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RESPONSE TO THE WORKING GROUP ON DETERMINING THE BEST INTEREST OF THE CHILD

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THE consensus reached at the Fordham Conference on Ethical Issues in the Legal Representation of Children articulated a subtle but profound change in the “best interests” debate of the past two decades. Previously the debate involved two camps: those proposing that lawyers must advocate the child’s position based on the child’s expressed wishes and those proposing that lawyers must advocate the child’s position based on the lawyer’s independent determination of what was in the child’s best interests. Often commentators and practitioners designated these competing roles as “attorney” or “counsel” for the former and “guardian *ad litem*” for the latter.

In the 1990s, the legal community has shown a tendency to distance itself from and even reject a paternalistic model of the subjectively driven guardian *ad litem*. Taken to its logical conclusion, this trend led to the adoption of standards by the American Academy of Matrimonial Lawyers¹ (“AAML Standards”) that preclude lawyers from acting as subjectively driven guardians *ad litem* in custody cases. Where the child client is unable to provide direction, the lawyer may not advocate any position at all.² The AAML Standards view children as either “impaired” or “unimpaired,”³ with the child’s lawyer taking a position in the case generally only as directed by the unimpaired client.⁴ The notion of an all-or-nothing impaired/unimpaired status, however, has been criticized as lacking an empirical basis.⁵ Further, the ramifications of the AAML Standards deny the “impaired” child

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1. American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* (1995) [hereinafter AAML Standards].

2. *Id.* §§ 2.7-2.13.

3. *Id.* §§ 2-2.2.

4. *Id.* §§ 2.3-2.4.

5. See, e.g., Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 *Fam. L.Q.*, Fall 1995, at 375, 379 [hereinafter ABA Draft Standards] (stating in the comment to Standard B-3 that “these standards reject the concept that any disability must be globally determined”); Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, *J. Am. Acad. Matrim. Lawyers* (forthcoming 1996) (on file with *Fordham Law Review*).

any advocacy at all, radically modifying the expectations of a lawyer's role as zealous advocate.

The proposed ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("ABA Draft Standards") provide that to the extent that the child client cannot or will not express a preference, the lawyer should determine and advocate the client's legal interests.⁶ The Working Group on Determining the Best Interest of the Child also used the term "legal interests" to limit the range of issues about which the lawyer should advocate.⁷

While child advocates have objected to being denied the right (and perceived duty) to advocate positions for even very young clients,⁸ they have also had to acknowledge their discomfort at being expected to determine the client's position in the absence of direction from the child or any expertise in evaluating the child's best interests.⁹ Critics of lawyers serving in a guardian *ad litem* role have pointed out that such independent determination of interests is antithetical to the traditional role of lawyers and threatens the rule of law.¹⁰ Commentators are now generally in agreement that the lawyer's subjective opinions, biases, values, and life experiences constitute inappropriate bases for determining the child's positions.¹¹

Some commentators have suggested that specialized training may equip children's lawyers to determine the child's position based on more objective criteria, even in the absence of direction from the

6. ABA Draft Standards, *supra* note 5, at 381 (Standard B-4(1)-(2)).

7. Recommendation IV(B)(3)(a) of the Conference defined "legal interest" as "any interest that the legal proceeding has authority to address." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) (part IV.B.3.a) [hereinafter *Recommendations of the Conference*].

8. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers Interviewing and Counseling the Child Client*, 64 Fordham L. Rev. 1655, 1696-97 (1996) (arguing that children are "rights holders" and may make rights claims that should be treated seriously); Haralambie & Glaser, *supra* note 5 (arguing that children under the age of 12 may be capable of decision making and should not be presumed "impaired").

9. See *Report of the Working Group on Determining the Best Interest of the Child*, 64 Fordham L. Rev. 1347, 1349 (1996) [hereinafter *Report—Determining Child's Best Interest*].

10. See, e.g., AAML Standards, *supra* note 1, § 2.7 cmt. (arguing that a lawyer advocating her "own preferred outcome in the name of the child's best interests" poses a "most serious threat"); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1416 (1996) (noting that a child client's rights are not necessarily advanced when the lawyer advocates what she perceives to be the child's best interests).

11. See, e.g., Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. Rev. (forthcoming 1996) (arguing that an attorney's subjective view of the child's best interests is an inappropriate standard) (on file with *Fordham Law Review*); 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, 1525-27 (1996) (criticizing the total discretion model of child representation).

child.¹² But such training, while it may improve the quality of the substituted choices made, does not answer the fundamental question about whether substituted decision making is a proper role for a lawyer *qua* lawyer. Further, the historical debate has questioned whether and to what extent the lawyer can represent a child as both "counsel" and "guardian *ad litem*,"¹³ potentially conflicting roles mandated by some judicial appointments, state statutes, and case law.¹⁴

12. See, e.g., Haralambie, *supra* note 11; ABA Draft Standards, *supra* note 5, § B-5 & cmt.; Report—*Child's Best Interests*, *supra* note 9, at 1349 (recommending specialized training); Report of the Working Group on Determining the Child Client's Capacity to Make Decisions, 64 Fordham L. Rev. 1339, 1341 (1996) (mandating training to enable the lawyer to evaluate the child's capacity to make decisions).

13. See Martha L. Fineman, *The Role of Guardians ad Litem in Custody Contests, in Who Speaks for the Children? The Handbook of Individual and Class Child Advocacy* 81, 85 (Jack C. Westman ed., 1991); Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* 24-35 (1993); Donald T. Kramer, 1 Legal Rights of Children § 2.25 (2d ed. 1994); Stephen W. Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. Rich. L. Rev. 661, 666-67 (1979); Catherine M. Brooks, *When A Child Needs a Lawyer*, 23 Creighton L. Rev. 757, 759 (1990); Howard Davidson, *Child Advocacy*, 74 A.B.A. J., Dec. 1988, at 119, 119; Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255, 264 (1991); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. Mich. J.L. Ref. 341, 351-53 (1987); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 Boston B.J., Jan./Feb. 1991, at 6, 6; Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 Cal. W. L. Rev. 16, 28 (1976); Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 334 (1993); Jacqueline A. Jacobs, *Incompetent Clients*, 2 Geo. J. Legal Ethics 305, 309 (1988); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. Fam. L. 607, 609-11 (1982-83); Angela D. Lurie, Note, *Representing the Child-Client: Kids are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. Sch. J. Hum. Rts. 205, 220-21 (1993); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 689-93 (1987); Louis I. Parley, *Representing Children in Custody Litigation*, J. Am. Acad. Matrim. Law., Winter 1993, at 45, 46-47; Sarah H. Ramsey, *Representation of the Child in Child Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Fam. L.Q. 287, 287-88 (1983); James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 Vill. L. Rev. 521, 539-42 (1978); Marvin Ventrell, *The Child's Attorney*, 17 Fam. Advoc. 73, 76 (1995); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259-60 (1995); Shannan Wilber, *Independent Counsel for Children*, 27 Fam. L.Q. 349, 353 (1993); cf. Hillary Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487, 495 (1973) (noting the lack of consensus among lawyers regarding the rights of children and the lawyer's role).

14. See, e.g., *In re Marriage of Barnthouse*, 765 P.2d 610, 612 (Colo. Ct. App.) (approving attorney's conduct in recommending against following the child's wishes), *cert. denied*, 490 U.S. 1021 (1988); *In re Marriage of Kramer*, 580 P.2d 439, 443-45 (Mont. 1978) (reversing district court award of custody that failed to take into account children's wishes but holding that role of appointed attorney is to present children's best interests to the court); *In re Davis*, 465 A.2d 614, 632 (Pa. 1983) (criticizing attorney's lack of representation on behalf of the child but suggesting that the attorney should have submitted the child's preference to the court and explained why he dis-

Rule 1.14 of the Model Rules of Professional Conduct¹⁵ ("Model Rules") discusses the ethical implications of representing parties under a disability, including the disability of minority. That rule requires lawyers, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired. The Model Rules, however, provide no guidance for how to determine that the client is under a disability or how to modify the representation to the extent that it is *not* possible to maintain a normal attorney-client relationship. This lack of guidance has allowed lawyers to embrace a subjective judgment guardian *ad litem* role without any limits on the individual lawyer's discretion, provoking the increasingly critical questioning of the inherent validity of the role itself.

The Recommendations of the Conference on Ethical Issues in the Legal Representation of Children¹⁶ ("Recommendations") articulate a clear, elegant, and satisfying way of resolving the competing problems. The consensus position rejected the legitimacy of the lawyer's serving in the traditional model role of guardian *ad litem*, with an expectation of subjective decision making accompanying appointment. The lawyer functioning as *lawyer*, however, may determine the position to be advocated for the child to the extent, but only to the extent, that the child is impaired (i.e., "under a disability" in the language of Model Rule 1.14).¹⁷ The Recommendations thus reject the idea that a child's lawyer is something other than a lawyer acting under traditional ethical mandates. Rather, the Recommendations provide guidance for applying the authority given by Model Rule 1.14

agreed). In his 1988 Supplementary Practice Commentary to New York's Family Court Act, art. 2, § 241, Douglas Besharov wrote: "Even after twenty-five years, the role of 'law guardian' remains ambiguous and subject to controversy. It seems fair to say, though, that the Legislature used the term to denote something other than simply a lawyer for the child and something other than the traditional guardian *ad litem*." N.Y. Jud. Law § 241 (McKinney 1983), Douglas J. Besharov, Practice Commentary, *cited in* Haralambie, *supra* note 13, at 16 n.7. Arkansas requires the child's attorney to perform two potentially conflicting duties: "to represent the best interest of the juvenile and to advocate for the juvenile's articulated wishes." Ark. Code Ann. § 9-27-316(e)(1) (Michie 1987). Wyoming expects the child's attorney to serve also as guardian *ad litem*. Wyo. Stat. § 14-3-211(a) (1977). The Iowa Supreme Court recognized the problem, stating:

We are mindful that in the ordinary lawyer-client relationship, the lawyer's role is not to *determine* the client's interest but to *advocate* the client's interest. . . . Such a duty may present an ethical dilemma in a juvenile proceeding where the objective is *always* the best interest of the child, not the child's personal objective. We are aware that the unsettled law in this area offers no clear direction to an attorney faced with such a predicament.

In re J.P.B., 419 N.W.2d 387, 391 (Iowa 1988).

15. Model Rules of Professional Conduct Rule 1.14 (1983) [hereinafter Model Rules].

16. *Recommendations of the Conference*, *supra* note 7, part I.

17. Model Rules, *supra* note 15, Rule 1.14 (1983).

to make some independent determinations on behalf of the child client.

The *Report of the Working Group on Allocation of Decision Making* provides for an advocacy role even for a lawyer who represents preverbal children.¹⁸ The *Report of the Working Group on Determining the Child's Capacity to Make Decisions* sets forth a rigorous process by which the lawyer determines a position. That process starts with the assumption of a client-directed determination and seeks to limit the lawyer's discretion in substitute decision making, rather than to expand it. Lawyers will be able to apply the process in a reasonably objective manner, answering the critics who are concerned with unbridled discretion in child advocates.

In practice, if the child's lawyer has spent the time necessary to understand the child's needs *from the child's perspective* and to establish rapport with the child, the range of what constitutes the child's best available legal interests will be acceptably narrowed. Further, most children will be receptive to the lawyer's recommendations, precluding the much discussed conflict between the child's expressed position and his or her best interests.

The bottom line in determining the child client's best legal interests is taking the time to plumb the context of the child's life and to consider the ramifications of each alternative position as seen through the child's eyes. Adults can too easily pontificate about a child's best interests while ignoring the day-to-day effect of those decisions in the child's life. A child's priorities are deserving of respect, at least by that child's lawyer. For some, a certain degree of physical maltreatment or neglect may be far outweighed by the importance of other benefits of life with the family: affiliation, continuity of environment, proximity to friends, activities, and school, availability of pets, and other needs that the family meets.

Implicit in the less paternalistic view of the role of the child's lawyer is the need for judges to be judges, and to make independent decisions based on statutory and case law criteria. A judge cannot merely defer to the recommendations of the child's lawyer, any more than he or she can delegate decision making to the social worker or evaluator. If the strength of the adversary process lies in the full presentation and consideration of different points of view, then giving a greater voice to the child should not impair either fact finding or decision making.

The Fordham Conference on Ethical Issues in the Legal Representation of Children has strengthened the position of those who would give children a meaningful voice in the legal matters concerning them. It has also required a newly articulated rigor in limiting the discretion of the child's lawyer. It may seem paradoxical that at a time when the

18. *Report of the Working Group on Allocation of Decision Making*, 64 Fordham L. Rev. 1325, 1334 (part IV).

field of pediatric law is advancing, with more multidisciplinary training, we should be limiting our discretion. But because we have learned so much more, including the long-term ramifications of various dispositions, we have finally come to recognize and, most importantly, to respect the wisdom of our child clients.