

The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective

by
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Introduction

In 1995, the American Academy of Matrimonial Lawyers (the Academy or AAML) promulgated Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings.¹ The first professional association to develop standards in this area, the Academy started a trend which in the past six years has greatly accelerated. In 2003, the American Bar Association promulgated standards on the same subject.² In 2006, the Uniform Law Commission (ULC) (formerly the National Conference of Commissioners on Uniform State Laws) released a draft of its Model Act on the same subject.³ This ferment in the field, combined with important changes to the American Bar Association's Model Code of Professional Conduct,⁴ led the Executive Committee of the AAML in 2006 to create the Special Committee to Review the AAML's Standards for Representation of

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¹ American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995) [hereinafter AAML Standards 1995].

² American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 126, 129 (2003), available at http://www.abanet.org/family/reports/standards_childcustody.pdf [hereinafter ABA Standards].

³ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2007), available at http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf [hereinafter ULC ACT].

⁴ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

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Children and charge it with the responsibility of reviewing the 1995 AAML Standards and to recommend modifications to them in light of this ever changing landscape.⁵

As with the previous effort, I was privileged to serve as Reporter to the Committee.⁶ This time around, I was extremely ably served by Randi Levine, then a law student at New York University School of Law, who worked closely with me in all stages of the process. The Journal has graciously asked me to contribute this Reporter's perspective on the drafting of the revised Standards. I hope to present something more than my perspective on the process and the result. I aim to bring alive the remarkable politics of children's representation, which came to a boil in recent years. Part I will describe what the original Standards set forth and why the Academy enacted them. Part II will compare and contrast the efforts by the ABA and ULC with those Standards. Part III will describe the new Standards promulgated by the Academy. In all cases, my description of these various proposals will be limited to the critical differences between them. Part IV will then tell the fascinating story of how the ULC Act came to be defeated by children's rights advocates. This story will form the heart of this perspective because it allows me the opportunity to reveal the complexities (and, to my mind, confusion) that are rampant in the field. Part V tries to reconcile the competing visions of children's advocacy shared by these three organizations. The concluding Part offers a vision of how best to use court-appointed aides to serve children and their families when

⁵ In the past 14 years, the following efforts have been made to clarify the role of a child's court-assigned representative in various legal proceedings. AAML Standards 1995, *supra* note 1; American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995); NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); ABA Standards, *supra* note 3; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002). See also *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families*, 6 NEV. L.J. 592 (2006).

⁶ Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW 35 (1995).

the parents are enmeshed in contentious disputes over custody and visitation.

I. The 1995 Academy Standards

In 1995, the AAML published standards for the representation of children in custody and visitation cases. Creating standards for representation of a group of people ranging in age from infancy to 17 years is a daunting challenge. Whatever the rules will be for articulate, thoughtful adolescents, they cannot be identical for newborns.

The 1995 Standards, designed to conform to extant rules governing the behavior of lawyers, distinguished “unimpaired” and “impaired” clients in accordance with the Model Rules of Professional Conduct.⁷ The Standards used a rebuttable presumption that a child age 12 or above is unimpaired and that a child below age 12 is impaired.⁸

The Standards created three categories of representatives courts could appoint to represent children: counsel for an unimpaired child, counsel for an impaired child, and guardian ad litem.⁹ Counsel for unimpaired children were to perform the same role as when representing an adult client.¹⁰ But it was the restrictions placed on counsel for impaired children and guardians ad litem that distinguished the 1995 Standards from all others.

The 1995 Standards were built on several basic concepts. Most importantly, the AAML wished to prevent lawyers from taking actions based on their own personal values or beliefs. Specifically, the Academy “regarded the most serious threat to the

⁷ In 1995, Rule 1.14 of the MODEL RULES OF PROFESSIONAL CONDUCT required

“(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 to 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.”

⁸ AAML Standards, *supra* note 1, at Standard 2.2.

⁹ *Id.* at Standards 2.1, 3.1.

¹⁰ *Id.* at Standard 2.3.

rule of law posed by the assignment of lawyers for children to be the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests."¹¹ The Academy wished to avoid the risk of "inviting arbitrary role behavior" with the result that the outcome in a case may be changed simply because someone was introduced into the case with the authority to recommend an outcome "without providing any assurance that the outcome will be 'better' than if no representative had joined the case."¹²

For the AAML, there was an elegant and simple means to avoid this set of concerns: simply prohibit anyone, regardless of their title, from advocating a position with regard to the outcome of the proceeding when representing a client who is unable to set the goals of the representation. I say this solution was simple and elegant, but I ought to add it was also highly controversial. Indeed, it continues to serve as the source of the greatest disagreement between the AAML and most other groups that have developed standards for children's representatives.

Since unimpaired children were, by definition, capable of setting the goals of the representation, the injunction against children's lawyers advocating for a particular outcome was inapplicable to them. But for the other two types of children's representatives – whether they were called "lawyers" or "guardians" – the 1995 Standards flatly forbid them from attempting to influence the court in reaching a particular outcome.¹³ Instead, the Standards assigned to these representatives what was designed to be as neutral a role as possible, one not dependent on the values of the representative. Both lawyers for impaired children and guardians ad litem were expected to strive to make the decision-maker aware of all facts that the decision-maker should consider, including the child's preferences, without advocating for a particular result.¹⁴

The AAML's contribution to the field was in providing direction within the interstices of controlling ethical rules. Those rules (then and now) *permit* attorneys representing young chil-

¹¹ *Id.* at Standard 2.7 cmt.

¹² Guggenheim, *supra* note 6, at 47.

¹³ Standard 2.7 prohibited lawyers from doing this; Standard 3.2 prohibited Guardians ad litem from doing this.

¹⁴ *Id.* at Standards 2.7, 2.12; 3.2; 3.7.

dren to act as “de facto guardians” and recommend an outcome in the case.¹⁵ But they do not *require* attorneys to do so. The AAML deliberately limited what the lawyer could do to a greater degree than ethical rules demanded. In what has been called “a move that breaks with the majority approach across the United States,”¹⁶ the AAML also rejected the use of a hybrid attorney/guardian ad litem model because when one person functions as both the attorney and the guardian for a ward, the attorney gets to make the decisions for the client.¹⁷

Another important underlying aspect of the 1995 Standards was that the AAML did not attempt to tinker with the substantive rules by which custody or visitation cases were to be decided. The Academy considered only the *procedural* matter of whether children should be represented, not the criteria judges should apply in deciding these cases. Thus, it neither endorsed, nor even independently reviewed the merits of, substantive rules that authorized courts to decide custody cases by considering the child’s preferences as merely one factor among many.

But the 1995 Standards also meant to make clear that the Academy was not taking sides in the debate over whether the appointment of counsel for children is a good thing. Rather, the Academy wished to perform a different function: to “define the role and functions of a lawyer – if appointed by the court.”¹⁸ As I explained in my 1995 article:

[j]udges should carefully consider whether they want such a lawyer in the proceedings. If they do not, it is fully consistent with the Standards not to appoint anyone to represent the child. But it is important for courts (and the other parties) to know what they should expect from a lawyer who is assigned to represent an unimpaired child.¹⁹

Finally, on the topic of the relationship of procedural rules involving the appointment of counsel for children in contested custody cases and the substantive bases upon which the cases are to be decided, the Academy in 1995 issued a warning to judges and legislatures throughout the country. It alerted judges that

¹⁵ *Id.*

¹⁶ Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW 183, 211 (2005).

¹⁷ AAML Standards, *supra* note 1, at Standard 3.1.

¹⁸ Guggenheim, *supra* note 6, at 50.

¹⁹ *Id.*

they should beware of too blithely appointing lawyers for children because doing so may have unintended consequences. Since every jurisdiction in the country supported (then and now) the substantive rule that custody cases should be decided based on a child's best interests,²⁰ judges and legislators ought to be extremely wary of changing procedural rules that will reduce the likelihood that cases will be decided based on what is best for children.²¹

The Academy observed that the more courts appointed children's lawyers who would strive to achieve the result desired by their clients, the more cases would be resolved in accordance with children's preferences, elevating the expressed wishes of the child to a degree of prominence and weight in the ultimate calculus that is at odds with the current law. With a lawyer forcefully articulating the child's preference using all of the rhetorical devices available to a trained advocate, that position inevitably will assume far greater weight than it would if merely expressed by the child himself or herself. "While a judge assuredly would endeavor to treat the child's wishes as merely one factor among many," the Academy warned, "it may become too difficult to give due weight to the child's preferences in the face of an able lawyer striving to persuade the judge to decide the case in favor of the child's wishes."²²

More could be said about what the 1995 Standards did. But this serves as the core of that work and also sets the stage well for the many developments that have followed.

II. Intervening Events: Enactment of the ABA Standards; Proposing the ULC Act

A. ABA Act

In 2003, the Council of the American Bar Association's Family Law Section unanimously approved Standards of Practice for Lawyers Representing Children in Custody Cases.²³ As Pro-

²⁰ See *infra* note 122 and accompanying text.

²¹ Guggenheim, *supra* note 6, at 54.

²² *Id.* at 53-54.

²³ ABA Standards, *supra* note 2.

fessor Linda Elrod reports, the Standards were the result of a nearly ten-year drafting process.²⁴

The ABA Custody Standards are in sharp contrast with the AAML's 1995 work. Although the ABA paid some lip service to the concerns expressed by the AAML over the dangers associated with empowering someone to decide for him or herself what position to try to persuade a court to reach in child custody cases, the ABA authorized a certain kind of child's lawyer to do precisely that. The ABA Standards created two different kinds of attorneys who represent children: the "child's attorney," a traditional attorney who is expected to be guided by the objectives set by the client, and a new creation: the "best interests attorney," who is free to advocate for an outcome different from the child's expressed objectives.²⁵ Eschewing entirely the label "guardian ad litem," the ABA preferred to call the court-appointed professional representing children in custody cases a "best interests attorney," instead of the more common term "guardian" in use in many jurisdictions.²⁶ The ABA's answer to the concerns about allowing court-appointed children's lawyers too much discretion in choosing which outcome to attempt to persuade the court to reach is to require that the attorney base his or her assessment of the child's interests on "objective criteria set forth in the law."²⁷

B. *The ULC Act*

In 2006, the Uniform Law Commission weighed in with its proposed Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (Model Act or ULC Act).²⁸

²⁴ Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 105 (2003).

²⁵ ABA Standards, *supra* note 2, at Standard II. B.

²⁶ *Id.* at Standard II. B (2). The term "guardian ad litem" has been terribly overused. Among the many different functions "guardians" are routinely asked to perform are "investigators, expert witnesses, lawyers, lay advocates for an incompetent child's best interests, mediators, negotiators, supervisors, monitors, friends or advisors to the court, and ears or arms of the court, recommenders, fact finders and de facto decision makers." Linda D. Elrod, *Client-Directed Lawyers for Children: It is the 'Right' Thing to Do*, 27 PACE L. REV. 869, 907 (2007) (citing Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 2002 LOY. J. PUB. INT. L. 106, 115).

²⁷ *Id.* at Standard V.E. & F.

²⁸ ULC Act, *supra* note 3.

Importantly, unlike both the AAML and the ABA, the Uniform Law Commission chose to combine standards for practice for children's lawyers across two very different kinds of proceedings: child custody and visitation on the one hand, and state-initiated child abuse and neglect proceedings on the other.

The proposed ULC Act created three categories of court-appointed children's representatives. It authorized the discretionary appointment of a "child's attorney," a "best interests attorney," or a "best interests advocate."²⁹ The meaning of a "child's attorney" was very close to the ABA's (and the AAML's). Since the child's attorney is expected to strive to achieve the outcome in the case desired by the client, the ULC Act recommended appointing children's attorneys when the children are old enough that their views on the outcome should be given substantial weight.³⁰ The ULC made clear that "[a] child's attorney may not refuse to advocate the child's wishes simply because the attorney disagrees with the child's view or believes the child's objectives will not further the child's best interests."³¹ At the same time, the child's attorney would not be obliged to seek the objectives sought by the client if the child's wishes "would put the child at risk of substantial physical, emotional, psychological or other harm."³² In such circumstances, the child's attorney may "either request the appointment of a best interests advocate or withdraw and request the appointment of a best interests attorney."³³ Alternatively, the attorney may choose "the dual attorney model" with the child ending up with both a "child's attorney" and a "best interests attorney."³⁴ When the attorney functions in this dual role, the attorney would continue to represent the child but would also be allowed to request the appointment of a best interests attorney.

The ULC Act allows the attorney to decide when the child "lack[s] capacity to formulate objectives of representation as to a

²⁹ *Id.* at §§ 2 (1), (2) & (3).

³⁰ An "older child with defined views" as the Commentary puts it. *Id.* at 25 (§ 6 cmt.).

³¹ *Id.* at 31 (§ 12 cmt.).

³² *Id.* at § 12 (e).

³³ *Id.* at §§ 12 (e)(1) & (2).

³⁴ *Id.* at § 12 (e)(3).

particular matter.”³⁵ When the child lacks such capacity, the Act “permits the child’s attorney to advocate the best interests of the child as to that matter.”³⁶ However, the Model Act forbids the child’s attorney from advocating “a position that is contrary to an expressed objective of the child in the proceeding.”³⁷ If the child expresses an objective that the attorney believes is not the product of sufficient capacity, the Model Act would allow the child’s attorney “simply [to] take no position on the matter in question.”³⁸ As an alternative, “the child’s attorney may request the appointment of a best interests advocate or a best interests attorney.”³⁹

The “best interests lawyer” contemplated by the Model Act was remarkably close to the ABA’s version.⁴⁰ This is unsurprising since the drafters of the Model Act acknowledged borrowing the concept from the ABA.⁴¹ Under the Act, a best interests attorney is required to “present any expressed objectives of the child” if the child insists,⁴² but would “not [be] bound by the child’s expressed objectives.”⁴³ Rather, this attorney is directed to “consider the child’s objectives, the reasons underlying those objectives, and the child’s developmental level, in determining what to advocate.”⁴⁴ The Model Act contemplated that the best interests lawyer is the child’s attorney to the extent s/he would be bound to provide “individual loyalty, confidentiality, and competent representation.”⁴⁵ But, also like the ABA, the Model Act thought it sufficient to constrain the discretion available to the lawyer by requiring that the best interests attorney choose what outcome is best for the child “according to criteria established by

³⁵ *Id.* at 31 (§ 12 cmt.).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ ABA Standards, *supra* note 2, Standard V (providing detailed guidelines for best interests attorneys).

⁴¹ ULC Act, *supra* note 3, at 6 & n. 29.

⁴² *Id.* at 33, § 13 (d).

⁴³ *Id.* at § 13 (e).

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* at § 12 (a).

law and based on the circumstances and needs of the child and other facts relevant to the proceeding.”⁴⁶

The major contribution in the ULC Act was the creation of a third entity – the “best interests advocate.” This is someone, not functioning as an attorney, who would be appointed to assist the court in determining the best interests of a child. This person would be barred from functioning as an attorney even if s/he is a member of the bar.⁴⁷ A “best interests advocate” “is not appointed to provide legal representation” and, as a result, communication between the advocate and the child would not be privileged.⁴⁸ The Model Act contemplated that many different types of individuals would be eligible to serve as advocates including social workers, counselors, and therapists. But the drafters of the Model Act, like the ABA, saw fit to eschew the use of “guardians ad litem” because “the use of guardians ad litem in custody disputes has come under sharp attack in recent years, based in part on the lack of clear guidelines for their role.”⁴⁹

The best interests advocate’s two major responsibilities is to “investigate the child’s circumstances” and “sometimes testify in the case about the child’s best interests.”⁵⁰ But the Act is appropriately sensitive to due process concerns. Whenever the best interests advocate would testify or submit a report containing the advocate’s recommendations regarding the child’s best interests or the reasons for the advocate’s recommendations, the court would be required to allow all parties the opportunity to cross examine the advocate.⁵¹

⁴⁶ *Id.* at § 13 (b). Like the ABA, the Model Act believes the problems associated with freeing randomly assigned members of the Bar to choose the objectives to seek for a child are sufficiently cabined by advising that the best interests attorney should carry out a child-centered representation according to applicable law and should never formulate a position on the basis of personal bias.

⁴⁷ *Id.*

⁴⁸ *Id.* at 24 (§ 8 cmt.).

⁴⁹ *Id.* (citing Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 *LOY. J. PUB. INT. L.* 106 (2002)).

⁵⁰ *Id.* at §§ 14 1(B) & 6.

⁵¹ *Id.* at § 16(e). Another similarity between the ABA Standards and the proposed ULC Act is both identified five purposes which an appointment of an independent professional for a child might serve: (a) Advocate for the objectives set by the child; (b) Advocate for the best interests of the child; (c) Make

The next Part will describe what the AAML promulgated in 2009 in order to contrast and compare its contribution with the ABA's and the Uniform Law Commission.

III. The Academy's 2009 Standards

In 2006, the Special Concerns for Children Committee was charged by the Executive Committee of the AAML with the responsibility of revisiting the work it produced in 1995 with a view towards updating and revising them in light of the changing landscape in the country. I found working with the Committee to be particularly rewarding. It was composed of smart, hard working lawyers who regarded the task of developing standards for children's lawyers in different ways than I have experienced working with other organizations, such as the American Bar Association.

For some, the question of standards for representing children is analyzed in the service of an agenda to *ensure* that children are represented.⁵² Thus, for some, “[c]hildren should have competent counsel representing their interests in all significant judicial proceedings that affect their lives.”⁵³ Others rely on the United Nations Convention on the Rights of the Child and other like documents to insist that children have the right to a lawyer.⁵⁴ But the Academy is different. It is made up of lawyers who see

the child's wishes known to the court; (d) Add information for the fact-finder; and (e) Protect the child from harm during the litigation.

⁵² See, e.g., Elrod, *supra* note 26, at 872 (“Some, including myself, favor traditional client-based representation which empowers a child as a ‘rights holder’ to have their wishes presented and considered by the court.”).

⁵³ ABA STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN STILL AT RISK 209 (2001). See also Henry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 356 (1972) (“children [with] their own lawyer when their disposition or welfare is at stake is the most significant and practical reform that can be made in the area of children and the law.”)

⁵⁴ Article 12 of the Convention is the central provision protecting the child's right of participation. That Article requires states to provide children who are capable of forming their own views “the right to express those views freely in all matters affecting the child, the views . . . being given due weight in accordance with the age and maturity of the child.” The Article goes on to require that a child be provided “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.” CONVENTION ON THE RIGHTS OF THE CHILD, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/25 (Nov. 20, 1989).

their task outside of representing clients in their own cases to improve the system in which they work. Its approach to the topic of providing children with lawyers was that of a problem solver. It was interested in what aspects of current practice the greater use of children's lawyers might improve.

The Special Concerns for Children Committee was comprised of a diverse group of highly experienced practitioners from many different states. Their breadth and diversity of experience made its deliberations both more complicated and, ultimately I think, more successful. Some practice in jurisdictions where children's attorneys are routinely employed in contested custody and visitation cases.⁵⁵ Others practice where they are virtually unheard of. Some saw their involvement as a positive development; others did not. This exchange of competing visions allowed the Committee to consider the subject more neutrally than seems to have been the case with either the ABA or ULC. The skeptical members of the Committee challenged the proponents of providing children with lawyers to explain and justify their position in a way that, at least from my experience with similar committees in other organizations, is rare.

Though this may appear counter-intuitive, there is, I believe, a distinct advantage to having members of a drafting committee who have little experience with using children's lawyers in particular legal proceedings when considering whether to recommend their use going forward. These novices are able to ask penetrating questions which sometimes are not asked when a committee is overpopulated with children's lawyers or with judges who like to appoint children's lawyers. In this sense, I believe the Academy had a distinct advantage over the ABA⁵⁶ and ULC.⁵⁷ It was

⁵⁵ According to Barbara Atwood, as of 2005, only ten states require the appointment of a representative for a child in custody actions under certain circumstances, such as where there are allegations of abuse. Atwood, *supra* note 16 at 192 & n. 36 (citing ABA CHILD CUSTODY PRO BONO PROJECT, APPOINTMENT LAWS IN DIVORCE CASES (Aug. 2003), reprinted at Elrod, *Raising the Bar*, *supra* note 24, at 126-29 (Appendix). Including Minnesota (MINN. STAT. ANN. § 518.165 (2004)); Oregon (OR. REV. STAT. § 107.425(6) (2004), and Wisconsin (WIS. STAT. ANN. § 767.045 (2005).

⁵⁶ Linda Elrod records the story of the drafting of the ABA Standards for Representing Children in Custody Cases. Although in the early stages, the committee helping to draft the standards had meaningful diversity (including Robert Levy, David Hofstein and me.) the key ABA members who took over the

highly instructive for the Committee to listen with skeptical ears to claims that children's lawyers have proven very helpful in particular jurisdictions that use them, according to committee members who practice in those jurisdictions.

In the end, the Committee recommended something outside the mainstream: that there be only one purpose for appointing lawyers for children. These lawyers should be used, the Committee concluded, *only* when courts want children's lawyers to advocate for the outcome desired by the child.⁵⁸ This recommendation was not reached because the Committee members were ardent children's rights advocates.⁵⁹ It was more a reflection of the Committee's views of what it means to be a

project included many well known advocates for making lawyers available to children as a matter of principle. This group included Jeff Atkinson, Gail Baker, Frank Cervone, Linda Elrod, Ann Haralambie, Gregg Herman, Howard Davidson, Judge Debra Lehrmann, Jack Sampson, and David Walther. Elrod, *supra* note 24, at 109-112. Professor Elrod revealed her strong support for providing children with lawyers in Linda Elrod, *Counsel for the Child in Custody Disputes - The Time Is Now*, 26 FAM. L.Q. 53 (1992).

⁵⁷ The group primarily responsible for drafting the Model Act included Barbara Atwood, Rhoda Billings, Howard Davidson, David Gibson, Ann Haralambie, Paul Kurtz, Judge Debra Lehrmann, Robert McCurley, Cisco McSorley, Jr., M. Gay Taylor, Harry Tindall, and Cam Ward. Though this group as a whole is less well known for its strong commitment to providing children with lawyers, the overlap of Atwood, Haralambie and Davidson is notable. All three have written powerful articles supporting the widespread use of lawyers for children as a matter of principle. *See, e.g.*, ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (ABA 1993); Barbara Ann Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127 (2008); Atwood, *supra* note 16; Howard Davidson, *The Child's Right to be Heard or Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLIN J. PUB. L. & POL'Y 177, 177 (2006); Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing 'Impaired' Children*, 13 J. AM. ACAD. MATRIM. LAW 57, 67 (1995).

⁵⁸ American Academy of Matrimonial Lawyers, *Revised Standards for Attorneys for Children in Custody or Visitation Proceedings*, 22 J. AM. ACAD. MATRIM. LAW 227, 236 (2009) (hereinafter AAML Revised Standards).

⁵⁹ Many scholars believe that children should be represented in these proceedings based on their rights to be represented. *See, e.g.*, Elrod, *supra* note 56. *See also infra* note 131 and accompanying text.

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lawyer. Reduced to a simple phrase, as David Hofstein often expressed it, “a lawyer is a lawyer is a lawyer.”⁶⁰

Working from an understanding of what it is that *lawyers* do (and don’t do), a number of Committee members placed two possibilities outside of bounds. Lawyers ought not to decide for themselves what outcome to attempt to persuade the court to reach. Lawyers are terrific at advocating for results. But nothing in their training suits them to choose the outcome (except, of course, to the extent lawyers are trained to counsel clients to choose among various possible outcomes based on what the clients themselves prefer). For these Committee members, this First Principle of lawyering – that lawyers act as agents for their clients, never as principals⁶¹ – demanded the rejection of best interests lawyering as out of bounds. The second impossible option for these Committee members was allowing anyone *other than a lawyer when advocating for an outcome chosen by the client* to attempt to persuade a court how to decide the case unless all parties are given an opportunity to cross examine the individual.

It is important to appreciate that these positions did not fit well with everyone on the Committee. Those who had positive experiences with children’s lawyers who have functioned as best interests advocates reacted negatively to these principles and answered back that, at least in their experience, much good came from permitting children’s lawyers to act outside of these constraints. This might have led to an impasse within the Committee until, in a key moment for everyone involved, we reached an epiphany: the thing we were debating over was the *label* assigned to the appointed individual.

Those Committee members who were familiar with and wished to permit the use of children’s lawyers really were supportive of appointing *someone* with investigative and reporting authority to cut through the confusion which too frequently exists in contested custody disputes. They were not insistent that this person be called anything in particular. Furthermore, they

⁶⁰ Alton Abramowitz and David Hofstein co-chaired the Committee. Hofstein and Barbara Handschu were the only members of the Academy who served on both committees that proposed the 1995 and 2009 Standards. The other committee members were Kenneth Altshuler, Jeffrey Anderson, Pamela Deal, John Slowiaczek, Louise Truax, and Donald Tye.

⁶¹ MODEL RULES OF PROF’L CONDUCT, R. 1.2. (2002).

really were not in disagreement that due process concerns justify the rule that someone who strives to influence the ultimate fact finder be subject to cross examination by the parties. On the other side, those unwilling to expand the definition of what is acceptable lawyer behavior saw nothing wrong with adding to contested custody and visitation cases someone appointed by the court to investigate and report on what they have learned, provided, of course, that their views be subject to cross examination.

Out of this quickly came the final product. The Committee ended up with two simple categories: “*Counsel for the child*” is a licensed member of the bar assigned to represent a minor who is the subject of the proceeding.⁶² The principal purpose of the assignment is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation’s objectives as established by the client. “*Court-Appointed Professional Other than Counsel for the Child*” is a person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.⁶³ The Committee unanimously supported courts using whatever kind of aides they wish to assist them to resolve contested custody disputes subject only to these two limitations: do not call these court-appointed individuals lawyers; and allow the parties the chance to cross examine them if they end up providing information to the court (whether the information is in the form of a claim about the facts or a recommendation about the outcome). Because no one on the Committee was advancing any kind of additional agenda, a rather diverse group of experienced practitioners was able to reach consensus on an issue that remains highly contentious in other places.

Much of the revised Standards set forth principles which no longer appear to be contestable. Standard 3.2 requires that whenever a court-appointed person makes a recommendation to the court on the outcome of the proceeding or on a factual claim about a contested fact or issue it must be done under oath subject to cross examination by all parties.⁶⁴ This accords with the ULC

⁶² AAML Revised Standards, *supra* note 58, at 247.

⁶³ *Id.*

⁶⁴ *Id.* Standard 3.2.

Act.⁶⁵ Basic principles of due process require that no contested claims about a matter be considered by the judge without providing all parties the opportunity to test the accuracy of the claim. This means that regardless of what courts call the court-appointed professional (“court appointed special advocates,” “guardians ad litem,” “best interests attorneys,” “court appointed advisors,” or “investigators”), whenever they attempt to make a recommendation in the case or express a view which is based on contested facts, they should be treated as experts testifying to facts and opinions pertinent to the case. In the event the court accepts a written report, the report must be made under oath and may not be considered by the court without affording all parties the opportunity to cross-examine its maker, unless otherwise agreed by the parties. As explained in the Commentary to Standard 3.2, unless someone is qualified as an “expert” within the meaning of the controlling rules of evidence, s/he should not be allowed to offer opinion testimony or any other form of opinion.

The Committee ultimately concluded that the only way to avoid contaminating the core meaning of what it is to be a lawyer was to join those who believe that the only proper role of a child’s lawyer is to advocate for the outcome desired by the client. But it is important to contrast how the Academy reached this result with how some children’s advocates do. For some, including Randy Kandel and Katherine Federle,⁶⁶ children ought to have the right to be represented by an attorney who is obliged to advocate for the outcome desired by the child. They reach this result from a children’s rights perspective. But no one on the Committee shared this view. The Committee’s conclusion that the only role a child’s lawyer ought to perform is to advocate for the outcome desired by the client was not a statement about chil-

⁶⁵ See ULC Act, *supra* note 3, at § 16 cmt.

⁶⁶ Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children’s Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994) (recommending that courts show greater deference to children’s preferences under children’s rights theory); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995) (recommending that children be given equal party status in custody proceedings and lawyers who would advocate for their desire outcomes).

dren's rights at all. It was a statement about what lawyers do or ought to do.

Even more, because the Committee was comprised of matrimonial lawyers well versed in the substantive law of custody and visitation disputes, it was a very troubling idea to unleash a cadre of children's lawyers to advocate for the outcome desired by the children since the substantive law in every jurisdiction refuses to weigh very heavily the child's preferences in the calculus for deciding the case on the merits.⁶⁷ Once someone outside of the children's rights field considers the possibilities, the odds are small that s/he would insist that courts assign a professional to persuade the court to decide the case as the child wishes. At least until judges and legislators begin agitating for change to substantive custody law and indicate a serious interest that cases should be decided in accordance with what the child wants, it should not be surprising that matrimonial lawyers would have little desire to ensure that children be provided with lawyers obligated to advocate zealously for the outcome desired by the child.⁶⁸

Thus, the Committee's insistence that a child's lawyer, once appointed, is expected to advocate for what the child wants had nothing to do with children's rights; more importantly, the Committee wanted to limit the importance of lawyers. The Commit-

⁶⁷ Atwood, *supra* note 57, at 630 ("While the law of almost all states provides that courts may consider children's preferences in deciding custody, states vary widely in the discretion they provide their trial judges. States differ not only with respect to the weight given children's wishes but also to the methods used by courts in ascertaining children's views.") *See also id.* at 640 ("American courts largely agree that children's wishes are a relevant, though not dispositive, consideration in resolving a custody dispute.")

⁶⁸ According to Professor Atwood the call for more children's lawyers who are expected to advocate for what their clients want is deeply in conflict with the prevailing sentiments of judges and legislators. As she explains, "An influential text for judges on mental health dimensions of child custody litigation is *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges*. The Deskbook is moderately critical towards 'children's rights advocates' who have pushed recently for a greater role for children's preferences in custody dispute resolution. The text states that the children's rights perspective is 'not widely shared in the United States currently by legislators, judges, or mental health experts.' It goes on to note that '[i]t is unlikely that an alternative social consensus concerning children's preferences in custody cases, one favoring 'children's autonomy' or any other, will soon prevail.'" Atwood, *supra* note 57, at 647 (citations omitted).

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tee believed that allowing a child's lawyer to advocate for an outcome selected by the lawyer would be a serious mistake. It would unleash a randomly assigned member of the bar to strive to achieve a result in a lawsuit in a way that, however much others believe it can be constrained, unleashes an unacceptable degree of arbitrariness. This is why in 1995 the Academy prohibited children's lawyers (along with guardians ad litem) from advocating for a particular outcome in a case except when doing so because the client desired it.⁶⁹

In its most recent Standards, not only did the Academy continue to prohibit children's lawyers from advocating for results the lawyer selects untethered from what the client instructs, it went an important step further. Now the only permissible purpose of appointing a child a lawyer is to give the child the same kind of lawyer all other clients get: one who does the client's bidding. For all other purposes, the Standards require the appointment of someone other than a lawyer. What the Committee realized in the midst of its deliberations is, in hindsight, the key to this great puzzle. No one on the Committee was troubled by allowing *some professional* the task of making an investigation and a recommending based on the investigation. The problem was in misappropriating the word "lawyer."

The differences between the most recent AAML Standards and those of the ABA and the ULC are significant. But it is even more important to emphasize the degree to which the Academy agrees with both the ABA and Uniform Law Commission. It agrees that children can have lawyers when the purpose of giving them lawyers is to have them seek the outcome chosen by the child.⁷⁰ And it agrees with both of the other organizations that courts, children, and all of the parties may benefit from adding to the process a professional whose function is to investigate and report, even making a recommendation to the court on the ultimate disposition of the case. If one could just stop there and reflect, this constitutes very considerable agreement between all three groups.

⁶⁹ AAML Standards, *supra* note 1, at Standards 2.7; 3.2.

⁷⁰ The Academy may be more agnostic about how often even this should happen or whether it is a sound idea to do regularly. But it fully supports the principle that *if* a court is to assign a lawyer to represent a child, the lawyer properly should seek the outcome desired by the child.

IV. The Legal Community's Reaction to the Proposed Uniform Law Act

The AAML Standards have not yet been subject to public scrutiny. The ULC Model Act, in contrast, was very publicly debated beginning in 2007 because the Uniform Law Commission needed the support of other key organizations before the Model Act could be presented as a Uniform Law intended for States to enact.

Among the organizations the ULC sought support from was the American Bar Association. Given the symmetry between the ABA Custody Standards enacted in 2003 and the proposed ULC Model Act, it would be more than reasonable to have expected that the ULC would have garnered very broad support for its proposed Model Act. Nothing, however, could be further from what happened. Indeed, I know of no other proposed standards relating to the representation of children that was received so negatively. The opposition was swift and furious and succeeded in defeating the effort. In May 2008, after unsuccessfully asking the ABA Standing Committee on Ethics to modify the Model Rules of Professional responsibility to eliminate any perceived conflict between the Rules and Model Act, the ULC gave up on its effort to secure ABA approval of the Act, effectively ensuring that the Model Act would never be promulgated.⁷¹

The strongest opposition was from the organized children's bar.⁷² Its position, in Professor Katherine Federle's words, "should come as no surprise."⁷³ As Federle explained, the Model Act "undermines the child's right to independent counsel, does away with the mandate of client-centered confidentiality, is inconsistent with existing state law, and eliminates the child's right

⁷¹ Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103, 103 & n.1 (2008).

⁷² They include such national organizations as the National Association of Counsel for Children, National Court Appointed Special Advocates, and the American Bar Association Section of Litigation. Similarly, children's law centers, law school clinics, legal services organizations, law professors, and other groups working on behalf of children. For the complete list, see *id.* at 113 & n.44.

⁷³ *Id.* at 113.

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to define the representation.”⁷⁴ Federle’s negative reaction to the Model Act was expressed in perhaps the strongest language used by anyone, calling it “a piece of paternalistic legislation that, while ostensibly well-intentioned, undermines the rights of children, violates the Model Rules of Professional Conduct, and sets the law regarding the representation of children back twenty years.”⁷⁵ She also condemned the Act as “disempower[ing] the child and strip[ping] her of a meaningful voice in the proceedings.”⁷⁶

Professor Federle is among a small group of legal scholars who insist that children always have the right to be represented by an attorney who will seek to achieve the objectives chosen by the child.⁷⁷ “It is astonishing,” according to Professor Federle, that the “ULC continues to promote an act that so clearly contradicts the consensus of those with expertise in representing children, the policies of the many and varied professional organizations who represent lawyers and child advocates, and a vast number of academics.”⁷⁸ Even worse, in her opinion, is the Uniform Law Commission’s “apparent disregard for the rights of children and the crucial role that client-directed lawyers play in securing and protecting those rights.”⁷⁹ Among those who share her views is Mark Henaghan who opposed the Model Act because it authorized court-appointed representatives to seek results for children without any requirement that the children want the result or instructed the representative to seek it.⁸⁰

⁷⁴ *Id.* at 114.

⁷⁵ *Id.* at 103.

⁷⁶ *Id.* at 104.

⁷⁷ *See infra* note 131 and accompanying text.

⁷⁸ Federle, *supra* note 71, at 115.

⁷⁹ *Id.* at 114.

⁸⁰ *See* Mark Henaghan, *What Does A Child's Right to be Heard in Legal Proceedings Really Mean?*, 42 FAM. L.Q. 117, 127 (2008) (“The major amendment this article argues for is that the lawyer for the child cannot substitute his or her view for the child’s at any point in the process unless the child explicitly endorses this.”) The Model Act was criticized by other scholars. *See, e.g.*, Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385 (2006). Among the thoughtful supporters of the idea of best interests lawyers is Professor Donald Duquette. *See* Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006); Donald N.

The claim made by opponents to the Model Act was not only that it was a bad idea, but that it “contradicts the policy and standards of the American Bar Association.”⁸¹ The ABA’s Litigation Law Section and its Standing Committee on Ethics and Professional Responsibility opposed the Model Act because of “perceived conflicts between various ABA policies” and the Model Act.⁸²

One might reasonably ask how the ABA could have opposed the Model Act given how closely its proposal was to the 2003 ABA Standards on the Representation of Children in Custody Cases.⁸³ The explanation, it turns out, has almost nothing to do with the substantive scope of matrimonial law. Although the ABA and the Uniform Law Commission appear to have much in common with each other when it comes to conceptualizing the role and purpose of court-assigned children’s representatives in custody and visitation proceedings, the ULC’s grave mistake was proposing a Model Law meant to cover both custody and visitation proceedings as well as neglect and abuse proceedings. Had the Uniform Law Commission seen fit, as the ABA did, to propose two separate Standards for children’s lawyers in these two very different kinds of proceedings, it is quite likely the Uniform Law Commission would have gotten its Model Laws enacted.

The claim that the Model Act conflicted with previously promulgated ABA policy refers to the 1996 Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases proposed by the Family Law Section of the American Bar

Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441 (2000).

⁸¹ *Id.*

⁸² *Id.* at 103 & n. 1. It is not perfectly clear which policy of the ABA’s was at issue. But it seems that, to some at least, ABA policy includes the mandate contained in Section 3 of the *Report and Working Draft of A Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 42 FAM. L.Q. 145, 147 (2008), that a lawyer be appointed “for each child who is the subject of a petition in an abuse, neglect, dependency, termination of parental rights or post termination of parental rights proceeding.” If this is ABA policy, the ULC Act would conflict with it because the ULC would allow a best interests advocate to appear for a child in a neglect or abuse case instead of a lawyer.

⁸³ ABA Standards, *supra* note 2.

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Association (ABA Abuse and Neglect Standards).⁸⁴ At about the same time that the AAML completed its original standards, the Family Law Section of the ABA proposed a set of standards for children's lawyers in abuse and neglect cases. These proposed standards went in a strikingly different direction from the AAML's. The proposed Neglect and Abuse Standards began with a stated preference that the child's lawyer generally should advocate the child's expressed preferences throughout the litigation.⁸⁵ But, in sharp contrast to the AAML, the 1996 proposed ABA Standards authorized the child's lawyer to advocate for a particular result even when representing children who are incapable of expressing an opinion.⁸⁶ Although the drafters of the proposed standards recognized the problems associated with allowing lawyers to choose preferred outcomes based on their personal values and beliefs,⁸⁷ they concluded that the lawyer could adequately be constrained by limiting choices to "objective criteria" established by law, based on the child's needs and interests.⁸⁸ Not only did the proposed Standards permit children's lawyers to advocate for results chosen by the lawyer, they even allowed the same lawyer to be appointed as a guardian ad litem model.⁸⁹

One thing the 1996 Standards did not do, however, was propose that courts appoint a best interests lawyer to represent children in neglect and abuse proceedings.⁹⁰ The apparent fatal misstep taken by the Uniform Law Commission was recom-

⁸⁴ American Bar Association, Standards on the Representation of Children in Abuse and Neglect Proceedings, Standard B-4(1),(2) (1996), <http://www.abanet.org/leadership/2006/annual/onehundredfourteen.doc> (hereinafter ABA Neglect Standards).

⁸⁵ *Id.* at Standard B-4(3).

⁸⁶ *Id.* at Standard B-4(1), (2). The Standards also rejected the AAML's binary impaired/unimpaired framework, anticipating the 2003 revision to Rule 1.14 of the Model Rules of Professional Conduct Rule 1.14 which gauging children's competence along a continuum like a rheostat instead of an on/off switch. Standard, B-4.

⁸⁷ *Id.* B-4 cmt.

⁸⁸ *Id.* at Standard B-5 and cmt.

⁸⁹ *Id.* at Standard A-2.

⁹⁰ The ABA Neglect and Abuse Standards also rejected the AAML's binary impaired/unimpaired framework, anticipating the 2003 revision to Rule 1.14 of the Model Rules of Professional Conduct Rule 1.14 which gauges children's competence along a continuum like a rheostat instead of an on/off switch. *Id.* at Standard B-4.

mending a best interests attorney for a child in a child protective proceeding. But comprehending why this proved to be so troubling to the ABA is rather complicated. At first blush, the ULC Act does not appear to be terribly in conflict with the ABA Abuse and Neglect Standards. As we have seen, although rhetorically the Neglect and Abuse Standards proclaimed that a child's lawyer is primarily an advocate whose charge is to help achieve the outcome desired by the client,⁹¹ the Standards comfortably authorized the child's lawyer to choose what position to advocate. The ABA in 1996, just as the ABA in 2003 and the Uniform Law Commission in 2006, even allowed lawyers to choose the outcome to seek, so long as they only "advocate[d] the child's legal interests [as] determined by objective criteria."⁹² Finally, the Neglect and Abuse Standards allowed for the appointment of an attorney as a guardian ad litem to protect the child's interests and even endorsed the single appointment of an attorney/guardian ad litem who is "appointed to protect the child's interests without being bound by the child's expressed preferences."⁹³

Thus it would seem rather odd for the ABA to react so negatively to the use of a "best interests lawyer" especially given that it was the ABA which invented the best interests attorney (in custody cases).⁹⁴ One can commiserate with the Uniform Law Commission if it felt blindsided by the harsh criticism its 2006 work engendered from the ABA when all it did was borrow from the ABA the very concept for which it was being criticized.

Indeed, the rapidly shifting landscape within the ABA only fully came to light in 2008 when the ABA issued a Report and Working Draft of A Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings.⁹⁵ This new Model Act is a dramatic departure from the 1996 ABA Neg-

⁹¹ See *supra* note 85 and accompanying text.

⁹² ABA Neglect Standards, *supra* note 84, at Standard B-4(1), (2).

⁹³ *Id.* at Standard A-2.

⁹⁴ See *supra* notes 40-41 and accompanying text.

⁹⁵ *Report and Working Draft of A Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 42 FAM. L.Q. 145 (2008) (hereinafter ABA Abuse and Neglect Model Act). The Working Group had worked with members of the Uniform Law Commission (ULC) drafting committee to effect changes to the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act. When those efforts failed, ULC sponsored a resolution seeking American Bar Association ap-

lect and Abuse Standards; it could almost be characterized as a repudiation of that work. The 2008 Draft moves the ABA ever further towards a traditional lawyer role for children's lawyers in child protective proceedings—a relationship “which is ‘fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.’”⁹⁶

The ABA Abuse and Neglect Model Act was obviously developed from a child empowerment vision of children's advocacy, even creating a default presumption of capacity for all children and included standards of practice for lawyers that apply when that presumption has been overcome.⁹⁷ The Draft only reluctantly acknowledges that “some children (including infants, preverbal children, and children who are mentally or developmentally challenged) may be unable to be counseled at all.”⁹⁸

The giant change this time around is the ABA's refusal to permit someone performing the role of a child's attorney in child protective proceedings to advocate for an outcome not sought by the child, observing that “most lawyers are not trained to themselves serve as experts nor to render opinions.”⁹⁹ Instead of permitting a lawyer to perform this role, the ABA Abuse and Neglect Model Act recommends that courts assign a “court-appointed advisor.”¹⁰⁰ This advisor, who is not to function as a lawyer, may be “appointed by the court to assist in determining the

proval of the Model Act at the Association's Midyear Meeting in February 2008.

⁹⁶ *Id.* at 147 § 7(c) cmt. (2008).

⁹⁷ *Id.* at 152.

⁹⁸ *Id.* It is remarkable that that the ABA prefers to regard infants, preverbal children, and children who are mentally or developmentally challenged as “the exception, not the rule, and the structure of representation for children as a whole should be based upon a theory of competence and capacity.” *Id.* Though very young children make up a minority of all foster children, according to the federal government more than 40 percent of children who enter foster care are under six. ANALYSIS OF STATE CHILD WELFARE DATA: VCIS SURVEY DATA FROM 1990 THROUGH 1994, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/vcis/iii06a.htm. Of these, more than half are preverbal. Although this may technically count as an “exception,” it is a huge one.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at § 1.

best interests of the child.”¹⁰¹ If this proposal sounds familiar, it is because it so closely tracks what the most recent AAML Standards proposes.¹⁰²

Finally, the ABA no longer even believes that it is permissible for lawyers in child protective cases to be asked to serve as guardians ad litem, “since nothing in an attorney’s training or experience as a lawyer prepares him or her to make a decision on what is in the best interests of a particular child.”¹⁰³ Stressing that “[c]hildren’s lawyers are not social workers or psychologists and should not be treated as such,”¹⁰⁴ the ABA, as of 2008, believes that “[t]o the extent that courts need information about what is in the child’s best interest, the court should use a court appointed advisor or an expert, subject to the rules governing all court experts.”¹⁰⁵

Small wonder the ABA in 2008 called the ULC Model Act “fundamentally flawed.”¹⁰⁶ For the ABA, at least in child protective proceedings, it is unacceptable to assign a lawyer to represent a child who is authorized to choose the outcome to seek and then to marshal a strategic game plan to persuade the court to decide the case accordingly. In their place, the ABA now prefers the use of “best interest advocates” child protective proceedings.

By now, one might think the ABA is of two minds. It turns out that is precisely the case. Although I have consistently referred to the ABA as a monolith, two very different components of the ABA were separately responsible for the Standards in custody proceedings and for the Standards in neglect and abuse proceedings. The Family Law Section was responsible for the former and the Litigation Law Section was primarily responsible for the latter.

V. Making Sense of These Disagreements

Ultimately, the three organizations end up in very interesting places on a comparative basis. Both the Academy and the

¹⁰¹ *Id.*

¹⁰² *See supra* note 58-69 and accompanying text.

¹⁰³ ABA Abuse and Neglect Model Act, *supra* note 95, at 147.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 151.

ULC are consistent in their differences regarding best interests advocacy. The former believes there are no types of proceedings in which lawyers should serve as best interests lawyers. The latter believes that best interests lawyering for children may be appropriate regardless of the type of proceeding. In this sense, only the ABA is inconsistent.¹⁰⁷ It rejects best interests lawyering in child protective cases and supports it in custody and visitation cases.

But what is most important, at least to me, is that the reasons for the ABA's opposition to best interests advocacy in neglect and abuse cases are indistinguishable from the Academy's opposition to best interests advocacy for children's lawyers in custody cases. At the core of this opposition are three basic points. First, best interests advocacy liberates lawyers to choose the outcome to seek without any certainty that what is being sought is what the child wants (or even what is best for the child). Second, best interests lawyering is too different from the core meaning of what lawyers are or should be. As ABA leaders recently explained: "It is the role of the judge, not the lawyer, to decide best interest after hearing from all of the parties."¹⁰⁸ Permitting "the lawyer to decide what is in the child's best interest and [to] make that recommendation to the Court," proponents of the new ABA Neglect and Abuse Standards explain, "places the lawyer in an uncomfortable position akin to testifying, outside their area of expertise, while denying others in the proceeding the opportunity to cross-examine the presenter."¹⁰⁹ Finally, allowing lawyers to advocate for the results they themselves have chosen risks contaminating the proceeding by making the child's lawyer more important to the result than is appropriate.

With so many in the ABA and the children's advocacy bar so well attuned to the core concerns of the AAML, there is rea-

¹⁰⁷ The ABA's Litigation Law Section steadfastly opposes best interests advocacy in any proceeding outside of custody and visitation cases and led the opposition to the ULC Act. In 2009, the ABA's Family Law Section led the effort to derail the ABA Model Abuse and Neglect Act because it believes that children's lawyers should represent the child's best interests even in child protective proceedings.

¹⁰⁸ Letter dated July 27, 2009 from Bob Rothman, Larry Fox, Joanne Epps, Dave Weiner, and Trish Refo to the ABA House of Delegates regarding the ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings (on file with the author).

¹⁰⁹ *Id.*

son to be hopeful that the AAML's vision of appointing representatives for children in custody proceedings will prevail over all other proposals. This is because all of the reasons that led the ABA to forbid the use of best interests lawyering in child protective proceedings fully apply to custody proceedings. Indeed, it is theoretically easier to limit the discretion of a best interests lawyer in a child protective proceeding than in a custody proceeding.

As a result of more than a decade's focus on the dangers of allowing too much room for randomly assigned lawyers to argue for outcomes they personally believe is best for children, everyone, including the ULC, concerned about the role of children's lawyers acknowledges the importance of cabinining the degree of discretion lawyers ought to have. Two principal means to accomplish this have been proposed. The first is the AAML's solution (and the ABA's in neglect and abuse proceedings): simply forbid best interests advocacy entirely. The second is everyone else's answer. Both the ABA in its 2003 Custody Standards and the ULC believe that best interests lawyers can reliably be prevented from acting on their subjective values by enjoining them to based their decisions "according to criteria established by law and based on the circumstances and needs of the child and other facts relevant to the proceeding."¹¹⁰

Among those who enthusiastically support this means of limiting attorney discretion is Professor Barbara Atwood.¹¹¹ Professor Atwood is comfortable permitting the appointment of best interests attorneys because, as she explains, if they do their job properly they are "under a duty to get to know the child in context, to fully investigate the facts, and to consult knowledgeable persons."¹¹² She specifically endorsed both the ABA Standards and the ULC on the reasoning that the requirement that lawyers "arrive at a position in the proceeding according to objective legal criteria," adequately guides and limits their discretion.¹¹³

¹¹⁰ ABA Standards, *supra* note 2, Standard V. F.; ULC Act, *supra* note 3, at 35 (§ 13 cmt.).

¹¹¹ Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63 (2008).

¹¹² *Id.* at 83.

¹¹³ *Id.* at 83-84.

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It is crucial, however, to trace the origin of the idea that a child's attorney's discretion can be meaningfully constrained by limiting the lawyer to advocate for results based on the child's "legal interests." The concept works well in certain types of proceedings – those in which the decision-maker is constrained by rules of law to decide the case in the absence of a particular level of proof of certain facts. But it was never meant to work in all types of proceedings.

Limiting children's attorneys' discretion to advocating for their client's "legal interests" became an organizing principle of the invitational conference hosted by Fordham Law School in 1995, entitled "Ethical Issues in the Legal Representation of Children."¹¹⁴ It was also employed by the ABA in 1996 when it proposed Standards for Children's Lawyers in Neglect and Abuse Proceedings.¹¹⁵

In my contribution to the Fordham conference in 1995, I identified certain types of proceedings in which it would be possible to limit meaningfully the choices children's lawyers may make when advocating for results in cases where their clients are unable to express a preference.¹¹⁶ I explained that restricting a child's lawyer to performing the role of law enforcer by enforcing the substantive rights children possess in the case can significantly restrict the lawyer's prerogatives.¹¹⁷ The key is to confine the lawyer's advocacy to outcomes that can be objectively ascertained based on the controlling law. Among the areas of the law in which this can work successfully are juvenile delinquency proceedings and, to a lesser extent, child neglect and abuse proceed-

¹¹⁴ See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996).

¹¹⁵ ABA Neglect Standards, *supra* note 84, at § B-5 ("The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings."); see also *id.* § B-5 cmt. ("A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing."). The "Post-Fordham" held at the University of Nevada, Las Vegas reaffirmed the need to circumscribe meaningfully choices available to lawyers when they are to advocate for a child's legal interest. See *Recommendations of the UNLV Conference on Representing Children in Families*, 6 *NEV. L.J.* 592, 609-10 at IV.A.2.d. (2006).

¹¹⁶ See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996).

¹¹⁷ *Id.* at 1427.

ings (at least for certain phases in those cases). This is because there are objective substantive rules in neglect cases, including that children may not be removed from their parents' custody simply because a showing has been made that such intervention is in the child's best interest;¹¹⁸ a requirement that the case be dismissed unless competent proof is adduced of parental unfitness;¹¹⁹ and a strong preference to reunify a child with her family of origin if she is placed in foster care.¹²⁰ When objective rules such as this exist, enjoining lawyers to seek results driven by the law can meaningfully constrain the lawyer's capacity to act subjectively.

But this does not mean that limiting a lawyer's discretion to whatever are the child's "legal interests" makes sense for all types of proceedings. The critical error that the ABA and the Uniform Law Commission made was adapting this principle from an area of the law where it works and applying it to a field where it doesn't. Whereas neglect and abuse proceedings are grounded in fundamental ways by the rule of law – depriving both courts and children's lawyers from acting based on their perceptions of the child's best interests – the field of custody and visitation dispute resolution is the polar opposite. In these disputes, judges are *required* to decide the case based on what they believe will further the child's best interests.

After a generation of scholarship on the subject, practically no one any longer believes that the best interests standard con-

¹¹⁸ Stanley v. Illinois, 405 U.S.645 (1972).

¹¹⁹ 42 U.S.C. § 671(a)(15) (2006).

¹²⁰ See Santosky v. Kramer, 455 U.S. 745, 753 (1982). New York's statutory scheme, for example, states:

- (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive; (ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home . . . ; (iii) the state's first obligation is to help the family with services to prevent its breakup or to reunite it if the child has already left home; and (iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child . . . then a permanent alternative home should be sought for the child.

N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 1992).

strains judges to decide the case objectively.¹²¹ What the standard is unable to do for judges, it is unable to do for children's lawyers. This is why the AAML reached the conclusion that children's lawyers in custody cases cannot be constrained in any meaningful way when authorized to choose what result to seek for their clients; because of this impossibility, it refused to authorize lawyers to make this choice in the first place.

It is difficult for me to believe that anyone is seriously comforted by a requirement that children's lawyers in custody cases rely on "objective rules" since those rules are entirely subjective. That is, after all, the deep point of criticism of the best interests standard upon which courts everywhere are required to decide these cases.¹²² Insisting that lawyers rely on the law in deciding what position to advocate for a child when the law demands that the lawyer base the decision on what is in the child's best interests is the opposite of constraining the lawyer's subjectivity; it demands subjectivity precisely because there is no objectivity to the best interests standard.¹²³ It is for this reason that I do not understand why scholars such as Professor Linda Elrod conclude that children's lawyers are meaningfully moored by objective information because they "must consider the individual child's

¹²¹ See Robert H. Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226 (1975). See also MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 39-43 (2005); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 *MICH. L. REV.* 477 (1984); Andrea Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 *YALE L. & POL'Y REV.* 267 (1987); Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523 (1994).

¹²² See D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 *FAM. L.Q.* 247, 247 (2005) ("The custody law in every state in the United States also embraces the 'best interests' standard.").

¹²³ See Henaghan, *supra* note 80, at 122. (A child's lawyer "cannot be totally neutral in putting forward the child's legal interests as the ABA guidelines suggest. The lawyer for the child is likely to emphasize [sic] some principles over others, based on the lawyer's own views of what is best for the child. This cuts across a major concern of the ABA guidelines that lawyers should not be making decisions for their clients. . . . The child is inevitably at the mercy of the values that the child's attorney believes is best.")

needs, the child's developmental level, including the child's sense of time."¹²⁴

I am hopeful that those who, like Professors Atwood and Elrod, are sensitive to the concerns of the misuse of discretion will change their views about the utility of limiting lawyers' discretion in custody cases to the "objective" rules by which those cases are guided. Simply stated, there are no such rules. Because of this, the wisest course is to follow what the ABA decided to do in neglect and abuse cases and what the AAML decided to do in custody cases: eschew entirely the use of best interests lawyers.

This does not mean, however, that there is no virtue to assigning a professional to investigate a child's situation and return to court to express an opinion based on what was learned. That is why the AAML (and the ABA in its Model Abuse and Neglect Act) authorize the use of a closely related court-assigned professional: what the ABA calls a "best interest advocate."¹²⁵ As both of these groups see it, everything good about the use of best interests lawyering is maintained and everything problematic about its use is avoided. Courts are able to call upon court-assigned professionals to investigate and report on the children involved in the case without the constraints ordinarily associated with limiting litigation strategy to the adult parties. That's the positive part.

What is avoided by this is even more important. First, the court-assigned professional no longer is allowed to express an opinion without being subject to cross examination. If this were all that is to be accomplished by forbidding best interests lawyering, it would be considerable. But the best is yet to come. Above all else, what should trouble us about best interests lawyering is the danger that the court-assigned professional will become far more important in the outcome reached by the court than anyone would want.

It is one thing to permit a randomly assigned professional to decide for him- or herself what result would best serve a child. Accepting for the moment that allowing someone to do this in custody cases has the potential to do more good than harm in most cases, there still remains the question why we should also

¹²⁴ Elrod, *Raising the Bar*, *supra* note 24, at 122.

¹²⁵ See ABA NEGLECT STANDARDS 2008, *supra* note 95, at § 1 (d).

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authorize someone to do whatever they can to try to persuade the decision-maker that their views should be followed by the court. Authorizing someone to *give* an opinion is one thing; authorizing her to marshal forces in support of that opinion to increase the likelihood that the court will follow it is entirely different.

Of all the arguments against permitting lawyers to engage in best interests advocacy, this should be counted as the strongest. The one thing lawyers are very good at is making a case for the position they are advocating. Lawyers routinely accomplish this by selectively highlighting facts. They emphasize those that support their position; they strive to obfuscate those that do not. They search for witnesses who will help advance their theory; they turn away those that don't. Their purpose becomes to persuade the fact-finder to rule in their favor. In other words, they litigate strategically. And the best of them are very good at doing so.

Liberating best interests lawyers to perform this second function is, to my mind at least, simply indefensible.¹²⁶ To be sure, it increases the likelihood that the case will come out in accordance with the views held by the child's lawyer. But that is precisely what ought to be of great concern. Even if we could agree that the court-appointed professional for the child should be allowed to investigate the case and reach a conclusion of what result is best for the child, we still should refuse to go this last step and permit them to do all they think is appropriate to try persuade the court that their view is right. This is the critical difference between someone who is allowed to testify or submit a report (and be subject to cross examination) and some who is authorized to build a strategic case in support of an opinion they themselves have formed and now seek to prevail in the litigation. And this critical difference perfectly captures what the AAML has sought to avoid.

¹²⁶ This does not mean that some do not try to defend it. *See, e.g.*, Atwood, *supra* note 16, at 218-19 ("The Standards recognize that giving meaning to the voice of the child may require not only presentation of facts by a lawyer but also legal advocacy. The young pre-verbal client caught in a bitter custody contest deserves more than a fact investigator. Since the other parties in the litigation can advocate their positions directly or through counsel, under the AAML approach only the child is left without a voice.").

Along the way, it is vital to dispel a closely related objection to what the AAML has proposed. This objection is well captured in one of the internal debates within the Academy while the proposed Standards were being considered by the Executive Committee. This opponent of the proposed Standards suggested that they should have been re-titled “How Not to Appoint Lawyers for Children,” implying that the Academy is opposed to having children’s lawyers in custody and visitation proceedings. But such a criticism misses the point of the Academy’s work.

Ultimately, the Academy is agnostic on the appointment of children’s lawyers - courts should use them when they wish. What the AAML is against is the *misuse* of children’s lawyers, not their *overuse*. The AAML Standards are based on the central belief that lawyers for children have been improperly used. The solution the AAML advances is to change the label and function of the court-appointed representative. For the Academy, no one – whatever their label – should be permitted to express an opinion on how a court is to decide a case (or on what is in a child’s best interests), unless the individual does so under oath and under conditions in which they are subject to cross-examination. Moreover, this individual should be authorized only to share with the court what they have learned and what they believe in light of what they have learned. Finally, above all else, they ought never to be given the extraordinary powers to marshal their own evidence to support their position.

The ultimate point of the Academy Standards is that all of the substantive purposes to be gained by using children’s lawyers as defined by the ABA and the ULC would survive the Academy’s Standards. The only thing that would not survive – the only real difference between the other works and the Academy’s – is what we call the court-assigned professional and whether the professional should be able to do more than merely investigate and report.

If what has just been written is persuasive, then the last piece to this great puzzle is why so many continue to insist on having the court-appointed professional for the child titled a “lawyer.” The best explanation may simply have to do with the symbolic importance of the idea of child representation held by some. It seems that some want something more than simply a professional assigned to cases to investigate and report (and be

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subject to cross examination). They want (some might think, they need) to have this professional *called* a lawyer.¹²⁷

One possibility is that the working groups that developed the ABA custody standards and the ULC Model Act included children's advocates who would not accept a result that does not include broad support for the use of children's lawyers.¹²⁸ So long as there are those who insist on the symbolic importance of calling court-assigned professionals "children's lawyers," even when they are to perform as best interests advocates, there will never be agreement in this field.¹²⁹

¹²⁷ Perhaps this story can better suggest to the neutral reader who has the more coherent position. During the Academy's deliberations, it was no secret that ULC's efforts to enact its Model Law were taking a beating. Many within the ABA were strongly opposed to the ULC's proposal to the great chagrin of its proponents. One of the most prominent of these proponents is Texas District Court Judge Debra H. Lehrmann who served as a commissioner of the Uniform Law Commission and chaired the drafting committee on the Uniform Relocation Act. I met with Judge Lehrmann in the summer of 2008 in an effort to build off of the deep common bond I, at least, saw between the Academy's draft and what the ULC sought. At the time, Judge Lehrmann was Chair-Elect of the Section of Family Law of the American Bar Association.

At our meeting, I explained that the two of us agreed on more than 99 percent of issues in the field in that we both agreed that sometimes it made sense to appoint a lawyer for a child for the purpose of providing the child with a skilled advocate who would be charged with the task of seeking the outcome in the case desired by the child and sometimes it is important that courts have the power to assign a skilled professional to investigate facts when the court was concerned that some salient facts might otherwise escape could when the child. I then proposed that we draft language together that meets these purposes and that the simplest way to do this is to call the one kind of professional who is expected to advocate for what the child wants "lawyer" and call all other professionals who will be asked not to advocate for what the child wants (at least not to do so merely because it is what the child wants) something else. Judge Lehrmann made clear to me that this compromise was impossible to achieve. I did not understand then why that was so; I still do not.

¹²⁸ The American Bar Association introduced its Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings by proclaiming that "[t]he participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings." This is a long-held belief of Howard Davidson and Ann Haralambie, prominent members of the ABA who helped draft the ABA Model Act.

¹²⁹ I do not think it is accidental that the two major organizations not to have recommended routinely using lawyers in matrimonial-related cases were

On the other hand, if we can overcome the symbolism, we can go very far towards achieving consensus. Almost everyone today strongly supports the importance of creating procedures designed to ensure that a child's views are known. To the extent this is the meaning of the U.N. Convention on the Rights of the Child's requirement that courts allow children "the right to express [their own] views,"¹³⁰ few would any longer demur. But the substantive question of how much the child's views should matter to the decision-maker is considerably more confusing. *Some* do want the child's views to matter a great deal, even to the point of being dispositive.¹³¹ But they lie at the fringe of the field. The clear consensus – whether national or international – is to prefer that ultimate decision-makers remain free to decide the case on

the AAML and the American Law Institute. The American Law Institute added its views with the publication of the Principles of the Law of Family Dissolution in 2002. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.13 (2002). Like the AAML, the ALI would permit a court the power to appoint a lawyer for a child only when "the court finds that the child is competent to direct the terms of the representation", (*Id.* at cmt. e, at 319) and also questioned the wisdom of routine appointments of counsel for children, worrying that a child's advocate can create "undesirable and inappropriate intrusions on the authority of parents." *Id.* at cmt. b, at 317. Neither the AAML nor the ALI, in contrast with the ABA and ULC drafting committees responsible for the standards discussed in this Article, developed their standards with any particular bias in favor of providing children with lawyers.

¹³⁰ See *supra* note 54 and accompanying text.

¹³¹ A number of children's rights advocates see the subject of representing children in plain terms. As Mark Henaghan has expressed it: "We either scrap the whole idea of children's rights and children's voices and call all children's lawyers 'best interests' lawyers" or, quoting Michael Freeman, we recognize "the child as a full human being, with integrity and personality, and with the ability to participate fully in society." Henaghan, *supra* note 80, at 127 (2008) citing Michael D.A. Freeman, *Taking Children's Rights More Seriously*, in *International Library of Essays on Children's Rights* 175 (M. Freeman ed., 2004) available at <http://law-fam.oxfordjournals.org/cgi/content/abstract/6/1/52>. See also Federle, *supra* note 71, at 112 ("It is indisputably good that the child's voice is heard without an adult filter, not only because it gives the child a sense of having participated in the decision-making process but also because it adds a dimension to the court's understanding of the facts that otherwise might be lost. Moreover, there is a significant difference between telling the court what a child wants and advocating for that preference in a forceful and persuasive way. A client-directed lawyer is thus in the best position to ensure that the child's voice is heard and taken seriously.").

an amalgam of factors, only one of which is the child's preferences, to achieve a result that is best for the child.¹³² Those children's rights advocates who call for children's lawyers in all cases to advocate forcefully for what their clients want should be understood as taking dead aim at the core substantive principles of matrimonial law. If the law called for custody cases being decided based on what the children want, the case for providing children with lawyers would be overwhelming.

Two prominent scholars who have written frequently on the subject have very important things to say about the importance of changing how judicial proceedings affecting children's lives are handled. In her articles on providing children with lawyers, Professor Atwood writes persuasively of the virtues of giving more prominence to the voice of children in custody proceedings.¹³³ But Professor Atwood plainly is not in the fanatical camp of children's advocates. Rather, she sensibly seeks to "affirm the dignity of each child through more individuated decision-making."¹³⁴

Similarly, Professor Linda Elrod has recently recommended some very important substantive changes in child custody dispute resolution calculated to deepen the meaning of the "best interests" test.¹³⁵ She suggests starting with a "child-centered, rather than parent-desired, most-convenient-to-parents' plan. A truly child-centered parenting plan," Elrod observes,

would focus on the needs of the particular child and be built to: (1) maintain, or at least minimally disrupt, the child's stable positive relationships with the other parent, siblings, extended family members, friends, groups (Scouts, church, 4-H), and professionals, such as doctors, therapists, and others; (2) ensure that the child's education and activities are not, or are only minimally disrupted or affected; (3) ensure that necessary changes are handled in a way to minimize the neg-

¹³² As Judge Debra Lehrmann sensibly asks, "Does the child's interest in directing the actions of counsel outweigh the child's interest in being assured that all evidence bearing on his or her welfare is presented to the court? Do we truly have the best interests of children at heart or are we caught up in an image of ourselves that precludes acknowledgment of the need for a protective approach to family law?" Lehrmann, *supra* note 57, at 126.

¹³³ See, e.g., Atwood, *supra* note 57.

¹³⁴ *Id.* at 127.

¹³⁵ Elrod, *supra* note 26.

ative impacts and maximize the child's ability to develop new or similar supports in the future setting.¹³⁶

After making these substantive recommendations, Professor Elrod observes that they will necessarily impact on the process by which custody cases will be heard. And, of course, she is right. Thus, she makes clear that, if the substantive law becomes as child-centered as she hopes, it will be necessary for judges to acquire the pertinent information about the child. "The judge must seek and hear the child's perspective; presume the child is capable of participation; and craft a plan that is developmentally appropriate for each child."¹³⁷

But when both of these scholars go further and support the broad use of children's lawyers to achieve these goals, their work almost has the quality of a non-sequitur.¹³⁸ They could easily achieve their goals of changing the quality of information judges obtain and of the considerations judge must make when deciding cases without giving children lawyers. It is important that no one confuse what the Academy has proposed with being antagonistic to Professors Atwood's or Elrod's visions. But they are talking past the AAML when they link what they want changed with their broad support for giving children lawyers. The Academy is all for improving courts' capacities to acquire information about children. It just does not agree that this that must be done by giving children lawyers.

VI. Conclusion

It would be a shame if the ULC's great contribution to the field were to become lost in the aftermath of the ABA's opposition to the Model Act. Although I am pleased the Model Act was rejected, the Model Act has advanced the field considerably by calling for the use of a "best interests advocate" as a substitute

¹³⁶ *Id.* at 904.

¹³⁷ *Id.* at 904-05.

¹³⁸ A professional who investigates the circumstances of the child's situation for the purpose of assisting the court in collecting relevant data is not acting as a child's representative. Rather, the professional is working on behalf of the court to help with the task of determining custody. Calling a fact-finder a child's lawyer or guardian ad litem creates the false illusion that the professional is representing the child as a client or a ward.

for a lawyer.¹³⁹ This creation was rapidly copied by the AAML in 2009¹⁴⁰ and the ABA when it proposed the new Abuse and Neglect Model Act in 2008.¹⁴¹

The ULC gets it exactly right in proposing the use of a best interests advocate who is not to be confused with a children's lawyer. This advocate is responsible for investigating facts in the case, including meeting the child and finding out from him or her who s/he is and what she thinks. But, beyond this, the advocate's role has nothing to do with what lawyers do. Instead, the advocate will eventually become a witness, who will provide, either in writing or orally, testimony which may include facts and opinions. Importantly, the advocate will be subject to cross examination.

By this device, in those cases in which the court does not want to appoint a child an attorney who is expected to advocate for the outcome desired by the child, from the trial court's perspective virtually everything that is to be gained from appointing the child a lawyer will be accomplished. The court will be assured that a neutral fact-finder (whether a social worker, a psychologist, or an empathic interviewer) will ascertain salient information that may otherwise not be brought to the court's attention, and the court may secure a neutral person's opinion about what outcome is most appropriate. All the while, due process is not compromised.

This result is a win/win for everyone except those whose major purpose in this area of the law is to ensure that children are provided with someone whose principal function is to advocate strategically for a particular result. It is one thing to want to hear from a neutral investigator who has spoken with the child in an extended way. It is another entirely to empower this investigator to try to ensure that the case comes out the way the investigator wants. The one adds to the case the findings of the investigator but leaves the case in the hands of the court and the adult parties to debate how much the investigator's views and opinions ought to matter. The other contaminates the proceeding by adding a

¹³⁹ ULC Act, *supra* note 3, at § 2 (3).

¹⁴⁰ AAML Revised Standards, *supra* note 58, at ___ (“court-appointed professional other than counsel for the child”).

¹⁴¹ ABA Abuse and Neglect Model Act, *supra* note 95, at § 1 (“court-appointed advisor”).

forceful and skilled advocate who is now advocating for the outcome s/he has selected. This is not only dangerous; it is unnecessary.

I hope others in the field of custody and visitation disputes who are interested in improving practice will build off of the Academy's Standards by supporting efforts to limit sharply the use of the term "children's attorney." If we could agree to call someone a child's lawyer only when we expect him or her to advocate for the objectives sought by the child, we can then work on the rest of the issues plaguing the field. Although some will certainly oppose the Academy's work because it does nothing to advance their agenda of providing lawyers for children in all cases in which their interests are at stake, many others in the field who do not share that particular goal should see the Academy's work as a clarion call to fix what is broken in matrimonial cases while preserving essential principles of due process and the good name of what it means to be a lawyer.

