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## Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings

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# Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings

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## I. INTRODUCTION

Across the nation, lawyers routinely represent children who enter the juvenile court system. Juvenile court systems typically handle two types of cases: delinquency and dependency.<sup>1</sup> Delinquency refers to those cases where children are accused of wrongdoing, which generally means a criminal

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1. Some states have combined juvenile and family court systems. Family courts generally handle divorce, child custody and other domestic law matters, which are not the subject of the article.

offense. Dependency cases involve situations where the child is alleged to be mistreated, i.e. abused or neglected, by parents or guardians.

Lawyers are involved in both types of proceedings most traditionally as representatives of the state. Lawyers represent the state and bring forth charges of criminal conduct against the child in delinquency proceedings. Lawyers represent the state and bring forth allegations of abuse and neglect against the parents or guardians of the child in dependency proceedings. In both types of proceedings, lawyers function as advocates for the state's position. Lawyers are also appointed to represent parents in dependency matters and function as advocates for their clients, by protecting the fundamental rights and interests of parents in these cases where parental rights are directly at issue.

The right to counsel for children in juvenile court proceedings is a relatively recent phenomenon. Prior to 1967, children did not have a right to counsel in juvenile court.<sup>2</sup> In 1967, the U.S. Supreme Court in *In re Gault* held that children in juvenile delinquency proceedings have due process rights, including the right to counsel.<sup>3</sup> A few years later in 1974, Congress enacted the Child Abuse Prevention and Treatment Act ("CAPTA") which mandated that states appoint representatives for children in abuse and neglect proceedings in order to receive federal child abuse prevention and treatment funding.<sup>4</sup> For over four decades, the roles, duties and responsibilities of the child's attorney in juvenile court have been the subject of extensive debate and discussion among scholars, judges and practitioners.<sup>5</sup> Currently, a general consensus exists that in delinquency matters, children have a right to counsel who functions as a legal advocate in the traditional sense.<sup>6</sup> However, the right to counsel and the role of the counsel in dependency proceedings continues to be the subject of debate.<sup>7</sup>

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2. From the late 1800s until the mid-1900s, children had no legal rights in juvenile court proceedings. For a comprehensive discussion of the history of child welfare law, see DONALD N. DUQUETTE & ANN M. HARALAMBIE, *CHILD WELFARE LAW AND PRACTICE*, 163-97 (2d ed. 2010).

3. 387 U.S. 1, 41 (1967).

4. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010).

5. See, e.g., Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM L.Q. 441 (2000); Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869 (2007); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) [hereinafter Guggenheim I]; Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 519 (1963); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1513 (1996); Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745 (2006); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-child Client Relationship*, 26 LOY. U. CHI. L.J. 259 (1995).

6. See Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 838 (2012); Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 105 (2010); Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 260 (2005).

7. See, e.g., Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on*

In delinquency proceedings, where children are charged with committing criminal acts, lawyers are directed to advocate as traditional attorneys, giving voice to their clients' positions and protecting their clients' liberty interests and due process rights.<sup>8</sup> In dependency proceedings, where children are alleged to be the victims of abuse or neglect, lawyers are often instructed to function as guardians ad litem.<sup>9</sup>

Guardians ad litem act as arms of the court and recommend to the court what they determine and believe to be in the best interests of the child.<sup>10</sup> Guardians ad litem are not bound by the ethical obligations of lawyers to follow the client directives and, accordingly, take a paternalistic view of the representation of the child.<sup>11</sup> Paternalism is inherent to the guardian ad litem model of representation. The guardians ad litem interject their own personal views and substitute their judgments for the child in reaching a "best interests" conclusion.<sup>12</sup> Such paternalism is at odds with the traditional advocacy approach to legal representation.<sup>13</sup> The guardian ad litem model, which requires lawyers to represent the best interests of their clients as opposed to their clients' positions, also leads to role confusion and ineffective lawyering.<sup>14</sup>

The expanding recognition that children have procedural and substantive due process rights in juvenile court proceedings has led to the evolution of the juvenile court into a rights-based system. Consequently, counsel for children in dependency proceedings must function as lawyers who protect the legal rights of the child clients and who advocate for the counseled positions of the clients. Lawyers who function as traditional advocates are necessary to protect the due process rights of litigants and to effectuate a rights-based system.<sup>15</sup>

In order for the dependency court to effectively operate as a rights-based court and to protect the fundamental liberty interests and due process rights of children who come before it, the role of counsel must be clear. In dependency proceedings, a child's right to counsel should mean a right to

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*Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer At All?*, 53 ARIZ. L. REV. 381 (2011) [hereinafter Atwood I].

8. Federle, *supra* note 6, at 104.

9. *Id.* at 109.

10. Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 72 (1995).

11. LaShonda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 618–19 (2009).

12. Henning, *supra* note 6, at 288–89, 309; see also Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation For Children Accused of Crime*, 62 MD. L. REV. 288, 295 (2003).

13. Henning, *supra* note 6, at 288–89.

14. Bernabe, *supra* note 6, at 863–64; Robert E. Shepherd & Sharon S. England, "I Know the Child is My Client, But Who Am I?", 64 FORDHAM L. REV. 1917, 1918, 1933–34 (1996).

15. Federle, *supra* note 6, at 110; Ventrell, *supra* note 5, at 269–73.

counsel who functions as an advocate, not as a guardian ad litem.

Part II of this article discusses the background of the juvenile court system by explaining the *parens patriae* paradigm and the development of the right to counsel for children in delinquency and dependency proceedings. Part III evaluates the two different models of representation that have developed in the dependency area, the best-interest/guardian ad litem lawyer and the traditional client-directed lawyer. This part also discusses the general problems with each model. Part IV proposes that the dichotomy between the two models is false and must be overcome in order for children in dependency proceedings to receive effective representation.

## II. BACKGROUND

### A. *The Parens Patriae Paradigm*

Prior to the Supreme Court's decision in *In re Gault*, juvenile courts took an informal approach to resolving cases.<sup>16</sup> A system of *parens patriae*<sup>17</sup> governed the juvenile court, which viewed its role as the protector of the helpless or less fortunate.<sup>18</sup> The court held a paternalistic view of children because of their status as minors and because of societal concerns for child welfare.<sup>19</sup> These first juvenile courts did not recognize children as individuals with rights or liberty interests. Children did not require due process because they had no rights and the state had complete authority to determine how best to care for them.<sup>20</sup> Courts thus dictated the appropriate outcomes for children without regard for the child's rights and without consideration of the child's point of view.<sup>21</sup> Judges relied instead on their own views of what was best for the child and thus maintained a paternalistic approach to the resolution of child cases.<sup>22</sup>

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16. Shepherd & England, *supra* note 14, at 1919.

17. The phrase "*parens patriae*" literally means parent of the country or nation and refers to the role of the state as guardian of persons under disability, including minor children. Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 120 (2009).

18. An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters, ABA JUV. JUST. CTR. (2003) 6 [hereinafter ABA Assessment]; Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1159 (1968).

19. Platt & Friedman, *supra* note 18, at 1176.

20. Ventrell, *supra* note 5, at 260-61.

21. *Id.* at 262.

22. The paternalistic notion that the court knows what is best for the child regardless of the child's point of view stemmed from the antiquated concept that children were property of their parents. From the 1800s until the mid-1900s, parental control over children was absolute. The state did not question parental authority over children nor intervene into family life. Likewise, the state did not provide services to assist parents and did not provide protection to children against abuse or neglect by parents. In the twentieth century, child abuse became the subject of academic discourse and recognized as a significant problem in society. States began to pass child protection laws which provided for state intervention into the family. States also set up juvenile courts to adjudicate minors for the commission of criminal offenses. The original juvenile courts handled both delinquency and dependency cases and operated within the *parens patriae* paradigm. Ventrell, *supra* note 5, at 260-61, 267.

The development of the juvenile court system into a rights-based system began with the U.S. Supreme Court's decision in *In re Gault*.<sup>23</sup> There, the Court held that juveniles in delinquency proceedings have due process rights, the most important of which is the right to counsel.<sup>24</sup> When procedural and substantive due process rights are at issue, lawyers must advocate to protect such rights. Protection of due process rights can only be effectuated by legal advocacy, not by paternalism.<sup>25</sup>

However, the paternalistic origins of the juvenile court system persist as a hallmark of the modern juvenile justice system, undermining the progression of the child's right to counsel and the function of the child's representative.<sup>26</sup> Judges and lawyers continue to view their roles as "protectors of the helpless" and consequently, do not necessarily consider the judgment of the child reliable. Therefore, judges have not been quick to embrace a traditional lawyer-client model of representation for children. Adherence to the paternalistic view of representing children has impeded the progress of the juvenile court into an effective rights-based system, particularly in the area of dependency cases. In delinquency matters, while paternalism continues to be an obstacle to effective legal advocacy, there is at least a recognition that the goal should be legal advocacy as opposed to the *parens patriae* approach to representation.<sup>27</sup> Thus, lawyers who represent children accused of wrongdoing have a clear mandate that they should protect their client's legal rights. However, lawyers who represent children who are subjected to abuse and neglect do not have a clear mandate about the goal of representation.

*B. The Guiding Principles of Best Interests of the Child and Family Preservation in Dependency Proceedings*

Under current juvenile law, the legal principles that govern the operation of the juvenile dependency court are the best interests of the child and family preservation.<sup>28</sup> The best interest standard developed after the *parens patriae* doctrine as one way to resolve disputes in which the state brought an action against a parent it deemed unfit.<sup>29</sup> The best interest of the child is the lens through which the juvenile court views the relationship of the rights and duties existing between parents, children, and the state.<sup>30</sup> For example, the court must determine the child's best interest in any dispositional phase of a

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23. 387 U.S. 1 (1967).

24. *Id.* at 41.

25. Henning, *supra* note 6, at 322; *see also* DUQUETTE & HARALAMBIE, *supra* note 2, at 197.

26. Henning, *supra* note 6, at 322.

27. *Id.*

28. DUQUETTE & HARALAMBIE, *supra* note 2, at 140.

29. Peters, *supra* note 6, at 1514.

30. McLaughlin, *supra* note 17, at 119.

dependency proceeding, when the court decides whether to return the child to the parents or continue custody with the state welfare agency.<sup>31</sup> The court also considers the best interests of the child as part of the substantive standard for a termination of parental rights.<sup>32</sup> Typically, in addition to the statutory factors required for termination of parental rights, the court must determine whether termination would be in the best interests of the child.<sup>33</sup> The best interest standard is a child-centered principle that focuses on the safety and well-being of the child. It directs and guides many court decisions about appropriate outcomes for children.<sup>34</sup>

Family preservation is another guiding principle for juvenile dependency courts and calls for the reunification of families whenever possible.<sup>35</sup> The family preservation doctrine is grounded in the recognition that families should remain together.<sup>36</sup> Federal law requires that state child welfare agencies engage in “reasonable efforts . . . to preserve and reunify families[,]” “to prevent or eliminate the need for removing the child from the child's home[,]” and to make it possible for a child to safely return home.<sup>37</sup> In practice, the state agency is required to show reasonable efforts at several stages of the dependency proceedings. Thus, the child welfare system places great emphasis on family unity and preservation.<sup>38</sup>

The juvenile court judge is charged with making determinations that are in the best interests of the child as well as preserve the family unit. When doing so, the judge relies upon information presented by counsel for the various parties, which includes the state agency, the parents, and the child. The current juvenile court system no longer functions as an informal exchange between the judge and the child. Juvenile court judges function in the same manner as all judges and rely on the lawyers for the parties to bring forth evidence and make arguments. In reaching their decisions, juvenile court judges depend upon adequate representation of all parties: state agencies, parents, and children.<sup>39</sup> As the juvenile dependency court has

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31. Peters, *supra* note 5, at 1514.

32. *Id.*; DUQUETTE & HARALAMBIE, *supra* note 2, at 360–61.

33. *See, e.g.*, CAL. WELF. & INST. CODE ANN. § 366.26 (West 2012); D.C. CODE § 16-2353 (2012); FLA. STAT. ANN. § 39.806 (West 2012); GA. CODE ANN. § 15-11-94 (West 2012); MONT. CODE ANN. § 41-3-609 (2012).

34. DUQUETTE & HARALAMBIE, *supra* note 2, at 194.

35. *Id.* at 195.

36. *Id.*

37. 42 U.S.C. § 671 (2010). Pursuant to 42 U.S.C. § 671, states are eligible for federal funding as long as the state foster care agency makes reasonable efforts to preserve and reunify families. *Id.*

38. Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward A Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 331 (2004).

39. The child's status as a "party" in a dependency case is currently a matter of some debate based upon differences in state law. *See* FIRST STAR & CHILDREN'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 23-131 (3d ed. 2012), available at <http://www.firststar.org/library/report-cards.aspx> [hereinafter FIRST STAR REPORT] (finding that thirty-four states give children full party status in dependency proceedings). However, the premise that the child is a party to the dependency matter is

developed into a rights-based system, there is an increased recognition that the litigants require legal counsel to ensure adequate protection of their rights.<sup>40</sup>

### III. DEVELOPMENT OF THE RIGHT TO COUNSEL

The Supreme Court's landmark decision in *In re Gault* in 1967 began the path toward recognition of children's rights. The Court established due process rights for children in delinquency proceedings, including the right to counsel.<sup>41</sup> A few years later, the passage of CAPTA recognized that children in dependency proceedings also deserved representation. CAPTA, however, brought only the requirement of a guardian ad litem, not necessarily legal counsel, to children involved in those cases. Thus, while children in delinquency proceedings have a constitutionally recognized right to legal counsel and the corresponding right to effective advocacy, children in dependency proceedings do not.<sup>42</sup>

When Congress enacted CAPTA in 1974, states began enacting legislation providing for the appointment of representatives for children in dependency cases. CAPTA provides funding to states to assist with the improvement of their child protective systems.<sup>43</sup> One condition of the receipt of federal funding is the requirement for the appointment of a representative for the child at all stages of legal proceedings.<sup>44</sup> The CAPTA representative must be a guardian ad litem who is to obtain a clear understanding of the situation and needs of the child and to make recommendations to the court concerning the best interests of the child.<sup>45</sup> CAPTA permits the child's guardian ad litem to be an attorney but does not require this.<sup>46</sup> Thus, largely driven by federal mandate, state laws regarding representation in child dependency cases have developed within the guardian ad litem/best interest paradigm.<sup>47</sup>

The CAPTA representative is unlike the child's counsel in delinquency cases. Delinquency matters, pursuant to *In re Gault*, require the appointment

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adopted for purposes of this article.

40. DUQUETTE & HARALAMBIE, *supra* note 2, at 197.

41. *In re Gault*, 387 U.S. at 41.

42. Although scholars continue to debate the effectiveness and adequacy of counsel for children in delinquency proceedings, such issues are not addressed in this article. For purposes of this discussion, it is important to note that children in delinquency proceedings have a constitutional right to counsel via the Supreme Court's decision in *In re Gault*, whereas children in dependency proceedings do not have a legally recognized constitutional right to counsel. Courts have alluded to the right, but the U.S. Supreme Court has not held that children have a right to counsel in protective proceedings and no federal statute provides for such right. Sobie, *supra* note 5, at 757.

43. 42 U.S.C. § 5106a (2010).

44. *Id.*

45. *Id.*

46. *Id.*

47. Sobie, *supra* note 5, at 789.



of independent legal counsel. Dependency cases have no such corresponding federal or constitutional mandate.<sup>48</sup> Thus, representatives for the child in dependency proceedings do not operate within a clearly defined model of representation. In fact, the role of the child's representative in a dependency case, in large part due to the CAPTA requirement, is unclear and inconsistent. CAPTA specifically requires a guardian ad litem, or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, who makes a recommendation to the court about the best interests of the child.<sup>49</sup> CAPTA states that the representative may be an attorney or a court appointed special advocate who has received training appropriate to that role, or both.<sup>50</sup> In order to comply with the mandates of CAPTA, states have enacted laws appointing a representative for the child in dependency proceedings. Some states require the appointment of guardians ad litem, some require attorneys, and some require attorneys who function as guardians ad litem.<sup>51</sup> The result is a lack of uniformity regarding the role of the representative for children in dependency cases across the nation.

#### A. *The Child's Right to Counsel in Delinquency Matters*

As explained earlier, delinquency cases involve juveniles who are alleged to have committed a crime or violation of the law. Under current practices, the process is similar to that for adults accused of committing crimes: arrest, probable cause finding, detention or release, trial and sentencing. The juvenile system differs from the adult system in the lack of a right to jury trials<sup>52</sup> and in the purpose of sentencing.<sup>53</sup> During the punishment phase of the proceedings, juvenile courts are concerned with the rehabilitation of the child and are governed by the best interest of the child standard. In keeping with the notion of rehabilitation, sentencing ranges are limited by law in juvenile courts. In addition, many more options for diverting children away from incarceration or restriction of liberty are available in juvenile courts than in adult courts. The courts look for programs designed to assist the child in modifying his or her behavior.<sup>54</sup> Regardless of the range of dispositions available in juvenile delinquency proceedings, courts have determined that the child's liberty is at stake and therefore, have established a right to counsel to protect that interest.

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48. *Id.* at 757.

49. 45 C.F.R. § 1340.14 (1990).

50. 42 U.S.C. § 5106a (2010).

51. See First Star Report, *supra* note 39.

52. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (denying juveniles the right to jury trials in state delinquency proceedings).

53. AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 36 (2002).

54. *Id.* at 37.

The establishment of due process rights for juveniles in delinquency proceedings began with the *In re Gault* decision. The Court held that because juvenile delinquency proceedings could result in commitment or confinement in a state institution, such proceedings must measure up to the essentials of due process and fair treatment.<sup>55</sup> The due process guarantees afforded to juveniles in delinquency proceedings by the *In re Gault* Court included the right to counsel.<sup>56</sup>

In *In re Gault*, the Court reviewed the history of the juvenile justice system and the traditional rationales for denying procedural safeguards to juveniles.<sup>57</sup> In rejecting these rationales, the Court observed that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure” and concluded that the denial of procedural rights frequently resulted in arbitrariness rather than “careful, compassionate, individualized treatment.”<sup>58</sup>

Since the *In re Gault* decision, juveniles in delinquency proceedings have been afforded procedural due process rights similar to those of adults accused of crimes. Juveniles have the right to notice of charges, the right to counsel, the right to confront and cross-examine witness, the right to a fair and impartial hearing and the right against self-incrimination, among other rights.<sup>59</sup> Juvenile courts around the nation appoint counsel for children accused of committing delinquent acts and conduct proceedings with a degree of formality similar to proceedings for adults accused of crimes.<sup>60</sup>

After the *In re Gault* decision, scholars debated the roles, duties and loyalties of counsel for children in delinquency proceedings.<sup>61</sup> Confusion existed about whether child’s counsel should assume a client-directed adversary role or a best-interest role at the various stages of delinquency proceedings.<sup>62</sup> Ultimately, a consensus evolved among scholars and practitioners that endorsed a client-directed adversarial model where the child’s attorney advocates for the child’s expressed positions.<sup>63</sup>

The debate over the proper role of counsel for children in delinquency has mirrored the debate ensuing in the dependency arena. Paternalism continues to influence the view that lawyers who represent children should represent the children’s best interests because children are either incapable of

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55. *In re Gault*, 387 U.S. at 41.

56. *Id.*

57. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 971–72 (1995).

58. 387 U.S. at 18.

59. *Breed v. Jones*, 421 U.S. 519, 530 (1975) (double jeopardy); *In re Winship*, 397 U.S. 358, 368 (1970) (applying a beyond a reasonable doubt standard of proof).

60. Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 44 No. 3 Crim. Law Bulletin ART 5, 2 (2008).

61. Henning, *supra* note 6, at 250.

62. *Id.*

63. *Id.* at 255.

directing their lawyer or exercise poor judgment.<sup>64</sup> In delinquency cases, however, the move away from paternalism is based in part upon the view of the juvenile justice bar that state intervention is unnecessary and detrimental in the lives of children who are accused of wrongdoing.<sup>65</sup> Children in delinquency proceedings are seen as perpetrators and offenders. Juvenile justice lawyers view their role as defense attorneys who advocate against punitive state intervention.<sup>66</sup> Such a view allows the attorney to advocate for the least intrusive state intervention.<sup>67</sup>

The juvenile delinquency system has also, with the *In re Gault* decision, evolved into a rights-based system.<sup>68</sup> When children have due process rights, adequate and effective representation necessarily requires advocacy as opposed to a paternalistic approach to representation.<sup>69</sup>

Currently, case law and standards of practice support the traditional, client-directed, adversary model of advocacy in delinquency cases and direct attorneys for children in such matters to represent the legal interests of their child clients.<sup>70</sup> These legal interests include all the due process rights that have been afforded to children following the *In re Gault* decision.<sup>71</sup> Because delinquency proceedings are similar to adult criminal proceedings, the juvenile justice system shares the view that state intervention into the life of the accused is intrusive, and should be limited.<sup>72</sup> Lawyers for children in delinquency proceedings understand their role to be that of an advocate against state intervention, and an advocate for the protection of due process rights.<sup>73</sup> In addition, lawyers for delinquent youth follow the directives of their child clients regarding the goals they hope to achieve with representation.<sup>74</sup> The juvenile delinquency court has thus evolved into a rights-based system that relies on effective advocacy by the lawyers who represent the parties to the litigation.<sup>75</sup>

However, the Court in *In re Gault* did not extend due process protections

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64. See Federle, *supra* note 6, at 108.

65. See Appell, *supra* note 7, at 588–91.

66. *Id.*

67. *Id.*; Sobie, *supra* note 5, at 764.

68. Henning, *supra* note 6, at 289.

69. Federle, *supra* note 6, at 110; Henning, *supra* note 6, at 288–92; Elrod, *supra* note 5, at 891–94.

70. Henning, *supra* note 6, at 255–58; Shepherd & England, *supra* note 14, at 1941–42; ABA Assessment, *supra* note 18, at 29; JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, § 3.1 (1980); NAT'L JUVENILE DEFENDER CTR., ROLE OF DEFENSE COUNSEL IN DELINQUENCY COURT (2009). Although the effectiveness of counsel for children in delinquency proceedings remains a subject of debate, the role of counsel in delinquency proceedings is that of a traditional attorney, who advocates for the client's positions, and protects the client's legal interests. This role of counsel for children, at least in theory, is entrenched in delinquency proceedings in the juvenile court system.

71. Henning, *supra* note 6, at 289; Sobie, *supra* note 5, at 764.

72. Shepherd & England, *supra* note 14, at 1941–42.

73. Sobie, *supra* note 5, at 764.

74. ABA Assessment, *supra* note 18, at 29.

75. DUQUETTE & HARALAMBIE, *supra* note 2, at 197.

to juveniles in dependency proceedings.<sup>76</sup> The underlying matter in *In re Gault* was a delinquency case, and the Court limited its decision to such cases. Other situations involving juveniles and the state, such as when children are alleged to be abused or neglected, were not at issue.<sup>77</sup> Thus, the right to counsel and the corresponding directives for the traditional attorney role have not been extended to children who are alleged to be abused or neglected.

### B. *The Child's Right to Counsel in Dependency Matters*

Matters involving juveniles who are mistreated are typically known as dependency cases.<sup>78</sup> Mistreatment includes physical abuse, sexual abuse, emotional abuse, and neglect.<sup>79</sup>

Dependency proceedings are generally civil in nature, though the legal consequences can be quite severe if the case progresses to termination of parental rights. The case is initiated by a state child welfare agency.<sup>80</sup> The state agency initially makes the decision whether to remove the child from the home.<sup>81</sup> The agency then files a complaint, or petition, with the juvenile court.<sup>82</sup> The agency must prove the allegations of abuse or neglect, and provide a basis for the removal of the child from the home.<sup>83</sup> The state is the petitioner, the parents are the respondents, and the child's welfare is the subject of the proceeding.<sup>84</sup> Dependency cases often include several participants, including the child, the state agency, the parents, foster parents, or other caretakers.<sup>85</sup> The purpose of the proceeding is to determine, first, if the child is abused or neglected, and, if so, what action should be taken and where the child should be placed.<sup>86</sup>

A dependency proceeding begins with the report of abuse or neglect to a state agency, which files a complaint with the juvenile court.<sup>87</sup> The first court proceeding is a preliminary hearing where decisions are made about the initial custody of the child, in consideration of the child's safety.<sup>88</sup> Subsequently, the adjudicatory hearing occurs, and the court determines whether the child is an abused or neglected child.<sup>89</sup> If the child is found to be

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76. *In re Gault*, 387 U.S. at 13.

77. *Id.*

78. DUQUETTE & HARALAMBIE, *supra* note 2, at 168.

79. *Id.*

80. *Id.* at 343–61.

81. *Id.*

82. *Id.*

83. *Id.*

84. DUQUETTE & HARALAMBIE, *supra* note 2, 343–61.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

abused or neglected, the court then determines disposition of the child.<sup>90</sup> A disposition concerns custody, the state agency's plan for the child and family, and the needs of the child and family.<sup>91</sup> Following the disposition, review hearings are held periodically while the child is in state custody.<sup>92</sup> Parents must complete their case plan requirements in order to obtain the return of their child.<sup>93</sup> If parents do not complete their case plan, an alternative placement must be found.<sup>94</sup> Ultimately, if parents do not complete their case plan, or the child continues to face abuse or neglect, a case could result in the termination of parental rights. Following termination, a child will either be adopted, or remain in long-term foster care.<sup>95</sup>

Because the Supreme Court in *In re Gault* did not extend due process rights to juveniles in dependency proceedings, the corresponding right to counsel did not extend to juveniles in such proceedings.<sup>96</sup> The Court in *In re Gault* held that due process protections are triggered because juvenile delinquency proceedings can lead to confinement in a state institution.<sup>97</sup> The Court specifically limited its holding to delinquency matters.<sup>98</sup> Although the U.S. Supreme Court has not specifically addressed whether there should be a right to counsel in dependency cases, courts across the country have found a similar due process right in such cases.<sup>99</sup>

For example, in *Kenny A. ex rel. Winn v. Perdue*,<sup>100</sup> the United States District Court for the Northern District of Georgia found a constitutional right to counsel in dependency cases under the Due Process Clause of the Georgia Constitution.<sup>101</sup> Similar to the *In re Gault* decision, the Georgia federal court found that children in dependency proceedings have fundamental liberty interests at stake.<sup>102</sup> Such interests, according to the *Kenny A.* court, include the child's interest in his or her safety, health, well-being, and maintenance of the family unit.<sup>103</sup> In addition, the court found liberty interests at stake in dependency proceedings because children in foster care are in state custody and subject to placement in a variety of foster care placements including institutional facilities.<sup>104</sup>

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90. DUQUETTE & HARALAMBIE, *supra* note 2, 343–61.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *In re Gault*, 387 U.S. at 27.

97. *Id.* at 27–29.

98. *Id.* at 13–14 (limiting its holding to the determination of delinquency as a result of alleged misconduct on the part of the child, and declining to consider the impact of due process upon the “totality of the relationship of the juvenile and the state”).

99. Shepherd & England, *supra* note 14, at 1920–23.

100. 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

101. *Id.* at 1359–60.

102. *Id.* at 1360.

103. *Id.*

104. *Id.*

State courts have similarly found that children in dependency proceedings have a constitutional due process right to counsel.<sup>105</sup>

Despite the trend toward recognition of a due process right to counsel for children in dependency proceedings, the *parens patriae* approach has remained the central component of the juvenile court system in regards to such cases.<sup>106</sup> The juvenile court acts in the role of guardian or parent for purposes of determining appropriate outcomes and placements for mistreated children.<sup>107</sup> The juvenile court typically relies on a guardian ad litem, or an attorney who plays the role of a guardian ad litem, to assist in the decision making process.<sup>108</sup> The guardian ad litem, or attorney guardian ad litem, makes a recommendation to the court about the best interests of the child and the court relies on such recommendations to reach its decisions.<sup>109</sup>

Children in dependency proceedings, unlike children in delinquency proceedings, are seen as helpless victims who are in need of protection against wrongdoers.<sup>110</sup> Lawyers who represent abused and neglected children see their role as protective or prosecutorial, and therefore, paternalistic.<sup>111</sup> Child welfare lawyers are more likely to welcome state intervention as necessary to protect their clients, and thus succumb to the *parens patriae* paradigm.<sup>112</sup> By doing so, lawyers in dependency proceedings perpetuate the best-interest model of lawyering as opposed to the traditional advocate model.

The passage of CAPTA in 1974 by Congress imposed the requirement that all children in abuse and neglect proceedings be represented.<sup>113</sup> However, CAPTA does not require that children be represented by counsel.<sup>114</sup> CAPTA requires only that a guardian ad litem be appointed to represent the child and permits the guardian ad litem to be a lay advocate, or an attorney, or both.<sup>115</sup> Thus, CAPTA does not guarantee the child's right to counsel in abuse and neglect proceedings, and states do not consistently provide counsel for children in such proceedings.

With the lack of a constitutional mandate for counsel for children,

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105. See, e.g., *In re Dependency of M.S.R. and T.S.R.*, 174 Wash. 2d 1, 20 (2012) (children have fundamental liberty interests at stake in termination of parental rights proceedings and at least the same due process rights to counsel as do indigent parents subject to dependency proceedings); *In re Jamie T.T.*, 191 A.D. 2d 132, 135–37 (1993) (finding that child has a constitutional due process right to effective legal counsel in abuse proceedings).

106. DUQUETTE & HARALAMBIE, *supra* note 2, at 190–95.

107. *Id.* at 188–94.

108. See, e.g., *Atwood I*, *supra* note 7, at 400; Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 46, 66 (2011).

109. *Id.*

110. Appell, *supra* note 7, at 591.

111. *Id.* at 588–89.

112. *Id.* at 613.

113. 45 C.F.R. § 1340.14 (1990).

114. *Id.*

115. *Id.*

prevalence of the *parens patriae* model, and CAPTA's requirement for a guardian ad litem, the right of children in dependency proceedings to legal counsel has not developed along the same path as that of children in delinquency proceedings. Nevertheless, scholars overwhelmingly take the position that children in dependency proceedings are entitled to legal representation.<sup>116</sup> The majority of states also follows this trend and appoints counsel for children in dependency proceedings.<sup>117</sup> The difference among states is the type of representation afforded to children.

A few states continue to provide representation for the child in dependency proceedings in the form of a lay guardian ad litem.<sup>118</sup> The guardian ad litem is generally an officer of the court and is appointed to protect the child's interest without being bound by the child's expressed preferences.<sup>119</sup>

Other states provide representation for the child in dependency proceedings in the form of an attorney.<sup>120</sup> The child's attorney is expected to represent the child's expressed positions, and perform the functions of traditional legal counsel.<sup>121</sup>

Most states provide for a hybrid model of representation where the child is represented by an attorney who functions as a guardian ad litem.<sup>122</sup> The attorney ad litem is expected to act as an attorney and give voice to the child's positions while also determining and advocating for the child's best interests.<sup>123</sup> Therein lies the problem; when lawyers are instructed to act as guardians ad litem, role confusion and ineffective lawyering occur.<sup>124</sup>

#### IV. ROLE OF COUNSEL

As explained above, the role, responsibilities, and loyalties of counsel for children have been the subject of intense debate for nearly fifty years.<sup>125</sup> Two schools of thought have emerged about the model of legal representation: the client-directed or expressed wishes approach mirrors the

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116. See Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663 (2006); Elrod, *supra* note 5; Ventrell, *supra* note 5; Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1 (2000); Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485 (2003).

117. See FIRST STAR REPORT, *supra* note 39.

118. *Id.*

119. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A-2 (1996), <http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/repstandwhole.authcheckdam.pdf> [hereinafter ABA STANDARDS].

120. See FIRST STAR REPORT, *supra* note 51.

121. *Id.*; Boumil, Freitas & Freitas, *supra* note 108, at 48-49.

122. See FIRST STAR REPORT, *supra* note 51.

123. FIRST STAR REPORT, *supra* note 51; Boumil, Freitas & Freitas, *supra* note 108, at 48-49.

124. Bernabe, *supra* note 6, 833-36.

125. Sobie, *supra* note 5, at 787.

role of the traditional attorney; the best-interest approach mirrors the guardian ad litem role.<sup>126</sup>

The “client-directed” model of representation is a traditional attorney role where the same requirements of adult representation apply to children.<sup>127</sup> Under this model, lawyers owe the same basic duties to child clients as to adult clients.<sup>128</sup> Such duties include communication, investigation, and confidentiality.<sup>129</sup> The traditional attorney role requires lawyers to represent children as individuals, protect the legal rights of the child clients, give the child clients voice in the legal proceedings, and advocate for the counseled positions of the child client.<sup>130</sup>

The “best-interest” model of representation is a substituted judgment model.<sup>131</sup> The attorney or representative for the child substitutes his or her opinion of what would be best for the child and advocates for that position.<sup>132</sup> This approach encompasses the role of the traditional guardian ad litem.

Attorneys representing children in delinquency matters have a clear directive to advocate for the counseled positions of their clients, and to maintain the traditional attorney role.<sup>133</sup> In the years following the Supreme Court’s landmark decision in *In re Gault*, scholars debated the roles, responsibilities, and loyalties of the child’s lawyer in delinquency cases.<sup>134</sup> The confusion emerged from the tension between the paternalistic, best-interest form of representation and the adversarial, client-directed role of counsel as used in adult criminal cases.<sup>135</sup> Commentators also debated whether the role of counsel should differ from the adjudication phase, where the determination of delinquency is made, and the dispositional phase where the focus is rehabilitation of the child rather than punishment of the child.<sup>136</sup> By the early 1980s, a consensus evolved among scholars and professionals that the appropriate model of representation in juvenile delinquency matters is the client-directed, adversarial model.<sup>137</sup>

Attorneys representing children in dependency matters, however, do not have clear direction about their roles, responsibilities, and loyalties.<sup>138</sup> Scholars continually debate the effectiveness of the best-interest and client-

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126. *Id.*

127. Ventrell, *supra* note 5, at 268.

128. *Id.*

129. *Id.* at 274–76.

130. See Appell, *supra* note 7, at 589; Bernabe, *supra* note 6, at 857; Guggenheim I, *supra* note 5, at 79–80.

131. See Elrod, *supra* note 5, at 910–11.

132. Bernabe, *supra* note 6, at 857; Edwards & Sagatun, *supra* note 10, at 72–74.

133. Henning, *supra* note 6, at 255–56; ABA Assessment, *supra* note 18, at 29.

134. Henning, *supra* note 6, at 250.

135. Bernabe, *supra* note 6, at 853–58; Henning, *supra* note 6, at 250; Shepherd & England, *supra* note 14, at 1933–34.

136. Henning, *supra* note 6, at 251.

137. *Id.* at 255.

138. Sobie, *supra* note 5, at 746.



directed models.<sup>139</sup> The two models of representation continue to confuse and cloud the proper role of lawyers for children in dependency proceedings.<sup>140</sup>

### A. *Best-Interest Model*

#### 1. Overview

In child dependency proceedings, although state laws vary, children are more often appointed attorneys who function as guardians ad litem rather than as client-directed lawyers.<sup>141</sup> The preference for the guardian ad litem or best-interest model of representation is based in large part upon CAPTA's requirement that states appoint guardians for children in abuse and neglect proceedings.<sup>142</sup> The best-interest model of lawyering emerged also from the juvenile court's paternalistic treatment of children and fits within the *parens patriae* paradigm.<sup>143</sup>

Traditionally in juvenile court, the judge acts as *parens patriae* and makes the decision regarding what is best for the child.<sup>144</sup> In making their decisions, judges rely on the information provided by the litigants. In dependency proceedings, while the state agency and the parents are represented by counsel, courts appoint guardians ad litem to protect the interests of the children.<sup>145</sup> Courts rely on guardians ad litem to gather information, conduct factual investigation, and make recommendations in written or oral form to the court.<sup>146</sup> Such reports detail information gathered as well as the guardian's own observations and include recommendations for appropriate disposition regarding the child.<sup>147</sup> The guardian ad litem determines what outcome would be in the best interests of the child. The guardian ad litem is expected to articulate and present a finding about the best interests of the child, regardless of the child's expressed positions.<sup>148</sup> Courts view guardians ad litem as officers of the court or as extensions of the

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139. See *supra* note 7 (providing examples of scholars who have extensively debated the role of child lawyers in juvenile court over the past 45 years).

140. See Marrus, *supra* note 14, at 326; Shepherd & England, *supra* note 14, at 1933–34.

141. Barbara A. Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 74 (2008) [hereinafter Atwood II].

142. *Id.*

143. *Id.* at 95.

144. Elrod, *supra* note 5, at 894.

145. Boumil, Freitas & Freitas, *supra* note 108, at 43.

146. *Id.* at 46.

147. *Id.*

148. *Id.* at 45; see also Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1823 (1996) (while guardians ad litem do consider to a child's expressed positions, this is only one component in evaluating the child's best interests and the guardian ad litem is not ultimately bound to advocate for those positions).

court.<sup>149</sup> The guardian ad litem's duty of loyalty is not to the child client, but to the court.<sup>150</sup> Judges tend to rely on the recommendations of the guardian ad litem in making their own decisions because the guardian ad litem is directed to represent the best interests of the child and not act as an advocate.<sup>151</sup>

The enactment of CAPTA brought only the requirement of a guardian ad litem or a representative who acts in the guardian ad litem role.<sup>152</sup> CAPTA does not require that an attorney be appointed for children in dependency proceedings, only that a guardian ad litem or other guardian ad litem-like representative be appointed. Since the enactment of CAPTA, the majority of states do not require the appointment of attorneys who act in the traditional client-directed role for children in dependency proceedings.<sup>153</sup> The majority of states require the appointment of attorneys who act as guardians ad litem and advocate for the best interests of the child client regardless of the child client's positions.<sup>154</sup> This hybrid role in dependency proceedings reflects the adherence to the paternalistic notion that lawyers for children should advocate for what they believe to be in the best interests of the child.<sup>155</sup>

The best-interest lawyer must generally substitute his or her own judgment about what outcome would be best for the child rather than receive direction from the child as to what the child desires the outcome to be.<sup>156</sup> The best-interest lawyer may consider various criteria such as protection and emotional needs of the child.<sup>157</sup> But the best-interest lawyer necessarily relies on his or her subjective views in deciding the course of action that serves the best interests of the child.<sup>158</sup> Essentially, the lawyer has complete discretion to arrive at a decision about the best interests of the child using whatever process the lawyer chooses with no procedural or substantive guidelines.<sup>159</sup> This best-interest approach does not necessarily follow the

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149. Jennifer L. Anton, *The Ambiguous Role and Responsibilities of a Guardian ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 171 (1997).

150. See Boumil, Freitas & Freitas, *supra* note 108, at 45–46 (courts rely on guardians ad litem to gather information about the child).

151. See Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 808–813 (2007) [hereinafter Guggenheim II]; Peters, *supra* note 5, at 1527.

152. 45 C.F.R. § 1340.14(g) (2006); Sobie, *supra* note 5, at 752–53. When CAPTA was enacted in 1974, Congress did not specify who could serve as guardians ad litem for children in abuse and neglect proceedings. In 1996, Congress amended CAPTA to specify that the guardian ad litem could be an attorney or a trained community volunteer. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)).

153. Sobie, *supra* note 5, at 791.

154. *Id.*

155. Appell, *supra* note 7, at 580.

156. See Elrod, *supra* note 5, at 911.

157. Sobie, *supra* note 5, at 791.

158. *Id.*

159. Peters, *supra* note 5, at 1525.

guidelines set forth by the bar for the ethical conduct of lawyers.<sup>160</sup> The best-interest lawyer functions as a guardian ad litem and does not adhere to the fundamental requirement that lawyers advocate for the legal interests of their clients and follow the directives of their clients in regards to the objectives of litigation.<sup>161</sup>

This model has appeal to legislatures due to the perception that children are incapable of directing their attorneys.<sup>162</sup> Historically, courts, not the legislatures, have begun to recognize children as rights-bearing citizens.<sup>163</sup> Legislators continue to view children as helpless and in need of paternal representation.

This model also appeals to the judiciary because the recommendation of a guardian ad litem provides an identifiable basis for the judge's decision in a case. The judge's job of determining the best interests of the child is certainly easier when a guardian ad litem provides a recommendation as an arm of the court.<sup>164</sup> Although case law is somewhat inconsistent on the issue of the proper role of counsel, courts have routinely held that lawyers representing children in dependency proceedings must advocate for the best interests of the child.<sup>165</sup>

## 2. Problems

The best-interest model of lawyering has several flaws. One main flaw is that the best-interest lawyer has "unfettered discretion" to substitute her own judgment to determine the goals of the litigation.<sup>166</sup> When attorneys substitute their own judgment, they will necessarily insert their own personal views and values thereby displacing the values of children and their parents.<sup>167</sup> As decision-maker, the best-interest lawyer faces the dilemma of choosing among competing values, such as religion, education, culture, race, and the emotional well-being of the child. Which value takes precedence in a child's life should depend upon the personal views of the child and his parents, not upon the attorney for the child.<sup>168</sup> Lawyers may refer to their own childhoods, stereotypical views of clients with backgrounds that differ from their own, and their lay knowledge and opinions about child

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160. See Boumil, Freitas & Freitas, *supra* note 108, at 51–53; Taylor, *supra* note 11, at 618.

161. See Boumil, Freitas & Freitas, *supra* note 108, at 51; Taylor, *supra* note 11, at 618.

162. Appell, *supra* note 7, at 585.

163. See, e.g., *In re Gault*, 387 U.S. at 41 (concluding that the constitutional privilege against self-incrimination is applicable in cases involving juveniles just as it is applicable in cases involving adults).

164. See Guggenheim II, *supra* note 151, at 808–13; Peters, *supra* note 5, at 1527–28.

165. *In re Josiah Z.*, 115 P.3d 1133, 1137 (Cal. 2005) (in dependency proceedings, "the best interests of the child are paramount"); *Parham v. J.R.*, 442 U.S. 584, 610 (1979) (identifying a presumption that parents act in the best interests of their children).

166. See Duquette, *supra* note 5, at 447.

167. Appell, *supra* note 7, at 612.

168. Duquette, *supra* note 5, at 447.

development and children's needs.<sup>169</sup> Thus, the best-interest model inappropriately substitutes the values and judgment of a lawyer for the child "so that the 'wrong person' ends up deciding the goals and objectives of the advocacy."<sup>170</sup>

In a dependency proceeding, the best interests of the child are often times contested issues and thus, it is not always clear whose interests the child attorney serves.<sup>171</sup> If the attorney is not required to advocate for the child's positions, the attorney's role is then reduced to agreement with one of the parties and the child remains voiceless.

The power of an attorney in the attorney-client relationship is magnified when the client is a child.<sup>172</sup> The tendency toward paternalism is amplified when the lawyer is instructed to use her own judgment in representing the child, rather than objective legal criteria.<sup>173</sup> The best-interest attorney thus yields extraordinary power over the direction of the litigation, yet holds little accountability for her decisions.<sup>174</sup> The best-interest lawyer has unchecked power because he is told to proceed based upon his own personal opinions rather than giving a voice to the child's positions or advocating for legal rights.<sup>175</sup>

Lawyers are not qualified, trained, or otherwise prepared to fulfill the role of a guardian ad litem who determines the best interests of the child.<sup>176</sup> Neither law school curricula nor the practice of law provide guidance on child development, child welfare, or family dynamics.<sup>177</sup> Lawyers are ill-equipped to navigate the cross-cultural, socio-economic issues that affect families.<sup>178</sup> In addition, lawyers are generally vastly different, particularly in terms of class, race, and educational backgrounds, from the children they represent.<sup>179</sup> The lack of familiarity with the child's background and family values that may be important to the child, coupled with the lack of training, can significantly lessen a lawyer's ability to assess a child's needs and represent the child's best interests.

Best-interest lawyers confront ethical uncertainty about the attorney-client privilege, scope of representation, and use of evidence, among other issues.<sup>180</sup> For example, the attorney-client privilege is often lost when the

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169. Peters, *supra* note 5, at 1526; *see also* Bernabe, *supra* note 6, at 837–38 (discussing ineffective lawyering as a result of role confusion).

170. Duquette, *supra* note 5, at 447–48.

171. *Id.* at 448.

172. Appell, *supra* note 7, at 597. As adults, attorneys naturally feel responsible for children and act on those feelings, thereby rendering children less able to direct the objectives of the representation.

173. *Id.*

174. *Id.* at 595.

175. *Id.* at 599.

176. Peters, *supra* note 5, at 1526.

177. *Id.*

178. Appell, *supra* note 7, at 599.

179. *Id.* at 608–09.

180. Boumil, Freitas & Freitas, *supra* note 108, at 50–54.

attorney is instructed to take on the role of guardian ad litem.<sup>181</sup> Guardians ad litem do not have a duty of confidentiality to their wards.<sup>182</sup> When attorneys engage in best-interest advocacy, as opposed to traditional client-directed advocacy, they necessarily put themselves in the same position as a guardian ad litem. Courts have found that best-interest attorneys do not have the duty of confidentiality as do traditional lawyers.<sup>183</sup>

The primary drawback to the best-interest model is that the child's voice is lost.<sup>184</sup> To be meaningful, legal representation should allow the client to be heard in the proceedings. When the attorney acts as a guardian, in lieu of a traditional attorney, the client's voice is not expressed and thus not heard.<sup>185</sup>

Scholars generally agree that the best-interest model does not suffice in dependency proceedings.<sup>186</sup> It is too broad and indeterminate to be an effective model for lawyers for children.<sup>187</sup> If children have a right to counsel in dependency proceedings, that counsel should also help their voices be heard.

## B. *Client-Directed Model*

### 1. Overview

The role of an attorney in the traditional sense is to advocate for the counseled positions of the client and to protect the client's legal interests. In most areas of legal practice, there is no other option. Lawyers are mandated by the Model Rules of Professional Conduct ("MRPC") to represent their clients' legitimate interests as determined by the client.<sup>188</sup> However, in child dependency cases, the traditional attorney role has become a separate track from the best-interest model and is an option, rather than a mandate, for the representation of children.

The MRPC are the governing rules for the client-directed attorney model.<sup>189</sup> Pursuant to MRPC 1.2, the child client directs the litigation and the attorney must abide by the child's positions regarding his or her preference for the outcome of the case.<sup>190</sup>

Scholarly opinions, as well as standards for practitioners, support this

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181. *Id.* at 77.

182. *People v. Gabriesheski*, 262 P.3d 653, 659–60 (Colo. 2011).

183. *Id.*

184. Duquette, *supra* note 5, at 447.

185. *Shepherd & England*, *supra* note 14, at 1942.

186. Duquette, *supra* note 5, at 442; *see also* Henning, *supra* note 6, at 277; Peters, *supra* note 5, at 1525–28.

187. Duquette, *supra* note 5, at 447.

188. MODEL RULES OF PROF'L. CONDUCT R. 1.2 (1998) [hereinafter MRPC R.].

189. Ventrell, *supra* note 5, at 268–72.

190. MRPC R. 1.2 (1998).

model of representation in the child dependency area.<sup>191</sup> Almost two decades ago, Professors Ramsey and Guggenheim proposed that lawyers should represent the positions of their child clients in the traditional attorney role.<sup>192</sup> Since then, scholars have generally favored the client-directed traditional attorney model for children in dependency proceedings.<sup>193</sup>

The client-directed model also has overwhelming support in professional standards and policies.<sup>194</sup> The American Bar Association (“ABA”) standards and the National Association of Counsel for Children (“NACC”) guidelines endorse the client-directed model for children in dependency cases.<sup>195</sup> Additionally, conferences held at Fordham University and the University of Nevada Las Vegas (“UNLV”) published recommendations for client-directed lawyers for children.<sup>196</sup>

Despite support by the profession and scholars, the traditional model raises concerns when lawyers represent children.

## 2. Problems

The primary concern with the traditional attorney model of representing children occurs because some children are too young or immature to make informed decisions about their own well-being.<sup>197</sup> When a child cannot articulate his or her own desires, the advocate cannot know what the child’s interests are and there is no certainty that the advocate is responsive to the child’s interests.<sup>198</sup> The likely result will be a return to the attorney’s own views of what would be in the best interest of the child, rather than advocacy for the counseled positions of the child.

Equally troubling for lawyers representing children is the dilemma that occurs when the child’s positions seemingly conflict with his or her best interests. Children often want to return to their parents even when the

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191. See, e.g., Duquette, *supra* note 5, at 442; Guggenheim I, *supra* note 5, at 135; Katherine R. Kruse, *Lawyers Should be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner And Smith*, 14 WASH U.J.L & POL’Y 49, 77–90 (2004); Sobie, *supra* note 5, at 794–95; ABA Assessment, *supra* note 18, at 29.

192. Guggenheim I, *supra* note 5, at 91–92; Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 320 (1983).

193. See, e.g., Peters, *supra* note 5, at 1569; Sobie, *supra* note 5, at 777–81; Taylor, *supra* note 11, at 607; Elrod, *supra* note 5, at 886.

194. Taylor, *supra* note 11, at 620.

195. ABA STANDARDS, *supra* note 119; NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001), [http://c.y.mcdn.com/sites/www.naccchildlaw.org/resource/resmgr/docs/nacc\\_standards\\_and\\_recommend.pdf](http://c.y.mcdn.com/sites/www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf) [hereinafter NACC RECOMMENDATIONS].

196. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter Fordham Recommendations]; *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006) [hereinafter UNLV Recommendations].

197. Appell, *supra* note 7, at 598; Duquette, *supra* note 5, at 448.

198. Appell, *supra* note 7, at 598.

parents are abusive, neglectful, or otherwise expose the child to harm.<sup>199</sup> In such a scenario, the natural tendency of lawyers is to protect the child and take on the *parens patriae*-based guardian ad litem role. The lawyer would then revert to advocating for what he believes to be in the best interest of the child rather than what the child desires or prefers. Alternatively, the lawyer would be in the position of advocating for a result that may be harmful to the child client.

Scholars have responded to the issue in various ways. One proposes that very young children need have no legal representation at all.<sup>200</sup> Another proposal is for the lawyer to take no position or to limit advocacy to “legal interests.”<sup>201</sup> However, the lawyer then faces the issue of defining the legal interests.<sup>202</sup> Still, another proposed solution is to appoint a best-interest lawyer for the young, pre-verbal child.<sup>203</sup> The question then becomes at what age are children unable to assist counsel? Some scholars put the age at seven.<sup>204</sup> But some children are able to express an opinion about their circumstances as young as age five.<sup>205</sup> Even some four-year-old children are able to express an opinion regarding where they prefer to live and with whom.<sup>206</sup>

While scholars and the bar support the traditional client-directed lawyer model for children in dependency proceedings, the dilemma of the pre-verbal child or the child whose position may lead to harm continues to pervade the discussion. The answer to the dilemma inevitably leads back to a version of the best-interest, paternalistic model of representation. The answer remains ambiguous and overly complicated. Until the dichotomy between the best-interest model and client-directed model is eliminated, the goal of effective representation for dependent children will remain elusive.

## V. PROPOSAL: OVERCOMING THE DICHOTOMY

To overcome the dichotomy between client-directed lawyering and best-interest lawyering, we must accept that the dichotomy is false and unnecessary. There should be no choice between client-directed and best-interest models of lawyering. Lawyers should act as lawyers and should advocate for their clients’ counseled positions. At the same time, lawyers can, and should, protect their clients’ interests.

Scholars and practitioners have reached a general consensus that legal

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199. Duquette, *supra* note 5, at 448.

200. *Id.*

201. *Id.*

202. *Id.*

203. See Atwood I, *supra* note 7, at 381.

204. Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV.L.J. 1240 (2006).

205. See Sobie, *supra* note 5, at 817.

206. Edwards & Sagatun, *supra* note 10, at 72.

representation is needed for children in dependency proceedings because the abused and neglected child has a right to counsel.<sup>207</sup> *In re Gault* established the right in delinquency proceedings, and courts are finding a similar due process right in dependency cases.<sup>208</sup> The clear trend in academia and the profession is toward the client-directed traditional lawyer model.<sup>209</sup> The best-interest lawyer model has been criticized heavily by academics.<sup>210</sup> In addition, the model has been rejected by the Fordham and UNLV conferences.<sup>211</sup> Nevertheless, state laws continue to require lawyers to take on the guardian ad litem role and represent children using a best-interest lawyer model.<sup>212</sup> Federal law, through CAPTA, continues to require the appointment of a guardian ad litem who makes a recommendation to the court.<sup>213</sup> And judges also generally prefer the best-interest guardian ad litem type lawyer because it makes their job easier.<sup>214</sup>

The traditional client-directed lawyer is guided by the MRPC. Support for the traditional client-directed model derives from MRPC 1.2 which requires lawyers to follow the directives of the client. On the other hand, the best-interest lawyer in a child dependency proceeding is expected to advocate for what he or she believes to be in the best interest of the child client, regardless of the child's positions.<sup>215</sup> As explained above, this approach leads to the interjection of the attorney's personal opinions.

Standards promulgated for child attorneys express preference for the client-directed role but simultaneously acknowledge and permit the traditional lawyer to take on the guardian ad litem role at times. The ABA Standards, for example, limit the advocacy role, but do not eliminate it, and accept the attorney ad litem model, albeit reluctantly.<sup>216</sup> The ABA Standards state that attorneys may accept appointment to represent children under the traditional or best-interest model.<sup>217</sup> The NACC guidelines similarly allow attorneys to act in either capacity.<sup>218</sup> Although the NACC is committed to client-directed representation, the guidelines limit advocacy for the child's

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207. See Federle, *supra* note 6, at 104–09; Pitchal, *supra* note 116 at 680–82; Shepherd & England, *supra* note 14, at 1919–23; Sobie, *supra* note 5, at 752–56.

208. 387 U.S. at 41; see *Kenny A*, 356 F. Supp. 2d at 1359–60 (finding that children in dependency proceedings have a constitutional right to counsel under the Due Process Clause); see also *supra* note 105 (state court findings that children in dependency proceedings have a right to counsel).

209. See Henning, *supra* note 6, at 246 (discussing the evolution of the client-directed model); Duquette, *supra* note 5, at 442.

210. See, e.g., Peters, *supra* note 5, at 1525–27; see also Sobie, *supra* note 5, at 806–08 (discussing the inherent subjectivity of the best-interest model).

211. See Fordham Recommendations, *supra* note 195; UNLV Recommendations, *supra* note 195.

212. See FIRST STAR REPORT, *supra* note 39.

213. 42 U.S.C. § 5106a (2010).

214. See Guggenheim II, *supra* note 151, at 880–13; Peters, *supra* note 5, at 1527–28.

215. See Appell, *supra* note 7, at 589; Bernabe, *supra* note 6, at 857; Guggenheim I, *supra* note 5, at 79–80.

216. Atwood II, *supra* note 141, at 78–79.

217. ABA STANDARDS, *supra* note 119.

218. NACC RECOMMENDATIONS, *supra* note 194.



positions throughout the litigation.<sup>219</sup> The NACC guidelines acknowledge that a child's lawyer may exercise a degree of substituted judgment.<sup>220</sup> The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act of 2006 also provides for two distinct lawyer roles, the child's attorney and the best-interest attorney, and specifically endorses the best-interest model.<sup>221</sup>

The problem for lawyers representing children arises from the conflicting directives regarding the role they are required to assume. The dichotomy between the client-directed traditional lawyer model and the best-interest guardian lawyer model causes role confusion and leads to ineffective lawyering.<sup>222</sup> Many scholars recognize that the dichotomy is unnecessary and detracts from the debate.<sup>223</sup> Some scholars suggest that the dichotomy is outmoded and should be abandoned altogether.<sup>224</sup> Other scholars find the line between the two models to be unclear but recommend moving beyond the distinction to establish alternative guidelines for lawyers regardless of which model is adopted in the particular jurisdiction.<sup>225</sup> However, when state laws and courts direct lawyers to represent the best interests of their clients as opposed to following the client's directives, lawyers are necessarily enveloped in the tension between the MRPC and the guardian ad litem role.<sup>226</sup>

Additionally, the use of the term "best interests" in the context of child dependency cases is itself confusing and misleading.<sup>227</sup> What is in the best interests of the child in a dependency case is a decision that lies with, and should remain solely with, the juvenile court judge.<sup>228</sup> In many aspects of a child dependency proceeding, the best interest of the child is the contested issue and the ultimate issue to be decided by the judge.<sup>229</sup> Each party or participant in the proceeding should have the opportunity to voice his or her position on the issue. Parents may argue one avenue is in the best interest of the child and the State may argue in favor of another avenue. The child may agree with the parents or with the State or may have a different proposal. Each party should be entitled to present evidence and make arguments supporting the respective position. Ultimately, the judge makes the decision

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219. *See id.*

220. *Id.*

221. 42 FAM. L. Q. 1, 10 (2008).

222. Shepherd & England, *supra* note 14, at 1926–27; Marrus, *supra* note 14, at 326–27.

223. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (Kathryn Calista et al. eds., 3d ed. 2007).

224. *See* Sobie, *supra* note 5, at 812–24.

225. *See* Duquette, *supra* note 5, at 464.

226. *See, e.g.*, Guggenheim I, *supra* note 5, at 93–100.

227. *See* Guggenheim I, *supra* note 5, at 94, 107; Sobie, *supra* note 5, at 791–92, 807–08.

228. *See* Elrod, *supra* note 5, at 904; Guggenheim I, *supra* note 5, at 137–38.

229. *See* Peters, *supra* note 5, at 1507.

and is in the rightful position to make the decision. Judges are appropriately trained and have the responsibility to make such decisions.

Lawyers are trained to function as lawyers and to protect and advocate for the legal rights of their clients.<sup>230</sup> Lawyers are not trained to act as arms of the court and to make recommendations about what they believe is the correct result.<sup>231</sup> Lawyers should not be asked or mandated to advocate for what they believe to be in the best interests of their clients.<sup>232</sup> However, lawyers are capable of advocating for their clients' positions, while also protecting the clients' best interests.<sup>233</sup> In practice, a good lawyer always has the client's best interests in mind.<sup>234</sup>

The goal of the legal system is to reach the result that is just and correct.<sup>235</sup> The adversarial system is utilized because it provides the greatest likelihood of a correct result in any given case.<sup>236</sup> For the adversarial system to function appropriately, lawyers must be allowed to operate in the manner in which they are trained.<sup>237</sup>

When we abandon the dichotomy between best-interest and client-directed lawyering, we can focus on the standards and requirements needed to provide the best possible advocates for children. The bar can revise and add ethical standards for lawyers who represent children.<sup>238</sup> The bar can also require additional training in the form of continuing legal education for lawyers for children.

But when the mandate from the legislature and the courts is for children's lawyers to act like guardians ad litem, the task of promulgating standards becomes burdensome and confusing, as it is currently.<sup>239</sup> "[A]dvocacy that is diluted by excessive concern for the client's best interest would raise troubling questions for attorneys in an adversarial system."<sup>240</sup>

Lawyers are required to consider the law, investigate the facts, communicate with their clients, and make arguments to the court based upon their clients' objectives, the law, and the facts. Lawyers who represent parties in litigation are not in the appropriate position to act as arms of the court or to make the ultimate decision in the form of a recommendation to the court.<sup>241</sup> Lawyers are trained to advocate and know how to advocate for

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230. Guggenheim I, *supra* note 5, at 101.

231. Elrod, *supra* note 5, at 911; Peters, *supra* note 5, at 1522.

232. Elrod, *supra* note 5, at 911; Peters, *supra* note 5, at 1522–24.

233. Peters, *supra* note 5, at 1513, 1518.

234. *Id.* at 1512.

235. *See, e.g.*, Guggenheim I, *supra* note 5, at 101.

236. *Id.*

237. *Id.*

238. *See* Elizabeth Laffitte, Note, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313, 329–32 (2004).

239. *See* Bernabe, *supra* note 6, at 850–51.

240. Laffitte, *supra* note 238, at 332 (quoting *In re Marriage of Rolfe*, 699 P.2d 79 (Mont. 1985)).

241. *See* Elrod, *supra* note 5, at 910–11.

their clients.<sup>242</sup> Lawyers are not trained to know or figure out what is best for an abused and neglected child.<sup>243</sup>

To overcome the false dichotomy between the client-directed and best interest models for attorneys in child welfare cases, the first step is to move beyond paternalism and eliminate the language of “best-interest lawyer”.<sup>244</sup> We can then begin to address the dilemmas that arise for the traditional client-directed lawyer for children.

A. *Moving Beyond Paternalism and Eliminating the Language of “Best-Interest Lawyer”*

Adherence to paternalism in the representation of children has impeded and continues to impede the progression of the juvenile dependency court into a rights-based legal system.<sup>245</sup> In order to reach the goal of effective lawyering for children, the legal community must abandon the *parens patriae* approach to representation and remove the “best-interest lawyer” language from our discourse.<sup>246</sup> Congress must amend CAPTA to require legal representation, not simply guardian ad litem representation. Judges and lawyers must eliminate the idea that lawyers for children can engage in best-interests representation.

States however persist in allowing the hybrid best-interest lawyer model.<sup>247</sup> States require an attorney to act as a guardian ad litem and represent the best interests of the child because essentially they kill two birds with one stone. With the appointment of an attorney as a guardian ad litem, states can satisfy the CAPTA requirement for a guardian ad litem and also satisfy the judicial concern for the child’s constitutional right to counsel. If Congress were to amend CAPTA, the need for the guardian ad litem would be eliminated, and thus, the hybrid approach could be abandoned in favor of a traditional client-directed attorney model. Even without a Congressional amendment, state legislatures can eliminate the best interest language and provide only that lawyers be appointed to represent children.<sup>248</sup>

Legislatures should not instruct lawyers *how* to represent their clients.<sup>249</sup> Lawyers must be guided by the standards issued by the bar and determine

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242. Peters, *supra* note 5, at 1522.

243. Appell, *supra* note 7, at 599–600; Peters, *supra* note 5, at 1522; Shepherd & England, *supra* note 14, at 1942–43.

244. Bernabe, *supra* note 6, at 858, 875; Elrod, *supra* note 5, at 910; Sobie, *supra* note 5, at 810–11.

245. Ventrell, *supra* note 5, at 262–67; *see also* Guggenheim I, *supra* note 5, at 83–85.

246. *See, e.g.*, Bernabe, *supra* note 6, at 858, 875; Elrod, *supra* note 5, at 910; Peters, *supra* note 5, at 1523.

247. Atwood I, *supra* note 7, at 391–93; Taylor, *supra* note 11, at 611.

248. In order to satisfy the CAPTA requirement for federal funding, states could utilize court appointed special advocates (CASA) to fulfill the guardian ad litem role.. 42 U.S.C. § 5106a (2010).

249. Sobie, *supra* note 5, at 823–24.

their role independent of legislative mandates.<sup>250</sup>

In order to eliminate the best-interest lawyer model, lawyers, legislatures, courts, and scholars must also abandon the paternalistic approach to representing children in dependency proceedings. Paternalism is the driving force behind the best-interest model.<sup>251</sup> But paternalism has no place in a rights-based system, and must give way to advocacy.<sup>252</sup> If we accept the premise that children have due process rights in dependency proceedings, children must have traditional legal representation.<sup>253</sup> Representation by a guardian ad litem or a lawyer acting as a guardian ad litem, who substitutes his judgment for that of the client, does not suffice to protect legal interests and rights of parties to proceedings.<sup>254</sup>

The difficulty in overcoming paternalism comes when the child client is too young or otherwise incapable of directing her lawyer, as well as when the child's positions diverge from what the lawyer views as her best interests.

#### B. *Dealing with the Dilemma of a Client Who Lacks Capacity and Whose Objectives Are Not in His or Her Best Interests*

The debate about the role of lawyers for children inevitably circles back to two main questions. What is a lawyer to do when: (1) a child is too young, immature, or otherwise lacks the capacity to direct her lawyer; and (2) a child expresses a desire for an outcome that would likely be harmful to the child?<sup>255</sup>

Some scholars recommend that when child clients are too young to direct their lawyers, they be represented only by a guardian ad litem.<sup>256</sup> However, children develop differently and mature at different ages.<sup>257</sup> Children differ in their capacity for understanding their situation and for expressing their desires.<sup>258</sup> Some very young children can participate in their cases, express their thoughts, and speak with their lawyer.<sup>259</sup> Some adolescent children cannot assist their lawyer due to mental disabilities or lack of judgment.<sup>260</sup>

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250. *Id.*; Peters, *supra* note 5, at 1524.

251. Henning, *supra* note 6, at 260, 288–94.

252. *Id.* at 283; *see also* Appell, *supra* note 7, at 591, 598 (suggesting that state intervention is unnecessary and detrimental to a child's life).

253. *See* Henning, *supra* note 6, at 288–90; Kruse, *supra* note 190, at 77–90; Pitchal, *supra* note 116 at 680.

254. Henning, *supra* note 6, at 283, 289–92.; *see also* Bernabe, *supra* note 6, at 868–74, 879–80.

255. This article does not intend to fully answer these difficult questions, but rather to begin the dialogue. The issue of effective representation of children is a topic to be explored in greater depth in a subsequent article.

256. Guggenheim I, *supra* note 5, at 77.

257. DUQUETTE & HARALAMBIE, *supra* note 2, at 61–68; Laffitte, *supra* note 238, at 330–31.

258. *Id.*; *see also*, Ramsey, *supra* note 191, at 315.

259. *See* Peter Marguiles, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1484 (1996).

260. *Id.*

Thus, there is difficulty in establishing a specific age at which children should receive representation in the form of a guardian ad litem in lieu of an attorney.

Some scholars recommend that a guardian ad litem be appointed for all children and that the guardian ad litem request the appointment of an attorney when the child's preferences differ from the guardian ad litem's opinion.<sup>261</sup> Other scholars recommend that an attorney be appointed for all children and that the attorney request the appointment of a guardian ad litem when the child seeks an outcome that would be harmful.<sup>262</sup> Still others recommend that the court specify an age before which children do not receive lawyers.<sup>263</sup> Here again, the age range differs—some scholars put the age at seven and others, lower.<sup>264</sup>

The debate can only be resolved by removing the guardian ad litem form of representation and allowing lawyers to proceed under the rules of professional conduct and the standards promulgated by the bar.<sup>265</sup> In the context of the debate surrounding the role of children, this seems to be a drastic step. How can lawyers represent children who cannot articulate their position or who ask for something that might place them in harm's way? It may seem difficult for scholars, judges, and legislatures to envision the representation of children without the lens of paternalism.

But for lawyers in other areas of practice, removal of the *parens patriae* lens is more a matter of routine and necessity to comply with the goal of advocacy.

Clients often seek outcomes in cases that are not practical, that may be harmful, or that may be unsupported by the evidence or law in the case.<sup>266</sup> Clients often refuse to settle a matter when it would be in their best interests to do so.<sup>267</sup> Clients often ask their lawyers to take action that is unsupported in the facts of the case or the law.<sup>268</sup> Clients often cannot articulate their positions in the case beyond a generalized goal.<sup>269</sup>

Attorneys are capable of dealing with incompetence or impaired judgment on the part of clients. For example, many criminal defendants suffer from mental illness or deficiency. Many criminal defendants express the desire to be set free from the criminal charges, but they disagree with their lawyers about strategy, plea negotiations, and other actions that would be in their best interests. In the criminal defense arena, the role of the lawyer

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261. Guggenheim I, *supra* note 5, at 100.

262. Fordham Recommendations, *supra* note 195.

263. Guggenheim I, *supra* note 5, at 91.

264. *See, e.g.*, Guggenheim I, *supra* note 5, at 91; Ramsey, *supra* note 191, at 316.

265. Elrod, *supra* note 5, at 907–11.

266. *See, e.g.*, Sobie, *supra* note 5, at 809.

267. *Id.*

268. *Id.*

269. *Id.*

is to provide zealous advocacy within the parameters of the law and ethics.<sup>270</sup> The essential relationship between lawyer and client is that of an advocate for the client and respect for the client's positions.<sup>271</sup> Within that role, and pursuant to MRPC Rule 1.2, the lawyer must abide by the client's positions concerning the objectives of the representation.<sup>272</sup>

When a client suffers from an impairment which affects his or her ability to make reasoned decisions, MRPC Rule 1.14 instructs the lawyer to maintain a normal client-lawyer relationship with the client, as far as reasonably possible.<sup>273</sup> Although the Rule provides little guidance to the lawyer on how to accomplish this, lawyers can look to other Model Rules to deal with the impaired client.<sup>274</sup> For example, when a lawyer has difficulty maintaining a normal client-lawyer relationship with a client due to impairment, the lawyer can rely on information from family members, expert witnesses, and other professionals who treat, or have contact with, the client.<sup>275</sup> MRPC Rule 2.1 provides parameters for the lawyer to take on an advisor role.<sup>276</sup> MRPC Rule 1.4 also requires the lawyer to communicate with the client.<sup>277</sup> Lawyers can, and should, continue to protect the legal interests of clients who have difficulty expressing their positions.<sup>278</sup> In child dependency cases, lawyers can advocate for the least restrictive intervention by the state and for preservation of the family unit.<sup>279</sup>

Regardless of competency, clients generally control the goals of litigation but not necessarily the means by which those goals are achieved.<sup>280</sup> Lawyers have some latitude to make decisions about matters that are strategic, rather than fundamental, regardless of the client's preferences.<sup>281</sup> In fact, lawyers necessarily often make strategic decisions without client input. As long as the lawyer is advancing the client's objectives and takes into consideration the client's concerns, a lawyer is authorized to make strategic and tactical decisions based upon an investigation of law and facts relevant to the case.<sup>282</sup> Although there is not always a clear distinction

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270. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 65-67 (1988).

271. Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 338-40 (1999).

272. *Id.*; MRPC R. 1.2 (1983).

273. MRPC R. 1.14 (1983).

274. *See id.*

275. *Id.* at 1.14 cmts. 1-5.

276. *Id.* at 2.1; *see also* Kim Diana Connolly, *Navigating Tricky Ethical Shoals in Environmental Law: Parameters of Counseling and Managing Clients*, 10 WYO. L. REV. 443, 445 (2010).

277. MRPC R. 1.4. (1983); Connolly, *supra* note 191, at 446.

278. Sobie, *supra* note 5, at 811-13.

279. *Id.* at 784-85.

280. Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1627 (2000).

281. *Id.*

282. Strickland v. Washington, 466 U.S. 668, 681 (1984); Slobogin & Mashburn, *supra* note 280, at 1621-22.

between decisions a lawyer makes and decisions that the client makes,<sup>283</sup> lawyers generally proceed upon the directive that they are to advocate for the clients' stated objectives and not some notion of what the lawyers believe to be in the best interests of the clients.<sup>284</sup> When there is clarity in the role that the lawyer plays, then the lawyer can attempt to resolve issues of client impairment using the same standards that govern all lawyers.<sup>285</sup> When there is no consensus about the role of the lawyer, there will be a greater likelihood that the lawyer falls back on his or her personal opinions and values.<sup>286</sup>

In areas of legal practice outside of child dependency, lawyers know that they must be first and foremost zealous advocates, and thus, the dilemma of what to do when the client is impaired, at minimum, can be addressed by looking to ethical rules and by engaging in the professional skills in which lawyers are trained. When lawyers for children are instructed to represent the best interests of the child and act as guardians ad litem, the ethical analysis becomes muddled.

When a child client is capable of communicating with his or her lawyer, but expresses a preference for an outcome that would likely result in harm, the lawyer faces an equally if not more difficult dilemma than when the child is incapable of communicating a position. But clients with bad judgment are also part of the daily life of lawyers. Even in the situation of a child, lawyers must advocate and leave decision making to judges.<sup>287</sup> Lawyers cannot allow paternalism to take hold and pursue what they personally believe to be in the client's best interests.<sup>288</sup> Theoretically, this premise is hard to swallow, particularly in the case of a child who may be facing abuse in the home.

But, in reality, lawyers cannot change facts and are ethically obligated to only present arguments that are based in law. No matter how vigorously a lawyer argues for the child to return home to an abusive parent, if the facts or law do not support such a decision, a judge will not necessarily follow the lawyer's recommendation.<sup>289</sup> The child's lawyer is one of several attorneys involved in the case.<sup>290</sup> The state agency's lawyer will generally have the burden and the resources to present evidence or testimony regarding the nature of the abuse or neglect.<sup>291</sup> The parents may each have their own lawyer and may have opposing positions to each other.<sup>292</sup> One parent may agree with the state agency's position and point the finger at the other parent.

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283. Slobogin & Mashburn, *supra* note 280, at 1630; *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 569-70 (1993).

284. Uphoff, *supra* note 269, at 106.

285. Bernabe, *supra* note 6, at 870.

286. *Id.*

287. Guggenheim I, *supra* note 5, at 80-83.

288. *Id.*

289. *Id.* at 103-05.

290. *Id.*

291. *Id.*

292. *Id.*

The judge is not bound by any party's single voice.<sup>293</sup> The adversarial system contains the necessary procedural checks and balances designed to produce an informed decision based upon the evidence.<sup>294</sup> The system requires an impartial judge and zealous advocates to reach the goal of "reasoned, informed decisions upon full evidentiary review".<sup>295</sup>

The theoretical difficulty with advocacy that may put a client in harm's way is no different than the lawyer's moral dilemma in other types of cases. Lawyers must embrace the advisor role and vigorously counsel their clients. When a client seeks a result that would be unlikely to occur or would be harmful to him or her, it is the lawyer's duty and obligation to counsel the client.<sup>296</sup> It is incumbent upon the attorney to explain the law, the facts, and the likelihood of success or failure of the client's goals. If a client continues to seek an objective that would be unlikely or harmful, the lawyer has options. The lawyer can refuse to take action that would be frivolous under the law, ask for the appointment of a guardian ad litem for incompetent clients, or seek withdrawal from representation.<sup>297</sup> While such options are not ideal, they are acceptable. Lawyers for children must first work to counsel and to advise their clients about the consequences of certain courses of action. As a last resort, when all else fails, lawyers can proceed with an alternative.

In order to assist lawyers in resolving the dilemmas of incompetence or impaired judgment on the part of clients, we must look to ethical rules and bar standards that govern lawyers.<sup>298</sup> We must look at how lawyers in other arenas, such as criminal defense, handle such dilemmas. When formulating guidelines or standards for lawyers for children in abuse and neglect proceedings, the distinction between client-directed and best-interest lawyers must be abandoned. If the legislature and the bar continue to permit the appointment of counsel under either model, courts will continue to rely on lawyers to advocate for what they believe to be in the best interests of the child, rather than allowing the lawyers to advocate for their clients' counseled positions.

## VI. CONCLUSION

Lawyers for children in juvenile dependency proceedings currently receive inconsistent and unclear directives on their role. Lawyers for

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293. Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 333 (2004).

294. *Id.*

295. *Id.*

296. See Ventrell, *supra* note 5, at 279.

297. The Model Rules of Professional Conduct do not allow lawyers to act frivolously. MRPC R. 3.1.

298. Peters, *supra* note 5, at 1524.



dependent children are routinely instructed and are expected to act in the role of guardians ad litem, rather than the role of advocates for which they are trained. The result is ineffective lawyering that fails to protect the due process rights and liberty interests of abused and neglected children.

In the forty-five years since the decision in *In re Gault* and the thirty-eight years since the passage of CAPTA, we are still debating about how lawyers are to represent children in dependency proceedings. As long as we continue to instruct lawyers to act as guardians ad litem, we continue to try to fit a square peg into a round hole. And until we move beyond paternalism, we cannot reach the goal of effective representation for abused and neglected children.