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Being a Lawyer for a Child Too Young to Be a Client: A Clinical Study

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Being a Lawyer for a Child Too Young to be a Client: A Clinical Study

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I. INTRODUCTION

The way legislatures and courts view the role of children in the divorce process has changed dramatically in recent years. The substantive standard for decision has remained relatively constant, usually the "best interests of the child,"¹ or some variant of that, such as the "least detrimental alternative,"² focusing on the child's interests as distinguished from those of the parents. However, the procedure for gathering and presenting the facts relevant to that substantive standard has been modified in a majority of American jurisdictions to provide for independent legal representation of the child by a court-appointed attorney who serves as "counsel" or "guardian ad litem" for

¹. See, e.g., CAL. CIV. CODE § 4600 (West 1983); CONN. GEN. STAT. ANN. § 46b-56 (West 1986); FLA. STAT. ANN. § 61.13 (West 1985); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1987).
². J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child ch. 4 (1979) [hereinafter Beyond the Best Interests].
The widespread adoption of this procedural innovation has generated considerable professional and scholarly debate over the role of the child's legal representative in divorce litigation, especially in cases involving young children. This debate encompasses diverse views, which include: (1) a child's lawyer in a custody case should play the classic advocate's role of employing all legal means to advance the child's expressed preference, regardless of the child's age or the lawyer's view of what would be in the child's best interests; (2) an attorney should refuse to represent a child who is too young to express a meaningful preference; (3) the attorney for the child has a duty to advocate her independent, professional judgment of the child's best interests, even if it is inconsistent with the child's expressed preference; (4) the child's attorney should act as a mediator, not an advocate, assisting the parents to negotiate a settlement of their dispute that may, or may not, give substantial weight to the child's preferences or the attorney's view of the best interests of the child; (5) the child's legal representative should act as a neutral, objective investigator, fact gatherer, and reporter, assisting the court in making a fully informed assessment of the needs of the child and how those needs can best be met; (6) counsel for the child should not act as a lawyer, but should


5. Guggenheim, supra note 4.


7. BEYOND THE BEST INTERESTS, supra note 2, at 121-22 (court-appointed counsel should follow statutory standard for child placement decisions and not directions of child client).


serve only as a professional companion for the child, protecting her from the process, explaining the process to her, answering her questions, and influencing or "orchestrating" the conduct of the process so that the child is damaged as little as possible by the legal proceedings; (7) the appointment of independent legal counsel for a child disempowers the parents and undermines their ability to act in their child's best interests; and (8) a child's attorney should act to make the custody determination process more formal and public, to diminish the influence of mental health experts, and to advocate the abolition of the "best interest" standard in favor of a "primary caretaker" standard.

Some have argued that the child advocate in a divorce case must assume a variety of roles including confidante, counselor, investigator, negotiator, mediator, "orchestrator", and advocate. Depending on the age, maturity, intelligence, and emotional state of the child, as well as the circumstances of the case, some argue that the advocate should assume several or all of these roles simultaneously or at different times in a given case. Even those who hold this view may disagree on how to balance the various roles, how to evaluate and weigh the child's preferences, and what to do when a child is too young to state a meaningful preference. Others have argued that none of these roles are appropriate professional roles for lawyers, and that young children ought not have their own legal representatives in custody disputes.

These various positions reflect two distinct, but related, critiques of the child advocate's role in divorce litigation: (1) an ethical critique that questions what the lawyer's role should be and whether it is possible for a lawyer to act as a "lawyer" and comply with the rules of professional conduct when she is appointed to represent a young child who is the subject of a parental custody or visitation dispute; and (2) a policy critique that questions whether legislation authorizing or requiring appointment of independent legal representatives for children in custody and visitation disputes is a good idea, even if lawyers can represent their young clients in a manner that complies with ethical requirements.

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11. Id. at 1187.
13. Id.
The ethical critique requires an analysis of the lawyer's role in relation to the child's status as a client. It is the professional relationship of the attorney with her child client that generates ethical concerns. The ethical critique questions whether an "agency" relationship can exist between a young child as "principal" and a grown-up lawyer as "agent"; whether an attorney without specialized training and competency in child development and communication is capable of consulting with and counseling a young child in order to be in a position to advocate her choices; whether a lawyer can, or should, establish a confidential relationship with a child and protect the child client's confidences from parents and the court, especially when the child discloses to her attorney information relevant to her best interests; whether a child's lawyer can avoid conflicts of interest when dealing with fellow adults, such as the child's parents; and whether the attorney's views are more "reasonable" than the child's views. In short, the ethical critique questions whether it is possible to provide "competent" representation as required by ethical rules.

In the case of a preschool child with developmentally immature abilities to perceive, evaluate, and report facts relevant to her experiences, relationships, and interests, these problems are compounded. Indeed, in cases involving children incapable of meaningful communication, an attorney cannot effectively interact with her "client."\[1\]

The policy critique requires a careful description and analysis of

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\[1\] Ethical rules regarding the role of counsel for a minor child are, at best, ambiguous. See, e.g., Model Code of Professional Responsibility EC 7-11 (1981): "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . ." The Model Code of Professional Responsibility EC 7-12 (1981) states:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. . . . If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests . . . the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.

See also Model Rules of Professional Conduct Rule 1.14(a) (1983): "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."; Model Rules of Professional Conduct Rule 1.14(a) comment (1983):

[1] . . . When the client is a minor or suffers from a mental disorder or disability . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects. . . . [T]o an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are
how children are involved in and affected by divorce litigation, as well as possible benefits of children having their own legal representative. One forceful policy critique argument holds that a lawyer who represents a very young child, and who therefore cannot take directions from the "client," will give too much weight to the opinions of mental health experts; will devalue the opinions of the child's own parents, who are the adults most familiar with the child; and will usurp the judge's power to decide the case. This approach questions whether children are in fact harmed by their parents in the process of a custody dispute, and argues that, if not, there is simply no basis for the intrusion of another adult into the family.19

II. CASE STUDIES

We have been accepting court appointments to represent children in custody and visitation disputes for several years (one of us for more than ten years). Our sense, based on our experience, is that in many cases we help parents come to some agreement, and assist the court in making informed decisions about children's best interests, and that our representation diminishes the damage done to children by custody disputes. What follows are descriptions of three cases in which we represented children too young to be clients. We believe that these case studies illustrate the variety of roles a child's attorney can assume and the ways in which she can assist a child client.

A. The Case of R and S

We were appointed to represent R and S (ages six and four) in a custody dispute between their parents. At the time of our appointment, the divorce had been pending for approximately seven months. The father had temporary custody, although both parents continued to reside, under incredible tension, in the family home. A court social worker had conducted a study of the family and recommended joint legal custody with primary physical custody in the mother and liberal visitation for the father. The mother was agreeable to this recommendation, but the father was not. The father moved for our appointment.

In our investigation, we contacted the attorneys for both parents, and interviewed the parents and the court social worker. We reviewed the social worker's report, transcripts of depositions taken by the father's lawyer, and reports concerning both parents submitted by regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. . . .

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.

the mother's psychologist. The father had filed for divorce following the mother's admission that she had engaged in extramarital affairs with two of their friends. Each parent claimed to be the children's primary caregiver. The father claimed that the mother had neglected the children and that her immorality made her an unfit parent. We were unable to confirm any of the father's allegations of neglect, nor was there any evidence that the mother's sexual activities had been witnessed by or otherwise affected the children. We found no basis for disagreement with the social worker's conclusion that the mother had been the primary caregiver.

When we met with the children, six-year-old R stated that she wanted to live with her mother, although she had previously told the court social worker that she did not care with which parent she lived. Four-year-old S did not want to talk to us. Both children had told the social worker they did not like it when their parents fought.

Based on our investigation, we concluded that both parents were fit and competent, that the mother had been the primary caregiver, and that it would be most beneficial to the children to bring the dispute to an end as soon as possible. We recommended to the parents that they accept the general recommendations of the social worker's report. We offered to meet with them and their attorneys to help them reach an agreement about details.

The parties accepted our offer to mediate. At the meeting the parents quickly agreed to joint custody in principle. However, two financial obstacles stood in the way. The father balked at paying anything called "child support" to the mother because he was so angry with her for having extramarital affairs. He also refused to give her any portion of the family home because he had built it on land belonging to his family and because some of her infidelities had taken place there. The mother agreed to maintaining two households for the children, with frequent movement between them, but was unable to support a second household without substantial assistance from the father.

We met with each parent separately, and then together. We urged them to think of their children's needs ahead of their own and to work together to meet those needs. We reinforced their agreement that each was a good parent and that the children needed both of them. We proposed that the father assume certain major expenses for the children, in lieu of child support. We also proposed that he transfer a partial interest in the family home to the children rather than to the mother. These proposals in effect transferred enough money to the mother to enable her to support her own home, while enabling the father to remain in the family home. The custody and visitation schedule then fell into place, with the children's time divided approximately equally between the parents. The case was settled without a trial.
B. The Case of J

We were appointed by the court to represent seven-year-old J in a post divorce custody and visitation battle between his parents. At the time we were appointed, the parents had been divorced slightly more than a year. The court had ordered joint custody, with primary physical custody in the mother. The parents had been in constant warfare over J. Both the mother and the child had been in psychotherapy. The child's therapist had attempted, without success, to mediate the parents' disputes. Finally, the therapist suggested that an attorney be appointed for J and that a comprehensive evaluation of all three family members be undertaken by the university child study center. The mother moved for both a modification from joint to sole custody and for appointment of a lawyer for J.

We began by interviewing both parents and the child's therapist. According to the therapist, J's symptoms were the result of being in the middle of a battle between his parents. He was experiencing behavioral problems in school and having difficulty controlling his temper. Although his primary loyalty was to his mother, he felt torn between his parents. The mother wanted to eliminate the father from J's life and made this known to J. J wanted to continue seeing his father, but could not let his mother know this. Both parents had histories of mental illness, which exacerbated their difficulties in cooperating with each other. The therapist hoped that we, as attorneys, would be more successful than she in getting the parents to stop fighting.

Our meetings with the parents confirmed the therapist's impressions. The mother complained that the court never should have awarded joint custody, that J did not want to visit his father, and that the father might have sexually abused J. The father complained that the mother was "crazy," was an alcoholic, and was consistently denying him his visitation rights under the court order. We then met with J, who confirmed that he wanted to continue living with his mother and visiting his father, but felt unable to tell this to either of his parents.

By the time we were appointed, the parties had already agreed to the child study center evaluation and to keep J in treatment pending the outcome of the evaluation. We decided that our first goal was to keep peace as best we could during the evaluation period.

Almost immediately, the parents began calling us with a variety of complaints about each other. The mother refused visitation, claiming J either did not want to go or was too sick to go. The father demanded a make-up visit, even if that meant keeping J home from school. He repeatedly filed motions for contempt against her. The mother complained about the father's choice of babysitters. Both parents were furious, impulsive, and vindictive with each other, and they often
fought in front of J. Once they engaged in battle, they thought only of winning and not of J's interests.

Initially, we listened to the complaints and urged the parents to calm down and let the visitation proceed. We told each parent when we thought he or she was being unreasonable. After we got a sense of what the fights were about, we arranged a mediation session with both parents and J's therapist. Our goal was to produce an interim agreement to govern the parties' relationship until the child study center evaluation was complete. We divided the dispute into separate issues. On each issue we urged the parents to come to an agreement, recommended a solution we thought fair, and made clear that if they could not agree, we would make a recommendation to the court. We repeatedly urged them to think of J rather than themselves, and expressed our view that the worst thing for J was the constant battle.

We succeeded in negotiating an interim agreement. The mother later refused to sign it without numerous alterations and additions, most of which were trivial, leading to a continued fight and delayed implementation of the agreement. Once the agreement was signed, we moved that it be made a court order. We then attempted to resolve the parents' subsequent disputes with reference to their own agreement. We found that the parents exploited every possible ambiguity in the agreement to find room for dispute. This taught us that any future agreements would have to be worded more carefully. We chose not to amend the interim agreement, however, because to do so would open up all of the issues between the parents and would consume the rest of the evaluation period, if not longer.

When the evaluation was finally complete, we gave the parents time to discuss it with their lawyers, and then arranged a meeting between the two parents, the evaluating psychiatrist, and ourselves. The psychiatrist explained the reasons for his recommendations and offered the parents an opportunity to ask questions. His primary finding was that the battle was harming the child, so the changes that would be in the child's best interest were those that disentangled the parents from each other. He explained to them how the principles of stopping the fight and separation demanded that each parent give up something. In the mother's case this meant sending J for visitation, even when J said he did not want to go. In the father's case it meant giving up joint custody in recognition of the parents' inability to cooperate and J's closer relationship with the mother.

It was particularly difficult for the father to understand why he should give up time with and influence over J because the mother was emotionally disturbed and uncooperative. The psychiatrist tried to help him see that the worst thing for J was the fight and that once the fight diminished, J's relationship with his father could improve, even if the number of hours they spent together decreased.
Our role in this meeting was to support the psychiatrist by letting the parents know we approved of his proposals and would recommend them to the court.20 We also offered to draft a new and very specific agreement based on the evaluator’s recommendations, and to meet with the parents’ lawyers to discuss possible amendments to the financial orders that would further separate the parents.

At the end of our meeting, the parents had come to accept most of the evaluator’s recommendations. After the meeting, however, the mother refused to follow through with the concessions she had made concerning specific holiday visits and financial adjustment. This prompted the father to refuse to abide by his agreements. Neither parent would sign the stipulation we drafted, and both resumed accusing each other of violating the interim agreement. Both also resumed their angry telephone calls to us, each accusing us of favoring the other parent. Finally, after months of failed negotiations and increasingly bitter battling, the mother requested a court date for her motion to modify custody. In the courthouse hallway the parties agreed to a settlement virtually identical to the one proposed by the evaluating psychiatrist. The agreement was ordered by the court; however, the final written stipulation has yet to be signed. Undoubtedly, even after it is signed, the parents will continue to fight over its interpretation.

C. The Case of D and L

We were appointed to represent D and L (ages three and one respectively) in an extremely heated divorce battle between their parents. Prior to our appointment, the mother had filed for divorce and had obtained a temporary restraining order barring the father from the family home based on allegations that he had beaten and threatened both her and the children. He denied her allegations and obtained a temporary visitation order.

The divorce had been pending approximately three months when the mother was stabbed in the back in her home by an acquaintance of the father, who claimed to “have something for you from your husband.” The mother was injured so seriously that she required a week of hospitalization. The children did not witness the attack because they were visiting their father at the time. The mother firmly believed the father had arranged the attack, although the father denied any involvement and was not criminally charged.

Immediately after the stabbing incident, the mother moved to terminate the father’s visitation, though she permitted him to visit pend-

The court appointed us to represent the children and suspended the father's visitation until we reported to the court whether it was safe for the visits to resume.

We began our investigation by interviewing the parents' lawyers, the parents, and the children's pediatrician. The mother claimed that the father was violent and "crazy," pointing to the stabbing as evidence. The mother also claimed that during the marriage the father had often hit her in front of the children and had hit D and the mother's older son, M. She did not allege any violence toward L because L was "only a baby." Though she alleged violence toward D prior to the separation, she thought the father had not hurt the children during visitation. In the interview, it was hard to separate the mother's fear for her own safety, which we felt could be adequately addressed by providing a neutral drop-off point for visitation, from her fear for the children, which would, if based in fact, justify a prohibition of the father's visitation.

The father denied all of the mother's allegations of violence, claiming she was the inadequate parent because she abused drugs, ignored the children, and hit D. The pediatrician could not confirm any of the parents' allegations of abuse or neglect.

We did not interview the children. In the case of L, who was only one year old, an interview would have been impossible. In the case of D, who was three, we chose not to conduct an interview. Both parents agreed that D wanted to see his father, so it was not necessary to interview him to ascertain his preference. The issue in the case was not what the child wanted, but whether what he wanted was safe. We felt we lacked the expertise in child psychiatry or development to conduct an interview to evaluate D's relationships with his parents or the emotional effect on him of his parents' divorce or his separation from his father. We felt we needed the assistance of a psychiatric expert to determine whether it was in the children's best interests to see their father. We also felt it would be confusing and stressful to D to be interviewed by any more strange adults than necessary. Therefore, we did not meet with our clients.

We contacted the child study center and discussed with an expert in child development what sort of evaluation would be necessary to answer our questions about resuming the father's visitation. We obtained the center's agreement to do the evaluation and moved that the court order it. We requested an evaluation of both parents and both children to consider the relationships between the parents and children, any psychological problems or special needs of the children, and the ability of each parent to meet the children's needs.

Even as we arranged and moved for the evaluation, we harbored doubts about whether the information produced by the evaluation would be worth the delay it would cause. We knew, from previous
experience, that thorough family evaluation takes at least two months and usually longer. In the meantime, the father's visitation was suspended, the dispute was unresolved, and the parties were anxious and angry.

Three weeks after we filed our motion, and before it had been heard by the court, we met with the parents and negotiated a visitation agreement. Though the father made us somewhat nervous, his anger seemed directed at the mother rather than the children. We found his claim for custody totally unrealistic, but he did seem genuinely concerned about the children. The mother's fears centered on her own physical safety instead of on the children's safety. She admitted that she was more concerned that the father would harm the children by "messing with their minds" than by putting them in physical danger. She also continued to acknowledge that D wanted to see his father. That being the case, we thought it unlikely that the court would enter any final order forbidding visitation. We knew there was no positive way of evaluating the father's potential dangerousness, but given the admissions of the mother, who was motivated to oppose the visitation, we felt reasonably safe in supporting renewed visitation, even in the absence of a psychiatric report. With some pressure from us, the father agreed to custody in the mother and the mother agreed to a visitation schedule, provided that the children would be exchanged at a neutral third party's home so she would not have to meet the father alone. The agreement was approved by the court as part of a final divorce decree.

Three months later we began hearing from the parents again. The father claimed the mother refused to allow the agreed visitation. The mother claimed she had never agreed, and that the visitation was not in the children's interests. The mother claimed that the father continued to harass her by following her in his car, calling her on the telephone, and threatening to kill her. She claimed he had sexually abused L, though L's pediatrician said L had a yeast infection. The mother also claimed that the visitation was detrimental to D since he often cried after visits, seemed confused, and asked her to resume living with the father. We listened to her, investigated her complaints, and urged her to abide by the court order. We also suggested she seek therapy for D to help him cope with his parents' separation.

After several scheduled court hearings on the father's contempt motions, the court ordered the mother to comply with its previous visitation orders. The parties agreed to obtain the psychiatric evaluation we had previously recommended; however, they failed to follow their agreement. The mother also rejected our suggestion of therapy for D.

About a year and a half later, we received a call from a social worker from the state child protective agency stating that D and L had been removed from their parents and placed temporarily in a foster
home. The father had brought the children (then ages five and three) to the agency to give statements describing physical and sexual abuse by the mother and her boyfriend. Initially the agency placed the children with the father, but after hearing the mother's counter accusation of sexual abuse of L by the father and his previous physical violence toward her and both children, the agency placed the children with a foster family and filed neglect petitions against both parents. The agency had arranged for evaluations by a child sexual abuse clinic at the local university hospital and at the child study center. Its plan was to leave the children in foster care pending completion of the evaluations.

Our immediate reaction was to oppose the removal. Based on our previous contact with the family, we doubted the father's allegations and suspected that he had turned to the agency as part of his continuing battle with the mother. Most of the father's allegations concerned the mother's boyfriend and not the mother. The boyfriend had agreed to stay away from the children pending the evaluations. It therefore seemed safe to return the children to the mother during the evaluation process.

Over the next several weeks, we met with the parents, the boyfriend, the agency social workers, and all the evaluators involved with the case. The mother denied the father's allegations. Her boyfriend also denied everything and expressed strong support of the mother and willingness to stay away for as long as it took to investigate the case. The sexual abuse clinic found no conclusive evidence of physical or sexual abuse of either child. The father maintained that he had only acted on behalf of his children, who were frightened of their mother and her boyfriend and who begged to stay with their father.

Though the agency had removed D and L from their mother based primarily on the children's statements, we again declined to interview our clients. We were concerned because D and L had already been questioned by at least two state social workers, a physician, and a social worker at the sexual abuse clinic. They were also to be evaluated by a team of psychiatrists at the child study center. We could think of no basis for believing we would learn anything more or different if we interviewed D and L ourselves. With respect to the children's preference, the agency social worker acknowledged that they wanted to go home. The only dispute concerning their preference was that the father claimed D and L wished to be with him and the mother claimed they wished to be with her. We did not consider this dispute relevant to the pending legal issue—whether the children should remain in state custody.

As we collected information, we shared it with the agency social worker in charge of the case and continued to advocate the return of the children to the mother pending completion of the evaluations. We
met with the mother and urged her to cooperate with the agency. We tried to expedite the evaluations by arranging a meeting between the social worker, several representatives of our office, and the coordinator of the child study center evaluations.

During this period we and the parents’ lawyers also contested the removal in court. The hearing dragged on for weeks due to the court’s overloaded docket and both parents’ lawyers’ waste of court time attacking the other parent, rather than focusing on whether the state had met its burden of proof to justify the emergency removal. The longer the court hearing dragged on, the more important our out-of-court contacts with the agency social worker became. Finally, nine weeks after the removal, but long before the completion of the court hearing, we succeeded in convincing the agency to withdraw its application for the order of temporary custody. The children returned to their mother’s care.

The father then filed a motion to modify the divorce decree by changing custody from the mother to himself. The mother responded by moving to terminate his visitation. The case returned to court numerous times on contempt motions while we waited for a trial date. Each time we urged the parties to abide by the original court orders until the case could be tried. When the person serving as the neutral drop-off point refused to continue acting in that capacity, we tried to help the parties find an alternative. When the only alternative turned out to be the lobby of a police station (a solution suggested by the father and opposed by the mother), we informed the court of our view that exchange of children for visitation at a police station was a bad idea but it was the only way for D and L to see their father, which they wanted to do. The court ordered continuation of the visitation under the arrangements proposed by the father.

When the custody case finally came to trial, we participated by questioning witnesses called by the parents and by calling a psychiatrist from the child study center as our own witness. In our questioning, we tried to focus on the issues affecting the children — who had been their primary caregiver; what their current needs were; whether their primary caregiver was incapable of meeting their current needs; why the mother wished to terminate the father’s visitation; what harm the father’s visits had; and whether the children wanted the visits to continue. In contrast, the parents’ lawyers, in their examination of witnesses, sought only to establish their clients’ grievances against each other.

We were clear in our position that custody of D and L should remain with the mother and advocated that position both through our questioning of witnesses and in a post-trial brief. Despite several evaluations and investigations, none of the father’s allegations were substantiated. None of the clinicians, except a psychologist hired by the
father who did not see the mother, expressed any doubt about her ability to care for the children. The clinicians’ conclusions agreed with our own.

The visitation issue was considerably more difficult. The mother conceded, as she had two years before, that the children wanted to see their father and that it would not be physically dangerous for them to do so. She believed, however, that his constant criticism of her in their presence was harmful. She still refused to exchange the children for visitation except in a neutral setting because of her fear for her own safety, and no such neutral setting (other than the police station) seemed available. Several of the evaluating clinicians expressed concern that it was harmful for the children to be exposed continually to the parents’ battles about visitation.

We felt uncomfortable actively advocating against our clients’ expressed preference to continue visitation. None of the numerous evaluators had observed both parents with the children. The evidence was not clear whether the cost to the children of continued warfare and exposure to the father’s inappropriate behavior was greater than the cost of losing the father. We elected to present to the court, through examination of witnesses and our brief, all of the available evidence concerning the visitation, including the children’s expressed preference to continue visiting their father, but made no specific recommendation about whether to terminate the visitation.

At the close of trial, the court temporarily suspended the father’s visitation, apparently in response to testimony concerning his behavior in the presence of the children. The court has not yet rendered a final decision, but it is relatively clear that the mother will retain custody, and probable that the temporary suspension of visitation will be made permanent.

III. DISCUSSION

The three cases we have described, in which the authors served as court-appointed counsel for young children, each involved bitter, emotionally charged custody disputes between the parents. The relationship between the parents in each case was hostile, suspicious, uncooperative, and vengeful. In each case, the children were exposed to angry, emotional arguments between the parents, at times accompanied by physically threatening behavior. In all three cases, the parents demanded rigid adherence to pendente lite visitation and

21. For example, a social worker from the child sexual abuse clinic testified that D had told her that the father used a photograph of the mother as a dart board, and encouraged the children to do so also. A state protective services worker also testified that during a supervised visit she had heard the father denigrate the mother to the children.
monetary agreements or orders on the part of the other parent, but insisted upon flexibility and relief from strict compliance on their own part.

All the parents sought major, disruptive changes in their children's lives including: removing the children from the custody of their primary caregivers; depriving the children of significant contact with one of their parents; requiring the children to participate in a visitation arrangement that imposed substantial and unnecessary hardships and inconvenience upon the children in order to accommodate the parents' needs and desires; or significantly reducing the financial resources available for the support and maintenance of the children.

All the children were harmed in varying degrees by the behavior of their parents in relation to the litigation. The children’s symptoms included unhappiness, depression, regression, and acting-out behavior, such as declining school performance and antisocial or other inappropriate actions such as aggressive or rejecting behavior toward a parent.

From our experience in representation of young children over the past several years, review of child development literature, and consultation and collaboration with experts in the field of child development, we have formulated a set of presumptions that define the professional role of court-appointed counsel for young children. We believe that reliance on these presumptions enables us to function as lawyers for children who are, on the whole, too young to express meaningful, reliable judgments about what custody and visitation arrangements would serve their best interests. Such children must be considered, in traditional lawyer's terms, too young to be “clients.”

These presumptions are not rigid rules to which we adhere strictly and without exception, but guidelines to which we refer in determining how to carry out our role as advocates for individual children in particular cases.

Before we spell out these presumptions, a brief word on the role of the child's preference is in order. In cases involving adolescents, the child's views and preferences should play an important, usually decisive, part in determining what result to pursue. For school-age and younger children, the child's views and preferences (if any are expressed) should not necessarily be decisive of what outcome the child's legal representative should advocate.

One need not be a child development expert to know that most fifteen-year-olds are capable, with some adult assistance, of making a reasonable assessment of what custody and visitation arrangements are most likely to work for them. It would be wrong not to include them as meaningful participants in the decisionmaking process. Similarly, most preschool-age children are not capable of expressing such preferences with sufficient clarity and basis in articulated reasons to lead us to accord substantial weight to them in the decisionmaking
process. However, even a very young child can serve as a source of important information about how each of her parents, or which parent, meets her basic needs for care, nurturance, affection, and stimulation. Such information can assist the child’s attorney in ascertaining what the child’s “preference” would be if she were mature enough to express it.

IV. THE PRESUMPTIONS

While we do not adhere to the “tender years presumption” that young children ought always to be in the custody of their mothers, we do believe, and it is our principal presumption, that children ought to be in the custody of that parent who has, most consistently during the child’s life, been the child’s primary caregiver. Except in the most extreme circumstances, involving the actual inability of the primary caregiver to care for the child, a child should not be removed from the custody of the primary caregiver.

Second, we subscribe to the view that every child needs two parents. Even where the child’s parents are no longer able to live together, every effort should be made to maintain the child’s relationships with both parents. 22

Third, it is our experience that involuntary joint custody does not work, and that joint custody should not be imposed on parents who are not willing and able to work together to raise the child.

Fourth, the child’s life should be changed as little as necessary. To the extent possible, her living arrangements should be maintained, and her relationships with both parents sustained.

Fifth, a visitation schedule for the child and noncustodial parent should be devised that accommodates the child’s needs.

Sixth, the custodial parent should receive adequate child support payments to enable him or her to continue to meet the child’s needs after the parents separate. 23

Seventh, contacts between the parents (except in a joint custody situation) should be minimized to avoid opportunities for conflict between them.

Eighth, continuing efforts should be made to reduce conflict and resolve disputes between the parents through negotiation and mediation. It is always better for the child, directly and indirectly, when the parents are helped to come to agreement, rather than resorting to contested court proceedings and other less restrained forms of combat.

Ninth, opportunities for conflict and misunderstanding should be

reduced by incorporating all custody, visitation, and support provisions, whether by agreement or court order, in detailed, comprehensive written documents which leave no room for flexibility or discretion.

All nine of these presumptions reflect our belief as child advocates that the primary need of children involved in custody and visitation litigation is not simply the “right” result, but protection in, and from, the process itself.

The nine related presumptions that we have enumerated are derived from our experience in representing young children in custody litigation. They are consistent with the findings of child development experts that stress children’s needs for continuity of care, affection, and stimulation, and that document the adverse psychological effects on children of protracted and emotional custody battles.24

The role of the child’s legal representative should be to work for the implementation of these presumptions in both the conduct in and outcome of the litigation. The professional actions of the attorney as court-appointed counsel, or guardian ad litem, for a child client should be geared to the purpose of the litigation — to identify and secure the child’s interests — and to the capacity of the child to participate in the fact-gathering and decisionmaking process.

The child advocate’s duties include those customarily performed by lawyers for a wide range of clients, not only those who are children. These include the duties to investigate, evaluate, negotiate, mediate, and advocate.

Investigation, or fact gathering, is a primary function of the attorney. It includes interviewing the client and others, and collecting documents and other sources of information informally and through formal discovery. It can also include arranging, or moving the court to order, psychosocial, psychological, and psychiatric assessments of the child and the parents.

Evaluation of the facts gathered through investigation in order to assess, weigh, and formulate a professional judgment about them is a related and equally important function of the lawyer. Does the child have a preference? What weight should be accorded that preference in view of the child’s age, maturity, intellectual capacity, emotional state, and any strong evidence that the preference is contrary to the child’s interests? Who is and has been the child’s primary caregiver? What do others report about the child and the parents, such as school teachers, pediatricians, relatives, friends, and psychotherapists? What do school, medical, and other records reflect? What are the findings

24. BEYOND THE BEST INTERESTS, supra note 2; SURVIVING THE BREAKUP, supra note 22.
and recommendations of formal evaluations conducted in connection with the litigation?

Negotiation of interim, pendente lite agreements between the parents regarding custody, visitation, support payments, and other issues is another attorney role not peculiar to the child advocate. It is always in a child's best interest for her parents to stop fighting and come to agreement about matters affecting her welfare, provided that such agreements meet the child's needs and are not one-sided and unfair. The child advocate is in a position to negotiate such agreements on behalf of the child.

Mediation, like negotiation, is an appropriate role for a lawyer. The child's lawyer is in a unique position to help the parents settle their custody dispute, since she is viewed by both parents as trying to help them come to an agreement that will best serve the child's interests under the circumstances.

Finally, advocacy in support of the client's interests is the lawyer's principal responsibility. Once the client's interests have been identified through fact gathering and evaluation, including interviewing and counseling the child client where possible, it is the attorney's obligation to be an advocate for those interests in negotiation and mediation, in conferences with the judge and other court personnel, and in the courtroom.

V. CONCLUSION

In each of the three cases described, the parents were so consumed by their own dispute that they could not focus on the needs of their children. Rather than putting aside their adult grievances to ease their children's difficulty in the divorce, these parents placed their children in the center, as prizes to be won or lost, or sought to enlist the children as allies in the battle. The parents' own lawyers could not or would not advise their clients to compromise because they believed they owed a duty of zealous representation to the parents that precluded their doing so.

One useful role we played in these cases, therefore, was the role of adults committed solely to the welfare of the children. In this role we were able, in conversations with the parents and in proposals to the court, to focus the debate on the children's needs rather than the parents' grievances. We were most successful when, in the case of R and S, we were able to convince the parents to stop fighting and cooperate in meeting their children's interests. We were less successful in the case of D and L when we investigated, determined what was in the children's best interests, and advocated that to the court. We were least successful in the case of J, when both parents were unwilling, or for reasons of mental illness, unable either to cooperate or to separate,
follow professional advice from therapists or lawyers, or abide by court orders.

In all three cases, the fact that we were neutral third-party lawyers and were perceived as having power within the judicial system enabled us to gain the respect and attention of the parents, their lawyers, court and agency social workers, and judges. Many of our activities, such as interviewing, counseling, and mediating, could also be done by other professionals, such as social workers. It is because lawyers are uniquely powerful in judicial proceedings, however, that a child advocate should be a lawyer and not a social worker or other sensible adult.

The purpose of giving a child her own legal representative is to limit the power of the parents to separate children from primary caregivers, to terminate children's relationships with one parent, or to involve children as allies in the adult battles surrounding divorce litigation. We agree with the policy critics of child advocacy that appointment of a separate legal representative for children disempowers parents. We disagree that such appointment is a bad thing. Our experience has convinced us that many parents who care deeply for their children are simply unable to keep their children's needs in mind in the midst of divorce. In those cases even a child too young to be a client needs her own lawyer.