a party to the lawsuit, he or she is required to review and sign, or decline to sign, any agreed order affecting the child. The attorney is also required to explain the basis for his or her opposition to the entry of an agreed order. As such, any agreed settlement should be presented to the amicus attorney before it is presented to the court for entry. If an agreed order is signed by the court without the amicus attorney’s knowledge or approval, and the amicus attorney determines that the settlement is sufficiently detrimental to the child’s welfare that it should be set aside, he

700 Fam. C. § 107.005(b)(3) (provides that the amicus attorney shall “explain the role of the amicus attorney to the child”).

701 See Fam. C. § 107.005(b)(2) and Fam. C. § 107.005(b)(3).

702 Fam. C. § 107.005(b)(4) (provides that the amicus attorney shall “review and sign, or decline to sign, an agreed order affecting the child”).

703 Fam. C. § 107.005(b)(5) (provides that the amicus attorney shall “explain the basis for [his or her] opposition to the agreed order if the amicus attorney does not agree to the terms of the proposed order”).
or she should file appropriate pleadings with the court requesting that a new trial be granted with regard to the issues involving the child.

Upon presentation of an agreed order to the amicus attorney, the lawyer should determine whether or not to approve of the settlement, and notify the court (in writing) of his or her determination. If the lawyer determines not to approve of the settlement, he or she should set the matter for formal hearing, with Notice to all parties, for the court to determine whether the agreement should be entered. If the court determines that the agreement should not be entered, the amicus attorney should initiate additional settlement negotiations and request that the case be set for trial.

As is the case with all court-appointed lawyers for children, the amicus attorney should realize that settlement of the lawsuit in a non-adversarial manner is usually in the child best interests. Extreme caution should therefore be used before deciding to decline to sign an agreement. While an amicus attorney should consider the child’s views when determining whether to approve a settlement agreed to by the named parties, the lawyer is not bound by those views.

704 AAML Custody Standards, supra, note 12, at Comment to 2.11 (states that “[i]n those exceptional cases, counsel should alert the court before allowing the settlement to be completed. The manner of alerting the court may vary. However, ex parte communication is inappropriate. Ordinarily, counsel should file a formal pleading with Notice to all parties”).

705 This should be done upon proper motion, with Notice to all parties; the facts should be presented through evidence or by argument based upon the evidence. ABA Custody Standards, supra, note 36, at V-F (2) (states that best interests attorneys “should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement”); ABA Custody Standards, supra, note 36, at Comment to V-F (states that as “a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement if it were aware of certain facts, the Best Interests Attorney should bring those facts to the court’s attention. This should not be done by ex parte communication. The Best Interest Attorney should ordinarily discuss his or her concerns with the parties and counsel in an attempt to change the settlement, before involving the judge”); AAML Custody Standards, supra, note 12, at 2.11 (states that in exceptional cases, where counsel for an impaired child “reasonably believes that the court would not approve the settlement if it were aware of certain facts, counsel should bring those facts to the court’s attention”); AAML Custody Standards, supra, note 12, at Comment to 2.11 (states that “[i]n those exceptional cases, counsel should alert the court before allowing the settlement to be completed. The manner of alerting the court may vary. However, ex parte communication is inappropriate. Ordinarily, counsel should file a formal pleading with Notice to all parties”).

706 The court-appointed lawyer should set the case for trial so the case will not languish; cases that are set for trial usually settle.

707 See ABA Custody Standards, supra, note 36, at Comment to V-F.

708 See Fam. C. § 107.005(a).
impact upon the child in formulating the attorney ad litem’s presentation of the child’s expressed objectives of representation to the court.\footnote{See Fam. C. § 107.004 (5).}

The importance of giving the child a voice is no less true when the attorney ad litem determines that substituted judgment should be used on behalf of the child. While attorneys ad litem are only statutorily required to represent and follow a competent child’s expressed objectives of representation, the lawyer should nevertheless ensure that the views of a child who is not competent are made known to the court, if the child so desires.\footnote{AAML Custody Standards, supra, note 12, at 2.13(b) (states that “[u]nless the child requests otherwise, counsel [for an impaired child] should take appropriate steps to make the court aware of the child’s preferences”).}

The AAML Custody Standards state that, unless the child requests otherwise, counsel for an impaired client should take appropriate steps to make the court aware of the child’s preferences.\footnote{Id.}

The comment adds that impaired children have the same right as other children to have their views made known to the court, if they so desire.\footnote{AAML Custody Standards, supra, note 12, at Comment to 2.13(b) (states that “counsel should ensure that the court is made aware of the child’s wishes. In virtually all jurisdictions, courts may or must take into account the preferences of children as one factor among many in determining the outcome. Judges have discretion to decide how much weight to give the children’s preferences, based on such factors as age, maturity, and the appearance of undue influence. However, under current substantive law, impaired children have the same right as all other children to make their views known to the judge”).}

\section{§ 5.34 Conciliatory Phase}

\subsection{[1]—Introduction}

During this phase of the lawsuit, the attorney ad litem should follow the steps set out in Part (a), which deals with duties of all court-appointed lawyers for children. As is always the case, it is extremely important that the lawyer encourage that the conciliatory phase of the lawsuit be commenced as soon as possible.

\subsection{[2]—Step 1: Determine Whether to Approve Agreed Settlement}

\subsubsection{[a]—Overview}

It is not completely clear whether the attorney ad litem is required to sign off on an agreed settlement that is reached between the parties to the lawsuit. Although the child is not a named party to the lawsuit, he or she is the “real party interest” and the attorney ad litem is required to “participate in the conduct
of the litigation to the same extent as an attorney for a party." It is therefore arguable that the attorney ad litem must approve any agreement that is reached between the named parties before such agreement is presented to the court for entry. However, to be certain that such agreement is not subject to court entry absent the consent of the attorney ad litem, the lawyer should file an answer and counter-claim for the child. This pleading should name the child as a party to the lawsuit, and state that he or she is entitled to Notice prior to the entry of any agreed order regarding the child. If an agreement is entered by the court without the approval of the attorney ad litem, and the attorney ad litem determines that the agreement should not have been entered, he or she should file appropriate pleadings with the court requesting that a new trial be granted with regard to issues concerning the child.

The lawyer must follow the directions of a competent child with regard to the entry of any agreed settlement that is reached. That is, an attorney ad litem who represents a competent child whose objectives of representation do not present a threat of serious injury to the child is obligated to be directed by the child with regard to the entry of any agreed settlement. As is always the case, the lawyer should advise and counsel the child if the lawyer does not agree with the child’s opinion about whether an agreement should be approved. If the child does not approve of the agreement, the attorney ad litem should notify the court, in writing, of said disapproval, initiate further settlement negotiations and set the case for trial.

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786 See C. v. C., 534 S.W.2d 359, 361 (Tex. App.—Dallas 1976, reh. denied) (stating that “[i]n an action involving custody, the children are the real parties in interest. This is because the controlling factor is the best interests of the children”); see also Fam. C. § 107.003(1)(D).

787 For years, lawyers at the Children’s Rights Clinic at the University of Texas School of Law have filed answers on behalf of their child clients, requested affirmative relief and set the case for trial. The Texas Family Code now authorizes such conduct. See Fam. C. § 107.003(1)(D). Several of the national standards specifically authorize court-appointed lawyers for children to request affirmative relief for the child. See ABA Abuse & Neglect Standards, Id., at C-3 (states that the lawyer “should file petitions, motions, responses or objections as necessary to represent the child”); ABA Custody Standards, supra, note 36, at III-F (8) (directs the lawyer to “file or make petitions, motions, responses or objections when necessary”).

788 Fam. C. § 107.001(2) (defines an attorney ad litems “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation”); ABA Abuse & Neglect Standards, supra, note 6, at Comment to C-6 (states that “[a]s developmentally appropriate, the child’s attorney should consult the child prior to any settlement becoming binding”).

789 See Fam. C. § 107.008(a).

790 The court-appointed lawyer should set the case for trial so that the case will not languish; cases that are set for trial usually settle.
[b]—Substituted Judgment

An attorney ad litem who uses substituted judgment on behalf of the child is not bound by the child’s directions about whether to enter into an agreed settlement.\(^791\) Much as a guardian ad litem in a personal injury case substitutes his or her own judgment about whether to approve an agreed settlement that involves a child, the attorney ad litem (rather than the child) has the authority to determine whether to approve any agreement that has been entered between the parties. If a separate guardian ad litem has been appointed (in suit filed by DFPS/CPS), the lawyer who uses substituted judgment is bound by the guardian ad litem’s opinion about whether an agreement should be entered.\(^792\) The guardian ad litem is authorized to “review and sign, or decline to sign, an agreed order affecting the child” and “explain the basis for the guardian ad litem’s opposition that the guardian ad litem to the agreed order.”\(^793\) The attorney ad litem is also required to “present the child’s objectives of representation to the court based on the guardian ad litem’s opinion regarding the best interests of the child.”\(^794\)

As is the case with all court-appointed lawyers for children, the attorney ad litem should realize that settlement of the lawsuit in a non-adversarial manner is usually in the child best interests. Extreme caution should therefore be used before deciding to decline to sign an agreement.\(^795\) An attorney ad litem who represents uses substituted judgment and determines not to approve of an agreed settlement should bring facts to the attention of the court which would influence whether the court were to approve of the agreement.\(^796\)

\(^791\) See Fam. C. § 107.008(b).
\(^792\) See Fam. C. § 107.008(c).

\(^793\) The non-lawyer guardian ad litem is not a party to the suit and is not authorized to participate in the conduct of the litigation. The guardian ad litem is authorized (but not required) to “review and sign, or decline to sign, an agreed order affecting the child; and . . . explain the basis for the guardian ad litem’s opposition to the agreed order.” See Fam. C. § 107.002. The amicus attorney is required to “review and sign, or decline to sign, an agreed order affecting the child; and . . . explain the basis for the guardian ad litem’s opposition to the agreed order.” See Fam. C. § 107.005.

\(^794\) See Fam. C. § 107.008(c).

\(^795\) Id.

\(^796\) AAML Custody Standards, supra, note 12, at 2.11 (states that in exceptional cases, where counsel for an impaired child “reasonably believes that the court would not approve the settlement if it were aware of certain facts, counsel should bring those facts to the court’s attention”); ABA Custody Standards, supra, note 36, at V-F (2) (states that best interests attorneys “should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement”); ABA Custody Standards, supra, note 36, at Comment to V-F (states that as “a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement

(Rel.49A—7/04 Pub.705)

should take special care not to reveal a competent child’s confidences in this situation. 797 The attorney who decides, after careful consideration, not to approve of an agreed settlement should initiate further settlement discussions and set the case for trial. 798 In this situation (as when representing a competent child) the attorney ad litem should file appropriate pleadings requesting that the court grant a new trial with regard to issues concerning the child, if an order is entered without the attorney’s consent and the lawyer determines that the agreed order should not have been entered.

§ 5.35 Adversarial Phase

[1]—Step 1: Present Evidence to Support Position Advocated

Needless to say, when the attorney ad litem is to be child-directed, he or she should present evidence that supports the child’s position. However, when an attorney ad litem decides to use substituted judgment to advocate what the attorney determines will serve the best interests of the child, he or she has the added duty of presenting the fact-finder has sufficient information to render a decision that is in the child’s best interests. 799 While the attorney ad litem should if it were aware of certain facts, the Best Interests Attorney should bring those facts to the court’s attention. This should not be done by ex parte communication. The Best Interest Attorney should ordinarily discuss his or her concerns with the parties and counsel in an attempt to change the settlement, before involving the judge”). AAML Custody Standards, supra, note 12, at 2.11 (states that in exceptional cases, where counsel for an impaired child “reasonably believes that the court would not approve the settlement if it were aware of certain facts, counsel should bring those facts to the court’s attention”). This should be done upon proper motion, with Notice to all parties; these facts should be presented to the court through evidence or by argument based upon the evidence.

797 T. Disc. R. Prof. Conduct, supra, note 10, at Comment 17 to 1.05 (provides that in “some situations, Rule 1.02 (g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. . . . [T]he lawyer is authorized . . . to reveal such [confidential] information in order to comply with Rule 1.02 (g)”).

798 The court-appointed lawyer should set the case for trial so that the case will not languish; cases that are set for trial usually settle.

799 NACC Revised ABA Abuse & Neglect Standards, supra, note 8 at B-4 (2) (directs the attorney who uses substituted judgment to “formulate and present a position which serves the child’s interests. Such formulation should be accomplished through the use of objective criteria, rather than solely on the life experience or instinct of the attorney. The criteria shall include but not be limited to . . . [d]etermine (sic) the child’s circumstances through a full and efficient investigation”). AAML Custody Standards, supra, note 12, at 2.12 (directs an attorney for an impaired client “to develop facts which the decisionmaker (sic) should consider in deciding the case and which otherwise would not be brought to the decisionmakers (sic) attention); AAML Custody Standards, supra, note 12, at 2.13 (states that at “a trial or hearing to determine custody or visitation, the primary function of counsel for an impaired child is to make the decisionmaker (sic) aware of all facts which the decisionmaker (sic) should consider”).
September 21, 2004

Jane Doe
112 Washington Ave.
Youngstown, OH

Molly Mediator
25 Landon St.
Columbus, OH

Re case number:

Dear Ms. Mediator,

I am serving as Karen’s representative in the MacKenzie case. I wanted to introduce myself to you and tell you a little about my role in this case before the mediation. As you may know, I have been appointed by the court to represent the interests of Karen MacKenzie. I look forward to meeting with you and the MacKenzies at the mediation. I understand that you do/do not want any information from the parties before the mediation. I want to reiterate that I am working to help Karen and her parents come to an agreement that all the parties can support and that will be in Karen’s best interests. I will be making a recommendation to the court if we are unable to reach a settlement in this case. I wish to (or don’t wish to) let the parties know what my recommendation will be at the mediation.

If you need any more information before the session, please do not hesitate to contact me.

Sincerely,

Jane Doe, Attorney ad Litem (Guardian ad Litem) (Child’s Representative)

Enclosure
September 21, 2004

Jane Doe
112 Washington Ave.
Youngstown, OH

Molly Mediator
25 Landon St.
Columbus, OH

Re case number:

Dear Ms. Mediator,

Thank you for speaking to me on the phone about the upcoming MacKenzie mediation. As you know I have been appointed by the court to represent the interests of Karen MacKenzie. I look forward to meeting with you and the MacKenzies at the mediation. I understand that you do not want any information from the parties before the mediation. I appreciate your interest in my role and want to reiterate that I am working to help Karen and her parents come to an agreement that all the parties can support and that will be in Karen's best interests.

If you need any more information before the session, please do not hesitate to contact me.

Sincerely,

Jane Doe, Attorney ad Litem (Guardian ad Litem) (Child's Representative)

Enclosure
Keys to a Successful Mediation

Mediations are funny things. Sometimes the parties scratch, claw, fight, attack, and hammer each other, and move at glacial speed. Other times they quietly proceed, dance a minuet, and reach agreement at warp speed. The funny thing is that mediation works in both situations. There are many reasons why mediations are successful in particular cases and unsuccessful in others. This article explores (a) some of the keys to successful mediations; (b) obstacles to expect along the way; and (c) methods of overcoming these obstacles.

Things That Make Mediations Work

Mediations work because the parties want them to work. Let me repeat: Mediations work because the parties want them to work. Here are some of the things that are important to the success of a mediation.

1. **A Positive State of Mind.** The parties should enter the mediation process with the idea that the case can be settled. If their attitudes are negative and expectations low, the mediation does not have much of a chance to succeed.

2. **Good Faith.** "Good faith" is an amorphous term that means different things to different people. What it essentially means is that the parties enter into the mediation process seriously, with adequate resources to resolve the case, and negotiate in a reasonable manner.

3. **Adequate Authority.** We all know that a mediation cannot work if persons with adequate authority to settle the case are not physically present at the mediation. Frequently, claims representatives appear at a mediation with authority to settle the case within a pre-set limit. Sometimes there is no claims representative or client present. In such cases those present at the mediation must either negotiate within the predetermined limits or communicate by telephone with those with higher authority. This is an unsatisfactory situation. Persons who are not present at mediations can be very difficult to persuade. The "feel" and flow of the
mediation are missing and they tend to remain fixed in their positions. It can be difficult for those present at the mediation to communicate the intangible, especially when the person at the other end of the phone only wants to know, "What’s changed since the mediation began?". Consequently, mediations under such conditions have a lower chance for success than mediations with all the necessary players present.

Defendants are regularly frustrated when the plaintiff fails to appear with sufficient authority. This situation can arise when multiple plaintiffs are involved but only one or two appear at the mediation. Plaintiffs then have exactly the same problem as defendants: persons present can settle only within pre-determined limits. Judges can address these problems by ordering the parties to appear with adequate settlement authority.

It is important to decide exactly what it means to have "adequate authority" to settle a case. Most defendants interpret it to mean authority to settle within the defendant’s evaluation of the case. Most plaintiffs interpret it to mean authority to settle within the plaintiff’s last settlement demand. Although neither of these interpretations is satisfactory, frequently cases are settled in an amount beyond the claims representative’s authority upon the representative and counsel’s recommendations to someone with higher authority.

4. Flexibility. As anyone who has ever participated in a mediation knows, the negotiating environment can change quickly. New facts are brought to your attention, a different "spin" or emphasis is placed on known facts, or new legal arguments are raised. Any of these developments can change your perspective during a mediation. For that reason it is important to be flexible and to adjust your negotiating strategy accordingly. Parties who are inflexible can, oddly enough, be successful but only a lower percentage of the time. Parties who are most often successful are skilled at adjusting and "expecting the unexpected."

5. Patience. It is difficult to mediate when one or both sides is impatient. If they believe the situation is hopeless and want to walk out after one or two proposals are exchanged, they are selling the process short. Parties should recognize that a mediation is still a negotiation and neither side should be expected to collapse. Experience shows that even if the parties are far apart at the outset, that is not usually the end of the story. The story continues when the parties are patient and negotiate step-by-step. When the process is complete, the parties may discover to their surprise that they had evaluated the case in or near the same settlement range. If impatience prevails, however, they never get to make this discovery.

6. Realistic Expectations. Mediations get off to a rocky start when the parties have unrealistic evaluations of the case. If a party insists on a settlement value outside the range of similar verdicts and under similar legal conditions, such a party may be in for a rude awakening during the mediation. Both the mediator and the adversary will attempt to persuade the party that their evaluation is out of line. The lawyer’s task is to
manage the client's expectations concerning the value of their case. Some ineffective lawyers, however, unrealistically inflate their client's expectations and work the client into a frenzy. Obviously, it is impossible to settle a case under these conditions.

7. **Preparation.** On some occasions the expectations are unrealistic because the attorney has misevaluated the case. The misevaluation can occur for many reasons, such as a weak grasp of the facts or unpreparedness. Successful parties are usually well prepared parties. They know their case inside out and can present their positions effectively.

8. **Willingness to Listen and Heed.** Even well prepared parties need to be able to listen to other views, including the mediator's and other parties' views. The worst mistake one can make is to put on blinders and not see the warning signs ahead. The mediation process is designed to provide the information one needs to negotiate on an informed basis. One must heed what one has heard and put the ego aside.

9. **Adopt an Effective Negotiating Strategy.** There are many ways to mediate a case. An important step in the process is to adopt an effective negotiating strategy. This requires an assessment of the likelihood of success at trial, a consideration of the forum and trial judge, the general litigation environment, the presence or absence of insurance coverage disputes, an awareness of the limits of insurance coverage, and many other factors. Such an analysis should result in a better understanding of the "big picture" and a detailed definition of the client's goals and objectives.

10. **Utilize Effective Negotiating Tactics.** Effective negotiating tactics are necessary to implement the strategy. Such tactics can include the following:

    (a) encouraging the other side to move by making bold moves without showing weakness;

    (b) putting on the brakes and signaling the other side that no further big moves will be made until there is some reciprocity;

    (c) "tit for tat" moves, in which one party moves in virtually the same amount as the other party (careful, this can also work against you);

    (d) being resolute and taking a hard line (without being abusive);

    (e) "pointing to a number" by signaling a probable settlement range or number; and
(f) diffusing anger and emotion with expressions of remorse and apologies.

11. Avoid Ineffective Negotiating Tactics. It is equally important to avoid ineffective negotiating tactics such as the following:

(a) threatening or insulting the other side;

(b) overplaying one’s hand by turning a position of strength into abusive conduct;

(c) unreasonably high opening demands;

(d) unreasonably low opening offers;

(e) refusing to respond to a proposal and demanding that the other side bid against themselves; and

(f) making the other lawyer "look bad" in front of the client.

Things that Make Mediations Fail

As you would expect, mediations fail when the conditions which make them work are absent. These conditions include:

1. A Negative State of Mind.

2. Bad Faith.

3. Inadequate Authority.

4. Inflexibility.

5. Unrealistic Expectations.

6. Unpreparedness.

7. Unwillingness to Listen or Heed.


9. Ineffective Negotiating Tactics.

Things the Mediator Can do to Break the Impasse

A temporary impasse is to be expected during the mediation. There are as many ways to overcome an impasse as there are obstacles. The mediator can take a variety of steps to recapture lost momentum. Among these are the following:
1. **Creativity.** Use creative, unconventional "out-of-the-box" thinking to solve problems.

2. **Narrow the Negotiating Range.** Try to close large gaps by encouraging the parties to negotiate within a specific settlement range.

3. **Encourage Bold Steps.** Try to create momentum by encouraging the parties to move in large increments.

4. **Encourage "Baby Steps" if Necessary.** On some occasions, big steps are not a possibility. To avoid the loss of momentum, encourage "baby steps."

5. **Be Brutally Honest.** The mediator is being paid to provide a "reality check." Brutal honesty may be required to bring a party back to the real world. However, there are times when it is counter-productive to push too hard. The mediator must recognize when the parties are under stress and give them the space that they need to function.

6. **Listen to the Parties.** Try to really hear what their position is and respond empathetically.

7. **Suggest a Specific Settlement Amount.** It may be desirable, if all else fails, to suggest a possible settlement number. This can be a relief to parties who cannot close the gap themselves.

8. **Schedule Another Session.** The parties sometimes need a chance to get more information, catch their breath, or regain their sense of balance. Rescheduling is a good option in these circumstances. The mediation should conclude with a game plan for further discussions.

9. **Emphasize the Advantages of Settlement.** The parties sometime need to focus on the primary objective, i.e., to resolve the litigation. By emphasizing the inherent uncertainty of litigation, and the advantages of a prompt resolution, the parties can regain their focus on the objective.

10. **Get Derailed Mediations Back on Track.** Some mediations get off track before they even begin. For example, miscommunication can occur between the attorneys regarding the amount of an outstanding settlement demand or concerning who should make the next move. The mediator must spend whatever time is necessary to get the parties to the starting gate.

**Conclusion**

Mediations work because the parties want them to work. When the parties approach a mediation with adequate preparation and the right frame of mind, they dramatically increase the mediations chance for success.
A
n article written by California attorney and mediator Chip Rose a couple of years ago addressed the situation when mediators suddenly realize that they don’t quite know what to do next. He pro-
vided five questions that were considered “drop-dead questions”—
the ones to ask when there was that awkward pause. Chip
encouraged mediators to identify their own questions or strategies,
since they can “stare uncertainty in the face and know you won’t
blink first.”

Chip’s challenge has been very helpful to me in my mediation prac-
tice, for it has caused me to think through how I mediate, and to
reflect upon techniques that have been of help to the parties in past
mediation sessions. The following points may be helpful to con-
sider when you feel stymied in a mediation—and when you feel that
you’re working harder than the clients are, and that they are look-
ing to you to bail them out.

1. Look for the “hook”
I usually try to find the “hook” that captures their interest and helps
them proceed. Sometimes that hook is focusing upon the best inter-
est of their children, and sometimes it is discussing the dynamics
of simple apologies. A recent newspaper article talked about an his-
toric agreement about water use in Colorado, in which Western Slope
ranchers and Front Range cities finally reached an agree-
ment—and the first point they agreed upon was that the Front
Range urban representatives apologized for the great need for
clean water that had arisen from almost unchecked development. Once
you find the appropriate hook—hopefully the same one for all par-
ties—then you can focus on meeting that interest.

2. Teach the parties how to brainstorm
One of the key elements in brainstorming, of course, is not to auto-
matically reject proposed answers, just because they look silly on
their face. Two examples: in training one group of medical person-
nel in the mountain states, the complaint arose that rural clinics did
n’t have enough doctors to service the intense need of the people
on a regular basis. While brainstorming, someone wistfully pointed
out that “we need docs to fall out of the sky”. I dutifully wrote that on
the whiteboard while others were chuckling—and then stepped
back to ask, “how could this work?” The resolution of the problem
was the realization that many physicians loved to fly and a signifi-
cant number had their own aircraft—and they needed regular flight
time to remain current under FAA regulations. The rural clinics set
up a program where they would get the community to sponsor a “fly-
in clinic” day once a month, in which a rotating group of physicians
would enjoy a bountiful, homemade lunch and dinner, and have their
aircraft fully serviced, in return for them seeing the medical cases
from the community on their one-day trip. Everyone’s interests were
served by this simple arrangement occasioned by a “silly” brain-
storming statement.

The second brainstorming example came in a parenting time
mediation in which both parents were frustrated with the Court-
ordered arrangement for Father to have time with the child every
other weekend. Mother was a teacher and Father was a logger, and
the order was that Father would drive two hours to Mother’s loca-
tion to pick up the child by 5:00 pm on Friday, and Mother would
drive two hours to pick up the child by 6:00 pm Sunday. The prob-
lem was that Father was always late picking up the child on Friday,
since he had to quit his logging job early, drive home to clean up,
then race up to Mother’s. Following up on a brainstorming sugges-
tion, they decided to simply reverse the driving—Mother, as a
teacher, could leave with the child at 3:00 to get to Father’s without
either one taking off work; and Sunday was a non-work day for them
both, so Father had no problem getting the child back to Mother on
time. They had been so focused upon the problem that they had
never considered a fairly obvious resolution.

3. Use of the imaginary child (or other person)

Pioneer mediator John Haynes came up with this powerful inter-
vention in a videotaped roleplay. He reportedly claimed afterward
that he did it spontaneously, and had not thought through how it
would work. John was mediating with two parents who lived in Cal-
ifornia, but both of whom were relocating to opposite ends of the
earth—Mother to Eng (her original home) and Father to Aus-
tralia (where he was considering taking a job). When they seemed
to be coming to an impasse, and were clearly focused upon their
own considerations, John set the stage for them to briefly roleplay
how they would tell their children their decisions. He looked down
to his left and asked the parents to describe their five-year-old son,
whom John imbued with an imaginary life by chatting briefly with
him. Then John asked them to do the same thing with their 8-year-
old daughter, whom John imagined was on his right. He then asked
each parent in turn to talk directly to their (imaginary) children and
tell them why they were choosing to take the course of action that
they had previously expressed. John had to gently remind each par-
ent at times to stay in the roleplay, but the result was that both par-
ents gained a radically new view of how their actions might affect
their children—something they could not fully understand until they
went through the brief roleplay in the mediation.

4. Know when to stop
I have facilitated family law mediations which were hard-fought, but
which were resulting in a number of partial agreements—until at
some point one of the participants begins to dig in their heels over
a position. At that point, I have found that doing something else is
fairly critical, since the prior agreements tend to begin to unravel as
both parents start to focus upon their positions, rather than the inter-
est they previously were meeting. In some cases, I have called for
a caucus with each parent; and in others—particularly where the par-
ties were almost to a full agreement—I have suggested that we take
a break and meet shortly thereafter, when each parent has had
some time to discuss the situation with their attorney (and to cool off).

5. Ask (in caucus) reality-testing questions

Sometimes, participants are so focused upon positions and expecta-
tions of what they have heard from their friends that they should
insist upon, that they begin to spout demands that are fairly dubi-
ous. One such situation actually came up in my law practice, but
could have easily been a part of a mediation. A young man, prob-
ably just 20, came into my office asking me to represent him in his
pending divorce. During the initial conversation, I asked him if there
were children involved, and he replied that he had a four-month-
old boy who was currently living with Mother. Almost immediately,
his said that his friends had all been talking to him, and they all told
him not to accept anything right now less than parenting time with
his son every other weekend, from Friday at 6:00 pm until Sunday
6:00 pm, and every Wednesday evening after school until 7:00 pm
to take their son to dinner. Realizing he had not really thought
this through himself, I gently asked him whether the child was being
toddler, and he said yes. I then asked him how he was going to
handle that over the two-day weekends, and he blanched. Yes, he
could have made arrangements for a bottle; but the very fact that
he was being asked to think through his buddies’ “standard” posi-
tion made him realize that parenting time was a little more involved
than it looked, and he began questioning himself as to whether he
was prepared for that responsibility. At that point he became more
receptive to some brief education on current attachment theory and
suggestions for possible parenting plans for young infants.

Looking for the next five tips? This article will continue in the
spring issue of the AFCC Newsletter.
6. Gently explore for the 800-lb. gorilla you haven’t recognized is in the room
Sometimes the parents know all too well a family issue or secret that they unfortunately forgot to tell you about, and that issue is so controlling their actions that you can’t quite figure out what is happening. If you get the sense that something is being mutually left out, but is wildly important, try calling separate caucuses and confronting each participant in a non-threatening way: “I sense that there’s something you both know, but that you haven’t told me yet, and it seems to be a big consideration in this mediation session. Is there some important fact that I’m missing?” Occasionally, that’s a partner or spouse of one of the participants who is preoccupied in working with any plan that involves the other participant. Or it may be a well-guarded family secret, and you may have to gently remind the participants that the mediation is a confidential procedure, and you can’t be an effective facilitator without knowing the important things that are going on between them.

7. Reflect back on what may be going on psychologically/emotionally
This is fairly dangerous ground, and should not be attempted lightly. Sometimes, however, it becomes fairly obvious that one or both of the participants have strong emotional feelings that are hampering the mediation. An example: in a divorce mediation with attorneys present, Father was oblivious to Mother’s thinly-veiled statements that indicated she didn’t feel he appreciated her abilities as a parent. When I began a caucus with Mother, she talked about Father always criticizing her for having placed a child for adoption before they met. When I met with Father, I asked him what he felt Mother’s strengths were as a parent, and he went on at some length about how good a mother she was to their children. Then I asked him, “Have you ever mentioned that to her?” When he said no, his attorney then asked to talk to him alone about this; and the mediation turned a bit smoother after we returned to the session and Father found an appropriate way to let Mother know she felt she had been doing a great job as a parent.

8. Make sure both sides have something they value that they can say they “won”
Saving face is important in nearly every culture, and sometimes it takes the mediator to reflect upon what each side is gaining that meets their interests for the parties to fully understand that they can hold their head up when they leave the mediation. Fathers many times strongly want to believe that they have been a significant part of their children’s lives, and will continue to be, even though they may have spent much more time working outside the home than in caring for or playing with the children. Colorado changed its statutes in 1999 to rename “custody” as “parental responsibility” and to allow for the division between parents of various major classes of decision-making for the child (e.g., religious, educational or medical major decisions). I try to suggest, when appropriate, that perhaps each parent’s individual expertise may play a part in their division of decision-making responsibility. I then give the example of a mother who is a physician and a father who is a teacher—perhaps it would be appropriate for Mother to have primary responsibility as to medical decisions, for Father to be primary as to educational decisions, and both of them to share the responsibility as to religious decisions (again, stressing that only major decisions are at stake here). This provides more options, based upon each parent’s abilities and expertise, and seems to allow the parents to begin to look more critically at how they can appropriately share in major choices in their children’s lives, rather than the parents seeing legal custody as only a win/lose designation.

9. Looking at realistic time lines, including how long their decision must last
Sometimes, participants try to fashion a decision that either looks too far into the future, or doesn’t consider it; with the result that their decision—while perhaps appropriate now—may not be later on. The other aspect of this too-limited thinking is that their decision may be premature for the many factors that are actually unknown at the time. Where this appears to happen most is in family law mediations where the parents are working out a parenting time plan for an infant. What needs to be done is not a formulaic determination of, say, “brief and frequent” parenting times forever—which might possibly be appropriate right now—but a slightly broader understanding of how things would and could change as the child grows older. What I have found to be helpful is to encourage the participants to focus their decisions on a relatively short time line (perhaps this school year, or until the child turns a certain age), and then ask if they are willing to commit to returning to mediation when more data become available.

A variation of the above is to remind the parties how long their decision must last. Sometimes, parents get bogged down with intricate parenting time schedules, totally forgetting that their child is entering her/his teen years and will likely want to spend more time with his/her friends at the mall than with either parent. In one mediation, I was able to quickly refocus two parents on reality when I reminded them that they only had to deal with planning one more summer before their daughter turned 18, when she could legally decide on her own where she wanted to be all of the following summers.

10. Recognize the “negative dance of intimacy,” and concentrate upon the most important issues at hand
I once mediated a parenting time issue with a couple who were highly vocal about their absolute distaste for each other. They sniped and verbally exploded at each other from the very first moment they met in the hallway before the mediation. Their need to negatively interact with each other became more apparent when I had finished the mediation—during which they had finally agreed to a reasonable parenting time approach. I tried to conclude the session by saying to them that I was glad to have met them, and that I wished them and their children good luck in the future. They both suddenly looked horror-stricken—then Mother brought up, out of the blue, a charge she had about Father unfairly keeping some of her property.

They were at it again, verbally sparring and denouncing each other as totally unfit to inhabit the planet, until they finally came to a reasonable agreement about the minor piece of property. I again told them they had done well in the mediation and wished them good luck in the future. Of course, this time their horsetalks were shorter until Father opened his bomb bay doors upon Mother for some relatively minor reason. Suddenly realizing what was going on, when we finished successfully mediating this minor crisis I changed my paraling words to indicate that I was very ready to help them mediate other things in the future, and that I had another scheduled appointment now, but that they should call me to set up another session. They never did call back for another probably unneeded session, but at least I succeeded in getting them out of the office—yelling at each other about inconsequential things all the way down the hallway.

PRACTICE TIPS
What to Do Next in Mediation: Ten Tips to Consider—Part II
by Robert M. Smith, M.Div., J.D., Colorado Judicial Branch Ft. Collins, CO

Editor’s note: In the last edition of the AFCC Newsletter, Robert Smith shared the first five of his ten practice tips for mediators in Part I of the article below. Since then, the AFCC Newsletter has had several emails asking for the second five tips. Below is Part II of “What to do Next in Mediation.” If you missed Part I and are looking for the first five tips, AFCC members can access past newsletter issues on the member section of the AFCC website at www.afccnet.org.

www.afccnet.org
THE CHILD INTERVIEW IN MEDIATION

These materials were prepared by MFCS mediators Kathleen Borland, Jan Lain, Cookie Levitz, and others for presentations from 1995-1999.

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The Child Interview in Mediation

Beginning the Child Interview

[The following is an example of what might be said when Mom, Dad, Child, and Mediator are all present in the Mediator's office. (It is phrased in a manner appropriate for a younger child).]

"Did you know that you're very popular? Your Mom and Dad both like to spend time with you so they are working together to make a good plan as to when each of them will be with you. You are so important in all of this planning that I wanted to meet you. We will talk alone for a while and if you don't want to talk or answer any questions that's okay.

When we talk together, you have privacy. Do you know what that means? It means that what you say to me stays here in the office. I'm not going to tell Mom and Dad what we talked about, and they're not going to ask you. Right, Mom and Dad? If you want to tell them, that's okay. Of course, if you tell me something that makes me feel you are in danger or unsafe, I will have to tell someone so you can be protected.

Sometimes, children want me to give a message to Mom and Dad, and I am always happy to do that. Also, sometimes if a child says something that I think would be helpful for Mom and Dad to know, I will ask your permission to share it with them. If you say no, I respect that and I won't tell them.

Do you have any questions? Okay, Mom and Dad are going to wait in the reception area just down the hall while we talk. When we're through talking, I will meet again with your Mom and Dad while you play."

The Child Interview in Mediation

Interview Questions for Children

[NOTE: All the questions listed in the different sections below are examples. Individual mediators would need, of course, to assess their particular case and determine which, if any, of the questions they would find useful to employ.]

I. GENERAL INFORMATION - The mediator begin by asking some general questions in order to relax and engage the child, as well as learn some pertinent information.

-How old are you?
-What grade are you in?
-Do you like school?
-What do you like about school?
-What don't you like about school?
-How are you doing in school?
-What kind of grades do you get?
-What's your favorite subject?
-What's your least favorite subject?
-Are you involved in any school activities (e.g., sports; clubs)?
-What do you want to do after high school?
-What do you want to be when you grow up?
-Is it easy or hard for you to make friends? Why?
-Do you have a lot of friends?
-Do you have a best friend?
-What do you think they like about you?
-What makes them your best friend?

II. DAILY ROUTINE/STRUCTURE - When the child is more relaxed, the mediator can begin to ask questions that help him/her understand the general structure and routine of the child's physical and emotional environment. This information, which may include a child describing his/her typical school/weekday and typical weekend day, may help the mediator get a clearer understanding of how parents share/divide childrearing responsibilities.

-Where do you live? -Who lives with you?
-What time do you wake up in the morning?
-Who wakes you up?
-Who helps you get dressed? -Who makes your breakfast?
-What time does school start? -How do you get to school?
-What time does school get out?
-How do you get home from school?
-Who's at home when you arrive home after school?
-Who makes your dinner? -Who helps you with your homework?
-What time is bedtime?
-Where do you sleep at Mom's house; at Dad's house?
-Do you have any chores? At which house? What are your chores?
-If you ever get hurt or feel sick, who takes care of you?

Interview Questions for Children continued....

III. The preceding questions and conversation lead to the central focus of the child interview -- how is the child feeling and reacting to the separation/divorce?

- Have you ever heard the word "divorce?" [Asked to a younger child]
- What does it mean?

- Sometimes, children tell me that when their Mom and Dad are getting a divorce that they think it's their fault. Do you ever feel that way? [NOTE: Some mediators like to add the following type of message to the children: "You know that it's not your fault -- you didn't cause the divorce to happen, and you can't make it not happen. It's not your job. Mom and Dad love you and will always be your parents. They are not divorcing you."

- How do you feel about the separation/divorce?
- What's good about the separation/divorce?
- What's bad about the separation/divorce?
- What was it like when Mom and Dad lived together?
- What's your opinion about what's going on in the family now?
- Was Mom and Dad's separation a surprise to you?

- Do you feel mad/sad/glad/scared about the separation/divorce?
- Is it okay to feel mad/sad/glad/scared about the separation/divorce?
- When you are sad about the separation/divorce how do you take care of yourself?
- Who do you usually talk to when you feel upset?
- What are you most worried about?

- What are the differences between Mom's home and Dad's home?
- What do you think life will be like after the divorce?
- How do you imagine your life will be a year from now?
- If you could change anything, what would you make different about the situation now?
- Do you have any friends or classmates whose parents are divorced or separated?
- How has the experience been for them?
- Do you talk with these friends about your feelings?

- Do you ever feel caught in the middle between Mom and Dad?
- Can you tell me when it last felt that way to you?
- Can you tell your Mom and Dad when you feel in the middle?
- Do you ever tell them?
- What do they say when you tell them?
- Is there something that Mom or Dad can do/not do to get you out of the middle? [NOTE: The mediator may want to ask the child if s/he would like the mediator to share this answer with his/her parents.]

Interview Questions with Children continued....

IV. The discussion of the child's feelings about the separation/divorce seems to lead naturally into questions regarding the child's relationship with each parent, his/her siblings, his/her relatives, and the child's perspective of his/her parents' relationship and how it affects him/her.

-When do you spend time with Mom/Dad?
-Do you feel that you see Dad/Mom enough?
-If you had your way, how often would you see Dad? How often would you see Mom?

-What kind of fun things do you do with Dad/Mom?
-What's your favorite thing to do with Dad/Mom?
-If you were describing your Dad/Mom to one of your friends, what would tell them is the nicest/best thing about Dad/Mom?
-If you had a magic wand and could change anything about Dad/Mom, what would you make different?

-Do you talk to Dad/Mom on the phone? -How often?
-Do you get privacy for your phone conversations?

-So you are the oldest/middle/youngest child in the family? How do you like that?
-What's good about it? -What's not so good about it?
-How do you get along with your siblings?
-How do you feel your siblings are dealing with the separation/divorce/conflict/changes in the family?
-Do you all (the siblings) talk with and support one another?

-Who do you trust the most, or feel closest to, in your family?
-Who do you tell your troubles to?
-Which grownup in the world do you feel closest to?
-What person in the world makes you feel good about yourself?
-When I bring my report card home, Dad says ___; Mom says ___?
-Do you feel that Mom and Dad love you?
-What kind of relationship do you have with your extended family (e.g., grandparents; aunts; uncles; cousins)?
-How do you get along with your step/half-siblings?
-How do you feel about your stepfather/stepmother?
-How do you feel about Dad or Mom's girl/boyfriend?

-Do Mom/Dad get mad or fight alot?
-Can kids make parents/grown-ups fight?
-What do you do when Mom and Dad get mad or fight?
-Who gets mad more?

-Does Mom/Dad talk about the other parent to you?
-How does that make you feel?
-Does Mom/Dad ever tell you to give a message to the parent?
-How does that make you feel?
-How can Dad/Mom help to make your life better/easier?

Interview Questions with Children continued....

V. Sometimes children have difficulty identifying or expressing their feelings, needs, and concerns. The following questions may enable the children to safely reveal their wishes and worries.

-What makes you happy?
-What do you like to do for fun?
-If you had a million dollars, what would you do? How would it change your life?
-Describe the happiest day in your life so far?
-Describe the saddest day in your life so far?
-If you had three wishes, what would you wish for? Why?
-Where would you go on an imaginary/ideal trip/vacation, and whom would you bring along?
-I'm writing a book (...or...I'm Oprah) and I'm interviewing you about kids and divorce. What advice would you give to kids when their parents separate or divorce? What advice would you give to their parents?

-Do you have any special hobbies?
-Do you have any pets?
-What's your favorite TV show?
-What's your favorite food?
-If you could be an animal, what would you(Mom/Dad) be, and why?
-Who's your favorite musical group/music?

-Do you like to draw/color?
-Could you draw a picture of your family/home?
-Could you draw a picture of your family doing something together?

-Who do you feel safe with?
-Who protects/takes care of you?
-Who understands you?
-What are the differences between Mom's home and Dad's home?
VI. SPECIAL ISSUE QUESTIONS - Usually the following questions would only be asked if the particular issue has been raised by one or both parents, or by the child.

-What happens when you do something "naughty" at Mom's home or at Dad's home? (Older child: How are you disciplined)?
-When you are punished do you understand why?
-Are you ever spanked?
-Does it happen often?
-Are you spanked with an object, or with a hand?
-Point to where you are spanked/hit?
-Does it hurt alot when it happens?
-How often does it happen?
-You know that it is never okay for someone to hurt you...Who would you tell if someone hurt you (preferably, an adult)?
-It is okay for me to talk about this with Mom and Dad?
-How would you like Mom and Dad to discipline you?

-Are there rules at Mom's home and at Dad's home?
-Are they different or the same?
-Give me an example.
-Do you understand why you have that rule in the house?

-Do you know the difference between good touching and bad touching?
-Sometimes when I talk to kids they tell me that sometimes they've been touched by other people in ways that make them feel uncomfortable -- has that ever happened to you?
-Sometimes you don't even have to be touched to feel uncomfortable with how people look at or talk about your body -- has that ever happened to you?
-Do you ever feel uncomfortable or unsafe with Mom or Dad?
-Have you ever seen Mom or Dad smoke/drink/use alcohol or drugs?

-Do you see a counselor?
-Has it been helpful to you?
-Do you feel that s/he understands you?

-Who takes care of you when Mom or Dad are not at home?

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Interview Questions with Children continued...

VII. CLOSING QUESTIONS

-I've asked you a lot of questions, do you have any questions you want to ask me?
-Is there anything you'd like to tell me that I haven't asked you about so far? Is there anything I should know that will help me work with your Mom and Dad?
-Do you have any messages you'd like me to give to your Mom and Dad?
-Is there anything we've talked about that you don't want me to share with your Mom or Dad?
-Can I have your permission to discuss/share ______ with your Mom and Dad?
-Is there anything you yourself would like to share with your Mom and Dad?

-Thanks so much for sharing with me.
-You've been really helpful.
CHILD-FOCUSED MEDIATION

REFRAMING EXERCISE

Instructions to Audience:

Please frame a Mediator's Response that is positive, neutral, and child-focused. If possible, construct two responses for each of the scenarios below.

Scenario #1

Dad and Mom are still residing in the same home while the divorce is pending. There are two children -- a 7-year old girl and a 5-year old boy. Things have been very tense between Mom and Dad in the last few months. The parents make the following remarks during a mediation session:

Dad: "I don't think that Mom is home enough to get primary residency of the kids. She's been going out every night before the kids go to sleep, and leaves me to take care of them."

Mom: "That's because we're always fighting and arguing in front of the kids. I leave so that they won't have to see or hear us act that way. It gets them upset."

Mediator's Response #1:

Mediator's Response #2:

Scenario #2

Same facts as above. The parents make the following remarks during a mediation session:

Mom: "You know that I have to work every Saturday, so I should get the kids every Sunday otherwise I'm never going to have any recreational time with them. I'll never have enough time to do fun stuff with them, like go to the zoo, movies, park, etc."

Dad: "Absolutely not! If you have the kids every Sunday I'll never have a full weekend with them to do the kind of recreational, fun stuff we like to do."

Mediator's Response #1:

Mediator's Response #2:

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NAME OF PARENT 1
- And -
NAME OF PARENT 2

This PARENTING PLAN is made __________ this day of __________________, 20__
SUPERIOR COURT

PARENT 1

Petitioner

and

PARENT 2

Respondent

PARENTING PLAN

Whereas

1) The parent 1 and parent 2 were married on January 1, 1999 in Chicago, Illinois.

2) The parties have the following children of their marriage, namely Tom, born on January 1, 2000, who currently is 4 years of age and Sally, born on June 1, 2002, who is currently 2 years of age.

3) The parties have lived separate and apart since January 2, 2004.

4) Both parties wish their children to have meaningful and loving relationships with each parent. Each parent recognizes that the children will benefit from a positive relationship with the other parent and that the children will benefit if the parents remain committed to shared parenting.

Now therefore, the parties acknowledge the following:

BASIC AGREEMENT

5) That the children wish to be able to love and to respect both parents, regardless of the present separation or future marital status of either of the parents and that the separation of the parents should not interfere with the rights of the children to love, be loved and to be parented by both parents.

6) That it is essential and in the best interest of the children that the children maintain regular, frequent and healthy contact with both parents.
7) That this agreement provides a clear mechanism to help guide the parents, which will result in a reduction in conflict, which is to the best interest of the children.

8) That there will be personal sacrifices that the parents will each have to make for the children as a result of their decision to separate. For this reason the parties recognize that the children's welfare is paramount and the children's needs will take precedence over the needs of the parents for the purposes of accommodating the best interest of the children.

9) That the children are sensitive to any conflict and bad feelings between the parents.

10) That the parents will not allow their disagreements of the past to influence the current situation.

11) That any form of activity intended to alienate the children from the other parent is harmful to the children. (Referred to as Parental Alienation).

12) That it is in the best interests of the children to have the children spend as much time with family members as possible in preference to care by non family members.

13) That equally sharing of costs of responsibilities relating to the children will remove conflict between parents which is in the best interests of the children.

14) That reducing children care costs and maximizing tax benefits to the parents is in the best interests of the parents as well as the children.

15) That flexibility and co-operation benefits both children and parents.

16) That the use of friendly and non adversarial language will reduce conflicts and feelings of hostility between parents and ensure that the children feel that both parents are of equal importance which will be in the best interest of the children.

DEFINITIONS

17) The following terms in this agreement are defined as following:

   (a) "Residential Parent" refers to the parent with whom the children are residing, according to the schedule set out in this agreement. During the time that one parent assumes the resident parent role the other parent automatically becomes the non-resident parent.

   (b) "Non-Resident Parent" refers to the parent with whom the children are not residing, according to the schedule set out in this agreement. During the time that one parent assumes the non-resident parent role the other parent automatically becomes the resident parent.

   (c) "Children" refers to the children listed in paragraph 2 of this agreement who are the children of the husband and wife.

   (d) "Spring Break" refers to that portion of the calendar year designated as the spring break by the school where the children attend.

   (f) "School night" refers to the night immediately preceding a normally scheduled
school day at the school that a child attends. For children who are not of school age, this will also apply to the night prior to attendance at a regularly scheduled daycare or babysitting facility.

(g) "Christmas break" - refers to that portion of the calendar year that the school where the children attends has designated as the Christmas break.

(h) "Summer" refers to that portion of the calendar year that the school where the children attends has designated as the summer period.

(i) "Long weekend" refers to any weekend where an additional holiday has been added immediately before or after the Saturday and Sunday weekend period as part of a holiday that is generally celebrated by others in the community.

(j) "Major Vacation" – a vacation which is at least three days and two nights in length, and which occurs more than 100 miles from the home of a parent.

(k) "Immediate geographical area" – refers to the geographical area within a 100 mile radius from the residential parent's home.

(l) "Family Support Persons" – refers to those persons who have been requested to assist the family in complying with this parenting responsibility document and to ensure, to the best of their ability, that the best interests of the children are being protected. Their duties to include but not limited to such duties as reviewing complaints by either party, providing third party witness to incidents, providing reports or evidence to other parties or to the court, etc.

(m) “Neutral Advisor” – refers to that person who assists the parents when they are unable to make decisions between themselves. The parents select this person, who offers to help the parties reach a decision in a matter pertaining to their children. The parents may agree or disagree with the result of the neutral advisor.

**CUSTODY/PARENTING**

18) Both parents shall be considered equal and shall have equal custody and parental responsibility for the children.

**RESIDENCY**

19) The children will reside with each of the parents on a full and equal shared residency basis in accordance to the schedules set under this agreement. Neither of the parent’s homes will be designated a primary residence for the purposes of designating one parent the support payer and one the support recipient.

**NAME OF THE CHILDREN**

20) The name of the children will remain as per birth and will not be changed without the written consent of both parents. This provision shall be deemed to be a bar to any such application.
JURISDICTION & MOBILITY

21) For the sake of consistency and predictability, the parents will do their best to maintain the children's current residency and parenting arrangements. Should either parent wish to move to a location which may create a situation in which it may not be practical to maintain an equal shared parenting arrangement, and the children is over the age of 12 years of age, then the children will have a voice in the decision of which parent with whom she or he may wish to reside. Should the children be less than 12 years of age at the time then the residency of the children and parenting arrangements will be determined subject to a full re-assessment of the family situation which is to be done prior to any move of the children.

22) Neither parent shall move the children more than 20 miles away from the local community of without the written consent of the other parent.

WISHES & PREFERENCES OF THE CHILDREN

23) Both parents will respect the age appropriate wishes and preferences of their children in regards to matters, such as, the children's desire to be with certain members of his/her family, privacy on the phone, etc., providing his/her wishes are reasonable and consistent to the best interest of the children.

PARENTING SCHEDULE

24) Except for the circumstances provided for in this agreement, the children shall reside with each of the parents on an equal shared parenting basis in accordance to the parenting schedule attached as "Schedule A". This shall be referred to as the basic parenting schedule and may be changed as circumstances change upon mutual consent of the parties.

EDUCATION

25) The children will begin their education in community. Where they attend high school will be decided by their parents, by agreement and in consultation with the children in question.

CONTACT WITH THE SCHOOL

26) Both parents will have equal and unrestricted access to all matters relating to the children's activities at school, including participation on school outings and activities.

27) Both parents will have the equal right to communicate with the school at any time, independently or jointly in order to discuss matters relating to the children.

28) Both parents will have the equal right to take the children out of school for reasonable reasons such as, but not limited to, having lunch or to attend special events.

DAY CARE

29) Currently the children are in daycare and require babysitting before and after school on
some days. The children shall continue with the current daycare provider.

30) Arrangements for daycare, including changing of day care providers shall be made jointly and with full consultation with the other parent.

DECISION-MAKING

31) The resident parent is responsible for making the routine day to day decisions affecting the children during the time that the children are in his/her care.

32) All significant decisions relating to the children, not already covered in this parenting agreement will be made jointly by the parties.

33) The resident parent may make emergency decisions affecting the children. A reasonable attempt must be made to contact the other parent under such circumstances.

34) Should any parent refuse to grant consent in areas where mutual decision making is called for, then this action shall be considered a violation of the intent and spirit of this parenting plan. Such action shall be considered in any future court action regarding a change in custody deemed as warranting modification to the parenting plan.

TELEPHONE CONTACT BETWEEN PARENTS & CHILDREN

35) The Resident Parent will at all times allow the children to have a reasonable amount of time on the phone at reasonable times with the Non Resident Parent.

36) Both parents will respect the children’s privacy while she is on the phone to the other parent and will not annoy or harass the children while she is talking to the other parent.

ADMINISTRATION OF DRUGS & ANTIBIOTICS TO CHILDREN

37) Neither parent will permit the prescription of any form of antibiotic to the children without the permission of the other parent or unless prescribed by a doctor in an emergency situation.

GENERAL HEALTH & MEDICAL

38) Both parents agree that no major medical procedures or operations will be undertaken in relation to the children without joint parental consent, unless in the case of an emergency requiring immediate treatment, as advised by a legally qualified medical practitioner, and that all reasonable efforts be made to contact the other parent.

MUTUAL AGREEMENT FOR CHANGES

39) The parties may make changes to this parenting responsibility document and have parenting time with the children at any and all times mutually agreed between the parents. Any of the parenting schedules outlined in this agreement may be altered or
changed upon mutual consent of both parents.

40) Should changing family circumstances or more permanent changes to the parenting responsibility document at the request of the parties require that the parenting document be changed or modified on a more permanent basis, then the parties shall revise the parental responsibility document and have the changes witnessed by a third party. Each party will review the agreement no less than once per year for the purposes of updating the documents to reflect current family conditions.

**EXTRA CURRICULAR ACTIVITIES**

41) Both the parents have the right to attend any extra curricular activities that the children may be involved in at any time, whether it is that parent's time to be with the children or not. The Resident Parent will advise the Non Resident Parent of any extra curricular activities that the children may be involved in during parenting time of the Resident Parent so that the Non Resident parent may have the opportunity of attending such activities.

42) Neither parent shall schedule time for activities with the children during the other parent’s normal parenting time without the written consent of the other parent.

43) The parents agree to share the costs of all extra curricular activities that they mutually agree to have the children participate. These activities and their shared costs are indicated in the budget with this agreement.

**PARENTING STYLE & CHILDREN GUIDANCE**

44) Each parent shall respect the other’s parenting style and privacy providing such parenting style does not violate the children’s best interests.

45) Both parents agree to cooperate to ensure that there is cooperation in discipline and that neither one of them will allow the children to leave the other parent’s home in order to avoid facing discipline of the other parent’s home.

46) The parents will not argue in front of the children and will refrain from making any kind of derogatory comments about the other parent while in the presence of the children. The parents are not to pressure the children to take sides in any issues between the parents.

**COMMUNICATION BETWEEN PARENTS**

47) All communication of importance or where a misunderstanding may develop will be by writing, fax, or through a third party.

48) Neither parent shall use the children, either directly or indirectly, to take verbal or written messages between the parents unless the messages should involve the children such as communication about the children’s homework, etc.

49) Each parent will advise the other parent of any scheduled parent-teacher meetings of the school and community functions in which the children is involved, and any
meeting where professionals may be involved. Copies of report cards will be given to the other parent as soon as possible after a report card has been received.

50) Each parent will make best efforts to share appropriate information about the children’s schooling and health as well as information about any important events in the children’s life.

**TRAVEL**

51) Neither parent will take the children out of the country without the written consent of the other party, nor shall such consent not be unreasonably withheld. In the event that either party is taking the children out of the country they shall give a brief itinerary of travel arrangements to the other parent before the trip.

**DOCUMENTS**

52) Neither parent will apply for any passport documents for the children without the prior written consent of the other parent.

53) Each party will provide the other party; upon request, the children’s passport and/or birth certificate upon demand of the other should the other parent be traveling outside of the country with the children.

54) Each parent will provide the other parent with any documents that may be needed from time to time that may be relevant to the welfare of the children including birth certificates, insurance cards, immunization records, etc. Both parents will keep such documents in their possession in a safe and secure place.

55) Each parent will have the right to full access to medical, dental, and educational records and information in relation to the children.

**TRANSPORTATION OF CHILDREN**

56) Both parents will share in transportation of the children. Each parent will drop off the children at the end of their parenting period appropriately dressed for the weather.

**AVOIDANCE OF LEGAL COSTS**

57) The parents will take all reasonable steps to avoid litigation which only hurts both parents and diminishes the ability of the parents to provide for the children’s care now and in the future (such as when the children may need post secondary education)

**CHILDREN SUPPORT**

58) Each parent shall contribute a fair amount to the children as agreed in the budget attached as Appendix “B” to this parenting plan. The money will be deposited in a joint checking account with both parents being allowed to spend their assigned share on the children in accordance to the budget. The parents will mutually decide how to spend any surplus amounts, if any.
59) Should, at any time, the parents feel that the budget needs to be modified to take into account for any factor which relates to the support of the children, such as increases or decreases in costs relating to him/her, income of the parents, the budget can be revised by mutual written consent, properly witnessed.

**DISPUTE RESOLUTION PROCESS**

60) Should disagreements arise about the children or the terms and conditions contained in this parenting responsibility document, the parties shall attempt resolution of the dispute through alternate dispute resolution process before taking action through the courts. The dispute resolution process shall be open.

61) In the event of a dispute, each parent agrees to appoint their own support person to assist them in resolution of any conflict. This person could be anyone outside of the family and may include a professional such as a mediator, counselor or other conflict resolution person. This person will work in cooperation with the other parent’s support person to assist the family resolve their difficulty.

62) The parties agree that they will share the costs of any dispute resolution process on an equal 50/50 basis or on a ratio of their respected incomes, whichever is the higher of the two methods for the person who initiated the conflict resolution process.

63) That both parents will discuss openly with the conflict resolution persons with a view to work out a mutually satisfactory resolution. If after 60 days, the parents are still unable to agree through a conflict resolution process, then either parent can make an application to the court having relevant jurisdiction to resolve the dispute.

64) The conflict resolution person(s) shall file a complete report on the attempt to mediate with the court which will include anything that they consider relevant to the issues in dispute.

**CHILDREN TAX CREDITS**

65) In order to maximize tax advantages, the parent who can apply the children tax credit for the children in a manner that will result in the greatest tax benefits will claim the children on their personal income tax form.

66) Taxes saved as a result of claiming the children on one parent’s personal taxes will be used to benefit the children and will be deposited in the children’s bank account to be kept as savings or to be used at the parties jointly agree. Such monies to be deposited in the children’s account as soon as any tax savings are received.

**CHILDREN’S SAVINGS**

67) Each parent will contribute to the children’s savings plan in accordance to the monthly budget set out in the schedule. Payments will be made monthly - bimonthly - quarterly) by each parent paying directly to the children's account.

68) The savings account will be held jointly in the names of the parties. Neither parent
will have the right to withdraw any of the money without the consent of the other.

**MEDICAL EXPENSES**

69) Each parent will share equally the costs of any necessary medical expenses relating to the children that are not covered as part of any medical plan. Either parent requesting money from the other will provide receipts upon requests for such additional expenses.

70) Should either of the parents receive medical insurance coverage through employment for themselves or other members of their family, and this can be used for the children, then each parent will allow use of their plans at no cost to the other parent. Both parents will release to the other parent copies of any medical insurance plan so that the type and extent of coverage can be determined.

**MISCELLANEOUS**

71) Each parent will share, equally, any reasonable and necessary expenses relating to the well-being and best interest of the children. Expenses for the children that would be in excess of the amount budgeted for in this agreement will require the mutual prior consent of both parents. Once the parents are in agreement to such expenses then the both parents will contribute to the required expenses as soon as possible. If one parent has been given the authority to spend the money and then to be reimbursed by the other parent, then that parent will upon request provide a receipt to confirm the expenditure for the children.

**AGREEMENT TO PREVAIL**

72) This agreement prevails over any matter that is provided for in any subsequent domestic contract between one of the parties and another person.

**SEVERABILITY OF TERMS**

73) Except as otherwise provided, all of the terms of this shared parenting agreement are severable from each other and shall survive the invalidity of any other term of this agreement.

**INDEPENDENT LEGAL ADVICE**

74) Both parents acknowledge that he or she:

(a) Has had spoken to a lawyer and obtained independent legal advice

(b) Has read this agreement in its entirety and has full knowledge of the contents

(c) Understands his or her respective rights and obligations under this agreement, the nature of the agreement, and the consequences of this agreement.

(d) Acknowledges that the terms of this agreement are fair and reasonable
(e) Is entering into this agreement without any undue influence, fraud, or coercion whatsoever, and is signing this agreement voluntarily.

EXECUTION

75) To evidence that both parties are in agreement to the terms and conditions contained in this document, both parties have each signed this document under witness.

Dated this _________ day of ____________, 2000

_________________________________________ ____________________________ (Witness)

Signature of Parent 1

Dated this _________ day of ____________, 2000

_________________________________________ ____________________________ (Witness)

Signature of parent 2
APPENDIX "A"

SHARED PARENTING SCHEDULE
(Based on a 50/50 Parental responsibility)

BASIC PRINCIPLES

1) The following are the basic principals and intentions upon which this parenting schedule has been based.

a) To provide a parenting schedule that is fair for the children and provides the children with as equal as possible parenting time with both parents which is in the best interests of the children.

b) To provide a parenting schedule that provides a reasonably consistent, regular, and predictable schedule for both the children and the parents.

c) To provide a parenting schedule that will minimize the breakup of weekend family parenting periods so that each parent will have the opportunity to fully enjoy weekend outings and family activities with the children without the worry of a conflict due to being unable to drop off the children to other parent's place of residence at a specified time on Sunday evening.

d) To accommodate long holiday weekends which include a Monday without any special changes of schedules as the children will always be with same parent on the Monday as was during the weekend immediately preceding.

e) To accommodate transportation for the children that is convenient, consistent and regular for both the parents and the children.

REGULAR PARENTING PERIODS

2) Each weekly parenting period will commence from the commencement of school Monday morning after the children arrives at school and will continue to the following Monday at the same time unless otherwise provided in this agreement.

SICKNESS OR UNSCHEDULED PARENTING DAY

3) In the event of illness, should the Resident Parent or a member of the Resident Parent's immediate household or family not be able to care for the children, then the non resident parent will be contacted and given the first opportunity to care for the children for that particular day should it be practical for the children to be transported to the home of the non residential parent.

CHRISTMAS PERIOD

4) Odd numbered years - the father will be allowed to parent the children from Christmas eve day at 12:00 p.m. (noon) continuously through Christmas Eve until 12:00 p.m. Christmas Day. If this is the father's regular time as resident parent then no change in schedule is required. The mother will be allowed to parent the children
from Christmas day at 12:00 p.m. to 6:00 p.m. the following day. Whichever parent is the non resident parent for the week when the children is off school will also be given one additional day during the Christmas week that the children are not attending school. Whichever night of the week Christmas falls on, the non-resident parent for the week should have a total of 2 full mid week days with the children.

5) **Even numbered years** - the mother will be allowed to parent the children from Christmas Eve day at 12:00 p.m. (noon) continuously through Christmas Eve until 12:00 p.m. Christmas Day. If this is the mother's regular time as resident parent then no change in schedule is required. The father will be allowed to parent the children from Christmas day at 12:00 p.m. to 8:00 p.m. the following day. Whichever parent is the non resident parent for the week when the children are off school will also be given one additional day during the Christmas week that the children are not attending school.

6) It will be the responsibility of the non-resident parent to pick up the children and drop him back at the assigned times when they are the non resident parent.

**NEW YEARS EVE AND NEW YEARS DAY**

7) **On odd numbered years** - the father will be allowed to parent the children from New Year's Eve day at 12:00 p.m. (noon) continuously through New Years Eve until 2:00 p.m. New Years Day. If this is the father's time as resident parent then no change in schedule is required. The mother will be allowed to parent the children from New Years Day at 2:00 p.m. to 8:00 p.m. the following day.

8) **On even numbered years** – the mother will be allowed to parent the children from New Year's Eve day at 12:00 p.m. (noon) continuously through New Years Eve until 2:00 p.m. New Years Day. If this is the mother's time as resident parent then no change in schedule is required. The father will be allowed to parent the children from New Years Day at 2:00 p.m. to 8:00 p.m. the following day.

9) It will be the responsibility of the non-resident parent to pick up and drop the children off at the assigned times when they are the non-resident parent during that period.

**MAJOR VACATIONS DURING THE CHRISTMAS PERIOD**

10) Should one of the parents wish to take the children on a major vacation which may interfere with the other parent's parenting time, then agreement must be obtained from the other parent in order for this to be allowed.

11) If one parent grants to the other parent the opportunity to take the children away during Christmas Eve or Christmas Day, then the parent who grant permission shall have the right of first refusal the following calendar year to take the children away under equal consideration during the Christmas break period following in the next year.

12) Should one parent request to take the children on a Christmas vacation during the Christmas period and should the other parent refuse such permission, then the parent
making the request to take the children on a vacation may at their option take the children out of school for a one week period immediately before or following the normal Christmas break, for the purposed of taking the children on a vacation, providing the children’s teacher at school feels that this will not interfere with the children’s studies in any significant way.

**SPRING BREAK**

13) **On odd numbered years** - the father will have the option to parent the children for the school March Break if it is not his week to be Residential Parent. If the father exercises his option to have the children, he will exchange the week before or after as make up time, to be decided by the mother.

14) **On even numbered years** – the mother will have the option to parent the children for the school March Break if it is not her week to be Residential Parent. If the mother exercises her option to have the children, she will exchange the week before or after as make up time, to be decided by the father.

**PARENTS’ BIRTHDAYS**

15) The parents agree that the children will be allowed to make his/her own arrangements to be with either of the parents should the parents be celebrating their own birthday. Both parents will respect the children’s wish and will accommodate the children if they wish to see the other parent on their birthday.

**EXTENDED FAMILY MEMBERS BIRTHDAYS & SPECIAL EVENTS**

16) Both parents agree that it is in the best interests of the children to be in the company of family and friends during important events that occur with each family. Both parents agree to mutually rearrange their respective parenting schedules to accommodate special and reasonable events of the other parent, such as but not limited to, visits by out-of-area relatives including grandparents, aunts, uncles, cousins, special friends, funerals, wedding, special family events, etc.

17) Should special events cause one parent to lose some of their regularly scheduled time with the children, then the parent will be given make-up time.

**THANKSGIVING & EASTER**

18) On odd calendar years, father will have the first choice to take the children away during the regular scheduled Easter weekend or part thereof and the mother will have the first choice to take the children on the Thanksgiving weekend or part thereof. If the parent exercising their option to take the children for the weekend is taking that time away from the time that would normally have been the Non Resident Parent, then that parent will forfeit to the other parent the weekend immediately before or following the weekend.

19) On even calendar years the same conditions will apply as the odd calendar years except that the words “father” and “mother” will be reversed.
20) If the parent having the first option of having the children for the whole weekend does not exercise their option to take the children away for the Easter or Thanksgiving weekend, then the normal parenting schedules will be maintained during these periods with the exception that the Non Resident Parent will have one day with the children during the weekend between the hours of 11:00 am and 8:00 p.m. at night. This will allow the Non Resident Parent to visit family with the children for at least one of the days of the weekend. The Resident Parent will first chose which day of the weekend they wish the children to be with them and the Non Resident Parent will get choice of the second day of the weekend. The Non Resident parent will be responsible to pick up the children and drop the children back to the home of the Resident Parent.

HALLOWEEN

21) On odd numbered years - the father will have the children for Halloween. If it is not the father's parenting week then the father will pick up the children at the mother's home or daycare (whichever is earliest) and return the children to the mother's home, bathed, cleaned and ready for bed by 9:00 pm.

22) On even numbered years - the mother will have the children for Halloween. If it is not the mother’s parenting week then the mother will pick up the children at the father's home or daycare (whichever is earliest) and return the children to the father's home, bathed, cleaned and ready for bed by 9:00 pm.

SUMMER HOLIDAYS

23) During the summer the regular alternating weekly schedule will remain in place unless changed to provide for the parents vacation periods.

24) Each parent will be allowed at least one 2 week continuous parenting period of their choice with the children each summer should this be required this for vacation purposes. Each parents will provide at least 45 days notice to the other parent of which period they wish to have the children during their summer vacation period should this be required.

MOTHER'S DAY OR FATHER'S DAY

25) The children will be allowed to spend Mother's Day with the mother. Should Mother's Day fall on a day when the mother would normally be considered the Non Resident Parent, then the mother will be allowed to pick up the children from the father's home as early as 9:00 a.m. (lunch time) and then to return him to the father's home no later than 9:00 p.m. the same night. For Father's day the children will be allowed to spend it with his father under the same terms and conditions as outlined for Mother's day.

THE CHILDREN'S BIRTHDAY

26) The children will celebrate his/her birthday with the parent who is the Residential Parent at the time. The Non-Residential parent at the time of the children's birthday will celebrate the children's birthday either the week before or after the actual date of
the children's birthday. The Non-Residential Parent will be allowed to telephone the children on his/her birthday.

**LONG WEEKENDS**

27) Should a holiday fall on a Monday, which is the normal exchange time, then, the exchange day will be moved ahead to Tuesday at the same time to allow the Monday to be combined with the weekend to make it a long weekend. Make up time will not be provided for long weekends.

**ATTACHMENTS TO THIS SCHEDULE**

28) Appended to this parenting schedule, is a schedule of parenting times up to and including _____________(one year after date), marked as appendix "A-1". This chart is for purposes of determining the basic parenting periods. Mid week, vacation, or other minor variations to the schedule are not shown on this chart but are covered by the specific clauses of the parenting responsibility document.

**END OF SCHEDULE "A"**
DISPUTE RESOLUTION CLAUSE INCLUDING A WISE ELDER CLAUSE

In the event of a dispute about the custody or support of one of their children, Jane and John Doe agree to the following guidelines.

1. Jane and John will attempt to negotiate an agreement on their own.

2. If they are unable to reach an agreement, John and Jane Doe also agree to consult with their mutual friend Sam Smith. Sam Smith has been a friend to John and Jane Doe for many years and John and Jane trust Sam to help them resolve their dispute. Sam will attempt to informally help the parties to reach an agreement.

3. If they are unable to agree after talking with Sam, each parent agrees to appoint their own support person to assist them in the resolution of their conflict. This person could be anyone outside of the family and may include a professional such as a mediator, counselor or other conflict resolution person. This person will work in cooperation with the other parent’s support person to assist the family resolve their difficulty.

4. If John and Jane are still unable to reach an agreement, they agree that they will submit their dispute to mediation. John and Jane have agreed that Sally Jones will serve as their mediator.

5. If they are unable to reach an agreement, John and Jane Doe agree to arbitration. The arbitration will be conducted under the rules and guidelines of the American Arbitration Association.

6. Only after these steps have been taken will Jane or John Doe submit their dispute to a court of law.
CHILDRENS CHECKBOOK

1) Each parent shall contribute a set amount to a checking account for the children's expenses. The amount is set in Appendix "C" to this parenting plan. The money will be deposited in a joint checking account with both parents being allowed to spend their assigned share on the children in accordance to the budget. The parents will mutually decide how to spend any surplus amounts, if any. The parents will both receive statements or be allowed to check the balance of the checkbook on line. If the bank does not allow this access, the parent who receives the statements will copy the statement every month and forward it, by mail, to the other parent within 14 days.

2) If one of the parents feels that the budget needs to be modified due to the changed needs of the child or changed circumstances of one or both parents, the budget may be revised through the mutual written consent of the parties.

3) If the parties cannot agree to the revision, the initial amount will continue to be deposited in the account until there is a new order of the court or mutual agreement.
American Bar Association
Child Custody and Adoption Pro Bono Project

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□ Under 30 □ 31 to 39 □ 40 to 49 □ Over 50

12. Contact information:
□ Name (please print):
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Information about the Child Custody and Adoption Pro Bono Project is available at www.abachildcustodyproiect.org. You may mail this form, fax it to (312) 988-5483 or access and fill out on website.