THE ROLES AND CONTENT OF BEST INTERESTS IN CLIENT-DIRECTED LAWYERING FOR CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

Jean Koh Peters*

Table of Contents

Introduction ............................................. 1507

I. The Roles of Best Interests in Lawyering for Children .... 1513
   A. Best Interests as a Looming Legal Standard in the Case ............................................. 1514
   B. Best Interests as the Ultimate Concern for Most Other Professionals Involved With the Client ........... 1516
   C. Best Interests as a Guide to Conducting Your Relationship with the Client: Making Micro Choices that Affect Your Client's Well-Being ............................................. 1518
   D. Additional Roles for Best Interests Based Upon Child's Ability to Be Counseled ......................... 1519
      1. For Clients Who Can be Counseled ..................... 1519
         a. Counseling the Client About the Lawyer Conclusions About the Client's Best Interests... 1519

* Clinical Professor of Law and Supervising Attorney, Yale Law School. J.D. Harvard 1982; B.A. Harvard-Radcliffe 1979. The author represented children in abuse, neglect, termination of parental rights, delinquency, and status offender cases at the Legal Aid Society-Juvenile Rights Division in Manhattan from October 1983 through January 1986. She served as Associate Director to the Child Advocacy Clinic at Columbia Law School from 1986 through 1989. She currently co-teaches Advocacy for Parents and Children and Immigration Legal Services, two clinical seminars, and supervises students representing children, parents, and refugees.

I am grateful to Deans Anthony Kronman and Guido Calabresi, and the Yale Law School, for generous support of my research. These chapters benefitted greatly from Ernie Galvan's excellent research, thoughtful feedback, and his contributions to the recommendations section and footnotes of this manuscript. I also thank Fall Ferguson, Marcia Glickman, Kimberley Harris, Meredith Hightower, Jeff Marcus, Jaclyn Moriarty, Kimberly Walp, and Steven Zansberg for their research assistance. Susan Terry, Kathy Stoddard, and Gene Coakley offered steady technical and logistical support. I thank Ana Mari Bermudez, Peggy Davis, Sonja Goldstein, Martin Guggenheim, Jay Katz, Martha Leonard, Mona Scales, Kathleen Sullivan, Bob Solomon, and Steve Wizner for their helpful comments in the writing of these chapters. I am also grateful to participants in the Yale Law School Faculty Workshop and participants in the Fordham Conference on Ethical Issues in the Legal Representation of Children, particularly Frank Cervone, Michael Corriero, Chris Dunn, Ellen Effron, Rose Firestein, Deborah Glasier, Ann Haralambie, Daniella Levine, Bob Schwartz, Jane Spinak, and Luis Zayas. I also thank the publisher of the book, Michie Company and my editor Ray White for their extraordinary support.

My ultimate thanks go to my mother, Dr. Hesung Chun Koh, and to Jim, Elizabeth, and Christopher Peters, my unending sources of inspiration and joy.
b. **Confronting One's View of Best Interests to Promote Honest Counseling** ................. 1521

2. For Clients Who Cannot Be Counseled: Determining the Objectives of the Representation ................................................................. 1522

E. **Summary** .................................................................................. 1524

II. An Integrated Approach to Determining Best Interests .... 1524

A. **Four Existing Models for Determining Best Interests** .... 1525

1. The Total Lawyer Discretion Model: the Guardian *ad litem* .......................................................... 1525

   a. **Definition: Whatever the Lawyer Thinks Is Best** ............................................................................. 1525

   b. **Critique of the Total Discretion Model** ............ 1525

   c. **Why the Model Persists and Even Prevails** ..... 1527

2. The Expert Deference Model ...................................................... 1528

   a. **A Professional Already Involved with the Child** ................................................................. 1529

   b. **An Expert Consultant (Who May Also Be an Expert Witness) Working with the Attorney** .... 1532

   c. **An Independent Expert Appointed by the Court** ...................................................................... 1534

   d. **Summary** .................................................................................. 1536

3. The Psychological Parent Model .............................................. 1537

   a. **The Least Detrimental Alternative: Placement of The Child With His Psychological Parent** .... 1538

      i. The Child's Sense of Time .................................. 1539

      ii. The Limitations of Knowledge ...................... 1540

      iii. The Wanted Child........................................ 1540

      iv. Continuity of Relationships ......................... 1540

      v. The Psychological Parent .............................. 1541

      vi. Grounds For State Intervention .................... 1541

      vii. **Summary** ......................................................... 1542

   b. **The Limits of the Psychological Parent Model in Informing the Lawyer's Determination of Best Interests** ................................................. 1542

      i. The Authors's Recommendations About the Role of the Lawyer for Children ..................... 1542

      ii. Critics’ Concerns About the Goldstein, Freud, and Solnit Model .......................... 1544

4. The Family Network Model ...................................................... 1550

   a. **The Recognition that Children Form Attachments With Multiple Caregivers in a Family Network** .................................................. 1550

   b. **The Limits of the Family Network Model in Informing the Lawyer's Determination of Best Interests** ................................................. 1552
INTRODUCTION

Lawyers for children in child protective proceedings in the United States must reconceive their role and their responsibilities. While lawyers for juveniles in delinquency and quasi-criminal matters have been understood, since In re Gault in 1967, to provide traditional legal representation for their clients, a lawyer for a minor in a child protective proceeding has generally been expected to play the role of guardian ad litem with respect to his clients. As guardian ad litem, the child’s lawyer determines the child’s best interests, and represents those interests through advocacy and testimony before the court.

The book Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, of which this Article forms two chapters, reviews, rejects, and replaces that guardian ad litem role. Through historical, statutory, and ethical analysis, the book demonstrates that the guardian ad litem role for lawyers for children has outlived its historical usefulness. Because it requires lawyers to make decisions which they are not qualified to make, and because it de-

1. 387 U.S. 1 (1967).
2. Chapter One of Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions offers historical background concerning the history of child protection and parental rights. It concludes that, despite federal and national initiatives designed to preserve families, the current child welfare system is disturbingly continuous with what scholars have described as a dual system of family law, protecting parental rights of rich parents and discounting parental prerogative of poor parents, which originated in Elizabethan England. Chapter Two offers a capsule history of lawyering for children in the United States. It concludes that the prevalent “guardian ad litem” role of lawyers for children originated in property disputes involving orphaned wealthy British children and has no logical place in contemporary child welfare proceedings. Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions (forthcoming from the Michie Company) [hereinafter Representing Children].
3. Chapter Three of Representing Children reviews the substantive law of the 50 states, the District of Columbia, and the U.S. Territories regarding the role of lawyers for children in child welfare proceedings. Although lawyers for children or guardians ad litem are required in all jurisdictions, the role of any given lawyer in any given state, city, county, or courthouse varies wildly, with few areas of consensus or consistent practice. Id.
4. Chapter Four of Representing Children examines the ethical provisions regarding representation of children. Concluding that lawyers for children are ethically required to design a representation that closely resembles traditional lawyer-adult client representation, the chapter offers three default postures for the child’s attorney and seven principles for keeping the attorney true to the ethical requirements. Id.
prives children of the traditional competencies of a good legal representative, the guardian *ad litem* role doubly disadvantages child clients and should be abandoned.

The book thus tries to answer the central question facing lawyers for children: How do lawyers for children represent children in a lawyerly way, one that is deeply respectful of the individuality and unique perspectives of the client? I recommend that lawyers for children be guided in their role by the letter and spirit of Model Rules of Professional Conduct ("Model Rules") Rule 1.14, which provides:

a) 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.

b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.5

In Chapter Four, I argue that Rule 1.14, despite its broad and flexible language, offers useful guidance to the lawyer for children. The child’s attorney can understand the rule in terms of three practical defaults for action in his representation of his client. These defaults are:

1. **the relationship default**—the lawyer must meet and get to know his client.

2. **the competency default**—the lawyer should initially presume some level of competency for his client on each issue in the representation in which a client’s point of view would ordinarily be sought.

3. **the advocacy default**—the lawyer should initially attempt to advocate for the position expressed by his client.

The lawyer may deviate from these default positions only when independent evidence, that is, evidence not arising exclusively within the lawyer-client relationship, such as psychological, educational, and psychiatric evaluations, demonstrate that the default position is erroneous, and that deviation from the default position would clearly benefit the child.

Without a consensus about these default positions, the danger in the discretion inherent in Rule 1.14 lies in the following scenario. In traditional lawyer-client relationships, lawyers are constrained to follow the wishes of their clients when they are convinced that those wishes are based on information and thorough legal counseling. The lawyer may not override those wishes, even if he is convinced that

---

they are wrong-headed. Clients, not lawyers, set the objectives of their legal representations.\(^6\)

The danger arises when the lawyer for a child or a person with a disability takes Rule 1.14(b) as a license to overrule a client’s stated wishes, simply because the lawyer disagrees with the client’s well-counseled decision. In this undesirable scenario, the lawyer would retain the final trump card in any decision-making process. If the client, after careful counseling, reaches the decision that the lawyer favors, the lawyer can congratulate herself for operating under Rule 1.14(a) and retaining a clear conscience. If the client, after careful counseling, reaches a decision that the lawyer thinks is foolish and that the lawyer has advised the client is foolish, the lawyer can use that decision as evidence for her “reasonable” belief that the “client cannot adequately act in the client’s own interest” and represent what the lawyer considers to be the “right” decision rather than the client’s stated desires.\(^7\)

Because this kind of circular, lawyer-centric thinking epitomizes the inadequacies of the guardian ad litem model and fundamentally excludes the child client from the representation, this profession must reject it. The central theme of the defaults is this: a lawyer for children should start by trying to have a conventional professional relationship with her client. Only after the lawyer has determined, through independent evidence and her own observations, that crucial elements of the conventional lawyer-client relationship cannot be maintained, should the relationship be modified.

To be sure, a lawyer for children must acknowledge that, for many of her clients, these defaults will not hold. I firmly believe, and the book is designed to demonstrate, however, that lawyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client.

The conceptual change that I am suggesting may be understood in the following way. Posit a spectrum in which a fully competent, involved, adult client contributes 100% to his representation—by providing information, listening to counseling, providing direction for the representation, and expressing opinions about substantive and procedural choices to be made. Traditional thinking about lawyering for anything but this fully competent client suggests that competency is a light switch—on or off: if the client cannot contribute 100%, the cli-

\(^6\) Id. Rule 1.2(a).

\(^7\) Kate Federle warns in her paper for this Conference that giving lawyers discretion to determine client competence invites manipulation when lawyer and client disagree. Katherine Hunt Federle, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 Fordham L. Rev. 1655, 1661, 1676-77, 1681; see also infra note 34 (discussing results when lawyer and client disagree).
ent should not be expected to contribute at all. At that point, the lawyer is free to determine the goals and methods of representation with total discretion.

I believe, however, that every client can contribute some amount to his lawyer’s representation. Even the newborn child evinces a personality, a level of health, physical characteristics, a gestational and birth history, and a family context and history that distinguishes her from the next newborn client. While this uniqueness may provide, perhaps, only eighteen or twenty-six percent of what the lawyer requires to determine how to represent the child, the lawyer’s representation must reflect this contribution, and remain true to its individuality. Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it. The lawyer must strive to incorporate every percentage of the client’s contribution into the representation. Thus, I would suggest that a lawyer whose client can contribute thirty percent to the representation, but who assumes that the client can only contribute fifteen percent, is failing to represent her client to a significant degree.

8. Martha Matthews notes a tension in the Model Rules between a view of competence as an incremental concept and competence as an all-or-nothing concept. On the one hand, the Comment to Model Rule 1.14 notes that the “law recognizes intermediate degrees of competence.” Model Rules, supra note 5, Rule 1.14 cmt. On the other hand, Model Rule 1.14(b) authorizes protective action which may remove entirely the client’s ability to direct the representation. Matthews notes that the Model Rules drafters acknowledge, but do not resolve, this tension. Martha Matthews, Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases, 64 Fordham L. Rev. 1435, 1439-40 (1996).

The all-or-nothing view is expressed in Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 1.14:101, at 439 (2d ed. 1990 & Supp. 1993): “At some point, however, the ability of a disabled client to communicate or to take action is so limited that assigning that person the role of “client” is a mere formality—as where a lawyer has been assigned to represent a newborn infant.”


10. Peter Margulies in his article for this Conference, notes that because “even infants are taking in information, and giving it out, at a spectacular rate,” attorneys for very young children should not forego meeting their clients. Peter Margulies, The Lawyer as Caregiver: Child Client’s Competence in Context, 64 Fordham L. Rev. 1473, 1484 n.38 (1996).

11. In this regard, I agree with the Council of the Family Law Section of the ABA, which states in its proposed Standards of Practice that client disability is not globally determined, but rather is “contextual, incremental, and may be intermittent,” and that “[t]herefore, a child may be able to determine some positions in [a] case but not others.” Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375, § B-3 cmt. (1995) [hereinafter ABA Proposed Standards]. For a discussion of competence as a contingent construct that varies with the decisions the client confronts and with the way the client is treated by lawyers and other professionals, see Margulies, supra note 10, at 1477, 1485. See also Emily Buss, “You’re My What?”: The Problem of Children’s Misperceptions of Their Lawyers’ Roles, 64 Fordham L. Rev. 1699, 1739-41 (1996) (argu-
Of course, these percentages are artificial and imprecise, but they are useful to conceptualize what lawyers for children already know. In fact, child clients are unique individuals from the day that they are born. In practice, however, especially high-volume, low-paid practices, client representations have had a disturbing cookie-cutter sameness. We assume a great deal about our clients without getting to know them, we slot clients whom we have just begun to represent into categories, and we participate in extraordinarily important decisions in the child's life with extraordinarily little information. This Article attempts to outline the concrete steps a truly individualized representation requires, so that the sophistication of our representation of child clients can reflect the gravity of the family decisions in that we participate.

To double check the lawyer’s actions and their harmony with Rule 1.14, Chapter Four of Representing Children also sets forth the following seven questions to keep lawyers for children honest:

1. In making decisions about the representation, am I seeing the case, as much as I can, from my client’s point of view, rather than from an adult’s point of view?
2. Does the child understand as much as I can explain about what is happening in his case?
3. If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?
4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?
5. Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?
6. Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

These questions memorialize my concern that, when lawyers are asked to exercise broad discretion over their client’s lives, filling in, for example, the seventy percent that the infant client cannot provide to the representation, adult concerns and the lawyer’s own needs will tend to fill the vacuum. Representation of very young and nonverbal clients can and ought to resemble the child’s perspective and not those of the adults around him.
The Chapters included here address the roles and content of best interests in lawyering for children. As a practitioner, I knew that I was deeply uncomfortable with the "guardian ad litem" orientation of much of my practice, and hoped that a strictly "advocacy-oriented" child's lawyer, as described above, could largely avoid the responsibility of contending with her client's best interests. Further examination of the ethical codes as well as my experience as a supervisor and teacher, however, have convinced me that, not only must lawyers for children be expected and required to understand and act on their client's best interests, but in fact all lawyers are expected and required to do so. Thus, even as I lay out a "client-directed" role for children's lawyers in the book, I must explain how the principled lawyer for children factors best interests into his representation, and how he determines the content of best interests.

Thus, Chapter Five identifies the roles that best interests play in even the most child-directed lawyer's representation. Chapter Six describes prevailing views of how an attorney should determine those best interests, and then presents a model integrating those views. These chapters follow in their entirety.

Part One of the book concludes with a discussion of interdisciplinary consultation and learning as well as sample representations of two clients. Part Two of Representing Children outlines the practical application of the principles presented in Part One through an in-depth look at the lawyer-child client relationship. The book con-

---

12. It is fair to say that I was led, kicking and screaming, to this rather uncomfortable conclusion. As a practitioner, I found the responsibility of taking positions on huge issues in my client's life to be awesome and humbling. As a teacher and supervisor, I found the level of discretion entrusted to lawyers for children to be frighteningly huge. When undertaking the project of writing this book, I originally believed that I could enunciate a view of lawyering that would eliminate the discretion to determine and contend with a child's best interests altogether. I am therefore deeply sympathetic with and fascinated by Martin Guggenheim's work, including the article included with this Conference, which seeks principled elimination of lawyerly discretion in representing children. Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399 (1996). The chapters contained herein demonstrate my conclusion, based upon my practice and my research, that while this discretion, and the awesome responsibility it entails, cannot be eliminated, it can nevertheless be reduced to acceptable levels and exercised in a principled manner.


15. Chapter Seven of Representing Children discusses the roles of interdisciplinary consultation and learning. Chapter Eight, which concludes Part One, outlines the nuts and bolts of representing verbal and non-verbal clients, offering a practical roadmap through the representations of various kinds of clients.

16. Part Two of Representing Children describes in depth a rubric for the relationship of the adult attorney with the child client, addressing issues of interviewing, counseling, and beginning and ending the professional relationship.
I. The Roles of Best Interests in Lawyering for Children

Resolving that, wherever possible, the lawyer will represent her child client through as traditional a lawyer-client relationship as possible does not relieve the lawyer of the obligation to confront and determine her client's best interests in a number of contexts. This part will identify the roles of best interests in lawyering for children.

All lawyers for children must develop a sophisticated understanding of the best interests of each client in order to carry out their representation for three reasons: (1) the ultimate legal standard governing the client's case will often require a determination by a fact finder of best interests; (2) all conversations with other professionals in the case, whether in preparing litigation or seeking settlement, will be framed by their concern for your client's best interests; and (3) the logistics of representing children require lawyers to make choices based on their clients' best interests on a daily basis. Lawyers who can meaningfully counsel their child clients must understand best interests for two more reasons: they are permitted and encouraged to counsel the client about the client's best interests in assisting the client in making decisions directing the representation; and, in addition, responsible lawyering for these clients requires a lawyer to confront his assessment of a client's best interests, to ensure that bias and personal values have not assumed too important a role in the representation. Lawyers who cannot meaningfully counsel their child clients must understand best interests also, for the most daunting reason of all: they will be required to determine the goals of the representation, and a myriad of other decisions for their clients, with relatively little client input.

The following list of roles for best interests in the representation of child clients is meant to be exclusive and narrow. It excludes other determinations of best interests in the relationship because lawyers for children should wherever possible defer to their client's expressed statements about a matter rather than determine independently what they think is best for their clients. In addition, each moment in the representation when best interests is implicated should be approached as a narrow event, allowing the lawyer as little leeway as possible in conceiving a view of best interests unrelated to the child's views. Even a determination of best interests must begin and end with the child in her context and the child's expressed views. Thus, this list of roles of best interests must not be seen as carte blanche to override a child's point of view. Rather, lawyers at these moments in the repre-

---

17. Part Three of Representing Children examines selected issues in pursuing the representation, including lawyering at interdisciplinary meetings, and calling the child client to the stand as a witness. Id.
sentation must recognize the responsibility and danger of losing track of the child client that inheres in these small and large invitations to lawyer discretion. Each of these roles of best interests will be considered in turn.

A. Best Interests As a Looming Legal Standard in the Case

Courts in the dispositional phase of an abuse, neglect, or dependency proceeding must generally determine the child's best interests to resolve the proceeding. Similarly, best interests is usually the standard in the dispositional phase of a termination of parental rights proceeding. In other stages of proceedings, for instance, the emergency removal phase of a dependency proceeding or interim visitation decisions, best interests may be one important factor among others. In keeping with the lawyer's duty to approach this moment of best interests determination narrowly, it is critical to note that while best interests lurks at any potential dispositional phase of child protective proceedings, the child's lawyer may, pursuant to his client's instructions or otherwise, seek to resolve the case at the adjudicative phase, at which the standard is parental unfitness. Often, a child's attorney will conclude that moving to prevent an adjudication of parental unfitness and thus end the case will best achieve the client's objectives. This is particularly true when the client clearly wants the lawyer to oppose further state intervention of any kind into her family. In these instances, therefore, a child's lawyer may well decide to attempt to focus the parties and the court exclusively on questions relating to the existence or absence of parental unfitness, and not on the sprawling question of best interests.


19. Generally the standard in those proceedings is imminent harm to the child if there is no removal. Many courts may believe that a finding of imminent danger requires a general assessment of the interests of the child at the time.

20. Certainly the child's attorney should feel comfortable holding the state to its burden demonstrate parental unfitness before further state intervention into the family's life. Likewise, at an emergency removal hearing, an attorney opposing removal
Despite her best efforts to keep the court focused upon adjudicatory matters, however, a lawyer may find that she is fighting a losing battle. As a result of the prevalence of the "best interests" standard, judges will often be preoccupied throughout all phases of all proceedings with the "best interests of the child," even when, at a given phase of the proceeding, another standard, such as parental fault, is controlling. At this point, the lawyer may decide that she must battle on two fronts: seeking to focus on parental unfitness to the greatest extent possible, and formulating a theory of best interests. Thus, any child advocate must become adept at translating her proposals to the court into the language of "best interests." Just as a tort attorney must translate a client's story into the legal language of fault and negligence, children's attorneys must often translate their clients' desires and goals into the framework of "best interests." Like any attorney who respects the client's right to make her own informed decision, the attorney may be in the odd position of advocating a result which, personally, the lawyer believes is not in the child's best interests. Thus, a lawyer should be prepared to make an argument that a client's desire is in her best interests as long as the lawyer can do so in good faith. The lawyer should press herself to make those arguments even when they conflict with her personal assessment of the client's "best interests."

Thus, in a majority of the legal proceedings faced by the child advocate in doing child protective work, best interests will be a lurking concern for the court. Preparation for legal argument in the case must therefore often be done with an eye towards framing the client's position in terms of that looming legal standard.

should certainly require the state to demonstrate imminent harm to the child and prevent premature court deliberations on the issue of the child's best interests.

21. Of course, like any attorney, the child's attorney is bound not to make frivolous claims. Model Rules, supra note 5, Rule 3.1. Thus, if there is no argument that a child's desire is in the child's best interest, the lawyer should theoretically be unable to make that argument. In practical application, however, the duty of zealous advocacy requires that a lawyer define the term "frivolous claims" very narrowly. Only claims which are clearly untenable under the controlling law, or which reflect a wish of "harassing or maliciously injuring a person," should be deemed frivolous. Id. Rule 3.1 cmt. Such a narrow definition of frivolous claims prevents lawyers from arbitrarily vetoing their client's wishes. Guggenheim, supra note 12, at 1419 n.68.

22. As Representing Children will address in Part Two, The Lawyer-Child Client Relationship, a lawyer who believes he is making a very marginal or "likely to fail" claim, should certainly counsel her client about the tenuousness of the argument and encourage the client to consider more constructive positions. Peters, Representing Children, supra note 2. Nevertheless, if after thorough counseling, the client persists in wanting a marginally possible objective, and the lawyer can make a good faith claim for that, Rule 3.1 should not prevent her from putting forth that claim.

23. Bruce Boyer points out that the prevalence of the best interests standard imposes a similar obligation on parents' lawyers to translate their clients' objective into terms of best interests of the child. Bruce Boyer, Ethical Issues in the Representation of Parents in Child Welfare Cases, 64 Fordham L. Rev. 1621, 1626-27 (1996).
B. Best Interests As the Ultimate Concern for Most Other Professionals Involved with the Client

The lawyer must understand best interests additionally because best interests frames the ethical purview of most of the other professionals dealing with the client in the case. Although the lawyer who has not been assigned guardian ad litem does not necessarily have this duty, certainly the child’s therapist, state social worker, teacher, counselor, and other professionals are charged with protecting their client’s “best interests.” For instance, the social work code of ethics clearly places the interests of clients before straight advocacy of a client’s desires. The lawyer getting information from these professionals, cooperating with them on various matters, meeting with them, and seeking settlement with them would do well to remember this primary concern of these professionals.

The lawyer should also be mindful that the straight advocacy role of the lawyer will seem anomalous or repugnant to some of these professionals. Many professionals are horrified to think that a lawyer would represent the stated wishes of a child. A child’s lawyer’s failure to factor in this potential gulf between professional responsibilities can sometimes make initial communication with other professionals extremely awkward. This tension is compounded because many non-legal professionals understandably approach lawyers with a negative bias due to popular negative opinions about lawyers.

Therefore, the child’s attorney who stresses that he understands the best interests mandate of the professionals with whom he is talking may break down uncomfortable barriers to communication. It is often useful to spell out the responsibilities of the various professionals to make clear that everyone understands whose role is whose. The child’s lawyer must understand and speak the language of best interests to communicate usefully with other professionals. Often, a lawyer well-versed in best interests terminology and theory may forge settlement out of court with those crucial nonlegal professionals on issues both central and ancillary to the case.

At critical points in building relationships with other professionals, it is useful to ask them to explain to you their understanding of their ethical duties and their understanding of the child’s best interests. Be aware that various other professionals almost certainly have conflict-


25. The interdisciplinary meeting, which will be explained in Part Three of Representing Children, is often a useful forum for this clarification. See Peters, Representing Children, supra note 2.
The first paragraph states that professionals within their field are discussing theories about the definition of "best interests." For instance, the writings of Goldstein, Freud, and Solnit seek to replace a focus on best interests with a focus on permanent "least detrimental" alternatives for the child. That permanency view involves in turn an assumption that the child's long-term best interest is usually served by preserving one long-term permanent caregiver for the child. Nevertheless, another school of thought suggests that a permanent caregiver may be less important than the family network surrounding the child. Therefore, the child's attorney must educate herself about the factors contributing to a professional's view of best interests as she enters an ongoing dialogue, to create a basis for possible agreement and collaboration.

Determining the ethical duties of other professionals need not be cumbersome or overly artificial. Generally, as the attorney introduces himself to other players in the case, his words and actions will clarify his role in the case. It is very common, for instance, for nonlegal professionals unfamiliar with family court to wonder and ask, "Say, how did this kid get a lawyer in the first place?" The lawyer can briefly explain what statute and custom led to his appointment. Usually conversations about role need only take place in the initial encounters. The lawyer, however, should clarify his role at critical junctures in the case. For instance, at a presettlement phase of a case, one may have heated interactions with case workers or therapists whose views of one's client differ from one's own. It is often useful in those highly charged situations to step back and comment about the differences among the lawyer's roles, to reiterate the lawyer's understanding and respect for other ethical imperatives, and to search for ways to resolve the issue at hand in a way that is consistent with all of those roles.

Often professionals gather at various kinds of meetings before court, whether it is a settlement meeting or an interdisciplinary team meeting or a case conference of some kind. Meetings of this kind sometimes descend quickly into confusion for the simple reason that people do not know the identities and roles of everyone at the meeting. Even when meetings begin by having everyone introduce himself, late-comers or those who cannot write fast enough are often lost about the identities of the different people at the meeting. Circulating

26. See infra notes 63-128 and accompanying text (discussing and critiquing the works of Goldstein, Freud, and Solnit).

27. See infra notes 129-46 and accompanying text (discussing the Family Network Model).


29. These meetings and the dynamics thereof are discussed in more depth in Part Three of Representing Children. Peters, Representing Children, supra note 2.
an attendance sheet listing name, organization, and phone number to consult during the meeting is often useful. As Part Three of *Representing Children* discusses, a well-prepared lawyer should know in advance who will attend each meeting and what is each person's role. The attorney may then anticipate how that person's view of the case, usually couched in terms of best interests, will lead her to react to the client's position in the case. Once those roles and positions are identified, the lawyer can begin to strategize about convincing those professionals to support the client's position and building consensus around the client's position generally. Thus, even a lawyer utterly committed to representing the stated wishes of his client must be able to couch his client's position in terms of best interests in dealing effectively with other professionals serving the same client.

C. Best Interests As a Guide to Conducting Your Relationship with the Client: Making Micro Choices that Affect Your Client's Well-Being

The logistics of the lawyer-child client relationship require the lawyer for the child to make, on behalf of the client, many decisions that are appropriately resolved by reference to the client's best interests. For instance, the first interview with a client will often present a number of logistical choices for the lawyer. Should the interview take place at the lawyer's office, at the child's home or foster home, at the child's school, at the foster care agency serving the child, or some other place? How should that meeting be scheduled and who should prepare the client for the meeting in the first instance? Should anyone besides the lawyer and the client attend? It is appropriate and necessary for the lawyer to make educated guesses about the client's best interests in setting up that visit before the lawyer-client relationship has even begun.

Another classic "micro" decision that a lawyer might make would involve the timing of breaking adverse news to a client such as news about a negative evaluation of a mother with whom the child wished to be reunited or even a negative psychiatric evaluation of the child herself. Picking the time and place for those encounters with the

31. Indeed Part Two of *Representing Children* discusses ways to approach the first interview to make the client as comfortable with the lawyer and the lawyer's role as possible. *Id.*
32. Note that the comment to Model Rule 1.4 suggests that, in some circumstances, all lawyers may be justified in "delaying transmission of information when the client would be likely to react imprudently to an immediate communication." Model Rules, *supra* note 5, Rule 1.4 cmt. The rule itself requires that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *Id.* Rule 1.4(a). The comment offers as an example that "a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client." *Id.* Rule 1.4 cmt.
client must inevitably be done based on the lawyer's assessment of how the client would be best prepared and supported in receiving that information. Especially in planning a first meeting, the lawyer may only have an educated guess at the child's best interests to guide her in small decisions that may have a big impact on the lawyer-child client relationship.

Even when the determination of best interests is based on very preliminary information, the lawyer should think through these decisions as carefully as possible. Whether large or small, these common decisions may deeply affect the lawyer-child client relationship. An excellent, comfortable first meeting may propel the relationship forward; a painful awkward one may set the relationship back. While the lawyer should not expect to control the tenor of a meeting completely, the lawyer should attempt to make each meeting as comfortable as possible for her child client.

D. Additional Roles for Best Interests Based Upon Child’s Ability to Be Counseled

In addition to those three roles that best interests plays in the representation of all lawyers for children, best interests plays additional roles depending on the client’s ability to be counseled. Lawyers counseling clients should confront their own conclusions about the child’s best interests and the client’s decision making to keep the lawyer’s counseling as free from bias as possible. Lawyers representing clients who cannot be counseled are called upon to do the biggest job of all: to determine the objectives of the client representation.

1. For Clients Who Can be Counseled

a. Counseling The Client About The Lawyer’s Conclusions About The Client’s Best Interests

If the client is someone who can communicate with the lawyer and be counseled effectively, the ethical codes permit and encourage all lawyers to counsel their clients about the lawyer’s view of their “best interests.” For instance, Model Rule 2.1 advises that, “[i]n rendering advice, a lawyer may refer not only to law but to other considerations

Under no circumstances, however, may a lawyer “withhold information to serve the lawyer’s own interest or convenience.” Id.

33. Keep in mind that “as comfortable as possible” may not in the end be very comfortable. As Part Two of Representing Children explores, because many legal issues pose deeply unpleasant issues for the client, a lawyer should understand that children will often dread meetings with their lawyers. It is critical that lawyers not distort their roles by attempting to overcompensate, through gifts, food, and fun activities, for the pain that their clients are undergoing. Peters, Representing Children, supra note 2.
such as moral, economic, social and political factors, that may be relevant to the client's situation. As the Comment notes:

Advice couched in narrowly legal terms may be of little value to a client especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

The rules therefore clearly contemplate that lawyers will advise clients about the broader effects that any legal decision might have upon their lives and the lives of others. In that counseling capacity, the lawyer thus properly discusses the lawyer's assessment of the client's best interests and the impact of the client's decisions upon those best interests.

34. Model Rules, supra note 5, Rule 2.1. 35. Id. Rule 2.1 cmt.
36. A thoughtful debate about the appropriate role of lawyer recommendations in client counseling generally can be found in the writings of Stephen Ellmann, Robert Dinerstein, Peter Margulies, and others. See Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz. L. Rev. 501, 570 (1990) (arguing that Ellmann's presumption in favor of lawyer advice should be reversed in order to counteract rampant lawyer paternalism); Stephen Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717, 746, 761, 767 (1987) (arguing that lawyers owe their clients the full benefit of the lawyer's experience and that a lawyer's determination to protect client autonomy by not giving advice actually stifles the client's freedom to decide for herself whether she wants her lawyer's opinion); Stephen Ellmann, The Ethic of Care as an Ethic For Lawyers, 81 Geo. L.J. 2665, 2707-12 (1993) (arguing that an application of Carol Gilligan's concept of an ethic of care to legal practice would result in lawyers being even more forthcoming with moral and ethical advice than Model Rule 2.1 initially suggests); Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberations Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. Rev. 213, 214, 240 (1990) (arguing that the lawyer's obligations to her clients and to society as a whole require the lawyer to give advice regarding the moral, psychological and policy consequences of the client's decisions and in some circumstances to withdraw from representation if the client ignores the lawyer's advice) [hereinafter "Who Are You to Tell Me That?"].

These writers react to their reading of the perspectives on interviewing and counseling legal clients found in David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977) and David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991). Binder and Price's 1977 book called on lawyers to encourage clients to make their own decisions, and set out only a few circumstances in which lawyers should offer advice or respond to requests for advice. Binder & Price, supra, at 166, 196-203. Binder, Bergman, and Price, in their 1990 book, took a more expansive view of lawyer advice while still placing their focus on client autonomy. Binder et al., supra, at xxii, 279. While specific prescriptions vary among the authors taking part in the debate, all agree that the lawyer must be careful to preserve client autonomy while giving the client the benefit of useful counseling.

37. Emily Buss addresses the importance of clearly communicating to a child client about the nature of representation so that the child knows whether the attorney is representing the child's wishes or the child's best interests. Buss, supra note 11, at 1720-21. Communication about the lawyer's role is an essential element of the lawyer's obligations under Model Rule 1.14. Because little in a child's experience will cause her to expect that an adult will listen to and advocate her views, it is essential...
In addition, the client will often solicit the lawyer's advice: "What do you think I should do? Do you think I'm doing the right thing?" We have come to assume that professionals of all kinds—doctors, architects, technical support people—will be able to tell us what they believe is the best choice in a given situation. Indeed, we would often be appalled if a treating professional did not supplement her explanation of available options with one or two preferences based on her own experience and knowledge of us as patients.

b. Confronting One's View of Best Interests to Promote Honest Counseling

Best interests also plays a role in the lawyer's representation of a client as an inevitable part of honest lawyering. In preparing for a counseling session with a client, for instance, a lawyer may be aware that a client wishes to pursue a course of action that the lawyer finds repugnant or does not believe is best for the client. Especially when the client is a child, the lawyer will be tempted to impose her own belief upon the client. It may be easier, for instance, for a lawyer to seek to manipulate her client into accepting the lawyer's position instead of disciplining herself to advocate zealously for the client's position. Every lawyer must be aware of this temptation. Because children are even more likely than adults to be cowed by a lawyer's strong recommendation, the lawyer must approach a child client's choice with particular restraint.

Therefore, before counseling her client, a conscientious child's lawyer should confront herself with her own views of the client's best interests to remind herself to listen to the client's desires and not to superimpose her own. Lawyers who confront their own views of what is in their client's best interests and who expose these views free them-

that the child's lawyer communicate fully about the nature of the representation. Id. at 1723-24. The Council of the Family Law Section of the ABA recognized this obligation by including in its proposed standards the lawyer's duty to "remain aware of the power dynamics inherent in adult-child relationships" when expressing the lawyer's assessment of the case. Proposed ABA Standards, supra note 11, § B-4 cmt.

38. Stephen Ellmann, in discussing client-centered counseling, has pointed out the danger that even a lawyer who has no desire to manipulate her client may still seek to mold the client's thinking in service of what the lawyer sees as the client's interests, or some broader social interest. Ellmann, Lawyers and Clients, supra note 36, at 727.

Peter Margulies, while asserting that lawyers should counsel their clients about the morality, psychological impact, and unintended consequences of their goals, distinguishes influencing clients from manipulating them. Margulies, "Who Are You to Tell Me That?," supra note 36, at 247-49. Manipulation, according to Margulies, is usually an attempt to achieve the lawyer's goals in the guise of the client's best interests. Id. at 249.

39. I agree with Martha Matthews that "[t]he child's lawyer has an ethical duty to avoid using her superior skills and social position to silence the child's voice, or coerce the child into passive compliance with the lawyer's views." Matthews, supra note 8, at 1458.
selves up to hear what the client is really saying as opposed to what the lawyer hopes the client is really saying.\textsuperscript{40}

2. For Clients Who Cannot Be Counseled: Determining the Objectives of the Representation

For the client who cannot be counseled, \textit{e.g.}, the baby, the nonverbal child, or the child with a severe intellectual deficit, best interests plays the biggest role of all: it is the ultimate goal of the representation. It is difficult to consider a greater task than to determine the best interests of the client on both macro and micro issues, somewhat independent of the client's input. This basically replicates the role of the former guardian \textit{ad litem}. A central theme of this Article is that the lawyer should question any role that requires her to make large best interests determinations for her clients and then seek to achieve them as a goal of the representation. As discussed in part II below, little in the lawyer's training or the lawyer's role in society qualifies her to do that job.\textsuperscript{41} The discussion of the contents of best interests that follows explores how a lawyer should make best interests determinations of any kind. It must be noted from the outset, however, that calling upon a lawyer to determine the goal of her own representation of a client, largely independent of that client's direct input and largely independent of the client's wishes, is an anomalous and deeply complicated divergence from the usual path of legal representation.\textsuperscript{42} Moreover, it is not even clear

\textsuperscript{40} The danger of hearing only what you want to hear from your client may be particularly strong during initial interviews when you are trying to determine the facts of your client's case. While it is inevitable and useful that the lawyer will have one or more working hypotheses in mind at this stage, it is all too easy unconsciously to structure an interview so that it elicits only facts which confirm the hypothesis without ever getting to the truth of the case as the child sees it. \textit{See} John Rich, Interviewing Children and Adolescents 6-9 (1968) (citing Jean Piaget, The Child's Conception of the World 8 (1929), on the difficulty adult researchers have in not imposing their own preconceived ideas upon children with whom they are working). Part Two of \textit{Representing Children} will offer the child's attorney's techniques for confronting her subjective desires for the child so that her client counselling can focus on the client's, not the lawyer's concerns. Peters, \textit{Representing Children}, \textit{supra} note 2.

\textsuperscript{41} The fact that normal ethical analysis does not apply to a particular representation should be a clear warning sign that the lawyer is out of his professional depth. Christopher Wu's discussion of conflicts of interest notes that a lawyer who gets to set the goals of litigation may never be able to declare a conflict of interest. Christopher N. Wu, \textit{Conflicts of Interest in the Representation of Children in Dependency Cases}, 64 Fordham L. Rev. 1857, 1861 (1996). Wu warns lawyers against taking any comfort in this; on the contrary it should "be seen as a strong signal that the attorney is engaged in some function \textit{other} than the practice of law." \textit{Id.} at 1860.

\textsuperscript{42} The conflicts created by this type of representation are analogous to those facing the lawyer for a corporate entity. Under Model Rule 1.13, such a lawyer may have an obligation to inform the entity's officers that the lawyer does not represent them, but rather the best interests of the corporation. Model Rules, \textit{supra} note 5, Rule 1.13(d). Emily Buss, in her article for this Conference has applied this analysis to the situation of a lawyer who decides to represent a child's best interests. Buss,
that Model Rule 1.14 allows the lawyer to take on the full guardian ad litem role. Rule 1.14(b) authorizes a lawyer to "seek appointment of a guardian or take other protective action," but it is unclear if that protective action could include deciding the client's best interests and pursuing them as a goal of the representation. At least one commentator has suggested that "other protective action" is necessarily smaller than determining the client's best interests and pursuing those lawyer-defined interests.43

The lawyer entrusted with the job of representing a child's best interests must determine those interests with extreme caution. Every lawyer who claims to pursue the client's best interests must have a principled understanding of what that best interests determination looks like and how those principles are applied from case to case.44 It may appear that, because I contemplate that lawyers will continue to make best interest determinations on behalf of their clients, and because I believe that lawyers can continue, for some clients, to determine the ultimate objectives of the representation, I am essentially ratifying the continuation of lawyers acting as guardians ad litem for their clients. This is not the case. I believe that it is useful and necessary to abandon the guardian ad litem role for the following reason: Lawyers playing the role of guardian ad litem often have felt unconstrained by traditional lawyering duties. They have acted as witnesses, they have abrogated duties of confidentiality, they have disregarded or downplayed their client's desires, and they do not always include their client in decision making in the representation. In the extreme, these lawyers have seen the role of guardian ad litem as permission to pursue representation without meeting their clients, and with little or no investigation.45 As noted in the Introduction, I believe that there

---

43. Fall Ferguson, Applying Developmental Principles Within the Lawyer's Role: A Central Dilemma for Lawyers for Children (May 1994) (unpublished manuscript) (on file with author). Ferguson distinguishes best interests representation from Rule 1.14(b) protective action by pointing out that nothing in Rule 1.14(b) or the Comment mandates that protective action be permanent or comprehensive. Rather, she urges that protective action should be designed to address specific incapacities at specific moments of the representation. Id. at 28-29.

44. Part II, infra, describes four models of determining best interests and proposes a model integrating the four approaches in child placement decisions.

45. Linda Long cites a conversation with a lawyer friend who said: "I'm so glad that I'm a guardian ad litem in this case. For once I don't have to think and act like a lawyer." Linda L. Long, When the Client Is a Child: Dilemmas in the Lawyer's Role, 21 J. Fam. L. 607, 621 n.44 (1982-83); see also Wu, supra note 41, at 1861 (discussing the problems that occur when lawyers do not consult their clients when determining the objectives of the representation).
is a *lawyerly* way for a lawyer to represent a nonverbal child or other children who cannot fully direct their representation. I believe that lawyers representing children can abide by the Model Rules, including the duties of confidentiality, the duties of knowing and respecting client views, the duties of client direction, and the prohibition on lawyers becoming witnesses. The process outlined at the end of part II is designed to guide lawyers in confronting the dilemma of making best interests decisions without full client input in a way that is client-centered and lawyerly.

### E. Summary

To summarize, all children’s lawyers, even the most client-directed ones, inevitably must make some kinds of determinations about the child client’s best interests. They may be as tiny as deciding how an interview should be structured or how a piece of information should be delivered; they may be as large as deciding the entire goal of the representation. Thus, it is critical that lawyers employ a principled process in discerning the content of best interests. The next part will review the various definitions of best interests and propose an integrated model for use by contemporary child advocates.

### II. An Integrated Approach to Determining Best Interests

To derive a principled, integrated definition of best interests to be used by lawyers in the various moments in the representation examined in part I, this part must first explore the definitions of best interest that have been in use to date. This part identifies four such models:

1. **The Total Lawyer Discretion Model**;
2. **The Expert Deference Model**;
3. **The Psychological Parent Model**;
4. **The Family Network Model**.

Model One relies upon the total discretion of the child’s attorney. Model Two defers the best interests decision to one of three kinds of experts in the case: one already involved with the child or family, one appointed by the court, or one retained by the attorney. Model Three relies upon principles enunciated by an eminent trio of scholars who have focused upon continuity of care, the perspective of the child, and the psychological parent as crucial principles guiding all determinations of “best interests.” Model Four proposes instead a child welfare analysis focusing on preserving the child’s family network. Each model is discussed briefly before deriving an integrated model for use by attorneys for children today.
A. Four Existing Models for Determining Best Interests

1. The Total Lawyer Discretion Model: The Guardian *ad litem*

Recent empirical research suggests that a majority of lawyers throughout the country are left to their total discretion in determining best interests.\(^{46}\) This section defines and critiques this approach and discusses why, despite its patent flaws, the approach continues to flourish.

a. Definition: Whatever the Lawyer Thinks Is Best

In its rawest form, this "definition" of best interests has no substantive content at all. Best interests is left to the complete discretion of the lawyer in the case. This lawyer, assigned to represent a child, arrives at a decision about the best interests of a client through whatever process the lawyer sees fit to use, based upon no set substantive guidelines. The lawyer is constrained by no procedural mandates nor any substantive principles that are consistent from case to case. Thus, procedurally, a lawyer could determine the goals of his representation based wholly, for instance, upon his reading of the neglect petition, or upon a single conversation with the state child welfare caseworker, or upon an exhaustive investigation of the matter at hand, or upon something in between. Substantively, no matter what procedure the attorney uses, a lawyer ultimately takes whatever information he is using and, applying his own gut instinct and "common sense," reaches an opinion about a child's best interests, and advocates for that opinion.

b. Critique of the Total Discretion Model

The total discretion model suffers from three related but distinct flaws. The model gives a lawyer a job for which he is neither trained nor qualified, prevents the lawyer from doing the job that he *is* qualified to do, and creates an unjust system where similar clients are not represented similarly.

First, "the total discretion guardian *ad litem*" model gives the lawyer the responsibility for an important job for which he is neither trained nor qualified. Nothing in the traditional legal education quali-
ifies a lawyer to make determinations of a client’s best interests. Law school curricula often do not include guidance about human welfare, child development, child welfare, family dynamics, or even philosophy that might inform an educated guess about the best interests of another. It is unclear what qualifies the average lawyer, as opposed to the average social worker or a person close to a particular child, to make a judgment about a child’s interests which will then receive special attention from the judge.

Having lawyers who are supposed to do what is “best for them” must mystify and infuriate many child clients, just as it would many adult clients. The child confronted with state workers in her home and a lawyer claiming to want what is best for her will understandably wonder what gives the lawyer the right to pry into her life. When the lawyer advises his client about his view of the client’s best interests, the client might legitimately wonder, “Why should this lawyer’s opinion about my life be important to me?” The lawyer, especially one court-appointed for a child, may appear to be one in a parade of adults invading the family.

Lawyers are not qualified to represent clients in this way, because, in many ways, the model turns the lawyer-client relationship on its head. This extreme form of best interests representation omits several of the most fundamental characteristics of lawyering. The lawyer-client partnership and dialogue is reduced to a one-person monologue wholly unchecked by the client. The client becomes an object, rather than the subject, of the representation. The lawyer, usually agent, acts as the principal in the relationship.

I believe that this level of discretion makes it inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children’s needs, in assessing a client’s best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming. This jeopardizes the child client even more, as her unique circumstances are quickly distorted by a stranger through his own lens of experience and preconception.

Second, this model further frustrates child clients because it prevents lawyers from doing what they are trained to do. The model prevents lawyers from offering clients the chance to have their perspectives aired before the court. The total discretion model deprives child clients of the chance to direct the representation, to instruct the lawyer to pursue certain goals, and to think through and understand her options thoroughly and with counseling. This model, in extreme cases, may deprive a client of even the knowledge that a lawyer or court proceedings exists. Seen from the client’s view, the child does not receive two of the traditional benefits of professional
service: adherence to a consistent code specifying ethical standards of practice and in-depth professional training. Instead, the client becomes suddenly subject to the relationship. The lawyer, far from being constrained to communicate with, counsel, and present the client's cause to the tribunal, is not constrained to know the client at all.

Third, the total discretion model has led to a system containing unacceptable variability in child client representation. Seen in this extreme form, the "whatever the lawyer thinks is best" view of lawyering creates a huge area of unpredictability and inconsistency for child clients. Because this view guarantees no consistency among practitioners, the course of a child's case may be changed forever because practitioner A, who believed X was in the child client's best interests, was appointed to the case, instead of practitioner B, who believed Y was in the child client's best interests. Indeed, this view does not even guarantee that the same lawyer will be consistent with himself from case to case, because no practical or substantive guidelines make the lawyer's approach to his different cases uniform. Thus, the total lawyer discretion model disserves both the client and a legal system that seek quality representation, predictability, and consistency.

c. Why the Model Persists and Even Prevails

Despite the patent unacceptability of the total discretion model, many attorneys in many jurisdictions practice along these lines. Why should such a manifestly unlawyerly model persist?

Ironically, the model gratifies a number of powerful constituencies, while frustrating those least empowered to change it. For instance, many practitioners enjoy the discretion the model affords them because, by definition, they are always doing what they believe to be best. A practitioner is bound to feel good about her work when she believes that her efforts are always being used for her client's good. Likewise, some judges may find that having a lawyer in the case whose job resembles the judge's job simplifies the difficult task of judging. Especially where the judge thinks highly of the child lawyer's values, finding them similar to his own, judges can take comfort and conven-

47. Christopher Wu notes that children subject to child protective proceedings are already surrounded by people who must determine and achieve the child's best interests. What the child's lawyer should bring to the table is not a duplication of this function, but the loyalty and advocacy that are the essence of the lawyer's professional identity. Wu, supra note 41, at 1871-72.

48. See Guggenheim, supra note 12, at 1415 ("Similar cases will be decided differently merely because of chance assignment of a lawyer.")

49. Examining judicial decision making, Robert Mnookin points out that the best interest standard, being essentially indeterminate, poses an "obviously greater risk of violating the fundamental precept that like cases should be decided alike." Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law & Contemp. Probs., Summer 1975, at 226, 263.
ience in relying upon the child’s lawyer’s judgments in the case.\textsuperscript{50} Similarly, legislatures seeking to improve the quality of deliberations in child protective cases may find it easier to appoint lawyers, generally at very low rates of pay, in these cases, rather than authorizing money for courts to retain experts in child welfare to assist them.

Scarcity of resources also hampers the development of more sophisticated models of child representation. Private practitioners paid a low hourly fee or high-volume legal aid practices may be hard-pressed to spend more time per client on their cases. Currently, expert input and testimony to aid both practitioner and court is generally far beyond the means of most lawyers and court systems. Other professionals, who repeatedly are frustrated by this model of representation, for instance, workers and clinicians at agencies working with children, may decide that, of the many battles for better resources for their clients in the community, the battle for better legal representation is not the highest priority. Other players exposed to this model tend to be involved with the system only for one child or a few children, \textit{e.g.}, a concerned relative, an involved teacher, or the parents and children themselves, and are hardly in a position to effect legal change. Children, as a constituency, have no power to lobby for better lawyers.

Additionally, the historical version of the total discretion model, the guardian \textit{ad litem} model, appears to have served an important purpose in its day. When proceedings concerning child welfare were populated only by judges, lawyers for the state, and lawyers for the parents, a vocal figure focusing concern about the child’s perspective probably provided an important balance to courtroom discussions. The presence of the guardian \textit{ad litem} may have prevented those proceedings from dissolving into a simplistic two-sided custody battle between parent and state. Now that guardians \textit{ad litem} or lawyers for children of some kind \textit{must}, by statute, appear in all these proceedings, however, I believe that it is time for children’s lawyer’s role to be definitively clarified. Child clients require both much more and much less of lawyers than the total discretion model has asked. The remaining models, and the integrated model which concludes this part, attempt to provide a more principled method of determining a child client’s best interests.

2. The Expert Deference Model

Some attorneys, recognizing their lack of qualifications in assessing their client’s interests, have concluded that they must defer to experts in determining their client’s best interests. These experts are usually one of three sorts: (1) a professional already involved with the child;

\textsuperscript{50} “In the real world, judges rely on the advocacy of a child’s lawyer.” Guggenheim, \textit{supra} note 12, at 1430 n.102 (referencing Patricia S. Curley and Gregg Herman, \textit{Representing the Best Interests of Children: The Wisconsin Experience}, J. Am. Acad. Matrimonial Law. 9 (1995)).
ROLES OF BEST INTERESTS

(2) an expert consultant (who may also be an expert witness) retained by the attorney; or (3) an independent expert appointed by the court. After describing each kind of expert, I will discuss briefly my hypothesis that court-appointed experts currently enjoy the most deference from courts, when in fact experts who have been or will be involved with the family long term should be given special deference over one-time evaluators of the case.

a. A Professional Already Involved with the Child

A substantial number of our clients are already involved with professionals when they come to our attention. For instance, any child enrolled in school has a school guidance counselor and teacher; some others may be in community counseling or therapy. Most of them (but always fewer than one would hope) have doctors or clinics who see them regularly. These and other professionals have become involved with the client separately from the court case and have goals for the professional relationship which are distinct from, but often affected by, the legal proceeding. They may, in some cases, have long-term relationships with our clients and their families. These relationships may not only have pre-existed the family’s court involvement, but also last well after the lawyers and the courts have finished their work.

Ordinarily, the child’s attorney would identify and, optimally, meet most of these professionals in the early fact-finding stage of the case. Early on, a child’s attorneys should seek to identify professionals who are especially important to the client, either because of extensive day-to-day contacts or because a particular individual has established an especially strong interpersonal relationship with the client. These strong relationships may be positive or negative, but if they are important to the child, for whatever reason, then they will likely be very important to the lawyer as she gets to know the client.

These professionals may have goals for the client and their professional relationship with the mutual client that are not fully consistent with the demands of the proceeding that brought the child a lawyer.

51. This is one of the initial steps recommended by the Council of the Family Law Section of the ABA in Standard C-2(6) of their proposed Standards of Practice. Proposed ABA Standards, supra note 11, § C-2 cmt.

52. Of course, in some cases, these professionals may have participated in the bringing of the child protective action by reporting the family to the state department of child welfare. As one can imagine, these professionals are often experiencing a dramatic crisis in their relationships with the client and his family at the precise moment at which the lawyer is entering the case. In these circumstances, caution in associating oneself too closely with these professionals when initially meeting the client is essential. This need not prevent the lawyer from talking to these professionals (as one would interview anyone who initially reported the family to the state), but does suggest that the attorney keep some distance from them in early encounters with the family until the attorney determines the client’s connection and level of trust with these professionals.
Many of these professionals have confidential relationships with the clients that they share with us, and therefore they need to be extremely careful in not breaching that confidentiality in encounters with the lawyer and the court. Although some lawyers and judges believe that those confidentiality provisions fall away in light of the gravity of the legal claims which give rise to child protective proceedings,\textsuperscript{53} it is critical to note that the child has often come to rely upon the safety of the confidential relationship.\textsuperscript{54} Lawyers should be careful to get releases from their clients before extensive conversations\textsuperscript{55} with other professionals, to be careful not to endanger these pre-existing professional relationships.

As hard as it may be to admit, most of the time these professionals will be more important to the client and his welfare than is the lawyer. While lawyers can intervene at critical moments in their clients’ lives, solve nagging problems and, one hopes, otherwise contribute to bettering the quality of clients’ lives, these professionals are often \textit{an im-}

\begin{itemize}
\item \textsuperscript{53} For a discussion of the complex interaction among the lawyer’s obligation of confidentiality and the obligations prescribed by the ethical codes of social workers, psychiatrists, and other professionals, see Gerard F. Glynn, \textit{Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications}, 27 J. Marshall L. Rev. 617 (1994). Glynn notes that mandatory child abuse reporting laws have been interpreted to supersede the treating professional’s obligations of confidentiality to the client. \textit{Id.} at 639-43. I recognize that the caution I recommend may create a dilemma for lawyers who practice in jurisdictions where the privileges are abrogated in judicial proceedings. See, e.g., N.Y. Fam. Ct. Act § 1046(a)(vii) (McKinney Supp. 1996) (limiting the state’s statutory physician-patient, psychiatrist-client, social worker-client, and rape counselor-client privilege in child protective proceedings).

\item \textsuperscript{54} Peter Margulies cautions children’s lawyers to respect the “quasi-property” interest that a child may have in information entrusted to a treating professional. Margulies, \textit{supra} note 10, at 1494.

\item \textsuperscript{55} This will sometimes put the lawyer in a veritable Catch-22. For instance, in one case, a client’s therapist protested to me that I should have discussed the case with him before I met with my client. According to my duties to my client, however, I felt that I needed a release from her (and a sense about how she felt about the therapist) before I spoke to the therapist.

One solution, where a client has a long-term therapeutic relationship, is for the lawyer to have a “preliminary,” non-substantive conversation with a client’s therapist, informing the therapist simply that the lawyer has been appointed and that the lawyer will be making an appointment to see the child client in the near future. This solution would allow the therapist to talk to his client about the court case and the imminent appearance of the lawyer and thereby prepare the client for the first meeting with the lawyer. This may not be a foolproof solution, however; if the lawyer later ascertains that the client dislikes the therapist, the lawyer may wish that she had contacted the client completely separately from the therapist. Still, if this therapist is a long-term player in the child’s life, the lawyer’s initial actions should acknowledge the therapist as an important and ongoing resource for the child.

Like many “micro” choices that lawyers need to make in setting up meetings with their clients, this decision must be made based upon the lawyer’s best judgment based upon the (probably sketchy) information available to him at the time. I would tend to give heavy weight to the length of the therapeutic relationship, the client’s degree of mental illness or emotional disability, and the recommendations of others who know the client as to whether or not to contact the therapist before meeting the client.
portant ongoing part of the clients’ lives. Therefore, lawyers must treat these pre-existing, and often post-existing, relationships with the utmost respect. Even after lawyers are gone, these social workers, doctors, teachers, counselors, therapists, lay advocates, and other professionals will continue to work closely with the clients, day in and day out. It is important that the short-term lawyer-client relationship not disrupt these important services for the lawyer’s clients.

For the same reason, involving these professionals as experts in the quest to determine the client’s best interests is often complicated, because these professionals already have established procedures and goals with the client which may conflict with or supersede the lawyer’s procedures and goals. First, if a professional is currently treating the client, writing a report to a court or attorney about the client’s best interests could easily run afoul of the confidentiality which the professional promised to the client. Second, even if the confidentiality problems are resolved, through waiver, for instance, the professional may still conclude that stating an opinion and laying forth the evidence for that opinion at this juncture in the professional-child client relationship would compromise the relationship. For instance, a professional who has premised his relationship with his child client on nonjudgmental listening may find that foundation disrupted when forced to take a position on the client’s best interests in front of a lawyer or judge. Similarly, testifying in court on a delicate matter like a child’s removal from the home may forever taint the professional’s relationship with the family. Third, the professional may loom so large in the client’s life already that his importance to the child transcends the professional’s role, like a teacher who assumes a big-brotherly relationship with the child after hours or the highly respected family doctor who attends the same church as the family. Requiring that professional to aid the court could put the court’s needs before the child’s long-term need for the friendship and solidarity of this important figure.

Fourth, because these professionals are already enmeshed in the client’s life, they may not always have unbiased information to offer. They may be unable to shake outmoded views of the family, or they may be overly invested in their own theories of the family’s well-being. They also may have other institutional concerns, related to the agencies they serve. While the best professionals over a long period of time may develop strong, constructive, trusting relationships with clients, other less skilled or less caring practitioners may develop biases, misconceptions, and investments which disserve both the client and the lawyer’s representation.

Therefore, the child’s attorney must recognize a central conundrum in seeking advice and early factual investigatory information from these professionals. On the one hand, these professionals represent an extraordinary font of useful information about the client and his
family. On the other hand, the same history of involvement that makes these professionals so potentially helpful to the lawyer, or to the court, makes working with a strange lawyer or a powerful judge a complicated and threatening new role for the professional. In addition, should the lawyer later discover that the client does not trust a certain professional, the attorney will likely regret closely associating with that professional at the outset of the attorney's relationship with the child and may suffer in her own relationship with her client as a result.

In seeking information from these professionals, then, children's attorneys must: (a) value and respect the ascendant importance of that professional's long-term relationship with the attorney's client; (b) act in ways that do not jeopardize or compromise that relationship by being sensitive to issues of confidentiality and other long-term dynamics of those preexisting relationships; and (c) consult the professional about the client's best interests only (i) when doing so would yield helpful information while preserving the ongoing professional relationship, or (ii) as a last resort.

In the end, these professionals ought to be given special consideration by lawyers and judges in child protective proceedings. Inasmuch as they have no institutional loyalty to the lawyer or court (as the next two kinds of experts do), they represent an extraordinarily rich potential source of wisdom for the case. These experts have a more ongoing relationship with the client than they have with the lawyer or the court, and thus are not hamstrung by the perspectives and demands of the court proceeding. For these reasons also, however, relying on preexisting professional relationships to determine a client's best interests can be tricky. Because of the delicate considerations involved in using a professional already involved in a client's life to help one determine a client's best interests, it is best not to rely on those judgments exclusively.

b. An Expert Consultant (Who May Also Be an Expert Witness) Working with the Attorney

In an increasing number of cases, lawyers representing children work side-by-side with social workers and other professional consultants hired to aid the lawyer in her representation. At the Legal Aid Society-Juvenile Rights Division in New York City, for instance, a Juvenile Services Unit of staff social workers work in the same offices as the staff attorneys. At some law school clinics, law student interns and social work interns work together, supervised by attorneys and social workers, to represent child clients.56 Private attorneys for children also may retain social work or other professional assistance on a case-

56. This was the model of representation used, for instance, by the Columbia University School of Law Child Advocacy Clinic.
by-case basis, paying the consultants either an hourly rate or a yearly set rate for all cases.\textsuperscript{57}

Just as the professionals already working with the clients when the lawyer meets them have ongoing relationships with the clients, these expert consultants have \textit{ongoing relationships with the children's lawyers}. This difference subtly, but significantly, changes the expert’s perspective on the client’s case: by contrast with the treating professionals, these retained consultants are, like the lawyers, short-term intervenors into the family’s life who, once the case is resolved, will continue to have a relationship with the child’s attorney, but not necessarily with the child.

Professionals working with attorneys can provide a useful, and often, crucial array of services to the client. First, where a client’s specific needs require all professionals working with her to have special knowledge or sensibilities, for instance, with a deaf client or a client with mental illness, specialized professionals can help train lawyers in necessary skills and perspectives. Like any lawyer undertaking a representation which involves specialized expert knowledge, for instance a products liability attorney facing intricate technological questions, the child’s attorney ought to have these kinds of expert advice as well. Although written materials introducing the attorney to issues of child development, childhood mental illness, or mental retardation and the like do exist, only a consultant can help the attorney apply this expertise in the particular context of a new client.

In these cases, nonlegal professionals can offer practical, concrete help. They may help lawyers prepare for complicated interviewing. In some cases, perhaps the professional would accompany the attorney to an initial client meeting, to help the attorney develop a working relationship with the client.\textsuperscript{58} Professionals with strong community

\textsuperscript{57} In some states, these retained experts may be paid by the court. \textit{See}, \textit{e.g.}, N.Y. County Law § 722-c (McKinney 1991) (allowing court to authorize counsel to obtain expert services at the court’s expense). In other cases, where legal aid organizations, public defenders, or even groups of private practitioners contract for a group of cases yearly at a negotiated fee, the payment for social work and other professional services may be included in the total fee.

Despite these opportunities, it is painfully clear that the vast majority of lawyers representing children do not have ample access to professional services that would help them represent their clients more thoughtfully. As with the extraordinary low rate of compensation generally paid to lawyers for children, this systemic problem contributes to extraordinary stress and high caseloads for children’s lawyers and must be changed. Because the rest of this section details how useful these experts are to sophisticated representation of children, it is hoped that these arguments can be marshalled to convince state legislatures to allocate money for this important need.

\textsuperscript{58} Part II of \textit{Representing Children} will provide more on this initial phase of the attorney-client relationship. Peters, \textit{Representing Children}, \textit{supra} note 2. Whenever possible, it is much preferable for the attorney, rather than the consultant, to have the primary relationship with the client, for both financial and ethical reasons. In a rare case, where special expertise is critical to maintaining the lawyer-client relationship, a lawyer may decide that the consultant alone has direct contact with the client.
contacts may suggest helpful resources for the family, which may be especially crucial in shoring up the family to avert the need for foster placement of the attorney's client. Professionals may also participate in interdisciplinary negotiations, being more able than the lawyer to understand and respond to the nonlegal professionals working with the child.

Finally, nonlegal professionals may be crucial to the lawyer faced with the daunting task of determining the client's best interests. Some lawyers delegate this function to their consultants, reasoning that these professionals, unlike lawyers, have been trained to make principled determinations of best interests in family contexts. Lawyers may also decide that consultant experts are critical when the issue of best interests is in active litigation, because the consultant can put on the child's case through her expert testimony.

Leaving the best interests determination to a retained expert, however, is an extremely expensive option, available currently to only a tiny fraction of the lawyering for children community. Even when these expert services are more widely available, it is unclear how much of the tasks of lawyering should ultimately be delegated to non-lawyer consultants, creating, as it does, an inevitable distance between lawyer and client. While all lawyers for children should attempt to make these services available to their clients, and should sensitize themselves to the specific circumstances that suggest that those services must be deployed for a particular client, lawyers should not assume that all determinations of best interests can ultimately be delegated to others. Lawyers continue to need to develop principled ways of determining best interests for themselves in circumstances where these experts are not available to them.

c. An Independent Expert Appointed by the Court

Courts in child protective proceedings often appoint experts to investigate specific questions and provide guidance to the court on ultimate legal issues such as "best interests of the child." These provisions make eminent good sense, because judges are regularly entrusted with determining a child's best interests and may not completely trust the parties to present thoroughly the facts needed to make such a determination. Generally, experts are not appointed on all cases, or even most cases. When they are, they tend to be experts with ongoing relationships with the court; once a case is over, these experts will probably never see the child or family, and perhaps

59. When and how to work with a nonlawyer consultant on the same case will be discussed further in Chapter Seven of Representing Children. Id.
60. Indeed, if more states come to accept lawyers for children as advocates for their expressed wishes after counseling rather than guardians ad litem with the same duty to determine best interests as the court has, judges may come to rely upon these experts even more.
not even the attorneys again, but will most likely have an interest in being appointed to evaluate cases for the court in the future.

Court-ordered evaluations can involve a tremendous amount of time, investigation, and preparation time. Evaluators must review all relevant records, interview all relevant parties and service providers, prepare written reports detailing their findings, and testify in court on these findings. Each of these steps may be very time-consuming: for instance, rounding up all the records through the appropriate releases may take weeks or months; interviewees may have schedules that make appointments hard to schedule, and then may miss some, extending the interviewing period. Writing thoughtful, comprehensive evaluations takes hard work and much time, as does preparing for heavily cross-examined testimony.

Unfortunately, rates of payment for these court-appointed experts remain relatively low. Until the rate of compensation is raised to compensate fully the amount of time a capable evaluation would take, many court-appointed experts will be forced to seek high volumes of evaluations in order to be able to devote a substantial amount of their practice (and to be able to make a living) doing this difficult work.

Attorneys for children may provide input into the choice of court-appointed experts in some instances. If the attorney knows of any specific concerns that children have with new adults (e.g., a little girl who is very shy with older men, a Spanish-speaking child who relates much better in Spanish than in English), those should certainly be made known to the court. If the child has given the attorney a clear wish as to the issues the expert is to evaluate, the lawyer should act in every strategic way to make sure that the expert chosen is one likely to recommend the child's desired result.61 Often, the local courthouse or judge may have an established slate of experts whose reputations and predilections can be investigated through word-of-mouth; while being attentive to the vagaries of rumor and sour grapes, the child's attorney should investigate those experts thoroughly. For the reasons detailed above, the child's attorney should think carefully before allowing a professional already involved with the family to be appointed an expert by the court.

Commentators such as Albert J. Solnit eloquently warn against the intrusive and possible harmful effect of the evaluations on the child and family.62 A lawyer must acknowledge the possible ill-effects on the family and on the child of another evaluation by a stranger. Interviews with the court-appointed expert, the time spent waiting for

---

61. Similarly, a child's attorney may be required to lobby against the appointment of an expert, if the attorney has reason to believe that no expert will recommend the client's objective in the case.

these evaluations to be completed, and the diversion of resources by 
other professionals in the case spent in speaking with and providing 
records to the expert may all take their toll. In determining whether 
to support an appointment and how to structure an evaluation’s logistics, the child’s lawyer must carefully factor in all these considerations.

As becomes clear when thinking through the logistics of court-appointed experts, the child’s attorney cannot rely upon these experts to advise her about the client’s best interests, largely because of the timing of the expert’s involvement. Because courts generally appoint these experts later in the case, where settlement has been explored and abandoned, and trial is inevitable, the child’s attorney should have developed a view of best interests long before the court expert is identified. By the time the expert is appointed, the child’s attorney should be proactively trying to assure that any expert appointed will vindicate the child’s view of the case. Thus the attorney cannot wait to formulate a view of best interests until such time as a court-appointed expert may advise him. The client’s and lawyer’s view of best interests may change as a result of the evaluation, but until that time, the lawyer must continue to pursue the client’s initial instructions and objectives. To the extent that the lawyer must determine and factor in his client’s “best interests,” he must do so for much of the investigation without the benefit of the court-appointed expert’s thoughts.

d. Summary

While various kinds of nonlawyer experts can aid the lawyer and 
the court in determining best interests, lawyers for children cannot 
rely upon these experts exclusively. Professionals already involved 
with the clients when the attorney is appointed have established in-
vestments and goals for the professional-client relationship which may 
well preclude the attorney from obtaining best interests information in 
a reliable way. Some attorneys can retain experts, but those collabor-
rations are currently rare, given their expense, and even when available may unduly distance the lawyer from her child client. Court- 
appointed experts may prove indispensable in some cases, but are 
rarely appointed in time to aid the lawyer in his best interests determi-
nations. Because each of these professionals also has other institu-
tional commitments (the first to his agency or employer, the second to 
the child’s attorney, and the third to the court), they are not perfect 
advisors as to any given child’s best interests.

Ironically, courts may currently give disproportionately heavy 
weight to the opinions of court-appointed experts who, in most ways, 
are the least knowledgeable of the three kinds of experts. Profession-
als already serving the client and consultants working with the child’s 
attorney may actually have known the child longer and explored more 
fully the background material on the family. Because the first two 
kinds of experts are prevented in many cases from telling “all they
know” to the judge, however, the court-appointed expert, who exists in the case to serve the judge, will often seem to the court to be the most reliable source. Strangely, professionals who have worked with the family for years are virtually invisible to the court while these evaluators, who may meet the child only once or twice, take center stage. Lawyers for children should keep in mind this understandable distortion of reality as seen from the bench in preparing their presentations to the court.

3. The Psychological Parent Model

As described briefly above,63 the interdisciplinary Best Interests of the Child trilogy has profoundly affected judging and lawyering

63. In Chapter One of Representing Children, Goldstein, Freud, and Solnit are discussed as follows:

Also influential nationally was a trilogy of books written by the distinguished interdisciplinary collaboration of Joseph Goldstein, Albert J. Solnit, and Anna Freud. Goldstein is a Yale Law Professor and a graduate in Career Research from the Western New England Institute for Psychoanalysis. Freud, who died in 1982, was the Director of the Hampstead Child-Therapy Clinic and the prolific author of works on psychoanalysis and child development. Solnit, a child psychiatrist, wrote the books when he was the Director of the Yale Child Study Center and a Yale Medical School professor of Pediatrics and Psychiatry. Sonja Goldstein, who formally joined the collaboration in the third book, is a lawyer and lecturer at the Yale Child Study Center and Law School.

The first book, Beyond the Best Interests of the Child, published in 1973, laid out guidelines for child placement laws, premised upon the child developmental principles of continuity, a child's sense of time, and the limits of law and prediction. The book recommended that judges apply the “best interests of the child” standard placing the child permanently with his psychological parent. The second book, Before the Best Interests of the Child, published in 1979, focused on grounds for state intervention into families in the first instance, laying out concrete standards which are designed to limit state intervention to a minimum. In In the Best Interests of the Child, published in 1986, the trio, joined by Sonja Goldstein, focus on the roles of professionals in the child placement process, arguing that professionals should generally stay within the boundaries of their own professional competence, crossing those boundaries only in rare, carefully thought through circumstances.

The influence of these books was immediate and profound. “[E]very subsequent proposal for reform of the child welfare system has drawn its vocabulary and central ideas from Goldstein, Freud and Solnit's conceptual framework.” Nadine Taub, Assessing the Impact of Goldstein, Freud and Solnit's Proposals: An Introductory Overview, 12 N.Y.U. Rev. L. & Soc. Change 485, 485 (1983-84). By 1983, one commentator, Brooklyn law professor Marsha Garrison, reported that the trio's “central conclusions about the needs of children in long-term foster care have gained remarkably widespread acceptance.” Marsha Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423, 449 (1982-83) (footnote omitted). Garrison noted that the trio's premises “strongly influenced recent state foster care legislation and several model acts dealing with termination of parental rights for children in long term foster care,” id. at 449-50 (footnotes omitted), as well as social work handbooks and works of national planning commissions. Walking through the halls of juvenile and family courts around the country, one can
around the country. Armed with the principles laid out by Goldstein, Freud, Solnit, and Goldstein, some attorneys for children may believe that they are now equipped to determine a client's best interests based upon that interdisciplinary teaching. After describing the trilogy's central teachings in more depth, this section examines why such a use of their principles would violate the authors' own prescriptions for their work. This section also briefly examines critical views of the trilogy, which suggest that the trilogy's principles do not fully protect all children's best interests.

a. *The Least Detrimental Alternative: Placement of The Child With His Psychological Parent*

Goldstein, Freud, and Solnit propose replacing the "best interests of the child" standard with a guideline requiring "the least detrimental available alternative for safeguarding the child's growth and development." The authors stress that the best interests terminology leads...
decision makers to forget that the child "is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development."65 In addition, the authors note that courts in fact do not act in the best interests of children because they must balance the child's rights against competing adult interests, including parental rights and policies of administrative agencies.66 The authors hope that the "less awesome and grandiose, more realistic"67 standard will serve to remind decisionmakers that their task is to salvage as much as possible out of an unsatisfactory situation. It should reduce the likelihood of the decisionmakers becoming enmeshed in the hope and magic associated with "best," which often mistakenly leads them in to believing that they have greater power for doing "good" than "bad."68

Thus the authors propose replacing the "best interests" standard with "the least detrimental alternative."

The authors define the least detrimental alternative as follows:

[T]hat specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.69

This definition incorporates the five critical concepts expounded in Beyond the Best Interests of the Child, which are described in turn below. Also described briefly below are the limited grounds for state intervention set forth in Before the Best Interests of the Child.

i. The Child's Sense of Time

The authors fear that placement decisions more often reflect the adult's, as opposed to the child's, sense of time. "Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs."70 Children under two-years-old, for instance, cannot endure more than a few days absence of their parents without feeling overwhelmed. Time frames like months and years can be "beyond comprehension" for children before adolescence.71 "Therefore, to avoid irreparable psychological injury, placement,

65. Id. at 54.
66. Id.
67. Id. at 63.
68. Id.
69. Id. at 53 (emphasis added).
70. Id. at 40.
71. Id. at 40-41.
whenever in dispute, must be treated as the emergency that it is for the child." The authors warn in a footnote: "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever."

ii. The Limitations of Knowledge

The authors believe that "[t]oo frequently there is attributed to law and its agents a magical power—a power to do what is far beyond its means." Instead, law is properly seen as "a relatively crude instrument . . . [having] neither . . . the sensitivity nor the resources to maintain or supervise the ongoing day-to-day happenings between parent and child . . . ." As a result, the authors urge that prediction be avoided, and, where inevitable, limited to "a few . . . modest, generally applicable short-term predictions."

iii. The Wanted Child

The authors insist: "Only a child who has at least one person whom he can love, and who also feels loved, valued, and wanted by that person, will develop a healthy self-esteem." Offering a child the chance "to become a wanted and needed member within a family structure" provides children with the important advantage of supporting his self-esteem, his love and regard for himself, and "consequently his capacity to love and care for others, including his own children." The authors repeatedly stress that a child’s "primitive and tenuous first attachments form the base from which any further relationships develop."

iv. Continuity of Relationships

The authors believe that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child’s normal development." Precisely because children’s mental processes early in their lives are unstable, their primary relationships must be stable

72. Id. at 43.
73. Id. at 43.
74. Id. at 49.
75. Id. at 49-50.
76. Id. at 52. In support of this principle, the authors cite three factors identified by Anna Freud which "make prediction difficult and hazardous": (1) possibly uneven rates of maturation of ego and drive developments; (2) inability to quantify or to foresee drive development; and (3) unpredictable "environmental happenings in a child’s life." Id. at 51 n.36.
77. Id. at 20.
78. Id. at 21.
79. Id. at 20.
80. Id. at 18.
81. Id. at 31-32.
and represent uninterrupted support. The authors note the different consequences that disruptions of continuity produce at different ages: in infancy, difficulties with sleeping and eating; in infants and toddlers, separation anxieties leading to less trustful, more shallow, and indiscriminate relationships; in older children under five, setbacks in achievements such as toilet training, cleanliness, and speech; in school-age children, achievements based on identification with the parents' demands, prohibitions, and social ideals; and in adolescents, possibly feelings of rejection and abandonment. For this reason, the authors insist that "each child placement be final and unconditional and that pending final placement a child must not be shifted to accord with each tentative decision."

v. The Psychological Parent

The authors believe that an adult becomes a child's psychological parent through "day-to-day interaction, companionship, and shared experiences." An "absent, inactive adult" can never be a psychological parent. Because "[u]nlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development," the psychological parent may be either a biological parent or a longtime caretaker with no legal claim. The authors urge decisionmakers to prize this psychological relationship over traditionally privileged relationships, including blood ties, to mirror the child's attachment.

vi. Grounds For State Intervention

The trio's recommendations for placement with a psychological parent cannot be applied properly without an understanding of the very limited circumstances in which they would allow state intervention in the first instance. Because the authors believe that the state can only rarely offer alternatives which improve upon the opportunity to form and maintain nurturing familial bonds in a child's existing family,
they recognize only a few legitimate grounds for state intervention. Legitimate grounds are limited to parental requests for the state to place the child, requests by long-term caretakers to assume parental rights or to give up the child, gross failures of parental care, and refusal by parents to authorize lifesaving medical care. The child's need for legal assistance is a ground for state intervention (in the form of appointing counsel) only at the parents' request, or after an adjudication on one of the previously stated grounds, or after an emergency removal of the child from the parents' custody.91

vii. Summary

Goldstein, Freud, and Solnit have thus laid out a proposal for those faced with determining a child's best interests: place the child with his psychological parent swiftly and permanently. As their second book clarified, they believed that the state could legitimately consider the child's "least detrimental alternative" only in stringently limited circumstances. As the following section demonstrates, however, neither the authors nor their critics suggest that a simple application of these principles equips a lawyer to address a client's best interests in all cases and situations.

b. The Limits of the Psychological Parent Model in Informing the Lawyer's Determination of Best Interests

Neither the authors nor their critics believe that the psychological parent approach resolves the lawyer's concerns about best interests in all circumstances. The authors themselves proffer their own unique recommendations as to the role of the lawyer for children. Their critics fear that the psychological theories upon which their approach is based are incomplete or wrong and that an inevitable bias against poor families of color will result if the approach is not properly implemented. This section first examines the authors' direct statements about the role of the lawyer for children, and then the concerns of their critics.

i. The Authors' Recommendations About the Role of the Lawyer for Children

The authors believe, in the first instance, that children are presumed to be represented before the law by their parents. "[A]n integral part of the autonomy of parents is their authority and presumed capacity to determine whether and how to meet the legal care needs for their child . . . ."92 They continue:

The appointment of counsel for a child without regard to the wishes of parents is a drastic alteration of the parent-child relationship. In-

91. See infra notes 92-98 and accompanying text.
92. Before, supra note 89, at 112.
deed, it is in effect a disposition by the state. It intrudes upon the integrity of the family and strains the psychological bonds that hold it together. Therefore it cannot take place until the presumption of parental autonomy has been overcome—until the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for [state] intervention.93

Clearly, the authors believe that the appointment of counsel for a child should be an unusual step.

Only when parents have, in a sense, forfeited their autonomy in raising their children should the state impose counsel for the child on the family. In addition, when imposed, counsel is “a disposition for a limited purpose and a limited time. Such counsel are to act as lawyers, not as parents. They are to represent a child’s legal needs by gathering and providing the court with information that it requires in order to determine the least detrimental placement.”94

The authors formulate the role of the lawyer for children in a number of different ways. The authors require that a child whose placement is the subject of judicial proceedings should be represented by counsel “who has no other goal than to determine what is the least detrimental alternative for his client.”95 Counsel for the child “must independently interpret and formulate his client’s interests, including the need for a speedy and final determination.”96 “[T]he role we would assign to court-imposed counsel for a child is to advocate what, in accord with statutory and case law, is in the child’s best interests.”97 Unless the parents specifically delegate the role of directing counsel to the child,98 the lawyer should seek the least detrimental alternative for placement, usually with the psychological parent.

As to the necessary attributes of that lawyer, “[a] child’s advocate must, of course, be sufficiently knowledgeable about children and their development to determine what information he must obtain and present about the specific child he represents. Our guidelines should

---

93. Id. The authors suggest, for instance, that In re Gault “reaffirms the right of a child to have his own parents make decisions about what he needs.” Id. at 129. The authors read Gault as a strong statement of the right of parents to have their children represented by counsel. Other commentators dispute this reading. See, e.g., Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y. U. L. Rev. 76, 89-90 (1984) (arguing that Goldstein, Freud, and Solnit ignore the concern for the child’s personal autonomy underlying Gault). Certainly, states following Gault have focussed primarily on the child’s right to counsel. See, e.g., Conn. Gen. Stat. Ann. § 46b-136 (West 1995); N.Y. Fam. Ct. Act § 249 (McKinney 1983 & Supp. 1996).

94. Before, supra note 89, at 112.

95. Beyond, supra note 64, at 66.

96. Id. at 67.


98. Before, supra note 89, at 128. Goldstein, Freud, and Solnit prescribe that the parent remain involved in the lawyer-child client relationship unless and until “the presumption of parental autonomy has been overcome.” Id. at 112.
facilitate his task." Although this passage suggests that the guidelines could significantly inform a lawyer as to an individual client's least detrimental alternative, in the third book, the authors make clear that counsel's role should be limited and informed by consultation with experts. For instance, the authors chide a lawyer who offers an opinion about the advisability of his client visiting her parents based upon his own assessment of her possible mental illness or need for treatment. If the lawyer's job was to advocate for her "best interest," the authors write, "he should have recognized the need to organize expert knowledge about the meaning of the visits for [the girl] in order to equip the judge to make his decision." Similarly, the authors urge a lawyer representing a child to base his decision whether or not to push a case forward by being "informed by experts in child development about his client's needs."

Thus, the authors themselves do not expect lawyers for children to be able to determine a child's least detrimental alternative simply by referencing their writings. In fact, in In The Best Interests of the Child, the authors urge children's lawyers, as well as other professionals, to stay within professional boundaries, cross professional borders with care, avoid dual roles, recognize that they have no license to act as parents, and remain both softhearted and hardheaded. This role faithfulness, born of the recognition that the parent alone is charged with general responsibility for the child, while professionals must exercise specialized limited responsibility, leads the authors to prefer that lawyers do legal work and leave social work and mental health determinations to experts in that field.

ii. Critics' Concerns About the Goldstein, Freud, and Solnit Model

As Patricia Wald has noted, Beyond "became a storm center." In the foster-care context, the trilogy provoked deep debate even as many of the trilogy's principles were made law by admiring legislators and judges. In the academic debate, in large part culminating in an

99. Beyond, supra note 64, at 67.
100. In, supra note 97, at 33, 78.
101. Id. at 33.
102. Id.
103. Id. at 78.
104. Id. at 3-5.
105. The authors also make other interesting points about lawyering for children, relating to requiring one lawyer to represent all siblings, Before, supra note 64, at 116-17, the special conundrum of lawyers representing children in a class action, id. at 116, and the widespread misconception that giving a child a lawyer is an unmitigated good. Id. at 117.
107. As noted in the historical summary above, the trio's ideas were received favorably in the foster-care context, and resoundingly negatively in the divorce context. Marsha Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423, 453 (1983).
exceptionally thoughtful symposium held at Rutgers University and published in the *New York University Review of Law and Social Change*, commentateurs voiced three major related criticisms. First, a number of readers roundly criticized the authors for using inappropriate or inadequate data and authority for the psychological principles underpinning their work. Second, one set of critics expressed grave concern that the trio’s work reflected an overly narrow and culture-bound view of families, which failed to recognize the existence and success of diverse family forms larger than the two-parent nuclear family. Third, a number of commentators voiced their fears that the authors’ principles would be disproportionately harsh on poor families and children. Each of these criticisms will be briefly summarized.

First, mental health professionals criticized the psychological parenting theory. One set of commentators at the 1983 Rutgers conference noted that “parenting theory places too much emphasis on identifying a particular most significant attachment figure, when it is evident that there will often be several.” The trio’s focus on a psychoanalytic perspective distorts the wide applicability of the principles upon which they rely—because psychoanalytic research focuses on disabled children with more limited coping skills, while research psychologists examine nondisabled children, psychoanalytic conclusions may underestimate the ability of most children to handle separation or to form new relationships. Critics fear that the trio derives conclusions about the effects of separation from studies of children who have faced other traumas besides separation from parents, such as institutionalization, war, and severe deprivation of care. Commentators consistently discuss the research of Michael Rutter, whose

---


109. This section will focus on the sociologically based critiques of the psychological data relied upon in the trilogy. A larger substantive critique—attacking the monotropic psychological parenting theory and preferring a “family network” approach focusing on a web of supports for the child, rather than the dyadic mother-child relationship—is presented as Model Four below.


111. *Id.*

112. See, e.g., Daniel Katkin et al., *Above and Beyond the Best Interests of the Child: An Inquiry Into the Relationship Between Social Science and Social Action*, 8 Law & Soc. Rev., 669, 675 (1974) (criticizing the authors for their failure to distinguish separation from deprivation). These commentators generally critique the first book for its lack of a “single reference to any empirical study in the extensive literature on adoption and foster placement” and its “failure to review the literature.” *Id.* at 672.
research suggests that the "effects associated with breaking of bonds are significantly related to the circumstances surrounding the separation or loss, and are generally not long in duration." These commentators fear the consequences of an overly broad and rigid application of the trio's social policy guidelines, divorced from the evidence and research which led to their psychoanalytic conclusions.

A second set of critics make many of the same points from sociological and historical perspectives. These critics argue that because the authors based their work on a nuclear family model, psychological parenting fails to account for extended family models which prevail in many non-American contexts. For instance, "shared parenting responsibilities among kin" predominate in many Caribbean, African, and African American contexts, in long-standing cultural patterns, and as a hedge against poverty. Children raised under such circumstances experience a healthy "emotional universe" populated by people in addition to their biological parent. These commentators caution that an overly narrow application of the Goldstein, Freud, and Solnit principles could lead child welfare professionals to search mechanically for a single focus of attachment, find the biological parents wanting in that regard, and sever parental bonds, removing the child from a healthy family system. Commentators stress that

113. Waters & Noyes, supra note 110, at 511.
115. Id. at 541.
117. Joseph Goldstein, in an interview published with the NYU Review of Law and Social Change 1984 Symposium, notes that the notion of continuity set forth in Beyond acknowledges extended family groupings:

We are very respectful of what families of different ethnic groups, origins or economic status believe is best for their children. Our guidelines are much more protective of a variety of family lifestyles than are many existing laws, which are too broad and vague and put all too much discretion in the hands of workers with middle-class notions about good childrearing.

. . . . The notion of continuity pertains to continuity of relationships, continuity of settings, continuity of lifestyles. Consider a child who has grown up in a commune of some sort, and has had to leave the commune at an age where that style of life is what she anticipates and thrives on. If the setting was not the cause for the child's being removed, then every effort should be made to place her in a similar setting to reduce the difficulty of the transfer in terms of as many factors as possible.

breaking the tie with the biological family can hamper, rather than enhance, the child’s development: “The disappearing act which is a behavioral consequence of the psychological parenting theory is destructive to the child’s developmental needs and utterly disrespectful of the frailties of the human situation under conditions of poverty.”

On the historical side, commentators have expressed their concern that psychological parenting theory seeks to impose on everyone, for all time, the concerns peculiar to a particular class at a particular time. At the 1983 symposium, Linda Gordon linked the psychological parenting focus on the mother to the “redefinition of women’s labor as housework and child care” precipitated by the wage labor system that sent men out of the home to earn wages, as well as by the industrial production system that took productive work out of the home. She noted that full-time mothering and male breadwinning were characteristic of urban, business, and professional families, and were simply not an option for rural and proletarian families. Gordon concludes that, while children certainly need “continuing bonds with particular people,” she wished to call attention to the “social conditions and class perspective that gave rise to this view of children’s needs,” calling for “humility regarding the certainty and universality” of psychological parenting theory.

---


I thank Kimberley D. Harris, Yale Law School ’96, for her research connected with this subject.


121. Id. The period after World War II was a “unique historical juncture” for Western women as mothers, as more middle-class women than ever before in America and Britain occupied an increasingly private and isolated sphere as full-time mothers. Michael J. Bader & Ilene J. Philipson, *Narcissism and Family Structure: A Social-
A third, more political set of critiques springs from these insights. Because child protective laws apply overwhelmingly to poor, nonwhite families, these laws justify seizure of children from the politically powerless families "least involved in traditional forms of our culture."122 Child protection laws are necessarily vague, requiring the use of administrative discretion in their application. That discretion, however, often "leads to discriminatory application of the laws that is a function of cultural and class bias."123 In the context of a child welfare system that may needlessly separate poor, nonwhite children from their parents on an emergency basis, followed by long delays until adjudication and disposition, "time is always on the side of the current caretaker" to establish new psychological ties with the child.124 "The result," writes Martin Guggenheim, "is that a politically neutral theory about human behavior works untold harm in actual practice."125 According to Carol Stack, this theory allows us to accept "intervention and intrusion in low-income families, and . . . [to] discount[] the cultural backgrounds and solid parenting skills of low-income parents."126 Presumably, these commentators believe that the

Historical Perspective, 3 Psychoanalysis & Contemp. Thought 299, 314 (1980). Not only did fertility rates peak in the twelve years after World War II, Paul England & George Farkas, Households, Employment, and Gender: A Social, Economic, and Demographic View 12-13 (1986), but mass migration to the suburbs weakened extended family ties and left many women to raise their children in relative isolation. Bader & Philipson, supra, at 315. Bader and Philipson argue that this set of unique historical circumstances gave rise to a cultural and scientific idealization of the mother-child dyad, in which "[m]othering took on such ideological significance in the 1940s and '50s that a new host of experts arose to deal with every imaginable problem a mother might encounter, and to warn of every possible disaster that might arise if she were not constantly vigilant." Id. at 316; see also Ann Dally, Inventing Motherhood: The Consequences of an Ideal 96 (1982) (noting that among the complex mechanisms behind the postwar idealization of motherhood was the need for women to leave industrial jobs which they had held in wartime in order to make room for returning male veterans); Representations of Motherhood 6 (Donna Bassin et al. eds., 1994) (noting the "concerted postwar shift to return women to the home"); cf. Juliet B. Schor, The Overworked American: The Unexpected Decline of Leisure 83-105 (1991) (arguing that the postwar idealization of the isolated mother-child dyad was the culmination of an economic process beginning in the nineteenth century to remove paid work from the home and to restrict women to unpaid housekeeping tasks; ironically, these tasks consumed more time even as household investment in ostensibly labor saving capital equipment (e.g., washing machines, dishwashers) increased in the periods immediately before and after World War II); Reva B. Siegel, Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880, 103 Yale L.J. 1073 (1994) (tracing women's resistance as early as the 1850s to the shift from a household economy in which women were paid for work brought into the home to one in which women were restricted to unpaid child-rearing and housework).

123. Id. at 550.
124. Id. at 551.
125. Id.
126. Stack, supra note 114, at 547.
trio's high thresholds for initial state intervention are not being properly followed, while their requirements of permanent placement with psychological parents are followed. These commentators fear that failure to completely incorporate the trio’s guidelines into law discounts, disrespects, and damages many healthy, nurturing, poor non-white families.

In short, critics who generally respect the learned trio and their intentions fear that their elegantly clear prescriptions may lead to an overbroad application of only half of their proposals. Applying psychoanalytically learned materials in the broad context of all children underestimates the particular child’s ability to cope with separation. The “nuclear family” predicate leads the trio to ignore therapeutic family structures that differ from the traditional mother-child dyad. The propensity of an overtaxed, potentially classist system to heed the trio’s urge to sever parental bonds without applying their recommendations for restraint in intervening in the family in the first place has led to a system more prone to penalizing poor, nonwhite families for nontraditional family structures. These critiques have led to another distinct definition of best interests, known as the family network model, discussed next.

127. As noted earlier, it is critical to perceive the trio’s recommendations of limited state intervention and psychological parent placement as a package. See supra notes 92-105 and accompanying text. Unfortunately, it appears that in many contexts the trio's recommendations for psychological parent placement have been followed while the high threshold for state intervention has been ignored. Garrison, supra note 107, at 475-77.

128. In response, Joseph Goldstein notes:

It is not just child placement where the poor are disadvantaged, nor is it the result of anything we have said in our books. The experiment on poor families was being carried out long before our guidelines. If anything, the guidelines are intended to hold in check the experiment. . . . We are trying to stay the hand of the state. We hope we have provided a basis for the poor to challenge what social workers do, what child care workers do, and to call into question what has been happening.

Interview With Joseph Goldstein, supra note 117, at 582. Professor Goldstein also countered claims that continuity of setting presupposed financial ability and middle class or higher status:

There is an order of importance in continuity. We talk about interpersonal relationships with an adult. That is number one and it has nothing to do with money. Then we talk about continuity of surroundings. Now the surroundings may be poor or rich, but we try to protect them to the extent we can. One of the things that emerges from our guidelines is that it ought to be the state's first priority, if it really believes in the child's well being, to provide the minimum financial basis the family needs, the minimum nourishment base, the minimum shelter base, whatever best serves the development of continuous relationships. In fact, if the only reason that a mother or father can't continue to care for the child is because they have no place to live, or no money to buy food, then we would call it child abuse by the state if the state for that reason removed the child from her family.

Id. at 580-81.
4. The Family Network Model

In response to concerns raised by psychological parenting theory, Peggy Cooper Davis, a New York University law professor and a former New York City family court judge, has identified a new consensus among research scientists, clinicians, and child welfare practitioners. The new consensus rejects the “monotropic view” that a child’s development depends primarily upon the quality of his attachment to one person and instead examines how children thrive in a network of relationships.

a. The Recognition that Children Form Attachments With Multiple Caregivers in a Family Network

Professor Davis suggests instead a focus on “a supportive milieu in which caregiving is shared among several adults with whom the child is familiar.” Davis relies upon research compiled by Louis W.C. Tavecchio and Marinus H. van IJzendoorn concluding that “the optimal caregiving arrangement would consist of a network of stable and secure attachment relationships between the child and both its parents and other persons such as professional caregivers, members of the family, or friends.” These researchers conclude that “[i]n research, attachment should be considered in light of a network of relationships the child builds up in the first years of life.”

Tavecchio and van IJzendoorn further conclude that “[g]iven the inevitability of temporary separations, the optimal rearing context will, from the child’s perspective, be made up by more or less stable relationships with several different caregivers who all act as attachment figures.” In what these researchers call “an extended rearing context, a separation from an attachment figure does not automatically imply a separation as perceived by the child: there are a number of caregivers who may provide the same source security in potentially threatening situations.” Davis cites other research that acknowledges children recognize a “hierarchy of attachment figures, each of whom may [be] qualitatively different.” Davis also finds support

130. Id. at 24 (citing Marinus H. van IJzendoorn and Louis Tavecchio, The Development of Attachment Theory as a Lakatosian Research Program: Philosophical and Methodological Aspects, in Attachment in Social Networks 24-25 (1987)).
131. Id. (emphasis added)
133. Id.
134. Id. at 26 (citing James H. Bray, Psychosocial Factors Affecting Custodial and Visitation Arrangements, 9 Behavioral Sci. & the L. 419 (1991)).
within the cross-cultural research, including studies done in western Kenya\textsuperscript{135} and the southern United States,\textsuperscript{136} which identify multiple caretakers in a family network to be normative and therapeutically sound for children.

Finally, Davis relies upon psychoanalyst Jessica Benjamin's theory of intersubjectivity that challenges "the valorization of the omnipresent, omnicompetent, almost always maternal, parenting figure."\textsuperscript{137} This notion "lies behind"\textsuperscript{138} the psychological parenting theory:

In Benjamin's view, the infant has an ability to recognize, to enjoy, and to grow in reaction to the experience of the mother's subjectivity. The expectation that mother will be omnipotent and subject to the child's will leaves the child in a dominating isolation, with an illusion of "mastry," but no sense of otherness.\textsuperscript{139}

Davis summarizes:

The work of parenting—of caring for children and helping them to grow—includes the work of meeting their physical needs and providing basic comfort. But it is not the work of protecting the illusion of the omnipotent mother who satisfies all wants. It is the work of helping [children]—gently, lovingly, playfully—to grow in health and to learn to relate in health to other independent minds.\textsuperscript{140}

Thus, Davis downplays the importance of a single psychological parent in favor of recognizing the value and validity of a network of supportive caregivers for a child.

Davis challenges the Goldstein, Freud, and Solnit principles in three ways. First, she notes her concerns that the work of psychological parent theorists "does not acknowledge cultural and subcultural differences (and arguably underestimates age differences) in the reaction of children to separations."\textsuperscript{141} Second, she writes that these theorists "minimize the importance to the child of all but the most intense current bond."\textsuperscript{142} Third, Davis fundamentally conceives "everyday separations," as opposed to clearly harmful "long-term and other

\textsuperscript{135} Id. at 20 (citing Charles M. Super and Sara Harkness, \textit{The Development of Affect in Infancy and Early Childhood}, in \textit{Cultural Perspectives on Child Development} 1, 15 (Daniel A. Wagner & Harold W. Stevenson eds., 1982)).

\textsuperscript{136} Id. at 22-23 (citing Shirley Brice Heath, \textit{Ways With Words}: Language, Life and Work in Communities and Classrooms 116-17, 121 (1983)).

\textsuperscript{137} Letter from Peggy Cooper Davis, N.Y.U. School of Law, to Jean Koh Peters, Yale Law School (October 3, 1995) (on file with the \textit{Fordham Law Review}).

\textsuperscript{138} Id. (emphasis omitted).

\textsuperscript{139} Davis, \textit{supra} note 129, at 36 (citing Jessica Benjamin, \textit{The Omnipotent Mother}, in \textit{Representations of Motherhood} 133 (Donna Bassin et al. eds., 1994) and Jerome Bruner, \textit{Actual Minds, Possible Worlds} 59-62, 73-77 (1986)).

\textsuperscript{140} Davis, \textit{The Good Mother}, \textit{supra} note 129, at 41 (emphasis added).

\textsuperscript{141} Id. at 27.

\textsuperscript{142} Id. at 28. Note that Joseph Goldstein includes in his definition of "continuity of settings" settings beyond the parental dyad, as long as "the setting was not the cause for the child's being removed." \textit{Interview with Joseph Goldstein, supra} note 117, at 580.
traumatic separation" from caregivers, as "constructive learning experiences" that aid a child's development.\textsuperscript{143} Davis suggests that Goldstein, Freud, and Solnit view separations from beloved caregivers as uniformly harmful and dangerous to the "stability and uninterrupted support" that children need during invariably painful developmental initiatives.\textsuperscript{144} Davis recommends that children be encouraged to confront rather than deny routine and short-term separation. In sum, Davis's "family network" model defines an emotional universe of attachments which, while of differing weight and depth, all interact to create a healthy milieu for the child's development.

b. The Limits of the Family Network Model in Informing the Lawyer's Determination of Best Interests

Davis's alternative model of best interests resolves some nagging problems created by the Goldstein, Freud, and Solnit psychological parenting approach, by offering promising avenues for a broader, more "culturally competent"\textsuperscript{145} vision of the family. The family network model acknowledges roles for noncustodial parents and extended family members in the emotional development of the child. It resembles models that have worked in non-contemporary, non-Anglo-American contexts for generations. Additionally, it creates a model for understanding and evaluating the extended family systems devel-

\begin{itemize}
\item \textsuperscript{143} Davis, supra note 129, at 9.
\item \textsuperscript{144} Id. at 9.
\begin{itemize}
\item the full integration of ethno-cultural issues into the overall knowledge base that informs both the assessment and the planning process; the development of the assessment and planning skills required to manage those ethno-cultural issues; and the ongoing work required to remain sensitive to the fact that the differences between one's own ethnocentric view of the world and that of other ethno-cultural groups must be respected and appropriately addressed.
\end{itemize}
\textit{Id.} at 10. Dudley notes, for example, that African American families are often part of a multi-generational extended family network that includes biologically-related and non-biologically-related ("adopted") kin, who provide emotional and economic support when it is needed. These families are often further characterized by a flexibility in and an overlapping of roles and functions; a flexibility in the boundaries between households; and a subjugation of individual concerns in the interests of family survival. Children raised in families that function in this manner may have numerous adults in their lives who share parenting functions, and they may even move in and out of their biological parents' household.
\item \textsuperscript{145} Id. at 13-14. Dudley also comments on the "daily experience of racism" experienced by African Americans from birth. \textit{Id.} at 15.
\end{itemize}
oped by many nonwhite or poor families in America who may have been found wanting under the monotropic psychological parenting approach.

In fact, the Davis model, unlike the Goldstein, Freud, and Solnit model, may provide a prescriptive model that also describes family systems across social class in the United States. Just as a single mother on AFDC, who relies on extended family members locally and “down south” to care for her children could be found to be part of a therapeutic family network, a rich working couple who relies on full-time day care providers and regular babysitting, as well as local and distant family, could similarly be understood to provide a family network for their children. By removing the focus on mothers, Davis’s model sees the conscientious parent of any gender and any class as an important part of an integrated web of attachments which a healthy happy child will enjoy during her development.

Ongoing debate of the “emerging consensus” about family networking has just begun. Certainly, the model fails in its current form to provide clear guidelines as to what distinguishes a therapeutic family network from a malfunctioning one. While lawyers for children, through the use of genograms\textsuperscript{146} and a careful understanding of the child’s daily life, can discern who is in the child’s emotional universe, they have no direction as to how to evaluate the quality and deficiencies of that universe. While the model offers an excellent alternative paradigm to the Goldstein, Freud, and Solnit single psychological parent, it currently does not provide concrete ideas as to intervention, foster care, and permanency planning in the way that the trio’s model does.

5. Summary of the Prevailing Models

Each of the prevailing models of determining best interests used by lawyers for children is partly useful and partly troubling. The total lawyer discretion model recognizes the inevitable remainder of lawyer discretion that will enter a representation, but fails to cabin that discretion with principles which will ensure other-centric decision making or even consistency among the representations of the same attorney. The expert opinion model, in its three forms, is inadequate: professionals already involved with the client are often rightly constrained by ethics and history from disclosing all they know about a child’s best interests; lawyer-retained experts are expensive and thus currently available to very few lawyers; and court-appointed experts serve the court and announce their opinions too late to be useful in structuring an attorney’s representation.

\textsuperscript{146} A genogram is a method for drawing a family tree that records information about family members and the relationships over at least three generations. See generally Monica McGoldrick & Randy Gerson, Genograms in Family Assessment (1985). This book is a helpful manual for constructing genograms in client work.
The Goldstein, Freud, and Solnit psychological parenting model has captured the discourse and in many ways deepened lawyers' basic understanding of child developmental needs. The model has exhorted children's lawyers to treat time as precious and to put their client's perspective first. Its monotropic focus of power in a single psychological parent, its failure to account for many healthy forms of multiple caretaker family structures, and the disparate impact of its partial implementation, however, have led to serious concerns that the model, unwittingly, has compounded the disparity of treatment between rich and poor families. The Davis family network model thoughtfully addresses many of these concerns by offering an alternative paradigm, but needs to be discussed in greater detail before it can provide true guidance to the practitioner.

B. Towards An Integrated Model: Guidelines for the Lawyer for Children in Making Determinations of Best Interests

Recognizing the thoughtful considerations which gave rise to each of the above models, as well as the critical historical role played by each model in its time, the integrated model attempts to preserve the best of each paradigm while discarding the historically outdated or the unintentionally harmful. This Article's model borrows and benefits from each of the models described above. Because the lawyer must make best interests determinations from day one of each case, even before she meets or knows her client, some lawyer discretion is inevitable. Proper deference when appropriate to experts, already involved with the case, appointed by the court, or retained by the lawyer, will be critical in many cases. Especially early in the case, reference to many of the Goldstein, Freud, Solnit, and Goldstein principles will be extremely beneficial to the client, particularly the client's sense of time and the primacy of the child's development. Like the Goldstein, Freud, Solnit, and Goldstein model, this integrated model requires the lawyer to strive constantly to see the past, present, and future options from the child's point of view and to coax others constantly to do the same. Where a psychological parent is clearly in place and able to care for the child, he must be taken very seriously. As prompted by Davis's family network model, the lawyer must also look beyond the traditional mother-child dyad to alternative family arrangements which provide children with the stability needed for their development through an integrated family network.

The model of determining a child's best interests that I espouse requires a principled process based substantively on the uniqueness of each child client. In addition to the description which follows, the model is set forth in step-by-step fashion in part D of the Recommendations Section of this Article.

With respect to process, the attorney must base her determination of best interests on a full, efficient, and speedy factual investigation...
that leads the lawyer to a deep understanding of the child’s family system, her history, and her daily life. A lawyer can track the progress of her factual investigation by sketching these three perspectives on the child’s life through genograms, chronologies, and daily schedules. A conscientious process, which involves the client’s own words and desires at every possible point, will, I believe, lead the lawyer to a complex, three-dimensional understanding of who the child client is, what she wants, and why she wants it. This deep understanding, and a careful respect for the desires the child expresses, must form the foundation of the lawyer’s options for the representation. This starting point, therefore, returns the question of best interests to the context of the representation of a particular child; while any discussion of best interests implicates fascinating theoretical issues with which the child’s lawyer must contend, the lawyer must make actual decisions about best interests in the contexts of the child’s unique personality and desires.

Next, when removal of the child from her home is an option, the lawyer must consider the child’s current predicament not in isolation, but in comparison to the actual alternative options that foster care provides. For instance, if a baby appears not to be receiving optimal care in his home, but the state foster-care system is known to lack adequate foster homes for babies that age in the local area, the lawyer must factor that reality into her reasoning. Otherwise, lawyers are tempted to see the current home situation in isolation, focused more on what is suboptimal about the child’s care than on what the state can actually provide instead. The child faces a concrete set of alternatives at any moment in best interests analysis; the lawyer must understand the realities of each before determining a client’s best interests.

Next, the lawyer must evaluate the actual alternative options in terms of the psychological parent and family network paradigms that Models Three and Four have set forth. The lawyer should methodically and thoughtfully compare the child’s family system, history, and daily life with the priorities and concerns laid out by Goldstein, Freud, and Solnit, and Davis. If the child’s family history can be understood clearly in terms of one particular model, the lawyer may be able to eliminate from consideration some of the actual alternative options. For instance, a child who clearly had one primary caretaker from whom she has experienced a separation, and who is clearly in crisis,

147. As the Recommendations of the Fordham Conference note, these “actually available alternatives” should also include alternatives that can be created through innovative lawyering, including law reform. Recommendations of the Conference on Ethical Issues in the Legal Profession of Children, 64 Fordham L. Rev. 1301 (1996) [hereinafter Recommendations of the Conference] (part IV.B.3.d.). For instance, the lawyer may believe she can compel the system to create an excellent foster placement for a client even though one does not currently exist. Nevertheless, lawyers must be realistic, although not fatalistic, about what they may ultimately be able to obtain for their clients.
may also have no family network to speak of. Available alternatives which would place the child in a network of care with no single caregiver would appear to be inappropriate. The lawyer should explore with the client ways to reunite her with that caregiver, while exploring ways to create a larger group of community ties, including extended relatives, counselors, school personnel, and role models like Big Sisters, to afford the child some outlets for support and relationship while the primary relationship is being repaired. In another example, a child clearly may be living in the midst of an inner city family network, with a beleaguered potential psychological parent figure in crisis. If the network can support the child adequately, there may be no need to move the child to a foster home. It may also aid the child to shore up the psychological parent with supportive services, to afford the child the security of that special relationship.

Lawyers must continue to deepen their understanding of the rich and complex debates about child development that continue in other disciplines. At the present time, the psychological parent and the family network paradigms help lawyers benefit from these debates at some level of sophistication.\textsuperscript{148} The alternative paradigms may at least offer clarity about the changes that a child is undergoing. For instance, a client may be raised by a psychological parent, who has disabilities which prevent her from caring for the child further; the child then may be moved into a foster home that provides a family network of caring and love, without one clearly identified substitute for the biological mother's psychological parenting. While a traditional psychological parent perspective may cause a court or a child welfare bureaucracy to underestimate the strength of the ties developed by the child in this foster placement, a healthy respect for models of alternative family networks can help the lawyer and the court to examine the foster placement with an open mind, with an eye towards consolidating its strengths. When the lawyer feels that she cannot sort through the many factors contributing to best interests, she may need to seek expert assistance. In one such case, our office retained a social worker to work with us to determine whether or not the foster family network would or could offer our client a permanent home, before consenting to the adoption of our client by third parties.\textsuperscript{149}

If lawyers are to be open to hybrid forms of these two paradigms, how is a lawyer to assess when a hybrid option for the client becomes simply chaos, rather than a “diversified portfolio” of caring

\textsuperscript{148} See id., part III.D. Lawyers should be aware that the understandings of child development and placement issues in other disciplines are dynamic and constantly changing. The paradigms discussed here will certainly shift, evolve, and probably be replaced in the coming years.

\textsuperscript{149} This example, taken from my practice, marked my first real understanding of the potential limits of the psychological parent perspective and the necessity of additional child welfare paradigms. I thank Mona Scales, our social work consultant on the case, for her thoughtful and eye-opening teaching about this critical issue.
caregivers? The key indicator, it would seem, would be the actual progress of the child's development. Because each paradigm seeks, in the end, to safeguard and promote the child's development, the first by providing a stable, reliable, loving figure, the second by exposing the child to a panoply of loving others, the ultimately successful paradigm for each child will be the one, or the combination of the two, which actually aids her development. Thus, the lawyer should remain concerned about a child who is inappropriately aggressive, or morose, or hyperactive, and look closely at the structure of her contemporaneous home life. The child who is growing well, adjusting adequately at school, and interacting within normal parameters with her peers, despite an unusual family structure, should be presumed, to some extent, to be benefitting from the current structure of her home. This is not to say that there is always, or even usually, a direct correlation between sweet, well-behaved children and therapeutic homes, or ill-tempered children and chaotic homes. I suggest, rather, that attorneys for children must be open to the wide range of idiosyncratic family structures that may benefit children, and make changes to a child's family life only when the child's development is clearly at risk.

When these developmental conclusions are clearly complex, lawyers must consult experts for guidance. In a world of excellent resources, lawyers could retain mental health experts to consult closely on issues of best interests for their clients; this is, I believe, our ethical duty to supplement our lack of expertise. In the current world of limited resources, lawyers can also take advantage of pre-existing experts or community resources who can come into the child's life as counselors, teachers, and support people, but only, as noted above, if attorneys can remain mindful of the critical role these professionals play and their ethical duties beyond the court proceedings. When all else fails, the lawyer may also be able to convince the court that a court-appointed expert is critical. This route, however, is especially a concern when a client has a fixed perspective on her case—the lawyer may advocate for the entrance of a very credible witness who will in the end contradict the child's point of view.

If the analysis under the three models of expert deference, psychological parenting, and family network is inconclusive, either because none of the models point in a particular direction or because the models are in conflict, in the end the lawyer is left with the unavoidable remainder: her own judgment and discretion. Unlike the Total Discretion model, however, the lawyer reverts to her own judgment as a last resort only after a full investigation, which leads to a three-dimensional understanding of the child and her actual options; an exploration of the psychological parent and family network paradigms and

---

150. Chapter Seven of the book explores those collaborations in more depth, and suggests some ways to resolve the current resource crunch preventing children's lawyers from retaining these professionals. Peters, Representing Children, supra note 2.
their applicability to the child; and a thorough consideration of how and when experts might be helpful to the representation. Moreover, whenever possible, the lawyer should decline to choose among acceptable options and advocate for multiple options, while opposing options that the foregoing analysis may have rejected.

In addition, I propose two additional constraints. First, in a murky world, where best interests cannot be easily discerned and a decision in either direction can be justified, the lawyer should err on the side of seeking to keep the current family structure intact, while advocating aggressively for state interventions that ameliorate the worrisome conditions in the home.151 This default implements a view that Goldstein, Freud, Solnit, and Goldstein, as well as Davis, and many concerned experts clearly share: the value of minimal state intervention, the harm of precipitous removal of children, and the importance of seeking in every instance the least detrimental alternative.152 This default also acknowledges the trauma that the child will experience when she separates precipitously from her family.

Second, at the end of any given decision-making process, the lawyer must return to the child’s subjective view of the question at hand. How does the best interests decision that the lawyer has reached match the child’s desires? How does the decision reflect what is unique and essential about the child? At this moment, the lawyer should return to consider the “seven questions to keep lawyers for children honest.”153 As always, the lawyer should ask both how the child benefits concretely from the lawyer’s decision making and also examine whether the lawyer’s adult perspectives and needs are playing an unduly large role in the process. If multiple acceptable options remain, the lawyer should present evidence and argument describing all these options to the court while also presenting evidence and argument opposing all rejected options. Thus, in the end, the best interests determination must end where it began: with the attorney trying to see the decision to be made from the child’s subjective perspective, with a focus on the child’s uniqueness and individuality. This structure of decision making, starting and ending with the child, considering the child’s circumstances in light of the two paradigms, and

151. Martin Guggenheim would ground this default rule in the substantive law in every state recognizing the child’s right to be raised by her parents absent a court finding of unfitness. Guggenheim, supra note 12, at 1429-30. By contrast, Peter Margulies would ground this presumption in honoring the value of connection and commitment in children’s lives. Margulies, supra note 10, at 1482, 1493-94.

152. Dr. Solnit, in a discussion at the 1983 Rutgers Symposium, agreed with other participants that the state fails to support low-income families who are at risk of losing their children. “Deprived, confused parents would not have to lose their children, as they do all too often now, if we were more effective in providing supportive services for children and their parents in the home, and if we knew how to provide voluntary services that were attractive and accessible.” Solnit/Fanshel Discussion, 12 N.Y.U. Rev. L. & Soc. Change 517, 518 (1983-84).

153. These questions are outlined in the Introduction, supra.
seeking the input of experts when needed, reduces the range of lawyer discretion to acceptable levels.

Two examples follow to demonstrate briefly the way in which a lawyer could implement this integrated model; a more detailed discussion of the concrete execution of the model appears in Chapter Eight, of the book. 154

Miguel: You are appointed to represent Miguel, a thirteen-year-old boy who is the subject of child protective proceedings due to the death of his grandmother, who has taken care of him since birth. He has had minimal contact with his parents since his birth. You meet him shortly after you are appointed, minutes before the first court proceedings. He mentions that many members of his family live in town. Since his grandmother’s death, he has been living with his cousin, Luisa, who is nineteen and the mother of a one-year-old baby boy. He wants to stay there. You convince the court to let him remain there.

In court, Miguel gives you permission to read his Department of Child Welfare file and you agree to meet him at his home the next week one day after school. The file is very thin; Miguel’s grandmother and cousin had no previous contacts with the Department. The file reflects that Miguel is often truant from school, especially in the last three months; he is in good health. You speak with the caseworker, who has met Miguel and Luisa only once, and knows little about him.

When you arrive at his home the next week, he is not there. You learn from Luisa that as soon as he began to live with her, his behavior deteriorated: he is seen by police on several occasions with gang members known to sell drugs, he does not attend school, and he is often out until two in the morning. Despite your best efforts, you are unable to see him again.

Two weeks later, Miguel is arrested on charges of possession of drugs. When you arrive at court to meet with him, Miguel’s great-aunt introduces herself and tells you that she wants Miguel to live with her. You agree to speak with her after you have seen Miguel. You meet him in detention after learning that the prosecutor is seeking extended pretrial detention due to his truancy and home history. Miguel tells you that his great-aunt has offered to take him into her home, also offering to become his guardian on the understanding that he will abide by her strict rules and curfews. Miguel is honestly confused about what he wants, desperately wants to get out of detention immediately, and asks you what you think he should do. How do you counsel your client?

Analysis: Miguel’s lawyer should begin with a clear understanding of what Miguel wants, both in terms of objectives of the representation and feedback from the lawyer. Miguel’s nonnegotiable wishes are to leave detention. His request is for advice as to the best

154. Peters, Representing Children, supra note 2. The integrated model is also set forth step-by-step in the Recommendations Section of this Article, infra, part III.
course of action which achieves this goal. The lawyer should also note that she does not know Miguel or his family well, lacking even the information a less harried second meeting with her client would have provided.

In that light, the lawyer should assess Miguel's actually available options:

1. release to great-aunt, on her terms;
2. stay in detention (eliminated from serious consideration based on Miguel's stated wish);
3. release to stranger foster home (unlikely);
4. release to Luisa (unlikely); or
5. release to other family members.

Next, the lawyer should assess those options in light of the two alternative paradigms of family structure. A psychological parenting approach might suggest that the great-aunt is the best option to provide Miguel with the psychological parent that he lost when his grandmother died. Because she is the most prominent option, the lawyer should explore carefully with Miguel his feelings about his great-aunt, and think through the pros and cons of living with her. The lawyer should also interview the aunt, to learn about her family history, the structure of her home, and her plan for caring for Miguel. If she appears to offer a stable home for Miguel, it is probably true that courts would currently welcome a strong new parenting figure and give that figure great deference, and perhaps give Miguel a fresh start, when considering the issues of detention and sentencing. The lawyer should also discuss with Miguel the strict rules that his great-aunt proposes, the positive light in which a court would probably view them, and the negative light in which the court would see a second failed family placement, should Miguel not abide by the rules.

The lawyer should also explore at least briefly Miguel's feelings about his time with Luisa. The court will need an explanation as to why Miguel will behave better at the great-aunt's home, when he did not adjust well to Luisa's home. Learning Miguel's perspective on his cousin will be important to the lawyer's getting to know Miguel and his perceptions of his own needs. The lawyer also needs to know whether Miguel still hopes that living with Luisa in the future is an option.

Psychological parent analysis would also recognize, as well, the deep trauma that losing his grandmother represents. The lawyer should broach the topic of his grandmother's death with Miguel, to gauge his willingness and ability to talk about it. It may well be, for instance, that Miguel's recent behavior, both his truancy and his late-night behavior, stems from his grief and loss. If Miguel is understandably unwilling or unable to discuss these issues with his lawyer, she should think about creative ways to offer Miguel the option of professional expert assistance in dealing with his grandmother's death, through referrals to community counseling or the use of resources already available to Miguel (from school, religious affiliation, and the like). Crucially, involving these resources will
increase his chances of leaving detention permanently and receiving a more lenient sentence should he be convicted in the criminal proceeding.

If Miguel is ambivalent or negative about living with his great-aunt, the family network model offers another option for the lawyer to explore. The many other local family members may individually, or collectively, be able to offer him an alternative home. If Miguel gives his permission, the lawyer can contact these family members to see if they can propose an alternative. This proposal will take time and, because it does not get Miguel out of detention that day, may offer at best a backup plan if living with his great-aunt does not work out.

Because Miguel’s main goal is to avoid detention, it is fair to counsel him that his great-aunt is his best hope for release from detention and seems like the available option in his best interests. The lawyer should also make a plan to keep in touch with Miguel and the aunt, and ask Miguel if he wants her to explore his extended family network for backup options.

Thomas: You have represented Thomas, an eighteen-month-old, for nine months. You were appointed when he was originally the subject of neglect petitions based on his mother’s failure to attend medical appointments for his infant skin disease, which has cleared up. He has lived since birth with his mother, who is Haitian and speaks Creole and only a little English. His mother has recently given birth to twins. She has mild mental retardation and a mixed track record of keeping appointments for his medical and developmental visits and her prenatal visits at the local health plan. Throughout your representation of the children, she has lived with Thomas with a variety of family members, including her father, aunts, and uncles.

Soon after the twins were born, you visited her home before court and observed broken windows and damaged walls. Thomas’s mother reports that her boyfriend is responsible for the condition of the apartment, but refuses to say more. You learn from the child welfare worker that she has seen roaches and rats in the apartment. The worker is seriously considering removing Thomas due to the conditions in the home.

At the home, you also observe your client. Thomas is playing actively, riding toys throughout the small apartment, and offering you books in English to read. His mother tells you, however, that he sleeps much of the day, with active periods only in the morning and early evening.

Throughout your representation, Thomas has appeared well-adjusted and happy. He appears comfortable and happy when with his mother. Thomas speaks Creole and some English, and seems to understand you when you speak to him. Developmental evaluations have found him within normal ranges and recommended follow-up at the local health plan. The mother has missed a number of the follow-up visits sporadically.
One developmental report noted that the mother had a great deal of animosity for Thomas's father, who she has not seen since before Thomas was born. The mother has told you that Thomas is "like his father—selfish and nasty." Nevertheless, neither you nor any of the case workers who have worked with the family have ever seen evidence of any neglect or maltreatment of Thomas, apart from the various missed medical appointments.

Based upon your knowledge of the current foster care resources, you believe that Thomas, if removed, will probably be placed in the next city, a one and one half hour bus ride from his mother, and probably will live in a non-Creole speaking household.

Analysis: Beginning with the child's perspective, the child appears comfortable and happy with his mother. He has never known any life beyond her care and the company of his extended family. You find it odd that an eighteen-month-old boy should be sleeping much of the day, and tell his mother that you plan to talk to the child's developmental treatment people at the local health plan about that. You also ask her to take him for a medical checkup concerning the possible effect on him of having rats and roaches in the apartment with him.

Thomas's actually available options are:

(1) remain with his mother in the current apartment;  
(2) remain with his mother in another place;  
(3) live with a relative;  
(4) live in foster care with strangers.

Under a strict psychological parenting model, this mother's current situation raises great concern. The strain of raising three children, her postpartum condition, and the disrepair of the apartment could be taken to suggest that she is overwhelmed with her current responsibilities. You are concerned that her current boyfriend, if responsible for the damage to the apartment, has a violent temper. Initially, you wonder whether Thomas would be safer in another home.

A number of factors should prevent the lawyer from seeking removal at this time. First, under the psychological parent theory, there are a number of services that can be provided to Thomas's mother immediately to prevent Thomas's separation from her. Thomas's lawyer should work immediately with the mother's lawyer and the child welfare worker to advocate for speedy repair and extermination of the apartment, or alternative housing. Until these repairs or alternatives are arranged, Thomas's lawyer should monitor the case worker's progress and Thomas's situation daily. The child's lawyer should also explore with the mother's attorney whether adequate postpartum support is available to the mother. Referral to a community agency that could support the mother during this difficult adjustment period could be especially useful. Because Thomas has lived all his life with his mother, the prospect of separation, especially in a distant, distinct foster placement, should be an absolute last resort.
The extensive family network which has previously housed the family should be explored as an alternative home for Thomas's mother and the three children. The family network may also offer support and extra hands for Thomas's mother during the first weeks of the twins' lives. If Thomas is particularly close to a grandparent or aunt whom he knows well, perhaps that relative could plan to spend extra time with Thomas during this important adjustment period. If the strain of raising the three children is too much, the family network should be carefully explored for alternative placements, to prevent Thomas from entering foster care.

The lawyer may feel queasy not immediately advocating that Thomas leave a home that contains vermin and seems chaotic and violent. Once the lawyer has made sure that the system has moved Thomas and his mother into a situation that is safe for the time being, however, the lawyer should examine whether the impulse to "remove Thomas" does not arise from her own anxiety to have Thomas in a risk-free environment which requires less day-to-day attention on the part of the lawyer. The lawyer, returning to the seven questions to keep her honest, should continually explore ways to preserve the mother's and the family network's primary role in Thomas's life, to keep his family intact.

The lawyer need not limit her actions to preserving the home only. As noted earlier, the family should also be asked to take Thomas for medical checkups, especially if he has been near rats and roaches. Thomas’s lawyer should also ask the family doctor or a treating professional about Thomas's sleepiness, to inquire as to whether it is, given his level of development, of concern.

As Miguel’s and Thomas’s stories illustrate, the lawyer’s determination of best interests always takes place in the context of the child’s wishes and the attorney’s understanding of who the child is, in his context. Especially for verbal clients, any best-interests analysis begins and ends with the child’s desires. Even for nonverbal, less communicative clients, best-interests analysis must begin and end with the attorney’s best understanding of who the client is, what makes her unique, and what has been her context. Beginning and ending with a close focus on the child will keep best-interests analysis focussed on her needs and values, and not the attorney’s own.

If noting else, this attempt at an integrated model of process and substance for determining a child’s best interests represents a clear improvement over the total discretion model which pervades our current lawyering for children. While I remain open to refinements and criticisms of this first attempt at an integrated approach, I am sure that a uniform acceptance of these prescriptions for lawyers for children alone would immeasurably improve the quality of lawyering for children nationwide.
III. RECOMMENDATIONS

I therefore propose that the recommendations of the Fordham Conference include the following:155

A. The Model Rules and the Model Code direct the lawyer for children to conduct as traditional a lawyer-client relationship as possible, being directed wherever possible by his child client's well-counseled wishes. The lawyer may only modify that relationship based upon a "reasonable belief" that the client cannot adequately act in the client's own interests. In order to ensure that child clients receive the full benefit of traditional legal representation, a lawyer for children should begin a representation following these three defaults:

1. Relationship Default:
   a) A lawyer should begin each representation as she would any other lawyer-client relationship: by meeting the client and trying to ascertain the client's goals.
   b) Because meeting the client, explaining the lawyer's role, and listening to the client's view of the case are almost always prerequisite to providing the benefits of representation, the lawyer should not deviate from this relationship default unless the lawyer can articulate valid reasons for doing so which are specific to the individual child client’s development and circumstances and from which the child clearly benefits. Even when the child is too young to understand who the lawyer is, the lawyer will learn in these meetings about the child's personality, unique temperament, and physical characteristics.

2. Competency Default:
   a) A child’s lawyer should begin each representation with the presumption that the client can understand the legal issues in the case and express subjective perspectives or offer critical information about them. To the extent that the child's developmental status creates obstacles to communication and understanding, it is part of the lawyer's job to overcome them creatively in order to provide the child client with the benefits of an advocate who listens, informs, counsels, and answers questions.
   b) Because this presumption is critical to effective representation, it can only be overcome when the lawyer has independent evidence, arising outside the representation, that the child is incapable of understanding the legal issue or expressing a view of it.

155. The Recommendations of the Fordham Conference contain a modified version of Part D of these Recommendations. Recommendations of the Conference, supra note 147, part VII.A. While this model applied to best-interests decision making in child protective contexts specifically, the conferees modified the model to describe decision making on behalf of the child in a broad range of legal contexts. I fully endorse the conference's broader recommendations.
c) Even if the competency presumption is overcome by limits on the child's ability to communicate and understand some issues, effective representation requires that the lawyer continue communicating with the client at the level of sophistication of which the client is capable. The lawyer's determination of these limits cannot be static, but must change with the child's developmental progress through the course of the representation. Thus, the determination that a child cannot "adequately act in his own interest" must be made on a decision-by-decision, not on a child-by-child, basis.

3. Advocacy Default:
   a) All lawyers whose child clients can express a view relevant to the legal representation should proceed in the first instance as if the stated view is the goal of the representation.
   b) Inviability or unlikely success of the client's stated view is not a reason to ignore that view. As in any other representation, the child's lawyer is charged with counseling the client about the relative strengths and weaknesses of the client's stated goal. If a well-counseled client decides upon an inviable goal, the lawyer should continue to pursue it, or withdraw from the representation pursuant to established ethical parameters for withdrawal.
   c) The only time the child's lawyer may advocate for a position other than that stated by the client, is after the lawyer, based upon independent evidence arising outside of the representation, has determined that the client's development or circumstances preclude the client from either expressing a position or being effectively counseled as to the viability of the position. Only then may the lawyer seek appointment of a guardian or take other protective action pursuant to Rule 1.14(b) or make decisions on behalf of the client pursuant to EC 7.12.

B. Lawyers who decide to advocate the express wishes of their child clients are not free to ignore considerations of the child's best interests. Best interests determinations must play a key role in all representations of children. Because the best interests standard is prevalent in the child client's interaction with legal, medical, mental health, and social work institutions, the attorney cannot carry out effective representation without developing a sophisticated, principled understanding of the best interests of each client. Every representation of a child includes the following moments at which best interests determinations must be made:

1. In order to represent their clients in proceedings subject to a best interests standard, children's lawyers must be able to frame the goals of the representation in terms of the child's best interests.
2. In order to work effectively with medical, psychological, mental health, and social work professionals, the child's attorney must understand the various best interests standards applied by professionals in these fields.
3. A child’s lawyer must be able to make principled best interests determinations in those situations where the lawyer is called upon to make day-to-day decisions on behalf of the client such as the timing, setting, and attendees at client meetings, or the release of sensitive information to the client.

4. For clients who can communicate and be counseled effectively, the lawyer is often asked to advise the client about the lawyer’s view of the client’s best interests. As Model Rule 2.1 provides, the lawyer, “in rendering advice may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.” The lawyer should also confront himself with his assessment of best interests, to evaluate whether it is free from bias and stereotype.

5. Lawyers for clients who cannot be counseled and cannot be represented meaningfully pursuant to the three defaults must determine the child’s best interests as the ultimate goal of the representation.

C. Best interests determinations must be made in a contextual, self-conscious, deliberate, and principled manner. Lawyers should approach the determination of best interests with extreme caution. Nothing about legal training or traditional legal roles qualifies lawyers to determine best interests. References to the lawyer’s own childhood, stereotypical views of clients whose backgrounds differ from the lawyers, and the lawyer’s lay understanding of child development and children’s needs should be considered highly suspect bases for a best interests determination.

D. Lawyers for children who must determine their client’s best interests at any given moment in the representation should employ the following process. The lawyer should continue the analysis until only one option remains or otherwise until the analysis is complete at step six.

1. The process must begin with the child in her context. In making a best interests determination, it is the lawyer’s responsibility to carry out a full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client’s unique personality, her family system, history, and daily life. This process should include the client’s own words, stories, and desires at every possible point. Even where the lawyer has determined that the child cannot fully understand or express desires about the legal issues of the case, there will be very few verbal children who cannot express some views about their own lives. As the lawyer gathers information from her client and other sources, the lawyer should organize those facts using devices such as genograms, chronologies, and daily schedules to ensure that the lawyer is working from a thickly detailed view of the child client as an unique individual.

2. Essential to the process at its beginning is also a snapshot of the child at the moment of the determination. How is the child de-
veloping? How is the child behaving? How is the child benefit-
ing or suffering from her current living arrangement? A lawyer
should beware of undertaking these determinations without cur-
rent contact with the client.

3. The determination must consider the options actually available
to the child. Best interests determinations are not made in a vac-
uum. A lawyer who determines that a child’s current situation is
not in the child’s best interest, but who does not consider
whether the resulting intervention would be any better has done
that child client no service. The lawyer must go further and con-
sider the actual alternative options to the child’s current situation
in determining whether the proposed state intervention is in the
child’s best interests. Where the proposed intervention results in
no improvement for the child, the child’s attorney should be pre-
pared to negotiate other forms of intervention, or no interven-
tion at all.

4. In considering the actually available options that the lawyer and
client have identified, the lawyer should examine each option in
light of two important child welfare paradigms: the psychological
parent model and the family network model.

a. The psychological parent model—Does the option allow the
child to remain with or to develop a relationship with a psy-
chological parent who wants him and can provide continuity
in day-to-day interaction, companionship, and shared experi-
ences? Does the option respect the child’s sense of time?
Does the choice of the option recognize the limit of our pre-
dictive knowledge and confine itself to small, modest, gener-
ally short-term predictions?

b. The family network model—Does the option allow the child
to remain with or to develop a relationship with a family net-
work which provides a supportive milieu in which caregiving
is shared among several adults with whom the child is
familiar?

In assessing various options available to the child with re-
spect to these paradigms, the lawyer should be aware that
these paradigms intersect and interact in various ways. A
child may be moving from a situation that resembles one par-
adigm into a situation that resembles the other. The child
may be situated in an inadequate version of a family network,
which could use the anchor of a strong psychological parent-
like figure. A child may have lost their psychological parent,
and have only an extended family network, with no clearly
defined parental substitute identified. It will often be concep-
tually useful for the lawyer to understand the options the child
faces in these lights.

In many cases, the lawyer can combine her understanding
of the child and her context with these analytical paradigms
and reach useful conclusions about best interests. The lawyer
may, for instance, find that the child has always thrived in one
paradigm and floundered in another, or generally requires a
hybrid. Because the paradigms seek to identify family structures that aid a child's development, the actual progress of the client's development offers critical input in making those determinations.

In working with analytical paradigms derived from other fields, the lawyer should always remember that a little knowledge is a dangerous thing. This step will, therefore, ordinarily not be dispositive unless one paradigm or the other unproblematically accounts for much of the client's life history.

5. When this analysis becomes too complex, lawyers must consult experts for guidance. Where possible, lawyers should retain mental health and social work experts to aid them in making these best interests determinations in the course of their representations. Because much of the data upon which the decision is based is confidential lawyer-client information, the retained consultant is often the optimal, and only ethically acceptable, guide. When lack of resources or other factors make such a consultant impracticable, the lawyer may look to experts already involved with the client, or occasionally court-appointed experts. These latter experts, however, do not share the lawyer's duty of advocacy with respect to the child client's wishes and perspectives, often have other institutional loyalties, may have important ongoing relationships with the child that must not be damaged, or may not offer opinions to the lawyer in a timely fashion.

6. At this point in the process of determining best interests, there still may be no definitively preferable option for the child. If multiple acceptable options remain, the lawyer should represent evidence and argument describing all these options to the court while also presenting evidence and argument opposing all rejected options. If presenting multiple options is not possible, the lawyer is then left to his discretion. In exercising that discretion, the lawyer may be guided by a number of useful considerations.

a. Where a decision in either direction can be justified, the lawyer should err on the side of keeping the current family structure intact, while advocating aggressively for state interventions that ameliorate the worrisome conditions in the home.

b. The decision-making process should end with the child and his subjective perspective. During and at the end of the exercise of his discretion, the lawyer should consider seven questions to keep his decision child-centered and free of his own biases:

(1) In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?

(2) Does the child understand as much as I can explain about what is happening in his case?
(3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?

(4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

(5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?

(6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?

(7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

### Conclusion

Lawyers for children are ethically required to pursue as traditional as possible a lawyer-client relationship with their clients. Even traditional lawyer-client relationships, however, require the lawyer to contend with the issue of the child’s best interests during important moments in the representation. The “best interests of the child” is often the ultimate legal standard in the pending legal proceedings. “Best interests” is the guiding concern for most of the other professionals involved with the client. The lawyer must make day-to-day decisions in the client’s best interests, including structuring encounters with the client, the transmission of information, and the provision of services to the client. For clients who can benefit from counseling, the lawyer will often be asked to outline the client’s best interests. In these cases the lawyer must confront herself with her own gut instincts about the child’s best interests to be aware of when she may be trying to impose her preferences and biases onto the client. For clients who cannot be represented in an essentially traditional, client-directing mode, the lawyer may have to determine the very objectives of the representation with reference to the child’s best interests.

Lawyers for children have tended, empirically, to rely upon their total discretion in determining their clients’s best interests in these situations. Recently, other models have begun to inform these determinations. Expert opinions, by experts already involved with the client, court-appointed experts, and lawyer-retained experts, can contribute to the determination, where resources are available to pay them.

The interdisciplinary team of Goldstein, Freud, Solnit, and Goldstein have educated children’s lawyers in psychological parenting theory, directing lawyers, judges, and child welfare systems to seek the specific placement and procedure for placement which maximizes, in accord with the child’s sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her op-
portunity for being wanted and for maintaining on a continuous ba-
sis a relationship with at least one adult who is or will become is
psychological parent.156

Peggy Davis has suggested that child welfare professionals focus in-
stead on "a supportive milieu in which caregiving is shared among
several adults with whom the child is familiar."157

In making a best interests determination at any given moment of
the representation, the lawyer for children should deliberate as fol-
lows: she should begin with the child—his personality, his subjective
perspective, his family history, and context. The lawyer should also
look at the child client’s immediate situation—his behavior, his satis-
faction with the status quo, the progress of his development. Then the
lawyer should identify the actually available options for the child. She
should evaluate each option in light of the psychological parent and
family network paradigms to understand conceptually the options fac-
ing her client. In some cases, this analysis will identify a single best
path for pursuing the child’s best interests.

Where it does not, the child’s attorney should consider consulting
an expert, one whom she retains or, less frequently, an expert already
involved with the child or one appointed by the court. The lawyer
should advocate multiple acceptable options for the client, while op-
posing all rejected options. Where advocacy of multiple options is im-
possible, the lawyer must exercise her own discretion. This discretion
can be further guided by two sets of concerns. First, where alternative
paths appear equally appealing, the lawyer should err on the side that
preserves the existing family arrangements to the greatest possible de-
gree. Second, the lawyer should end the best-interests decision-mak-
ing process with the child and his subjective views, by considering
once again the seven questions to keep her honest.

This process for determining best interests will need to be continu-
ally refined, as new paradigms of child welfare emerge and as re-
sources for interdisciplinary collaborations by lawyers with other
professionals expand. This integrated model offers an important alter-
native to the prevailing total discretion, guardian ad litem, model,
which must be replaced.

156. Beyond, supra note 64, at 53.