Institutionalized Silence: The Problem of Child Voicelessness in Divorce Proceedings

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INSTITUTIONALIZED SILENCE:
THE PROBLEM OF CHILD VOICELESSNESS
IN DIVORCE PROCEEDINGS

Brandon Sadowsky*

INTRODUCTION

The issue of children’s rights is a contentious topic in the law.1 While today it is
commonly held that children have at least some rights, the United States judicial system hardly
recognized any children’s rights until the late 1960’s, when the Supreme Court finally declared
that “neither the Fourteenth Amendment nor Bill of Rights is for adults alone.”2 Since then, the
courts have stated that children have procedural Due Process rights,3 the freedom of speech (to a
certain extent),4 the right to an education,5 and other constitutionally protected rights.6 Although
great strides have been made through the recognition of these rights and others, children largely
still lack many of the rights that adults are afforded7 – and this is particularly the case in the
context of divorce and custody law. One such right that children have not been afforded in

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1 See Elizabeth Barthalet, The Challenge of Children’s Rights Advocacy: Problems and Progress in the
Area of Child Abuse and Neglect, 3.2 Whittier J. of Child and Family Advocacy, 215, 215-216 (2004);
David B. Thronson, Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying
Immigration Law, 63 Oh. St. L. J. 1 (2002).
2 In re Gault, 387 U.S. 1, 87 (1967); Also, for summaries of the history of children’s rights see: Laurence
3 Goss v. Lopez, 419 U.S. 565, 42 (1975); In re Gault supra note 2; HOULGATE supra note 2.
5 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
6 For discussions of the constitutional rights of children see Homer Clark Jr., Children and the
divorce proceedings is the unconditional right to representation, or counsel. Instead of affording children the right to an attorney, most states give courts the discretion to appoint a child attorney when a judge deems that doing so is necessary. It turns out that judges rarely exercise this power. And even when an advocate or attorney is appointed for a child, that person usually advocates for the child’s “best interests,” rather than the child’s expressed wishes.

The question is: why are we so hesitant to afford children the right to be heard in custody cases? I believe that in providing a clear answer to this question, we can come to important conclusions regarding what rights children should be afforded with regard to representation. In pursuit of answering this question, I will begin by explaining the current state of child representation in divorce proceedings in greater depth. Then, I will argue that children ought to be afforded some right to representation. The question then becomes, how should children be represented? In section two, I will characterize the debate between those who believe that children ought to be represented by best interest attorneys and those who believe children ought to be represented by traditional client-directed attorneys. I will argue that these models are underpinned by two conflicting intuitions. The first is what I call our paternalistic impulse, which drives our belief that we should help people make “good” decisions – or prevent people from making decisions that might harm themselves. The second is the value we place on autonomy, or freedom, which motivates our belief that we should not infringe on people’s “right” to make their own decisions. Finally, I will consider different methods of child representation that might satisfy both of the aforementioned appeals. I do this with the belief that both views have legitimate virtues – and we should strive to get the best of both worlds. Overall, I hope to provide suggestions that will help remedy child voicelessness.

I. REPRESENTATION FOR CHILDREN IN DIVORCE CASES

A. Overview of Child Representation Practice

By and large, children do not receive representation in divorce proceedings. According to a 2007 American Bar Association survey, thirty-nine states give complete discretion to judges

10 Id.
11 Federle, Looking for Rights, supra note 8 at 1554.
12 A best interests attorney advocates for a child’s best interests, rather than the child’s expressed wishes. A client-directed attorney establishes a normal client-attorney relationship with the child in which the attorney advocates for the child’s wishes.
13 From reviewing the statutes cited in ABA’s study, it appears that the statutes were still current as of 2013.
to appoint representation for children.\textsuperscript{15} That is, judges have total control over whether a child will receive representation, regardless of the circumstances of the divorce. In twelve states, the appointment of representation for the child is required under certain circumstances.\textsuperscript{16} In eight out of those twelve states, representation is required when there is an allegation or founding of abuse.\textsuperscript{17} The other four require representation in other circumstances.\textsuperscript{18} Oregon, for example, requires that a child receive representation if he/she requests it.\textsuperscript{19} Wisconsin goes the furthest by requiring that representation be provided in cases where custody is disputed.\textsuperscript{20} As such, only one state in the U.S. requires that children be represented when their custody is at dispute. And in states where the appointment of representation is discretionary, there are little guidelines as to when judges should appoint someone and what that person should do.\textsuperscript{21} Moreover, as aforementioned, judges tend not to use their discretionary power to appoint representation for children.\textsuperscript{22} Also, over ninety percent of cases are settled outside of court before going to trial and the court rarely challenges custody decisions that parents agree to before reaching litigation.\textsuperscript{23} This leads to an even greater concern in cases where custody is uncontested. In sum, by and large, children are not represented in divorce proceedings – even when their custody is contested.

B. Should Children Be Represented in Divorce Cases?

One of the most consistently relied upon canons in family law is the best interests standard,\textsuperscript{24} which holds that a judge’s decision on matters relating to a child must be governed by the child’s best interest.\textsuperscript{25} Historically, courts have presided under the presumption that parents represent and serve the best interests of their children.\textsuperscript{26} As such, with that assumption, there is little reason to provide independent representation for children. However, it is clear that this

\textsuperscript{15} See e.g. Oh. Revised Code § 3109.04 (“The court, in its discretion, may and upon the motion of either parent, shall appoint a guardian ad litem for the child”); Cal. Codes § 3150 (“If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel…”); N.J. Stat. § 9:2-4 (“The court…upon its own motion…may appoint a guardian ad litem or an attorney or both to represent the minor child’s interests.”).
\textsuperscript{16} ABA Survey, supra note 14. The twelve states are as follows: Florida, Louisiana, Minnesota, Mississippi, Missouri, Oregon, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.
\textsuperscript{17} Id. (Florida, Louisiana, Minnesota, Mississippi, Missouri, Virginia, West Virginia, and Wyoming).
\textsuperscript{18} Id.
\textsuperscript{19} ORS § 107.425 (“The court…may appoint counsel for the children. However, if requested by one or more of the children, the court shall appoint counsel for the child or children.”).
\textsuperscript{20} Wis. Stat. § 767.407 (“The court shall appoint a guardian ad litem…[when]…the legal custody or physical placement of the child is contested.”).
\textsuperscript{21} American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases 1 (August 2003) (Hereinafter ABA Standards).
\textsuperscript{22} MEYER, supra note 9; Linda Elrod, Counsel for the Child in Custody Disputes: The Times is Now, 26 Fam. L. Qtrly. 53, 55 (1992); Linda Rio & Amy Bouchard, Representing Children in Custody Cases: Where We Are Now and Where We Should go, 23 Children’s Rights J. 2, 3 (2003).
\textsuperscript{25} Id.
presumption does not always hold true.\textsuperscript{27} Especially in divorce, where money, homes, custody, pride, and more are at stake, can a child be at risk to having their interests put aside.\textsuperscript{28} Children, for example, are often used in divorce as a bargaining chip; a means to extorting monetary gains.\textsuperscript{29} For this reason, it seems necessary to provide representation to children. Giving children a voice can help take the practice of using children as a bargaining chip out of the equation.\textsuperscript{30} This could also aid in preventing custody disputes from growing out of hand, as the child’s best interests and/or wishes would be readily available for everyone to hear. The court would have a better idea of what would be best for the child or what the child wants, so custody battles would not merely be an endless battle between parents. As such, child attorneys could help in cutting down on the time it takes to settle the small number of high conflict divorce cases that eat up much of the family court’s time and resources.\textsuperscript{31}

In addition, children should be viewed as the third party in every divorce case. Their interests and wellbeing are just as on the line in divorce hearings as their parents’.\textsuperscript{32} Divorce often means significant changes for a child\textsuperscript{33} – even outside the fact that they will no longer live with both of their parents. For a child, divorce can mean a new house, new school, new financial situation and lifestyle, etc. It is important to ensure that children are not being forgotten about in the divorce process and that their needs are being taken into account sufficiently. I would contend that we owe children the right to an attorney in divorce cases and all cases concerning their custody and wellbeing.

Another benefit of giving children representation in divorce proceedings, especially if it is done early in the divorce process, is that doing so can mitigate parental alienation syndrome.

\textsuperscript{27} See e.g. Jenifer Troxel v. Tommie Granville 530 U.S. 57 (2004) (Justice Paul Stevens Dissenting) (“The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession”); U.S. Children’s Bureau & Dept. of Health and Human Services, Child Maltreatment 2011, 1, 19 (2012) (reported incidents of child abuse and neglect reach nearly 700,000 children).

\textsuperscript{28} See MEYER, supra note 9 at 448; Alan Eidsness & Lisa Spencer, Confronting Ethical Issues in Practice: The Trial Lawyer’s Dilemma, 45 Fam. L. Qtrly. 21 (2011) (“The very subject matter of family law cases…are of such great importance to our clients, that clients often lose sight of their better judgment”).

\textsuperscript{29} MEYER, supra note 9 at 450.

\textsuperscript{30} For more information on how parents use their children as a bargaining tool see Federle, Looking for Rights, supra note 8 at 1560.

\textsuperscript{31} For a discussion concerning high-conflict divorce, see Tonya Inman et al., High-Conflict Divorce: Legal and Psychological Challenges, 45 Houston Lawyer 24 (2008); Janet Johnston, High-Conflict Divorce, 4 Future of Children 165 (1994) (explaining the effects of high-conflict divorce on children).


\textsuperscript{33} Id. Also, see e.g. Vijender Kumar, Impact of Divorce on Children: A Socio-Economic and Legal Study, 6 NALSAR L. Rev. 124 (2011); MEYER, supra note 9.
(PAS) and issues that result from allegations of PAS. Parental alienation syndrome is a parent’s behavior of alienating a child from the other parent. Alienated children often express irrational fear of or opposition to the parent that they are alienated from. Parental alienation has caused courts and legal professionals to become skeptical of allegations of abuse. Additionally, threatening to allege PAS has become a tactic that abusive parents have used in order to encourage their ex-partners to remain silent about abuse, as a finding of PAS can lead to a loss of custody. Giving a child an attorney right away will allow somebody to take account of the child’s preferences before all the conflict that comes along with divorce takes its toll – thereby mitigating the occurrence and effects of PAS. Also, giving children representation ensures that children will have the opportunity to express any concerns about abusive behavior, allowing the court to hear such issues. Some might contend that giving a child an attorney will perpetuate the effects of PAS. However, as aforementioned, if a child is given an attorney early in the divorce process, the prospects of the child having already become alienated are slimmer. In addition, many have questioned the hypothesis of PAS and have argued that allegations of PAS are merely a tool for abusive parents in custody battles. In all, if PAS is a real issue, child representation will help and if PAS is not a real issue, child representation will help.

Finally, children of divorce want to be heard. They sense that their voices and concerns are disregarded and want to participate. Giving children representation can foster confidence and lead to a lasting respect for the judicial system. The following anecdote illustrates these points: An old woman, recounting her experience of her parents’ divorce, recalls that she was crying at the county court house. She was upset, because she did not know what was going to happen following her parents’ divorce. The judge put her on his lap and asked, “Do you want to live with your mother or your father?” She told him that she wanted to live with her mother. The judge responded, “Then you will.” The old woman enjoyed recounting this story and recalled her pride in being able to state her opinion. The judge who listened, Harry S. Truman, later became the President of the United States.

Although it is a longstanding view that parents have the constitutional right to raise their children without government interference, children’s interests that are at stake in divorce deserve to be accounted for by an attorney representing the child, instead of solely by parents. As aforementioned, divorce creates an extremely tense and adversarial environment, in which a child’s interests can be lost in the background. Moreover, the idea that children should be given the right to an attorney in cases that concern their interests is not unprecedented from a legal standpoint. In dependency and delinquency cases, for example, children are given the right to

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34 ELROD, infra note 44 at 900.
36 For a critique of PAS, see Janet Johnston, Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child, 38 Fam. L. Qtlly. 757 (2005).
38 Note that the woman was five years old at the time of her parents’ divorce.
39 I found this excellent story in Randy Kandel, Just Ask the Kid! Towards a Rule of Children’s Choice in Custody Determinations, 49 U. Miami. L. Rev. 299 (1994).
40 For more on parent’s rights, see Emily Buss, Parental Rights, 88 Va. L. Rev. (2002).
counsel. Overall, providing a child with an attorney ensures that their interests are being accounted for, will help take custody conflicts out of the equation, can help mitigate issues associated with PAS and PAS allegations, can encourage abusive behavior to be brought forth to the court, and will inspire children to appreciate the courts and feel that they have a legitimate say in a process that greatly impacts their lives. As such, in my view, children should receive representation the moment that divorce is filed, so that they could be represented even during settlement.

II. BEST INTEREST ATTORNEY VS. CLIENT-DIRECTED ATTORNEY

A. The Issues

Now that I have argued that children should be afforded the right to counsel in divorce cases, the question becomes, “how should they be represented?” First, there are two options in terms of who will represent children. The terms used to describe the two types of representatives vary across the literature; however, the general idea is that a child may be represented by a lay person (a non-attorney) or an attorney. Later, my answer to this question will become clear. Although this is an important issue, the biggest debate regarding child representation is the issue of how children should be represented. There are two main models of child representation: the best interest approach and the client-directed approach. For simplicity, I’ll refer to representatives who work under the best interest approach “best interest attorneys” and those who work under the client-directed approach “client-directed attorneys.” A best interest attorney’s role is to advocate for a child’s best interest and is not bound by the child’s wishes. The reigning model of child representation is the best interest approach. About thirty

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41 In re Gault, supra note 2 (children have the right to representation in delinquency cases); 42 U.S.C. § 5106a(b) (2013) (children have the right to a guardian ad litem in abuse and neglect cases).
42 So-called Court Appointed Special Advocates, generally, are trained lay persons meant to investigate and provide recommendations to the court in cases involving children. For a discussion of CASA volunteers see Davin Youngclarke, Trends and Developments in the Juvenile Court: A Systematic Review of Court Appointed Special Advocates, 5 J. Center for Fam. Child. & Cts. 109 (2004); Hollis Peterson, In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation, 13 George Mason L. Rev. 1083 (2005).
43 Generally, people have supported both types of representatives. See Linda Rio and Amy Bouchard, Representing Children in Custody Cases: Where We Are Now and Where We Should Go, 23 Children’s Legal Rights J. 1, 5 (2003) (describing state statutes concerning whether a child will receive an attorney or non-attorney).
45 A guardian ad litem is a person who advocates for a child’s best interest and is not legally bound by the child’s expressed wishes. A guardian ad litem can be an attorney or a non-attorney. A best interest attorney is another term, which is used to describe attorneys who represent the child’s best interest.
46 See ABA Standards, supra note 21 at 2.
47 See Elrod, Right thing to Do, supra note 44 at 869.
states require that the person representing a child in a divorce case be a guardian ad litem, or an advocate for a child’s best interests. Less than ten states, however, require the appointment of a client-directed attorney in divorce cases. Moreover, in many cases, the role of a child representative is unclear. Next, I will discuss some of the arguments that people have given on behalf or against each form of representation. My goal is to seek out their underlying motivations.

B. The Debate

Again, the principal question is how should children be represented? But related are several important questions: how much weight should be given to a child’s expressed preferences? Are children able to direct an attorney? How can we make sure that we put the child in a good situation? Following, I will present arguments on behalf of the both types of representation, attempting to motivate each viewpoint and make the issues in the debate clearer.

Proponents of the best interest attorney seem to be driven by the idea that the decisions being made in custody decisions and other matters concerning children are important and difficult decisions that require an investigation into a child’s life, a report of those investigations, and a suggestion of what would be best for the child. Best interest model proponents argue that their model is consistent with the consensus that children have not reached the competence, maturity, and so on that is needed for autonomous decision-making. It also is a more reasonable model when it comes to children who are not yet able to express their views and desires (e.g. infants). Moreover, best interest attorney proponents argue that a child’s voice is not irrelevant, but that it would be overburdening for a child to have to make decisions concerning something like their custody, for example. Children don’t want to be put in that spot. And at least some child representatives ensure that the child’s voice is listened to and taken into account, even if it is not dispositive. Another advantage of the best interest model is that the representative would not be obligated to the same attorney-client confidentiality that is required under traditional representation. As such, a lawyer could report abuse, even against their child client’s wishes. This is an obvious asset to the best interest model in cases like the one described. Additionally, the best interest attorney aligns well with the best interest standard – the judge’s method to deciding matters concerning children. Having an attorney objectively and accurately present a child’s best interests would greatly aid judges in satisfying the best interests standard. As Katherine Federle points out, judges cannot know with a large degree of certainty that their decisions will be in the child’s best interest and express “great discomfort” when

49 ABA Survey, supra note 14.
50 Id.
51 It is not always clear whether a child’s representative is supposed to act as a best interest attorney or a client-directed attorney. Not all states have clear guidelines and the role of the representative is not always clearly determined when they are appointed.
54 Id.
55 Id. Also, see Hill, supra note 52 at 623.
56 Hill, supra note 52.
making custody decisions.\textsuperscript{57} Having a representative support a certain decision based on a thorough investigation seems to mitigate that difficulty and make judge’s decision easier. At the end of the day, proponents of the best interest model want the best interest attorney to discern what would be in a child’s best interest and advocate that to the court, so that a good outcome for the child can be reached. They are getting at something that seems to really matter in the end: that a child is safe, happy, and in a good place.

Those who support the appointment of client-directed attorneys for children seem to be motivated by the idea that children are people with independent views and concerns\textsuperscript{58} and, as such, have the right to be heard and represented. Proponents of client-directed attorneys believe that those who support the best interests model overstate the incompetence of children.\textsuperscript{59} They argue that children, on the whole, are able to formulate reasonable views and aims, and that they can direct an attorney sufficiently.\textsuperscript{60} Moreover, they argue that giving a child a traditional, client-directed attorney effectively gives the child a meaningful voice in proceedings, whereas the best interests model does not.\textsuperscript{61} Proponents point out that best interests, in practice, are often ascertained without reference to a child’s expressed preferences.\textsuperscript{62} It is also important to note that giving a child a voice does not mean that they make the decision in any case. Instead, their voice is taken into account like any other party’s.\textsuperscript{63} Still, many proponents view the appointment of a client-directed attorney as a way to empower children and ensure that their needs and desires are being accounted for.\textsuperscript{64} Another benefit of allowing a judge to hear directly from a child is that the child is more or less an expert on his/her family. The child has a unique perspective of the relationships that he has with both parents, the qualities of both parents, and so on. This information could help a judge determine what arrangement would be in that child’s best interest. In terms of negative arguments, proponents of the client-directed attorney model also argue that “best interests” are more of a myth than a guide.\textsuperscript{65} That is, it’s impossible to determine what is in a child’s best interest. Instead, having an attorney advocate for a child’s best interest just opens the door for the lawyers to advocate for their subjective values and views.\textsuperscript{66} For example, a homosexual mother or father might be denied custody of his/her children under the

\textsuperscript{57} Federle, Looking for Rights supra note 8 at 1539.
\textsuperscript{58} Elrod, Right Thing to Do, supra note 44 at 905.
\textsuperscript{60} Id. (“The concern that young children make bad decisions also seems misplaced. In my experience representing children, I cannot say that young children make bad decisions. Rather, they have expressed their hopes and desires clearly and, usually, quite sensibly.”).
\textsuperscript{62} Federle, Children’s Rights, supra note 59 at 427. Also, see SHEPHERD & ENGLAND, supra note 26 at 1925 (“Problems involving attorney performance have also been characterized to be…lack of contact with the child contact.”)
\textsuperscript{63} Id. at 440.
\textsuperscript{66} SOBIE, supra 44 at 806.
pretense of “best interests.” Overall, proponents of client-directed attorneys believe that under the best interests model of representation, children are not taken seriously, are done a disservice by not being taken seriously, and are having their rights violated by not being heard by the court.

III. PATERNALISM AND AUTONOMY

A. Understanding Our Intuitions

So far, in this paper, I have presented the current state of child representation in United States custody proceedings, explaining that for the most part children do not have a seat at the table. I then argued that children should have an independent representative in divorce proceedings to both ensure that their interests are being represented and as a means to solving various other issues. I then moved on to discuss the two prominent methods of child representation: the best interest model of representation and the client-directed model of representation. I presented some of the main moves made by each side of the debate, both with regard to positive and negative arguments. Rather than arguing for one side or another, I hold that both models of child representation have important virtues and faults. In order to understand how to settle the issue, I think it’s important to understand the fundamental intuitions underpinning each model of child representation and to also understand that most of us believe these intuitions are acceptable in certain situations. I will argue that the best interest model and the client-directed model are fundamentally motivated by paternalistic impulses and our value or respect for autonomy, respectively.

Paternalism, roughly, is interference with a person’s freedom to act in the name of the welfare or happiness of that person. This includes preventing a person from acting in a certain way or requiring a person to act a certain way so as to promote that person’s welfare. Although paternalism often gives off a negative connotation, it’s clear that some paternalistic behavior and laws are generally accepted by society. For example, for the most part, people seem to accept seatbelt laws, anti-drug laws, anti-suicide laws, etc. We don’t think people should be able to use heroine or sell themselves into slavery.

However, it is clear that some acts of paternalism are considered less acceptable. The restriction of junk food, alcohol, and gay marriage are more controversial examples of paternalism. The key source of our objection to paternalistic behavior seems to be our value for

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67 There is sizable debate regarding whether homosexual behavior of a parent ought to be considered when determining the best interests of a child. There is obvious room for guardian ad litem to insert their personal views through situations like this. For a discussion of how homosexual parenting has factored in on courts’ decision-making see Lynn Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. Ill. L. Rev. 833 (1997); Steve Susoeff, Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852 (1985).

68 Gerald Dworkin, Paternalism, 56 The Monist 65 (1972).

69 See Joel Feinberg, Legal Paternalism, 1 Candian J. Philosophy 105 (1971).

70 David Shapiro, Courts, Legislatures, and Paternalism, 74 Va. L. Rev. 519, 519 (1988).

71 FEINBERG, supra note 69.

72 Gay marriage seems to be a paternalistic restriction on a constitutional right we have, the right to marry. See M.L.B v. S.L.J., 519 U.S. 102 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance to our society’…sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”).
autonomy, or freedom. For the most part, we don’t think the government or others should infringe on our autonomy. Instead, we value the ability to make our own decisions and live our lives the way we choose. While our paternalistic impulses urge us to prevent people from doing something that can harm them, our value for autonomy urges us to allow people to make their own choices. It seems that our confidence that a person is capable of rational decision-making also plays a key role in the debate. For example, even the most adamant paternalist might think that we should not let a person engage in harmful behavior while they were intoxicated, or in another state of mind that would prevent them from making a rational decision. The idea seems to be that we are justified in engaging in paternalistic behavior if someone is not able to perform rational self-determination on their own. This factor is important in the child representation debate.

It seems that the debate concerning how children should be represented is just the paternalism vs. respect for autonomy debate in a practical context – and with regard to children. Best interest model proponents are motivated by the idea that children are not mature or competent enough to direct an attorney in a way that will be ensure their well-being. The Supreme Court has shown this concern by noting “the peculiar vulnerability of children and their inability to make critical decisions in an informed, mature manner.” This explains the widespread use of best-interest attorneys over client-directed attorneys for children. Proponents of the best interest model think that we should take the decision-making out of children’s hands because they are incapable of making decisions that will ensure their safety and well-being. Accordingly, proponents of the best interests model believe that children should be given a best interest attorney to advocate for what their best interests really are. The paternalistic impulse in this reasoning is clear: we need to restrict the autonomy of children in order to protect them; as a matter of their own good. And the paternalism seems to be justified by the idea that children are not autonomous agents capable of rational or sensible deliberation – so we’re not violating their autonomy when acting paternalistically. The fact that we’re dealing with children also seems to strengthen our paternalistic impulses. For the most part, our protective instincts when it comes to children seem to be magnified. For these reasons, I think it’s clear why the best interests model is appealing and convincing. We just want the best for children – and do not think they have the experience, maturity, and competence that is necessary to ensure their own well-being. On the other hand, those who support the appointment of client-directed attorneys for children think that the incompetence of children is overstated and that the best interests model infringes on a child’s ability to make their own choices and let those choices be heard by the court. For them, denying a child a traditional attorney largely mirrors what it would be to deny an adult a traditional attorney. Imagine if the government outlawed client-directed attorneys altogether, because of a belief that best interest attorneys could better represent the interests of all clients. I think we can all agree that this would be a gross violation of our rights, our freedom, our autonomy, etc. Those who support the client-directed attorney as a means of representation for children are not alone.

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75 For a discussion concerning what courts have held with regard to children’s competence, see Richard Redding, *Children’s Competence to Provide Informed Consent for Mental Health Treatment*, 50 Wash. & Lee L. Rev. 695, 704-708 (1993). Redding points out that courts have long held that children are incompetent and not able to make sound decisions themselves.
76 This may not be a crazy belief.
driven by a similar reaction. The intuition is that children do have the right to make their own choices and a right to be heard in divorce proceedings. Denying them this right is an infringement on their liberties.

B. Competence

As aforementioned, proponents of the best interest model generally believe that children are not mature and competent enough to make the decisions that are involved in divorce proceedings. As such, they are driven by paternalistic impulses, which say to appoint a best interest attorney so as to protect children and advocate for their interests. Proponents of the client-directed attorney model argue that children are competent enough to valuably participate in divorce hearings. As such, it is a violation of children’s rights to not be supplied with a traditional attorney through which they can further their aims and be taken seriously by the court.\footnote{77} I think if it could be settled whether or not children are sufficiently competent to be considered to have the right of self-determination, we can make progress in the child representation debate. If children are not competent enough to make decisions regarding the matters being handled in divorce, then it seems we have good reason to appoint a best interest attorney and that the autonomy of children is not being violated. If children are able to make decisions regarding the matters involved in divorce, then it seems we have good reason to appoint a client-directed attorney and that we are infringing on their autonomy by not doing so.

Unfortunately, there is no clear consensus or answer over the decision-making abilities of children. A general issue is: how competent does a person have to be in order to be considered to have the right to make his or her own decisions?\footnote{78} It is clear that this question is nearly impossibly to answer.\footnote{79} However, we might not need such specificity in order to establish that children, in general, are competent enough to be respected as autonomous agents. If children, on the whole, are similar to adults when it comes to their capacity to make decisions, then we might be able to conclude that children should be given a client-directed attorney, just like an adult – and that not giving them one would be an infringement of their autonomy. So, we’ll consider the competence of children and see if we can move forward.

Common sense tells us that at least some children are not capable of establishing and formulating opinions about certain matters. For example, we cannot expect a two-year-old to meaningfully participate in divorce hearings or direct an attorney.\footnote{80} It seems that at least some children in their teens, on the other hand, are clearly able to form preferences and engage in rational decision-making.\footnote{81} Evidence shows that adolescents become increasingly self-reliant and more able to make decisions on their own.\footnote{82} Justice William Douglas, for example, in Wisconsin

\footnote{77} I understand these may not be the explicit arguments given by each of the sides. However, I believe that these reasons are the underlying intuitions pushing each side of the debate.

\footnote{78} Ferdinand Schoeman makes this point in \textit{Childhood Competence and Autonomy}, 12 J. Leg. Stud. 267, 269 (1983) (“[W]e do not know, short of the grossest incompetence, what exact level of competence should be related to abridging specific rights paternalistically.”).

\footnote{79} Id.

\footnote{80} Jessica Cherry, \textit{The Child as Apprentice: Enhancing the Child’s Ability to Participate in Custody Decisionmaking by Providing Scaffolded Instruction}, 72 S. Cal. L. Rev. 811, 830 (1999).

\footnote{81} Id.

v. Yoder cited a number of studies from which he concluded that “there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of an adult.” However, those findings have been questioned and there is evidence that some adolescents might not be as willing to seek advice, may be more impulsive, tend to be influenced by others easily, seem to engage in dangerous or risky behavior, and have other tendencies that can make their ability to make sound decisions questionable. The Supreme Court in Graham v. Florida also noted important differences between adolescents and adults. However, still, some studies suggest that children as young as nine are competent enough in the relevant respects to make meaningful decisions. Given the substantial disagreement over the competence of adolescents, it is no wonder that there is no “definitive psychological, sociological, or legal statement about children’s competence” altogether.

I think another important issue in considering when children become mature and competent enough to participate in legal proceedings is that there is clearly great variation among the capacities of children that are the same age. It seems to be a hopeless endeavor to determine a magical age at which children become rights holders and sound, autonomous agents. Instead, children are likely to reach a level of competence at which they are capable of forming opinions regarding the matters at stake in divorce and directing an attorney across ages. Given the widespread disagreement over the competence of children as well as the obvious consideration that children will become rational autonomous agents with the right to an (client-directed) attorney at different points, it seems there is no easy answer concerning whether children, at a certain point, should be given a client-directed attorney rather than a best interest attorney. As such, the debate concerning child representation cannot be settled by empirical studies concerning competence. Rather, it seems we need a method of representation that can handle our inability to agree on a general age at which children become competent and the fact that the age at which children can meaningfully participate in divorce hearings can vary across age.

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84 Many studies that report that adolescents show similar competence as adults focus on informed medical consent studies. For a summary of studies that conclude that children are competent and also a critical response to those studies, see Elizabeth Scott, Judgment and Reasoning in Adolescent Decisionmaking, 37 Vill. L. Rev. 1607, 1627 (1992).

85 STEINBERG & CAUFFMAN, supra note 82.

86 Id. at 262.


88 Id. Also, see Academic Academy of Child and Adolescent Psychology, The Teen Brain: Behavior, Problem Solving, and Decision Making (2011).


90 See Lois Weithorn & Susan Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 Child Development 1589 (1982) (Discussing the competence of children to make decisions concerning their health care.). This research has been extended to other legal debates concerning the competence of children.

91 See Federle, Looking for Rights, supra note 8 at 1529 (Federle lists literature which display the substantial disagreement over the competence of children).

Following, I will consider how we might be able to move forward with regard to finding a model of child representation that is consistent with our intuitions and the empirical research that is unable to settle the debate. That is, I will consider how we can represent children so as to ensure that we do what’s best for them without infringing on their autonomy.

IV. POSSIBLE MODELS OF CHILD REPRESENTATION

A. The Ground Rules

Here I’ll list some requirements that must be kept in mind in order to create a model of child representation for divorce proceedings that fits well with our paternalistic impulses and our respect for autonomy. The need for these requirements seems to have been made evident through previous discussion in this paper. The key, later on, will be to create a model that can handle all of these requirements in the best way possible.

1. All children should be provided with an attorney as soon as possible after a divorce is initiated. This is necessary to ensure both that children’s interests are accounted for and that children’s autonomy is being respected.

2. If a child is competent enough to engage in rational deliberation and is capable of directing an attorney, then we should give that child a client-directed attorney. This way we do not infringe on any capable minor’s right to make his or her own decisions.

3. A client-directed attorney should represent the child in a manner in which he/she would represent an adult. This includes ensuring the child client sufficiently understands the matters at hand and the consequences of their decisions. It also includes advocating for a child’s preferences, even if the attorney disagrees with them.

4. The court should treat the child as a party on par with any other party. This includes taking the child seriously without letting the child’s wishes entirely dictate the outcome.

5. If a child cannot reason for him/herself or direct an attorney, then we should give that child a best interest attorney.

6. A best interest attorney should do a thorough investigation so as to provide an accurate assessment of what would be in a child’s best interest.

7. That best interest attorney must meet with the child and do his/her best to extract preferences. Those preferences should be taken seriously and should be presented to and advocated to the court.

8. The best interest attorney must be objective. To help ensure this, the best interest attorney can be a pure presenter of fact rather than offering the court his/her opinion regarding matters having to do with the child. This will prevent the best interest attorney’s personal values from being advocated to the court.

9. All of these objectives must be accomplished through a model that is not overwhelming or harmful to children.

B. Possible Models

I think there are many possible models that can try to get at the “requirements” that I listed. The main issue is providing the right type of representation depending on whether or not the child is an autonomous, sound decision maker. That is, if the child is competent enough to
account for his own wellbeing, then we should allow him to make his own decisions. However, if a child is not able to protect himself, then we should help protect him.

Some would argue that the best interest model or client-directed model already gives children a meaningful voice and accounts for children’s wellbeing. For example, as aforementioned, some best interest proponents argue that the best interest attorney takes the child’s wishes seriously – and that the child is encouraged to be a key member of the dialogue.\footnote{EMERY, supra note 53.} However, the best interest model does not take children’s voices seriously enough. It seems that at least some minors should have independent representation, so that the court can hear directly from the minor and so that we are not infringing on his/her rights. Client-directed model proponents, on the other hand, argue that their model sufficiently accounts for children’s wellbeing and rights. Some go further and argue that the client-directed model ensures the wellbeing of children whereas the best interest model fails to do so.\footnote{Federle, Looking for Rights, supra note 8 at 1525 (“In the divorce context, our impoverished rights talk has had obviously bad effects in the handling and disposition of custody disputes.”).} While it is clear that the client-directed model takes children’s voices seriously, there are reasonable concerns that some children are not capable of guiding an attorney, accounting for their own wellbeing, and/or meaningfully participating. There is therefore good reason to believe that the client-directed model does not do everything we need in a model of child representation either.

So, what are the other options? One way to both protect and empower children in a reasonable way would be to begin with a determination of competence.\footnote{See Gerald Koocher, Different Lenses: Psycho-Legal Perspectives on Children’s Rights, 16 Nova L. Rev. 711 (1992) for a discussion about methods that are can be used to assess child competency.} From that point, if a child is sufficiently competent, he would be given a client-directed attorney. If he was not capable of meaningfully participating, he would be given a best interest attorney. However, determining competence is a difficult (if not impossible) task.\footnote{CHERRY, supra note 80 at 835.} Moreover, it is doubtful that people would be able to agree on any test or measure of “sufficient competence.” As such, I find this possible method impractical.

Another possible model is a hybrid model, a model that I think has the versatility needed to handle our conflicting intuitions. There are many different ways to frame a hybrid model,\footnote{Shireen Husain, A Voice for the Voiceless: A Child’s Right to Legal Representation in Dependency Proceedings, 79 Geo. Wash. L. Rev. 232, (2010) (Husain suggests that the child representative should investigate the child’s life, articulate the views of the child, and make recommendations to the court concerning the child’s best interest).} but I think the main reason why many have found the model appealing is that it tries to capture both of our intuitions: it’s meant to both respect children’s rights and protect children’s interests. Following, I will present a hybrid model that I think captures our intuitions. If we take children’s autonomy seriously, I think this model can work nicely. In a hybrid model as I envision it, the attorney would advocate for a child’s expressed wishes (if they are able to express their wishes) while still playing the role of a presenter of fact to the courts. Accomplishing both of these tasks would necessitate investigating into a child’s life and meeting with the child.

Put in a practical situation, the hybrid attorney, for example, can advocate for something like split custody on behalf of the child, while still noting the child’s mother has been his primary caregiver throughout the child’s life and that his father has a higher income. That is, the attorney can advocate for a child’s wishes while still noting facts relevant to the child’s best interests.
How about in a case where a child wants to live with an abusive parent? I still think it’s okay for the attorney to advocate for the child’s wishes while still presenting the fact, objectively, that the parent is abusive. Since the standard of judicial decision-making with regard to children is already the best interests standard, the judge will ultimately do what he/she believes is in the child’s best interests. The way the case that I have presented might be handled now, when there is the appointment of a best interest attorney, is by completely denying visitation to the abusive father. However, if the child wants to maintain a relationship with his/her parent, then that child should be able to in a way that the court thinks is conducive to that child’s interests. For example, given the child’s desire to live with his/her abusive parent, the courts can require frequent supervised visitation as a safe way to meet in the middle. It’s important to remember that the child’s wishes do not force any arrangement to be made. Instead, the advocacy of a child’s wishes ensures that the child is being heard and that his/her rights are not being violated. It also gives the court yet another voice, an important voice, to consider when making a decision regarding that child’s best interests: the child.

I believe the main objection to the hybrid model that I suggest might be that attorneys could be placed in situations that would be ethically suspect. In other words, people argue that hybrid attorneys are unable to follow the Rules of Professional Conduct. I agree that for a traditional attorney working with an adult client, the hybrid model of representation could be ethically suspect. For example, an adult client might not want the attorney to mention something in court that is damaging to his reputation, or is humiliating. As a client-directed attorney, the attorney would be obligated to grant the client his wish. However, under the hybrid model, the attorney would be required to share the information with the court, if the information was relevant to the client’s best interests. I think when dealing with children this is not as much of an issue. A different type of attorney dealing with different types of clients ought to be held to different ethical and professional standards. The confidentiality requirement that a traditional attorney faces should not be a standard for a child’s hybrid attorney, since the court needs the attorney to present all the relevant evidence. So long as the child is aware that the attorney has that obligation, I do not believe that there is an ethical dilemma.

Another concern is that the hybrid model is confusing and can put attorneys in conflicting roles. As far as the claim that the hybrid model is confusing goes, I think this belief has been formed due to the indeterminate hybrid models that some states currently use. As aforementioned, many states lack a clear suggestion of what role a child attorney should play. This leads to courts asking attorneys to play all different types of roles at the same time. Some of these roles probably are conflicting too. For example, how can an attorney seriously argue for a child’s wishes and his/her best interests? I think these problems can be solved be carefully laying out the responsibilities of the hybrid attorney.

Others might object that the hybrid model does not take children’s autonomy seriously enough or that it doesn’t take children’s best interests seriously enough. I disagree. Under the hybrid model, the attorney would give the courts relevant information concerning the child’s best

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99 For a fleshing out of this worry see e.g. Barbara Fines, Pressures Toward Mediocrity in the Representation of Children, 37 Cap. U. L. Rev. 411, 444 (2008).

100 Id.
interest. The attorney would also advocate for the child’s wishes. This model allows for children to be taken seriously and for their wishes to be advocated for, while still ensuring that the court has information regarding the child’s best interests that might not arise through information gathered through the parents or child.

Final worries that I can see arising concern the cost of hybrid representation and the ability of attorneys to play both of the roles involved in the hybrid model. As far as cost goes, some argue that having a better model of child representation would actually lower the costs of proceedings have to do with children. Regardless, the cost of adequate representation should not deter us from doing what is right for children. And, finally, to respond to the worry that hybrid attorneys might not be effective in both advocating for the child’s wishes and reporting best interest factors to the court: simply put, I believe that a bit of adequate training and education could remedy this potential problem, if it were even a problem at all in practice.

In all, the hybrid model I suggest is just a start. There are several other ways that might prove to be better in terms of respecting children’s rights while still accounting for their interests. For example, children can be represented by a client-directed attorney as well as an expert (or team of experts), who could present facts to the court concerning children’s best interests. Perhaps a psychologist would be better suited to determine factors that might be relevant in a decision of a child’s best interest. However, I believe that the hybrid model that I previously proposed is a model that respects both our paternalistic impulses and our value for autonomy—and has other valuable features. For example, attorneys may excel at producing objective reports regarding a child’s best interests. Ultimately, what should be taken away is that any model of child representation must respect both of our intuitions in order to capture what we want and need in a model of child representation.

CONCLUSION

In this article, I have considered a number of issues involved in considering the issue of child representation, specifically within divorce proceedings. It seems clear that an attorney should be appointed for children in divorce proceedings so as to ensure that the court is considering their needs and desires. And it also seems clear that we have failed children in this regard thus far. When it comes to providing a representative to children, I have argued that both our paternalistic impulses and our respect for autonomy seem to be reasonable intuitions that need to be accounted for in order to create an acceptable model of child representation. In order to account for both intuitions, I suggested a hybrid model of representation in which the hybrid attorney serves as a presenter of facts while also advocating for their client’s wishes. This is just one possible way that we can empower children and take their autonomy seriously, while also protecting them and acknowledging that children might not have the ability to protect their own interests. Overall, I hope to have made a contribution to the ongoing debate concerning child representation and to have called attention to the need to change our current practices regarding child representation in divorce proceedings.

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101 HUSAIN, supra note 97 at 256-258.