
NOTES

THE CHILD AS APPRENTICE: ENHANCING THE CHILD'S ABILITY TO PARTICIPATE IN CUSTODY DECISIONMAKING BY PROVIDING SCAFFOLDED INSTRUCTION

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I. INTRODUCTION

Representing a child whose parents are in the midst of acrimonious divorce litigation is always a daunting task for an attorney. Add to the mix a heated custody dispute, confusion over whether you are supposed to advocate for your client's wishes or what you think are her best interests, and a client who is unable to articulate particular reasons for wanting to live with one parent over the other, and your initial reaction is probably to head for the nearest exit. But as the sole advocate for this child whose family is collapsing around her, you will want to ensure that her voice is heard, that her interests are protected, and that whatever the outcome, her welfare was adequately taken into account.¹

* Class of 1999, University of Southern California Law School; B.A., 1987, Tufts University. I would like to thank Professor Tom Lyon for his insightful recommendations and sense of humor. I would also like to thank Jonathan Schwartz for commenting on a previous draft, and Rebecca Wolff for her invaluable editing assistance.

1. The *Southern California Law Review* adheres to a policy of linguistic gender neutrality. To further this policy while ensuring clarity, I use the male pronoun when referring to an attorney and the female pronoun when referring to a child.

This Note contends that all children have a right to independent representation in divorce proceedings involving child custody. To the greatest extent possible, children's preferences should be elicited and advocated. Focusing primarily on young children who are regarded as "impaired" under the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules")² and other proposed standards,³ this Note posits that many young children have greater decisionmaking capabilities than the law recognizes. Indeed, research in child development and educational psychology suggests that children can *learn* the decisionmaking skills needed to formulate preferences, especially when provided with assistance.⁴ But by classifying children as presumptively "impaired" at a certain age, the law denies many children this opportunity and their preferences are thereby ignored.

This Note attempts to answer some familiar questions concerning the proper representation of children from a different perspective. Its primary focus is not on reducing lawyers' role confusion—a topic that has justifiably received considerable attention.⁵ Instead, my overarching goal is to present a new strategy for ensuring that as many children as possible are provided with the opportunity to participate in their own representation to the extent that their opinions are sought, their ability to participate is maximized, and their voices are heard.⁶ I present one possible strategy here. It is my hope that other suggestions will follow.

2. Although the Model Rules do not contain a separate rule specifically for representation of children, Model Rule 1.14: "Client Under a Disability" refers to minors—suggesting that they may in some circumstances be "impaired" within the meaning of the rule. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1997) [hereinafter MODEL RULES].

3. See, e.g., American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (With Commentary)*, 13 J. AM. ACAD. MATRIMONIAL LAW. 1, 8 (1995) [hereinafter *AAML Standards*].

4. See Linda Taylor & Howard S. Adelman, *Facilitating Children's Participation in Decisions That Affect Them: From Concept to Practice*, 15 J. CLINICAL CHILD PSYCHOL. 346 (1986).

5. See, e.g., Samuel M. Davis, *The Role of the Attorney in Child Advocacy*, 32 U. LOUISVILLE J. FAM. L. 817 (1994); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 BOSTON B.J., Jan.-Feb. 1991, at 6; Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939 (1995); Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681 (1987); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1 (1977-78); Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?", 64 FORDHAM L. REV. 1917 (1996).

6. Although this Note takes the position that all children should be afforded the opportunity to participate in the decisionmaking process because of the significance of their interests, this should *not* be interpreted to mean that any child should be *required* to participate. Instead, this Note advocates that child participation in this process should be encouraged and facilitated because where children have preferences, those preferences should be respected. Requiring a child to participate when she prefers not to be placed in a decisionmaking role would run directly counter to this principle.

Part II focuses on the importance of counsel for children in the custody context. After presenting several compelling justifications for according children their own legal representative, Part II then highlights the many uncertainties lawyers face in trying to determine their proper role. By examining the language of the ABA's Model Code of Professional Responsibility⁷ ("Model Code") and the Model Rules, this section reveals the many ambiguities created by these overly vague provisions. Part II concludes that the fundamental flaw of the Model Code, the Model Rules and other standards promulgated by the profession, is their excessive focus on competence combined with their failure to provide any meaningful guidance on how competency should be assessed. The result is a standard that leaves much room for error and arbitrary classifications of children by their lawyers.

Part III addresses the problems that inevitably arise when children are categorized based on age-related presumptions of competence. After presenting research findings which suggest that the law underestimates children's competence, Part III cautions that methodological factors make it difficult to generalize from these studies. Part III concludes that there is no accurate test for assessing competence because it is not a fixed, global construct. Rather, once competence is viewed as modifiable, it becomes clear that it changes not only with the particular decision confronted, but also as a result of interactions with others. Part III suggests that the solution is not to ignore competence entirely, but rather to shift emphasis from *assessing* competence to *enhancing* it.

Building on the recognition that competence is malleable, Part IV discusses strategies for enhancing children's competence for custody decisionmaking. Looking to the fields of child development and educational psychology for guidance, Part IV recommends an 'apprenticeship' model⁸ for maximizing children's competence through "scaffolded" instruction—in which someone with greater skill than the child strives to bridge the gap between what the child already knows and what she needs to learn in order to handle a new situation.⁹

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

8. The child as apprentice is a notion developed by Barbara Rogoff, whose work is discussed in greater detail in Part IV. This analogy is appealing in the present context because it emphasizes the active role of the child learner and the valuable support provided by the child's partner. See BARBARA ROGOFF, APPRENTICESHIP IN THINKING: COGNITIVE DEVELOPMENT IN SOCIAL CONTEXT (1990).

9. See Mark H. Bickhard, *Scaffolding and Self-Scaffolding: Central Aspects of Development*, in 2 CHILDREN'S DEVELOPMENT WITHIN SOCIAL CONTEXT 33-51 (Lucien T. Winegar & Jaan Valsiner eds., 1992).

II. THE NEED FOR INDEPENDENT COUNSEL FOR CHILDREN IN THE DIVORCE / CHILD CUSTODY CONTEXT

It would be nice to believe that when two parents contest the custody of their child, each argues for what they think will ultimately be in their child's best interests. Experience tells us, however, that parents' motivations for contesting custody may have more to do with hostility towards their former spouse than with concern for the welfare of their child.¹⁰ The growing awareness that parents' interests often overshadow, or even conflict, with those of their child has led to much scholarly debate over whether children have a *legal right* to have someone speak on their behalf.¹¹

A. THE CASE FOR MANDATORY REPRESENTATION: SIGNIFICANT INTERESTS PROVIDE SIGNIFICANT JUSTIFICATION

A child's right to representation was first recognized in the context of delinquency proceedings. In *In re Gault*,¹² the Supreme Court relied on the Constitution's requirement of procedural due process when it held that children have a right to counsel in delinquency proceedings that could result in a deprivation of liberty.¹³ The decision was a narrow one, however, limited to the delinquency context. But the *Gault* court placed great emphasis on the critical role of counsel in the American judicial system. Thus, many commentators argue that implicit in the *Gault* decision is the proposition that a child's right to counsel is a procedural guarantee that extends to all cases where her interests are affected.¹⁴

There are, however, important distinctions between delinquency and child custody cases that limit the applicability of the *Gault* holding to the

10. See *In re Clark*, 185 N.E.2d 128, 130 (C.P. Ohio 1962) ("One doesn't have to work in a family court very long to learn that in countless circumstances a juvenile's rights and interests at many points are at sharp variance with those of his parents."); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 493 (1984). See also Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1584 (1996) ("In divorce custody situations . . . children become weapons used by feuding parents.").

11. See generally James Kenneth Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976).

12. 387 U.S. 1 (1967).

13. See *id.* at 36-37. In *Gault*, a 15-year-old boy was committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona as a result of a complaint alleging that he made a lewd telephone call. Neither the boy nor his parents were advised of any right to counsel. See *id.* at 4-10.

14. See, e.g., Genden, *supra* note 11, at 582.

latter context. First, whereas in delinquency cases it is the State that is potentially depriving a child of her liberty, in custody litigation, the State's role in the dispute is merely derivative of the parents' power over their child.¹⁵ Moreover, in delinquency cases there exists the possibility that the child will be removed from her parents' care entirely and become a ward of the State. In custody disputes, by contrast, the child will likely remain in the custody of at least one parent. Consequently, whereas some commentators still believe that *Gault* will eventually be extended to the custody context,¹⁶ given these distinctions and the current composition of the Court, such an extension is unlikely in the foreseeable future.

Nonetheless, there are a number of compelling justifications for requiring that separate representatives be appointed for children in the custody context, regardless of whether the appointment rests on constitutional due-process grounds. First, providing representation to children ensures that their voices are heard.¹⁷ Speaking through their representatives, children can provide important information about what it is really like to live with each parent, thus furnishing the court with important pieces to its puzzle. Moreover, because all other parties involved in the proceeding have someone in court speaking on their behalf, it seems unfair to deny the same right to the most vulnerable party of all who arguably has the greatest interests at stake.¹⁸

It is also important not to underestimate the value to the child of being involved in this decisionmaking *as a process*.¹⁹ By weighing costs and benefits, considering alternative points of view, and examining both short- and long-term consequences, the child gains valuable learning experience that will enable her to make better decisions in the future.²⁰ Furthermore, at a time when she likely feels little or no power over what is happening

15. See Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 119-20 (1984) [hereinafter Guggenheim, *Reflections*].

16. See *id.* at 76-77.

17. See Michael J. Albano, *Children—The Innocent Victims of Family Breakups: How the Family Law Attorney, the Courts, and Society Can Protect Our Children*, 26 U. TOL. L. REV. 787, 794 (1995).

18. See Judge John M. Newman & Judge Donald G. Collester, Jr., *Children Should Be Seen and Heard: Techniques for Interviewing the Child in Contested Custody Proceedings*, 2 FAM. ADVOC., Spring 1980, at 8, 10 (“[T]he bottom line is children have a lot to say if only we take time to listen.”). See also *Weichman v. Weichman*, 184 N.W.2d 882, 885 (Wis. 1971) (The child ought to be a player, not a football, in the game of life.).

19. See Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, in CHILDREN'S COMPETENCE TO CONSENT 241 (Gary B. Melton, Gerald P. Koocher, & Michael J. Saks eds., 1983).

20. See *id.*

around her, giving her the opportunity to express a choice enables her to feel some sense of control which may lead to a greater sense of personal autonomy and self-efficacy.²¹

Separate representation also places emphasis on the child-centered purpose of the proceeding. Because custody disputes often turn into forums for parental warfare,²² there is a significant danger that children's interests will be forgotten along the way. A child's representative serves as a reminder to all involved parties that the focus of the proceeding is supposed to be the child's well-being.

B. DRAWBACKS: THE CASE AGAINST MANDATORY REPRESENTATION

Despite its benefits, there are reasons to harbor reservations about providing children with their own representatives in custody disputes. First, while a representative provides a child with a voice in the proceeding, it is not always clear that providing a child with a voice is a good thing.²³ Divorce is a time of intense family conflict. Asking the child to choose where to live may increase pressure during a period that is already extremely stressful, possibly resulting in more harm to the child than good.²⁴ There is also a danger that the child will be the target of parental manipulation, with each parent trying to influence the child's decision.²⁵ Some evidence suggests that children are particularly vulnerable to paren-

21. See Ellen Greenberg Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 J. CLINICAL CHILD PSYCH. 78, 85 (1991). See also Elizabeth S. Scott, N. Dickon Reppucci, & Mark Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1042 (1988) ("The child whose strong desires about custody are ignored may suffer greatly—she may be dissatisfied with the outcome and feel helpless about her situation."); Kathleen Nemecek, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 467 (1998) ("By allowing a child the opportunity to make a choice, and by questioning even young children about preference, the divorce process could afford many more children the opportunity to speak and to be heard. Such a scheme would allow children self-determination, and thus avoid the damaging feelings of powerlessness that can accompany the absence of participation in major life decisions.").

22. See Ross, *supra* note 10, at 1584.

23. See Albano, *supra* note 17, at 794.

24. See Scott et al., *supra* note 21, at 1041 (citing Emery, *Child Custody Decision-Making* (Apr. 1987) (paper presented at the Conference of the Society for Research in Child Development)). See also J. WESTMAN, *CHILD ADVOCACY* 253 (1979) ("[G]enerally speaking it is not fair to place a child in the position of making choices between parents."); Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. L. 35, 41 (1995) [hereinafter Guggenheim, *Making of Standards*].

25. See Guggenheim, *Making of Standards*, *supra* note 24, at 41.

tal alignment appeals.²⁶ These appeals can take many forms, ranging from subtle hints to blatant threats of blackmail such as, “Tell the judge you want to live with me or don’t bother to visit.”²⁷ Finally, there are those who argue that recognizing a child’s right to counsel is harmful because it assumes a level of autonomy for which young children may not be prepared.²⁸

The underlying assumption of those who reject the idea that children should be afforded separate counsel is that children lack the competence or capacity necessary to make decisions that are in their own best interests.²⁹ Appointing an attorney would thus be of little or no value, as there is no competent position for the attorney to advocate and it is the duty of the court to make “best interests” determinations.

Perhaps the most trenchant critic of always affording counsel to children is Professor Martin Guggenheim. Tying autonomy rights to capacity, Guggenheim argues that since young children lack capacity, they have no autonomy rights for a lawyer to enforce.³⁰ Although he does not say that young children should have no representation at all, he suggests that attorneys with young clients serve as fact-finders—a role which essentially strips the lawyer of anything resembling his traditional legal duties.³¹

There is a critical difference in the focus of those who argue for child representation and those who argue against it. Those who argue in favor of separate counsel for children focus primarily on children’s rights and interests. As noted above, the arguments for representation include the right

26. See Susan Scott Meehan, *Child Custody Disputes: The Experiences of Children and the Importance for Social Policy* 87 (1982) (unpublished Ed.D. dissertation, Stanford University School of Education) (on file with author).

27. *Id.* at 81.

28. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L.J. 449, 456 (1996) (Reducing the discretionary judgment of authority figures can create “a vacuum that deprives children of an affirmative source of support and guidance.”).

29. Cf. Richard E. Redding, *Children’s Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 713 (1993) (listing reasons given in the mental health treatment context for not extending the right to decide to children, including the child’s relative lack of experience needed for fully formed values and sound judgment and the child’s inability to manage adult responsibilities). See also *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (observing that children lack the “maturity, experience, and capacity for judgment required for making life’s difficult decisions”).

30. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1420-21 (1996) [hereinafter Guggenheim, *Paradigm*].

31. See *id.* at 1427 (advocating a paradigm whereby the lawyer for young children ensures that judges are placed in the best position to make an informed decision about the child’s best interests). Whether lawyers are well-suited to the task of child representation, as opposed to guardians ad litem or social workers, is discussed in greater detail later in this section.

of a child to have her voice heard, the concern that her interests will not be adequately taken into account by other parties, and the substantial stake the child has in both the outcome and the process of the proceeding.

In contrast, critics of separate representation for children place great weight on children's *capacity* or *competence*. Their arguments begin by presupposing that children are incompetent, and this alleged incompetence justifies their opposition to independent counsel. One rationale for denying representation posits that giving children a voice is harmful to them because they are unable to handle the concomitant pressures.³² In other words, because they are immature, children are not *competent* to handle this kind of pressure. Therefore, the court should intervene on the child's behalf in order to shield her from the pressures associated with the choice. This is a clear example of a paternalistic approach based on an underlying presumption of incompetence. A different rationale suggests that the child should not choose because the context of the divorce may cause her to place undue emphasis on short-term considerations such as transitory anger at the "guilty" parent.³³ The underlying assumption here is that the child's short-term emotional biases interfere with her decisionmaking ability. Her decisions are therefore unavoidably *incompetent*.

Given that those who oppose separate representation of children rely so heavily on the presumption that children are incompetent, it is curious that these theorists provide little empirical evidence regarding children's competence in this context. Rather, support for their assumptions comes primarily from the "common knowledge" doctrine so often relied upon by the Supreme Court.³⁴ Moreover, the limited data collected treats competence as a fixed construct, assessing children's *current* status.³⁵ This conception of competence is called into question in Part III, which suggests *inter alia* that children's competence is not fixed, but functional, and therefore must be considered in relation to the decision to be made.³⁶ Addition-

32. See Scott et al., *supra* note 21, at 1041. See also WESTMAN, *supra* note 24, at 253.

33. See Scott et al., *supra* note 21, at 1055.

34. See GARY MELTON, REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 19-20 (1987). Chief Justice Burger's most common source of authority for many of his assumptions about children's competence was his own intuition. See *id.* at 239. See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 617 (1982) (relying on "the reality of human experience"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("the pages of human experience"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("the ordinary course of human experience").

35. See Taylor & Adelman, *supra* note 4, at 347.

36. When competence is considered contextually, it seems reasonable to believe that children's competence for decisionmaking should be highest in the custody context as compared to the other contexts where their competence is often at issue (for example, abortion, consent to medical treatment,

ally, Part III suggests that a child's competence can be greatly improved through scaffolded instruction, implying that the mean age at which competence is manifested is lower than the law currently recognizes.³⁷ This revised understanding of competence has serious implications for those who argue against child representation on competence or capacity grounds.

C. SOCIAL WORKERS, CHILD PSYCHOLOGISTS, AND
GUARDIANS AD LITEM: WHAT'S SO SPECIAL
ABOUT LAWYERS?

Even if one accepts the contention that children should be appointed separate representatives in custody suits, the question still remains whether lawyers are up to the task. One objection to the lawyer as child representative is that his role in custody proceedings is superfluous. Indeed, the lawyer serves no function beyond that which the parents' lawyers or family court judges already provide.³⁸ This view is untenable in practice, however, as the judge's considerable caseload and overburdened calendar require that she resolve her cases quickly, leaving little time for careful consideration of all relevant facts and concerns.³⁹ And to force the parents' lawyers to consider not only the wishes of their clients, but also the needs and interests of their clients' children, would immerse them into a morass of conflicting loyalties that may prevent them from providing full and adequate representation to *any* of the parties involved.

Some commentators argue that because lawyers typically lack specific training in child development or psychology,⁴⁰ social workers, child psychologists, or guardians ad litem ("GALs")⁴¹ are better qualified to represent children. After all, these other individuals are equipped to provide extensive factual and psychological information about the child which aids the court in making its ultimate best-interests determination. Lawyers, on

and waiver of privilege against self-incrimination), as children have considerably more relevant experience in the custody arena.

37. The "age at which competence is manifested" refers to a threshold level of competence without which the new skill could not be mastered even with intervention.

38. See Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1172 (1978).

39. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 117 (1997). Consider that a judge can only interview a child in chambers, if at all. A lawyer, by contrast, can meet with his client for longer periods of time and in more comfortable settings. See Note, *supra* note 38, at 1136 n.47.

40. See Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1966 (1996).

41. While there is no single definition of a GAL, typically they serve as fact-finders for the court. Their role in custody proceedings is discussed in detail later in this section.

the other hand, generally know considerably more about legal matters than family affairs.

But granting children the full panoply of legal rights afforded adults should not preclude the use of social workers, mental health experts, and others who can provide assistance. Rather, lawyers can increase their effectiveness by seeking input from, and working in tandem with, these professionals. But lawyers representing children provide a different perspective and set of skills than social service agency personnel and psychological professionals. And just as it would be a mistake to fail to recognize the important contributions made by these other professionals, so too would it be a mistake to underestimate the valuable contributions of lawyers.

Compare, for example, the role of the social service officer with the role of the lawyer. A social service officer gathers as much factual information as possible and provides it to the court. That is the extent of his role.⁴² A lawyer, on the other hand, provides factual information on both the child *and the child's point of view*. As one judge noted when confronted with conflicting opinions concerning a child's proper placement:

[Counsel for the child] is a different role from a Family Relations officer. The Family Relations office is a fact-gathering agency for the court that's supposed to get the background on the child and get as much information as it possibly can and make it available to the court, but that's the extent of it. He's not an advocate for the child, he's not an advocate for anybody.⁴³

Thus, if one of the primary goals of child representation is to ensure that children's voices are heard, the lawyer is better situated to perform this function.

Some commentators question whether a role remains for an attorney given that many courts give such significant weight to psychiatric evaluations and the testimony of mental health experts.⁴⁴ Although a psychological evaluation can be a valuable tool for a court to consider, especially in the case of the very young, inarticulate child, the mental health expert is not equipped to manage the process of litigation or to zealously present the

42. See Note, *supra* note 38, at 1179 n.264 (citation omitted).

43. *Id.* (alteration in the original). A judge in another case stated, "I am more apt to follow the suggestion of the child's attorney than the Family Relations [officer] if there is a conflict." See *id.* at 1179 n.260.

44. See *id.* at 1180.

child's case.⁴⁵ Those instances when the child client and the expert disagree about custody arrangements highlight why such an expert is a poor substitute for a lawyer.

Increasingly, courts are relying on GALs to represent children's interests in custody suits.⁴⁶ But the term GAL lacks a single definition; it can mean impartial fact-finder, "best interests" advocate, or legal representative.⁴⁷ Scholars argue that this lack of definition permits GALs to perform functions that are not appropriate to the role.⁴⁸ For example, courts will often ask GALs to render expert opinions on suitable custody placements even though they lack any training to qualify them as experts.⁴⁹ And while some courts and independent organizations require GALs to undergo training in child custody matters,⁵⁰ the extent and quality of such training varies.⁵¹ There are thus instances where the recommendation of the GAL is replete with personal biases concerning, for example, the material advantages of one parent, and yet it nonetheless carries considerable weight with the court.⁵² Moreover, because GALs are not regulated, they are not held accountable for mistakes or errors in the same manner as lawyers.⁵³

45. The use of experts can also create a host of problems. First, many lawyers report that these evaluations are often biased in favor of the hiring party. *See id.* at 1180-81. Moreover, experts have a tendency to testify abstractly rather than to focus on the specific child whose custody is at issue. *See id.* at 1181. This may be because experts are often asked to offer testimony concerning a child they have met only briefly or not at all. *See* Telephone Interview with Jan Sherwood, Attorney, specialist in child representation (Nov. 10, 1997) [hereinafter Telephone Interview with Jan Sherwood]. And significantly, courts do not always have clear guidelines concerning what is required for one to be deemed an expert. In some jurisdictions, for example, courts rely on the "expertise" of probation officers because presumably they know something about placement. *See id.*

46. *See* Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 261 (1991).

47. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 256-58 (1998).

48. *See id.* at 258. While the role of the lawyer in custody proceedings is also unclear, there are at least some, albeit imperfect, parameters within which the lawyer works.

49. *See id.* at 276.

50. There have been efforts to increase the quality of representation provided by GALs. For example, in 1982, the National CASA Association (NCASAA) was established to promote the development of quality CASA (court-appointed special advocates) programs. Member organizations must adhere to NCASAA standards for recruitment, training, and representation in order to receive federal funds. *See* Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023, 2026 (1996).

51. *See* Lidman & Hollingsworth, *supra* note 47, at 276.

52. *See* Telephone Interview with Jan Sherwood, *supra* note 45. So long as the lawyer is representing the child's view instead of his own, the problem of bias, while still a concern, is not as significant when a lawyer serves as representative.

53. *See* Lidman & Hollingsworth, *supra* note 47, at 267 ("[T]he lawyer is regulated, but, like Alice in Wonderland, litigants slip through a loophole into a world where the guardian or guardian ad litem figure is not."). *See also* Holly Marie McIntyre, *Fleming v. Asbill: South Carolina Guardian Ad*

Unfortunately, practitioners report that some judges appoint GAL volunteers when they do not know how to resolve a custody dispute and they want someone to perform a “cheap evaluation” upon which they can base their decision:⁵⁴

Judges often articulate that custody determinations are the most difficult decisions to make. When confronted with the issues of making future residency and custody decisions about children, judges hope for some outside, neutral, objective person who can provide more information and guidance to the court. . . . By appointing such a person, judges delegate their awesome responsibility to someone else.⁵⁵

In these cases, a lay volunteer with no knowledge of child development, child psychology, or the law is essentially serving as the ultimate decisionmaker in the case.⁵⁶ Such a result is clearly at odds with the normal functioning of our judicial system.⁵⁷

In sum, because a child’s interests are significantly affected by the outcome of a custody suit, she is entitled to the same legal advocacy available to adults.⁵⁸ This includes a representative who can file motions, draft stipulations, cross-examine witnesses, and take appeals if necessary. Although other professionals such as social services officers and mental health experts have valuable contributions to make in custody proceedings, they are not qualified to replace lawyers. And although GALs may be able to provide lawyers with important fact-gathering assistance given adequate training, they should not be asked to step in and usurp the lawyer’s role.

As the above discussion illustrates, a lawyer is uniquely qualified to both manage the process of litigation and to vigorously present the child client’s case. Unfortunately, there is yet another obstacle in the way of children receiving adequate representation in court, as the proper role of the child’s lawyer is shrouded in uncertainty.

Item Not Immune from Civil Liability, 29 CREIGHTON L. REV. 1711, 1711 (1996) (noting that the majority of federal and state courts have held GALs absolutely immune from liability).

54. See Telephone Interview with Jan Sherwood, *supra* note 45.

55. Lidman & Hollingsworth, *supra* note 47, at 297 (citation omitted).

56. See *id.* at 280 (“[T]he individual is no longer a mere investigator but has risen to the rank of an expert or perhaps has taken on the vestments of the judge himself.”).

57. See *id.* at 304.

58. See Note, *supra* note 38, at 1137. Note that if the rationale for representation is the Constitution’s guarantee of due process, then anything less than full legal counsel would fail to meet the constitutional requirement. See *id.* at 1139 n.60.

D. WHAT IS THE LAWYER'S PROPER ROLE?

Although there is widespread agreement that providing independent representation to children involved in custody disputes benefits children in at least some cases,⁵⁹ it is also well-established that lawyers trying to provide effective assistance to their child clients, while abiding by the ethical guidelines established by their profession, face much uncertainty.⁶⁰ A number of reasons for this confusion exist, including the various sources of authority for child representation, the various titles given to child advocates,⁶¹ and the nature of the proceedings and the person represented.⁶² Unfortunately, after examining the Model Code, the Model Rules, and other state and national standards for representing children, a lawyer seeking guidance has gained little, if any, ground. This section will begin by examining the Model Code and the Model Rules. After revealing the rules' most troubling ambiguities, this section then examines how practitioners attempting to promulgate standards for representing children in custody cases in conformity with these rules have responded.

E. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Until the adoption of the Model Rules in 1983, the Model Code stood as a model for codes promulgated by most states.⁶³ The Model Code addresses representation of children only superficially,⁶⁴ indicating in Canon 7 that although a lawyer must represent his client zealously within the bounds of the law, his duties "may vary according to the intelligence, experience, mental condition or age of a client."⁶⁵ The Canon continues, "a client . . . incapable of making a *considered judgment* . . . casts additional responsibilities upon his lawyer" including the duty to "act with care to safeguard and advance the interests of his clients" especially "[i]f the disability of a client and the [client's] lack of a legal representative compel

59. See Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 350 (1993) (citation omitted).

60. See generally Lyon, *supra* note 5, at 688 (encouraging clarification of the attorney's role while representing children); Shepherd & England, *supra* note 5, at 1934 (suggesting that ethical guidelines provide little guidance to an attorney representing a child).

61. Child representatives are sometimes asked to serve as the child's lawyer, sometimes as a GAL, and sometimes as an independent investigator. There are virtually as many permutations of the role of the representative in these cases as there are cases involving children.

62. See Mlyniec, *supra* note 5, at 8.

63. See Shepherd & England, *supra* note 5, at 1934 (citation omitted). Because some state codes continue to conform to the Model Code, it is necessary to examine both the Model Code and the Model Rules.

64. See *id.*

65. MODEL CODE, *supra* note 7, at EC 7-11.

the lawyer to make decisions for his client.”⁶⁶ But the Model Code also cautions that if the client is capable of understanding the matter in question, an attorney must obtain all possible aid from the client.⁶⁷

F. THE MODEL RULES OF PROFESSIONAL CONDUCT

In line with the Model Code, the Model Rules also contain no rule devoted exclusively to a lawyer’s proper role when representing a child.⁶⁸ However, Model Rule 1.14 titled “Client Under a Disability” encompasses clients whose “ability to make *adequately considered decisions* in connection with the representation is *impaired* . . . because of minority.”⁶⁹ As its title indicates, Rule 1.14 was not designed with children primarily in mind. It is, nonetheless, the only source of guidance for child representatives within the Model Rules. Whereas the rule states that a lawyer should “as far as reasonably possible” try to maintain a normal lawyer-client relationship, it also implies that the relationship with the client may differ when the client is “impaired” because of her young age. Thus, it would appear that where a child is “competent” or “unimpaired,” the normal lawyer-client relationship—the advocacy model of representation—should prevail. When the child is “impaired,” however, it is unclear what role the attorney should serve.

G. AMBIGUITIES REVEALED: SYNTHESIS OF THE MODEL CODE AND THE MODEL RULES

1. *The Normal Attorney-Client Relationship*

Both the Model Code and the Model Rules indicate that, to the greatest extent possible, an attorney representing a child should try to maintain a *normal* attorney-client relationship. Yet they fail to address the seem-

66. *Id.* at EC 7-12 (emphasis added).

67. *See id.*

68. Several commentators have expressed disappointment that such a rule does not exist, and have advocated for an extension of Model Rule 1.14 to include a section devoted entirely to child representation. *See, e.g.,* Lyon, *supra* note 5, at 694. While I agree that this type of rule is indeed necessary in light of the rampant confusion among children’s representatives, the form such a rule should take is beyond the scope of this Note.

69. MODEL RULES, *supra* note 2 (emphasis added). The full text of Rule 1.14 reads:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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

ingly insurmountable barriers that often stand in the way of an attorney forming anything close to a “normal” attorney-client relationship when serving a child client.⁷⁰

To illustrate the problem, consider an attorney who is representing a one-year-old client. Clearly it is impossible for this attorney to maintain a “normal” attorney-client relationship to the extent that such a relationship typically involves the client instructing the lawyer on the direction she wants the litigation to take. In Canon 7-11, the Model Code informs the attorney that “[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client,”⁷¹ but provides no further guidance. Certainly this attorney needs to know what his duties are and how they vary when his client is incapable of providing any input. Turning to the Model Rules, the attorney finds that he has the authority to seek appointment of a guardian or to “take other protective action.”⁷² But what kind of protective action the attorney can take or what standard the attorney should apply before taking such action is a mystery.

2. *Conflicts with Other Ethical Rules*

There are also good reasons for a lawyer representing a child client to be concerned about potential conflicts with other rules. For example, both the Model Code and the Model Rules require that a lawyer represent his client competently.⁷³ But depending on what role the attorney assumes, this may not be possible. Consider an attorney who is asked to represent a young child’s “best interests.” An attorney with no training in children’s issues may not know what criteria to use in order to identify what outcome would be in the child’s best interests. Suppose that he does what he can and it later appears that he made a poor assessment. Is he subject to professional discipline? Or suppose the lawyer is asked to assume the role of investigator. One would imagine that such an investigation would require discussions with the child’s parents. But under Model Rule 4.2, the lawyer is prohibited from communicating with anyone he knows to be represented by another lawyer in the matter.⁷⁴ It seems virtually impossible for the

70. See Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1289 (1996).

71. MODEL CODE, *supra* note 7, at EC 7-11.

72. MODEL RULES, *supra* note 2.

73. See MODEL CODE, *supra* note 7, at EC 6-1; MODEL RULES, *supra* note 2, at Rule 1.1.

74. See MODEL RULES, *supra* note 2, at Rule 4.2. Model Rule 4.2, titled “Communication with Person Represented by Counsel,” states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

lawyer to act in a manner that would satisfy all of the profession's ethical requirements—yet the rule fails to acknowledge these complications, much less provides guidance.⁷⁵

3. *Is My Client Impaired?*

Model Rule 1.14 indicates that whether or not a client is “impaired” is the key factor that determines who sets the goals of representation. Yet the rule provides no guidance regarding how this determination is made or who conducts such an assessment.⁷⁶ The Model Code indicates that so long as the client is capable of *considered judgment*, the attorney should seek considerable input from the child.⁷⁷ The Model Rules also suggest that the normal attorney-client model should prevail so long as the client is able to make *considered decisions*.⁷⁸ Presumably, in the case of a seven-year-old, for example, if the child cannot pass the considered judgment or considered decisions test, she is impaired.⁷⁹ But what criteria the attorney should use to assess whether or not his client is capable of making considered decisions is anybody's guess.⁸⁰ Of course, even if an attorney is absolutely certain that his client is impaired, the question still remains as to what form of representation the impaired client is entitled.⁸¹

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” *Id.*

75. These examples represent only a small sampling of the potential conflicts that could arise. To cover all of the conflicts would be beyond the scope of this Note and there is extensive coverage of this information in many law review articles. *See, e.g.*, Shepherd & England, *supra* note 5, at 1917.

76. Although it is not made explicit in the rule, the underlying assumption seems to be that the determination will be made by the attorney.

77. *See* MODEL CODE, *supra* note 7, at EC 7-12.

78. *See* MODEL RULES, *supra* note 2.

79. The word “impaired” itself demonstrates that including child representation within a rule designed for those with disabilities is like fitting a square peg into a round hole. Some commentators, apparently uncomfortable with the terminology, instead refer to children unable to direct their attorneys as “precapacitated.” *See, e.g.*, Appell, *supra* note 40, at 1957.

80. The issue of competence is addressed in greater detail in Part III, *infra*.

81. There are many different schools of thought on this issue. The most common debate centers on whether a young (“impaired”) child's attorney represents the child's best interests or the child herself. Those who believe that counsel in these cases is appointed to represent the child's “best interests” rather than the child contend that the attorney is free to advocate his own views regarding what would be an appropriate outcome. Others, disturbed by the inordinate amount of discretion such a model gives attorneys who typically know nothing about children, contend that counsel represents the child and therefore should either represent the child's wishes or withdraw from the case. Again, neither the Model Rules nor the Model Code provide guidance. Among the common models for attorneys are attorney as “champion” advocating for the child's best interests, attorney as “advocate” advocating for the expressed wishes of the child, attorney as “impartial investigator” providing the court with as much information as possible while remaining neutral, and attorney as “law guardian” advocating for both the child's needs and her wishes. *See* Angela D. Lurie, *Representing the Child-Client: Kids Are Peo-*

Since the Model Rules and the Model Code themselves provide little guidance, a brief summary of the manner in which these rules have been interpreted is presented below. This section reveals that the ambiguity inherent in the Model Rules and the Model Code has led to the creation of rigid classifications of children based on competence.

H. INTERPRETATION OF THE RULES AND THE DEVELOPMENT OF
THE IMPAIRED / UNIMPAIRED DISTINCTION:
THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS' STANDARDS
FOR REPRESENTING CHILDREN IN CUSTODY AND
VISITATION PROCEEDINGS

The American Academy of Matrimonial Lawyers ("AAML") promulgated its Standards for Representing Children in Custody and Visitation Proceedings ("Standards")⁸² in 1995. These Standards are particularly helpful to the present examination because Professor Martin Guggenheim, the Standards' Reporter, concurrently published an article describing the process by which they were developed.⁸³ Guggenheim stated that "the Committee felt it necessary to develop standards for attorney behavior in conformity with the Model Rules of Professional Conduct [Thus,] the committee adopted the distinction utilized by the Model Rules between 'unimpaired' and 'impaired' clients."⁸⁴ Accordingly, the Standards create a strict dividing line between impaired and unimpaired children and the different forms of representation to which they are entitled. While the attorney for the unimpaired child is instructed to adhere to the traditional advocacy model of representation, the Standards instruct the attorney for the impaired child to serve a diminished role.⁸⁵

To determine whether a child is "impaired," the Standards create a rebuttable presumption that children age twelve and above are unimpaired, and children below the age of twelve are impaired. The attorney is expected to make this threshold determination.⁸⁶

ple Too: An Analysis of the Role of Legal Counsel to a Minor, 11 N.Y.L. SCH. J. HUM. RTS. 205, 206-07 (1993).

82. *AAML Standards*, *supra* note 3.

83. *See* Guggenheim, *Making of Standards*, *supra* note 24.

84. *Id.* at 43.

85. *See id.* at 43-44.

86. *See id.* at 8. Whether the attorney is qualified to make such a determination is discussed in Part III, *infra*.

Yet it is not entirely clear that such a presumption was what the drafters of the Model Rules had in mind. The Comment to Model Rule 1.14 is instructive, stating:

[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.⁸⁷

This Comment allows flexibility in applying Rule 1.14, and it suggests that an attorney should seek the input of even a young child.⁸⁸ However, because this information is buried in the Model Rule's Comment section, and because the Comment is silent as to how a lawyer should assess or treat a client with an "intermediate degree" of competence, the instruction has not proven meaningful.

Consider, for example, the apparent discretion provided by the Standards:

[T]he essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interest at stake, and to appreciate the consequences of the available alternatives. Clients who have these qualities should ordinarily be deemed 'unimpaired'⁸⁹

But in as much as attorneys often lack expertise regarding children, it seems reasonable to surmise that, absent further guidance concerning *how* to assess children's capacity for comprehending issues or to appreciate the consequences of available alternatives, they will tend to defer to the age presumptions when determining whether or not a child is impaired. Thus while the Standards appear to allow for some discretion on a case-by-case basis, practically speaking, this discretion is probably of little import.

Moreover, the committee promulgating the Standards seemed to believe that flexibility carries with it a potential for bias. Thus in order to "eliminate the possibility that a lawyer's advocacy would be shaped by the lawyer's personal values or beliefs,"⁹⁰ the drafters chose to prohibit attor-

87. MODEL RULES, *supra* note 2, at Rule 1.14 cmt.

88. *See* Lurie, *supra* note 81, at 205. Similarly, the Model Code provides that the attorney's responsibilities may vary with the age of the client. *See* MODEL CODE, *supra* note 7, at EC 7-11.

89. AAML Standards, *supra* note 3, at 10-11.

90. Guggenheim, *Making of Standards*, *supra* note 24, at 44.

neys for impaired children from advocating *any outcome whatsoever*.⁹¹ The lawyer's role when representing an "impaired" child, according to the AAML, is to gather all relevant facts and turn them over to the judge who is in the best position to decide the case.⁹²

The Standards have been criticized on various grounds.⁹³ In fact, the very same volume of the Journal of the American Academy of Matrimonial Lawyers that published the Standards also contained an article highlighting the practical and theoretical problems with their application:

[T]he categorization of children is impractical in application and not based on sound empirical evidence concerning child development . . . [T]he diminished role of attorneys for 'impaired' children, precluding such attorneys from advocating a position, deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney.⁹⁴

Like the Standards, other proposed standards have adopted classifications of children based on similar "competence" tests. For example, the American Bar Association and the Institute for Judicial Administration ("ABA/IJA") indicate that "where the juvenile is capable of considered judgment on his or her own behalf, the determination of the client's interests in the proceedings should ultimately remain the client's responsibility."⁹⁵ Where the clients are "very young persons" the ABA/IJA Standards provide that the attorney should assume a purely fact-finding role.⁹⁶

In sum, the Model Code and the Model Rules are so ambiguous that one must look at these rules *as applied* in order to extract current guidelines for the representation of children. Although it is unclear exactly what the drafters of the Model Rules and the Model Code intended, the result has been the classification of children on the basis of competence as determined by age-based guidelines or, to rebut age-based presumptions, as assessed by the child's attorney. There is virtually unanimous agreement that competent or unimpaired children are entitled to the traditional, advocacy model of representation. But when the clients are deemed incompetent or impaired, their preferences are often ignored. Part III takes a criti-

91. *See id.*

92. *See id.* at 49.

93. *See* Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIMONIAL LAW. 57 (1995).

94. *Id.*

95. INST. OF JUDICIAL ADMIN.—ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 79 (1980).

96. *See id.* at 79-80.

cal look at the problems with placing so much emphasis on questions of competency, and expresses skepticism about the value of relying on this “competency construct”⁹⁷ to determine whether or not a client’s expressed wishes should be honored.

III. COMPETENCY AND THE IMPAIRED / UNIMPAIRED DISTINCTION

Obviously, many children involved in custody disputes are unquestionably able to engage in mature decisionmaking and to articulate clear preferences for wanting to live with one parent or the other. These children, often in their teens, are clearly able to communicate with their lawyers and to direct their own representation. Not surprisingly, there is virtually unanimous agreement that these clients are entitled to have their preferences advocated in the same manner as adults. Similarly, there exist many pre-verbal children and infants who are clearly incapable of expressing opinions, much less directing their lawyers. Again it is hardly surprising that no one is asserting the right of these children to the traditional advocacy model of representation. These are the easy cases. A lawyer can maintain a traditional attorney-client relationship with the first group and cannot with the second. But there is a wide range of children who fall in between these two groups. Many children are unable to articulate a well-reasoned preference for living with one parent or the other, but they do have opinions on the matter. Are these children “competent” or are they “impaired”? This section addresses the many problems that arise when one attempts to answer this question.

A. PROBLEMS ASSESSING COMPETENCE

1. *Blanket Presumptions of Incompetence*

Numerous United States Supreme Court decisions reflect the law’s traditional presumption of minors’ incompetence. In *Parham v. J.R.*, for example, Justice Burger held that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions Most children, even in adolescence, simply are not

97. This expression comes from Jan Ellen Rein, who criticizes our legal system’s reliance on competence to determine when and how to interfere with individual choice. See Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What’s An Attorney To Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1102 (1994).

able to make sound judgments concerning many decisions”⁹⁸ Similarly, in *Bellotti v. Baird*, the Court held that:

States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.⁹⁹

Finally, in *Ginsburg v. New York*, the Court stated: “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct. The difference that separates children from adults for most purposes of the law is children’s immature, undeveloped ability to reason in an adultlike manner.”¹⁰⁰

This blanket presumption of incompetence has gradually eroded, and in his dissent in *Wisconsin v. Yoder*, Justice Douglas cited child development research to support his opinion that the fourteen- and fifteen-year-old children involved had the capacity to decide whether to withdraw from public school to assert free exercise of religion.¹⁰¹

Yet, while adolescent children are generally no longer presumed to be incompetent, such presumptions are still applied to younger children. The following section analyzes the validity of these presumptions in light of current research on children’s decisionmaking abilities in different contexts.

2. *Underestimating Children’s Competence*

As discussed in Part II, the Model Rules and the Model Code support the right of a child client to determine the objectives of her representation when she is able to make *considered decisions* or a *considered judgment*.¹⁰² But these rules are silent as to what standard should be used to assess the child’s decisionmaking abilities. As blanket presumptions of incompetence are no longer favored, several different standards for assessing competence have emerged depending on the legal context and the policy

98. 442 U.S. 584, 602-03 (1979).

99. 443 U.S. 622, 635 (1979).

100. 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

101. See *Wisconsin v. Yoder*, 406 U.S. 205, 246 n.3 (1972) (Douglas, J., dissenting).

102. See MODEL CODE, *supra* note 7, at EC 7-12. See also MODEL RULES, *supra* note 2.

issues involved.¹⁰³ For example, in the medical treatment context, the Informed-Consent Doctrine requires that medical treatment be premised on consent that is knowing, voluntary, and competent.¹⁰⁴ In the custody context, the standard is less clearly defined.¹⁰⁵ Thus, like the AAML, several states have established age-based guidelines, with twelve or fourteen being the age at which the child is presumed to be sufficiently competent to meet the *considered judgment* or *considered decisions* test.¹⁰⁶

These age presumptions were based largely on principles of Piaget's stage theory of cognitive development that was well-regarded in the 1970s and early 1980s.¹⁰⁷ According to Piaget, the highest stage of cognitive development—the stage of formal operational thinking—permits reasoning about abstract possibilities and hypothesizing about consequences of different courses of action.¹⁰⁸ The operational structures required for such thinking begin developing during early adolescence and reach equilibrium at around age fourteen.¹⁰⁹ While the Piagetian model has been extremely influential to child development theory, theorists have called its validity into question in recent years, as its emphasis on linear developmental stages has not fared well empirically.¹¹⁰ Moreover, some data suggest that divorce-related knowledge and experience may be a more accurate predictor of the competence of children's custody decisions than age.¹¹¹

103. See Lois A. Weithorn, *Children's Capacities for Participation in Treatment Decision-Making*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 29 (Diane H. Schetky & Elissa P. Benedek eds., 1985).

104. See Elizabeth S. Scott, N. Dickon Reppucci, & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 223 (1995).

105. See *id.*

106. See, e.g., GA. CODE ANN. § 19-9-1(a)(3) (Michie Supp. 1998) ("In all such cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live."); TENN. CODE ANN. § 36-6-106(7) (1996) (stating that the court shall consider all relevant factors including "the reasonable preference of the child if twelve (12) years of age or older"). Some state statutes indicate that the court may consider a child's preference if the child is of "sufficient age and capacity." See, e.g., NEV. REV. STAT. ANN. § 125.480(4)(a) (Michie Supp. 1997) (stating that the court may consider the child's wishes "if the child is of sufficient age and capacity to form an intelligent preference as to his custody"); N.J. STAT. ANN. § 9:2-4(c) (West Supp. 1998) (stating that when making a custody award, a court shall consider "the preference of the child when of sufficient age and capacity to reason so far as to form an intelligent decision").

107. Piaget contended that children's cognitive development happens in stages whereby advances occur through individual adaptations to the environment. See ROGOFF, *supra* note 8, at 4 (describing Piaget's theory).

108. See Weithorn, *supra* note 103, at 29.

109. See *id.*

110. See, e.g., ROSEMARY ROSSER, COGNITIVE DEVELOPMENT: PSYCHOLOGICAL AND BIOLOGICAL PERSPECTIVES 11, 24 (1994); Richard A. Shweder, Manamohan Mahapatra, & Joan G. Miller, *Culture and Moral Development*, in THE EMERGENCE OF MORALITY IN YOUNG CHILDREN 1, 13 (Jerome Kagan & Sharon Lamb eds., 1987).

111. See Garrison, *supra* note 21, at 84.

Although few published studies have examined children's competence in psycho-legal contexts, there is ample evidence to suggest that the law generally underestimates children's abilities.¹¹² For example, Lois A. Weithorn and Susan B. Campbell conducted a study of children in the medical treatment context and found that children as young as nine years of age tend to render reasonable treatment preferences.¹¹³ Although the nine-year-olds in their study did not consider all relevant factors, they did identify the most salient.¹¹⁴ Thus Weithorn and Campbell concluded that nine-year-olds are "capable of *meaningful involvement* in personal health-care decision making, even if their developing competencies are not sufficiently matured to justify *autonomous* decision making."¹¹⁵ Moreover, additional evidence suggests that, at least where decisions are relatively uncomplicated, even elementary school children may make reasonable decisions when given the opportunity to exercise consent.¹¹⁶

Ellen Greenberg Garrison's findings in her 1991 study of children's competence to state custodial preferences in divorce situations supported those of Weithorn and Campbell.¹¹⁷ While significant developmental differences existed in the rationales given by children of various ages, the overall reasonableness of the nine-year-old's decisions did not differ significantly from those of the fourteen-year-olds.¹¹⁸ Thus, Garrison interpreted the data to "lend support to the involvement of nine- and ten-year-olds in the custody decision-making process."¹¹⁹ It should be noted, however, that of the two criteria assessed in the study, rationality of reasons and reasonableness of preference, the rationality score may in fact be more meaningful because of the inherently subjective nature of custody decisions.¹²⁰

112. See Taylor & Adelman, *supra* note 4, at 346 (citing various studies).

113. See Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589-98 (1982).

114. See *id.* at 1596.

115. *Id.* (emphasis added).

116. See Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 1, 15 (Gary B. Melton, Gerald Koocher, & Michael J. Saks eds., 1983).

117. See Garrison, *supra* note 21, at 78.

118. See *id.* at 82.

119. *Id.* at 84.

120. See *id.* Note however that the rationality of reasons scores did not increase in a linear fashion with age. In one situation, both the 9- and 11-year-olds did significantly worse on the rationality of reasons measure than the 18-year-olds. Yet their scores did not differ markedly from those of the 10-, 13-, or 14-year-olds. In a second situation, the 9- and 13-year-olds received significantly lower scores than the 18-year-olds. But their scores did not differ significantly from any of the other age groups. See *id.* at 82.

Several methodological factors limit the ability to derive general principles about children's competence from these studies. First, many of the early researchers relied on principles of Piaget's stage theory of development which, as discussed *supra*, are no longer widely accepted.¹²¹ Second, most studies, including those mentioned above, were conducted in a laboratory setting in which subjects were asked to respond to hypothetical situations.¹²² This factor could certainly skew the studies' results, although it is unclear in what direction. On the one hand, when a child is asked to make a hypothetical custody decision, she is significantly more emotionally detached than she is when confronted with a real-life choice. Thus, it is possible that the decisions made by a child in a laboratory setting are more objective and hence more competent than decisions she would make in a real-life setting. On the other hand, by instructing a child to imagine a fictitious child in a hypothetical situation, these studies increase the complexity of the child's task. When evaluating the wisdom of different custodial arrangements, the child must consider potential consequences to a mythical character about whom she knows very little. Moreover, her knowledge of the character's family is limited to the made-up facts provided by the evaluator.¹²³ When making a true custody decision, by contrast, a child has a lifetime of valuable, first-hand experience to factor into her equation. It is therefore possible that these studies underestimate children's competence in the custody context because they fail to consider the child within the realm of her own family.¹²⁴

And finally, most studies fail to consider several potentially significant factors. For example, some commentators suggest that divorce-related knowledge and social influences may be accurate predictors of children's competence for decisionmaking in this context.¹²⁵ Yet researchers have not designed a study that takes these factors adequately into account.

Taken together, these studies provide no absolute test for assessing competence. And while research indicates that children are in fact more capable of expressing preferences and participating in major decisions af-

121. See Scott et al., *supra* note 104, at 224-25.

122. See *id.* at 226.

123. It is certainly possible that where relevant factual information is lacking, the child will unconsciously inject information based on her own family experiences. This practice could lead to decisions that appear, at least initially, to be irrational. But these same decisions might seem perfectly reasonable if evaluated based on the sum total of the information upon which the child's decisions were actually based.

124. Some commentators argue that because white middle class samples are the norm in most cases, a further limitation of these studies is their failure to account for the possibility that different cultural experiences affect decisionmaking abilities. See Scott et al., *supra* note 104, at 226.

125. See *id.*

fecting their welfare than the law recognizes,¹²⁶ this information provides little practical help to the lawyer.

3. *Lawyers Are Not Qualified to Assess Competence*

Even assuming that it were possible to assess competence, most lawyers are not qualified to make such an assessment. As one professor appropriately remarked, “[d]etermining competency is difficult for medical and behavior experts, much less for lawyers”¹²⁷

The Model Rules provide no guidance to the lawyer seeking to determine his proper role in making competency determinations. Rather, their vague language invites the lawyer to impose his own subjective value system on his child client.¹²⁸ Consequently, if a lawyer disagrees with a client’s position, he may deem the child impaired in order to advocate the position he prefers. The Model Code and the Model Rules also fail to acknowledge that, despite decades of trying, neither legal nor medical experts have been able to come up with a single, workable competency test.¹²⁹ Asking a lawyer to perform such an assessment is thus like placing him in a rowboat without a paddle.¹³⁰ As a result, a lawyer who feels that he is unqualified to conduct a competency assessment may be more inclined to defer to an age-based presumption than to perform a task with which he is uncomfortable.

In sum, placing the primary burden for conducting competency assessments on lawyers leads to an almost total lack of accountability and opens the gates for unjustified paternalism.¹³¹ The result is arbitrary competency determinations that underestimate children’s abilities and minimize their participation in the decisionmaking process.

B. REJECTING THE COMPETENCY CONSTRUCT: THE ADVOCACY MODEL

As the discussion above suggests, there is no absolute test for measuring competence, and relying on age-based presumptions leads to arbi-

126. See Gerald P. Koocher, *Children Under Law: The Paradigm of Consent*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 3 (Gary B. Melton ed., 1987).

127. Haralambie & Glaser, *supra* note 93, at 66 n.39 (quoting Professor Allee).

128. As the Model Rules fail to articulate any criteria for conducting a competency assessment, it is hardly surprising that the lawyer is provided no guidance in determining whether his client is partially impaired.

129. Some commentators analogize this “test seeking” phenomenon to “the search for the Holy Grail” in light of the diagnostic complexities involved. See Rein, *supra* note 97, at 1130.

130. A lawyer should justifiably be concerned about whether undertaking such an assessment puts him at risk for a Model Rule 1.1 violation which requires that lawyers perform competently.

131. See Rein, *supra* note 97, at 1127.

trary and artificial distinctions. This reality has led some commentators to recommend an advocacy model of representation whereby the lawyer representing the child client ignores competence completely and simply advocates the child's stated preference.¹³² Under this model, the substance or the reasonableness of the child's position is irrelevant. Rather, if a child is not capable of expressing a preference, the Advocacy Model instructs the lawyer to advocate no outcome whatsoever, limiting his role to that of fact-finder.

Critics of the Advocacy Model argue that such an approach fails to recognize the differences between adults and children, and that by ignoring substance, lawyers may end up advocating for absurd outcomes. A child may decide, for example, that she wants to live with her father because he lets her eat candy, watch videos, and stay up late. Clearly this child has failed to consider long-term consequences. Yet under the Advocacy Model, the lawyer is duty-bound to advocate the child's position.

Of course it is important to remember that young children are not the only clients who ask lawyers to pursue absurd results. Lawyers deal with adult clients who want to pursue outrageous and sometimes even immoral outcomes all the time. Part of the lawyer's job is to counsel clients against pursuing objectives he considers unwise. As one commentator noted, "[I]t is conventional to describe good lawyering as including a willingness to tell clients when they are being fools"¹³³

The obvious shortcomings of the Advocacy Model may be tempered somewhat by the fact that the lawyer is not the ultimate decisionmaker in the case. The judge is responsible for making a final determination based on what she decides would be in the child's best interests in light of all the evidence presented to the court. Thus, even if the lawyer advocates a substantive position that most would agree is unwise, the child's position, as advanced by her attorney, is but one factor among many which the judge takes into account when making her 'best interests' determination.¹³⁴

Nonetheless, the Advocacy Model is far from a perfect solution to the problems inherent in classifications based on age-related presumptions of competence. Although it does place a premium on ensuring that children's voices are heard, this right is of little value without some consideration of

132. See, e.g., Ross, *supra* note 10, at 1616.

133. Jack L. Sammons, *Legal Ethics*, 46 MERCER L. REV. 305, 336 n.183 (1994).

134. See Guggenheim, *Paradigm*, *supra* note 30, at 1425.

the child's ability to understand the significance of the decision being made.¹³⁵

Both the Competency and Advocacy models have significant shortcomings from the perspective of the child. By classifying children as impaired or unimpaired based on age-related presumptions of competence, the Competency Model leads to arbitrary distinctions among children that are not based on sound empirical evidence concerning child development. But the Advocacy Model is far from the panacea its proponents suggest. By disregarding substance entirely, the Advocacy Model ignores fundamental differences between six- and sixteen-year-olds, and encourages lawyers to advocate for absurd outcomes in the name of procedural fairness.

C. A LOOK AT COMPETENCE FROM A DIFFERENT PERSPECTIVE

While the Competency Model relies too heavily on strict notions of competence per se, the Advocacy Model goes too far in the other direction by ignoring competence entirely. Both models ultimately fail because they do not recognize that competence is contextual, incremental, and malleable. In order to best serve the interests of children in legal contexts, it is essential that we revise our understanding of competence. First, it is important to recognize that competence is not a global concept. If someone told you that they were *competent*, the statement would be incomplete.¹³⁶ You would most likely ask what they were competent to do. In the context of medical decisionmaking, for example, one writer has stated that “[f]or children as well as adults, competence is relative to a specific decision”¹³⁷ A child may be capable of making certain decisions regarding her representation but not others, and no child will be competent with respect to all decisions that need to be made during the litigation.

Competence is thus contextual.¹³⁸ A seven-year-old's competence to make a decision concerning a medical procedure may be much lower than her competence to decide with which parent she would prefer to live. In the case of a medical procedure, she probably has little relevant knowledge

135. See Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 306 (1983).

136. See ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 18 (1989) (“Competence is always competence *for some task*—competence *to do something*....[T]he notion of decision-making capacity is itself incomplete until the nature of the choice as well as the conditions under which it is to be made are specified. Thus competence is decision-relative, not global.”) (citation omitted).

137. *Id.* at 217.

138. See Haralambie & Glaser, *supra* note 93, at 61.

to draw upon. When making a custody decision, by contrast, she has a lifetime of experiences that can serve as important building blocks. She knows who makes her feel safe, loved, hurt, or scared. She is thus more competent to make a well-reasoned decision in this context than in others.

The most essential aspect of this reformulation of competence is based on the recognition that competence is not fixed. While developmental sequences in the acquisition of certain skills and concepts are well established, rates of progression can be highly influenced by outside factors.¹³⁹ Certainly any individual, whether adult or child, gains competence with experience. Consider the following rudimentary example of a young bike rider: The first time a five-year-old child tries to ride her bicycle without her training wheels, she will probably topple over a few times if left to her own devices. She falls not because she lacks the ability to ride the bike, but because she has not yet had sufficient experience adjusting her weight in order to keep the bike upright. She also may not believe that she is capable of riding a bike with only two wheels because she has never done so before. Combine a parent's hand on the back of the bike with a few words of encouragement, and in a short period of time she can ride the bike unassisted. But a two-year-old in the same situation would probably be unable to master the same task that the five-year-old learns quickly. Thus, the five-year-old apparently possesses some threshold level of competence required for mastery at the outset, but without aid she initially appears incompetent to ride.

The remainder of this Note asserts that this same proposition holds true for children in the realm of custody decisionmaking. When competence is viewed as modifiable, it becomes clear that it changes not only with the particular decision confronted, but also as a result of exchanges that occur with others. Thus many children whom the law now deems "impaired" and therefore incapable of formulating preferences worthy of advocacy may in fact be able to make reasonable choices regarding the custody arrangements that they would prefer if given some help with the decisionmaking, or competence-enhancing, process. Viewed from this perspective, *assessing* competence is significantly less important than *enhancing* it. Strategies for enhancing competence thus form the focus of the remainder of this Note.

139. See June Louin Tapp & Gary B. Melton, *Preparing Children for Decision Making: Implications of Legal Socialization Research*, in CHILDREN'S COMPETENCE TO CONSENT 215 (Gary B. Melton, Gerald P. Koocher, & Michael J. Saks eds., 1983).

IV. FROM ASSESSMENT TO ENHANCEMENT: MAXIMIZING CHILDREN'S COMPETENCE

A. MUTUALITY OF THE SOCIAL AND THE INDIVIDUAL WORLD

A significant body of child development literature suggests that social interaction can contribute to children's competence.¹⁴⁰ The foundation for this assertion comes from the landmark work of Lev Vygotsky,¹⁴¹ whose sociocultural theory posits that higher psychological processes can be acquired only through interaction with others.¹⁴²

Thus, in contrast to Piagetian theory which focuses on the role of the individual in constructing reality,¹⁴³ those from the Vygotskian camp emphasize the development of the mind as a result of interpersonal activity.¹⁴⁴ And whereas the study of cognitive development has traditionally placed great emphasis on the individual, the tide has turned in recent years toward recognizing that social interaction does indeed play a significant role:

Since psychology began in this country, the dominant metaphor for a learner has been something between Rodin's thinker and Huck Finn heading off to the territories—a singular, lone figure arm-wrestling the world, some conundrum, or a conceptual matter to the table. We are at long last learning to question the singularity, even the isolation, of that figure.¹⁴⁵

B. THE ZONE OF PROXIMAL DEVELOPMENT AND SCAFFOLDING

One of Vygotsky's great contributions to educational psychology was his establishment of the concept of the zone of proximal development—"the distance between the actual developmental level as determined by independent problem solving and the level of potential development as de-

140. See generally ROGOFF, *supra* note 8, at 151-70. See also Bickhard, *supra* note 9, at 34-35.

141. Lev Semyonovich Vygotsky (1896-1934) has been a prominent figure in psychology since 1962 when his monograph was first published. See L.S. VYGOTSKY, *THOUGHT AND LANGUAGE* (Eugenia Hanfmann & Gertrude Vakar eds. & trans., 1962). Influenced heavily by Marxist theories, some commentators have called Vygotsky's sociocultural theory of higher mental processes "[a] psychologically relevant application of dialectical and historical materialism." L.S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 6 (Michael Cole, Vera John-Steiner, Sylvia Scribner, & Ellen Soubberman eds., 1978) [hereinafter VYGOTSKY, *MIND IN SOCIETY*].

142. See VYGOTSKY, *MIND IN SOCIETY*, *supra* note 141, at 6.

143. See *supra* notes 107-10 and accompanying text.

144. Vygotsky emphasized the mind *in* society—implying a reciprocity between the individual and the social world. Piaget, by contrast, viewed the individual as working independently to make sense of the world around her.

145. ROGOFF, *supra* note 8 at 4 (quoting a personal communication from Dennie Wolf).

terminated through problem solving under adult guidance, or in collaboration with more capable peers."¹⁴⁶ Principally, Vygotsky argued that by participating in activities slightly beyond their competence with the assistance of individuals who possess greater skill, children develop higher level psychological processes which they will eventually be able to carry out independently.¹⁴⁷

Educators interested in instructing students in the acquisition and application of new skills have applied Vygotsky's ideas in the classroom setting.¹⁴⁸ The resulting instruction is a collaboration between teacher and student whereby the teacher simplifies the problem in order to facilitate an eventual solution.¹⁴⁹ Studies designed to improve listening and reading comprehension skills of both first-grade and junior high school students suggest that scaffolded instruction is a powerful means to guide students in acquiring these skills.¹⁵⁰

But scaffolded instruction may do more than enable a child to accomplish a particular task that she would be unable to accomplish on her own. It may also enable a child to develop further *competencies*.¹⁵¹ For example, research shows a positive relationship between the extent and responsiveness of adult-child interaction and children's language development.¹⁵² Research also suggests that adult-child dialogue can enhance children's conceptual development.¹⁵³ For example, in a study of five- and six-year-olds, M. Heber found improvement in children's seriation skills when adults engaged children in dialogue about children's seriation decisions, especially when the children were encouraged to specify the rationales for their decisions.¹⁵⁴

146. VYGOTSKY, MIND IN SOCIETY, *supra* note 141, at 86.

147. See ROGOFF, *supra* note 8, at 13.

148. See Annemarie S. Palincsar, *The Role of Dialogue in Providing Scaffolded Instruction*, 21 EDUC. PSYCHOLOGIST 73 (1989).

149. See Bickhard, *supra* note 9, at 43.

150. See Palincsar, *supra* note 148, at 78-79, 95-96.

151. See Bickhard, *supra* note 9, at 35.

152. See, e.g., Erika Hoff-Ginsburg & Marilyn Shatz, *Linguistic Input and the Child's Acquisition of Language*, 92 PSYCHOL. BULL. 3 (1982); Catherine E. Snow, *Parent-Child Interaction and the Development of Communicative Ability*, in THE ACQUISITION OF COMMUNICATIVE COMPETENCE 69 (Richard L. Schiefelbusch & Joanne Pickar eds., 1984).

153. See ROGOFF, *supra* note 8, at 157.

154. See M. Heber, *Instruction Versus Conversation as Opportunities for Learning*, in COMMUNICATIONS IN DEVELOPMENT 183, 196-97 (W.P. Robinson ed., 1981).

C. STRATEGIES FOR ENHANCING COMPETENCE

Barbara Rogoff views children's development as an *apprenticeship*, whereby "[i]nteraction with other people assists children in their development by guiding their participation in relevant activities, helping them adapt their understanding to new situations, structuring their problem-solving attempts, and assisting them in assuming responsibility for managing problem solving."¹⁵⁵

The notion of an apprenticeship as a model for children's development is appealing because it focuses on both the active role of the child and the active support of the more skilled partner. Rogoff contends that such a collaborative effort¹⁵⁶ is essential to a child's apprenticeship, as it enables adults and children to (1) build bridges between the child's present understanding and skills to the understanding and skills needed in novel situations; and (2) arrange and structure the child's participation in activities, gradually transferring more responsibility to the child. Through these processes, children gain an increased understanding of, and become more adept at handling, the problems of their community.¹⁵⁷ These processes are briefly described below and then applied to the custody context in the model that follows.

1. *Building Bridges: Moving from Known to New*

In the communication context, adult and child make connections between what the child already knows and what she must learn to handle a new situation.¹⁵⁸ The first step in this process is for the pair to establish certain reference points or common ground. To accomplish this, both participants must modify their own perspective.¹⁵⁹

155. ROGOFF, *supra* note 8, at 191. Rogoff has published extensively on children's cognitive development within the context of the social world. See, e.g., Barbara Rogoff, *Children's Guided Participation and Participatory Appropriation in Sociocultural Activity*, in DEVELOPMENT IN CONTEXT: ACTING AND THINKING IN SPECIFIC ENVIRONMENTS (Kurt W. Fischer & Robert H. Wozniak eds., 1993); Barbara Rogoff, *Evaluating Development in the Process of Participation: Theory, Methods, and Practice Building on Each Other*, in CHANGE AND DEVELOPMENT: ISSUES OF THEORY, METHOD, AND APPLICATION 265 (Eric Amsel & Ann K. Renninger eds., 1997); Barbara Rogoff, *The Joint Socialization of Development by Young Children and Adults*, in 2 CHILD DEVELOPMENT IN SOCIAL CONTEXT 67-96 (1991); Barbara Rogoff, *Social Interaction as Apprenticeship in Thinking: Guidance and Participation in Spatial Planning*, in PERSPECTIVES ON SOCIALLY SHARED COGNITION 349 (Lauren B. Resnick, John M. Levine, & Stephanie D. Teasley eds., 1991).

156. Rogoff refers to this process as *guided participation*. See ROGOFF, *supra* note 8, at 8.

157. See *id.*

158. See *id.* at 66.

159. See *id.* at 71-72.

The child's modification of her perspective itself serves as the basis for development. The adult's modification ensures that information is presented in a form that the child can understand. The adult accomplishes this by linking the new situation to something that the child already knows, specifying how the new situation resembles the old.¹⁶⁰

2. *Structuring Situations and Transferring Responsibility*

By providing access to certain tasks and regulating their difficulty, adults can structure situations in order to facilitate learning. Through this structuring, adults can break down what may seem like an overwhelming problem into manageable chunks. The adult's joint participation serves a critical role, as he can handle the difficult features of a task and direct the child's attention to the steps required to handle sub-goals of the problem that are within her grasp. By engaging children in appropriate tasks, adults create supported situations in which children can extend their current skills and knowledge to a higher level of competence.¹⁶¹ The structure provided to support children's learning evolves as children gain experience and become capable of assuming additional responsibility.

Through both of these processes, adults can assist children to adapt their current understandings to new situations, efficiently structure their problem-solving efforts, and assume greater responsibility for managing problem-solving.¹⁶² The remainder of this section is devoted to applying these processes to the custody context.

D. ENHANCING CHILD COMPETENCY IN THE CUSTODY CONTEXT

Scaffolded instruction enables adults to help children bridge the gap between what they already know and what they must learn in order to handle new situations.¹⁶³ A child who is the subject of a custody dispute typically has a tremendous store of knowledge about what it is like to live with her parents. She may not, however, be able to express a preference for living with one parent or the other. Alternatively, if she can express a preference, she may be unable to articulate rational reasons for her selection. But as the above discussion demonstrates, to end the inquiry there would be to deny her the opportunity to bridge the gap between what she knows and what she is being asked to decide. Such a denial would do her

160. *See id.* at 72-73.

161. *See id.* at 93.

162. *See id.* at 191.

163. *See id.* at 66.

a great disservice, because in this context perhaps more than any other, she already possesses a number of blocks from which to build.

In light of the considerable experience children have living with their parents, as well as the many compelling reasons highlighted in Part II for involving children in this decisionmaking process, scaffolded instruction should be provided to children who are the subjects of custody disputes. While some young children will not possess even the threshold level of competence necessary to participate in the process, it is reasonable to anticipate that many young children who are initially unable to articulate a preference will be able to do so when provided with assistance. Thus a number of children who would currently be deemed “impaired” under the Model Rules and therefore incapable of *considered judgment* would, as a result of this process, become capable of directing their own representation.

Because lawyers are in a unique position to help children build the necessary bridges between known and new, it is imperative that we develop strategies to assist them in this endeavor. One such strategy is presented below.

E. AN APPRENTICESHIP MODEL FOR FACILITATING CHILD CUSTODY DECISIONMAKING

The first step any lawyer must take when representing a child client in a custody proceeding is to determine whether or not the child wishes to participate. In general, lawyers should encourage children’s participation, as children are often unaware that they have the right to be involved.¹⁶⁴ But where some children clearly welcome the opportunity to state a preference, others may express little interest in participating in the decisionmaking process. There are many different reasons why a child may initially opt not to participate. She may be uncomfortable with the responsibility because she is unsure about her ability to make the “right” choice.¹⁶⁵ In this situation it is important for the child to understand that she will not be required to formulate a preference on her own. Rather, part of the lawyer’s role is to help her with the decisionmaking process. She also needs to understand that if after going through the instruction process she still feels uncomfortable with the prospect of choosing, she can decline to state a preference at that time.

164. See Weithorn, *supra* note 19, at 252-53.

165. See *id.*

A child may also choose noninvolvement because participation in the process forces her to confront her parent's separation.¹⁶⁶ She may thus impulsively avoid the decision, hoping that it will go away and that things will go back to the way they were before. In this case the lawyer must make it clear to the child that if she does not participate in the decision-making process, the decision will not disappear. Rather, the decision will still be made, but by someone else.

Once the attorney provides the child with a clear explanation of the decisionmaking process and the consequences of noninvolvement, if she continues to demonstrate a preference not to be placed in a decisionmaking role, this preference should be respected as much as any other.

If the child does wish to be involved, the lawyer should first inquire whether the child already has a preference for living with one parent or the other. It is important to ask the question directly. Children know that they are being asked to make an important decision and they are not fooled by questions that skirt the issue. As one child said after a session with a court evaluator:

Everyone at court thinks you are a stupid kid. All along your parents tell you what you say is going to be real important—that the judge wouldn't want you to miss school and all that, and that it is a really big thing. Then you get to court and they tell you, "Oh, no, your opinion isn't important. We just want to know what you think about this and that . . . who you'd go to MacDonald's [sic] with . . ." They must think you are just plain stupid. My parents wouldn't have been so worried about what I'd say and ask me about every little detail when we went home in the car if what I had to say wasn't very important.¹⁶⁷

If the child expresses a preference, the lawyer should ask her to disclose the reasons for her choice. If she is able to articulate rational reasons for her selection, then the lawyer's task is clear—he must advocate her wishes. If the child is unable to give rational reasons for her choice, the lawyer must continue the inquiry.

The initial assessment of whether the child has rational reasons for her selection should be based on common sense rather than any sort of predetermined formula. In some cases the answer will be obvious. Clearly if the child indicates that she prefers living with her mother because her mother does not make her do homework, the reason is not a rational one. But if the child indicates that she wishes to live with her mother because

166. See Meehan, *supra* note 26, at 66.

167. *Id.* at 80.

her mother spends more time with her and takes the time to listen to her, her choice should be considered rational.

The lawyer may have to ask several questions before being able to determine whether or not the child has rational reasons for her choice, keeping in mind that a child may find *articulating* her reasons more difficult than the reasoning process itself.¹⁶⁸ Where the child expresses a preference which is not clearly based on rational reasons, or where she is unable to express a preference, the lawyer must continue the inquiry.

The lawyer must then help the child to arrive at a preference decision by providing scaffolded instruction. First, the lawyer should ensure that the parties share a common focus of attention. He should communicate to the child at the outset that the pair's overall goal is to work to aid the child in deciding with whom she would prefer to live. The most basic requirement of a reasonable decision is an overall understanding of the nature and significance of the question being posed.¹⁶⁹ Thus, if after repeated attempts the child is not able to grasp what it is she must decide, she will most likely be unable to benefit from scaffolded assistance.

Once the working partnership is established, the lawyer should involve the child as an active participant. After he has elicited information concerning her situation, the pair can then move on to jointly consider a variety of options. The lawyer should provide structure to the process by breaking down the overall decision into manageable segments. Borrowing the categories of reasons for custody decisions from Ellen Garrison's study, the lawyer may wish to engage the child in dialogue concerning all or some of the following factors: closeness of the parent-child relationships; where there would be continuity in the child's environment and relationships; which parent devotes more time and attention to the child; which parent is more stable and committed to the child; and the nature of the relationship between the parents.¹⁷⁰ By directing the child's attention to each of these categories or sub-goals independently, the lawyer main-

168. This proposition is suggested by both the Weithorn and Campbell and Garrison studies previously discussed, where young children scored lower than older children on the rationality of reasons criterion even though the overall reasonableness of their preferences were similar. See Garrison, *supra* note 21; Weithorn & Campbell, *supra* note 113.

169. See Lois A. Weithorn, *Children's Capacities in Legal Contexts*, in CHILDREN, MENTAL HEALTH, AND THE LAW 43 (N. Dickon Reppucci, Lois A. Weithorn, Edward P. Mulvey, & John Monahan eds., 1984).

170. See Garrison, *supra* note 21, at 81-82. Another category used in Garrison's study was the financial situation of each parent. Utilization of this factor is quite controversial, however, and thus has been intentionally excluded from the list. See *id.* Of course the factors to be considered will vary with the circumstances of the case.

tains the child's involvement with the overall purpose of the activity, in a manageable and supported form. Thus, although the child may initially believe that she is incapable of formulating a preference, she may think differently once she has engaged in meaningful dialogue about each of these categories.

Because no single script can be applied across situations, this process is best illustrated by example. A hypothetical situation, followed by comments, is described below. The following discussion is included merely to demonstrate generally what an interaction incorporating the recommendations set forth above might look like. As it would be impossible to illustrate the entire instructional process within the confines of this Note, the following comments focus only on small segments of the whole.

F. BREAKING DOWN THE DECISION: THE IMPORTANCE OF SUB-GOALS

Hypothetical: A lawyer has a client whose parents are involved in highly contentious divorce litigation. The child has positive relationships with both parents, but each is arguing for sole custody. The family had lived together in Los Angeles, but the mother has recently accepted a job offer in San Francisco.

1. Closeness

After spelling out the ultimate issue to be decided, the lawyer will need to break down the decision into several sub-parts. Clearly, one important factor in this case is to which parent the child has a closer bond. Thus, the lawyer may first work with the child to assess "closeness," one of the pair's sub-goals. The lawyer needs to ensure that he and his client have a common focus of attention. He should thus explain to the child that the first thing they want to determine is to which parent she is closer. But he should also explain that this determination is but one part of their overall goal—reiterating that their ultimate goal is to decide with whom the child would prefer to live. The child thereby remains focused on the overall purpose of the activity, but she is directed to work on a much more manageable segment of it.

The lawyer may then want to ask some questions about the overall quality of the child's relationship with each parent. In this hypothetical the child feels positively toward both of her parents, and she may be unsure whether she is closer to one parent or the other. The lawyer can help the child make this assessment by asking more specific questions about the

nature and quality of each relationship.¹⁷¹ Questions such as, “Who makes you feel better when you are sad?” or “Who do you like spending time with?”—although inappropriate as a substitute for the ultimate issue to be determined, are appropriate when their purpose is to gather foundational data. As a result of dialogue generated by these specific questions, the child will be better equipped to answer the broader and arguably more meaningful question: “Do you think you have a closer relationship with your mom or your dad?”

2. *Continuity of Environment and Relationships*

A second area of concern in this hypothetical is continuity. It is well established that children benefit from continuity and stability. But when a parent relocates, a certain amount of discontinuity is unavoidable. This discontinuity can take many forms. There is, of course, the physical discontinuity that results whenever a child is uprooted. But discontinuity also exists in the form of a lesser degree of contact with a parent or with friends. The critical issue here is the effect the mother’s move will have on the child, and whether the concomitant discontinuity will be more harmful to the child if she too relocates to San Francisco or if she remains in Los Angeles.

In this case the team must engage in a balancing analysis—weighing the relative advantages and disadvantages of each option. On the one hand, if the child moves to San Francisco with her mother, she will be leaving her father, her friends, and her school behind. On the other hand, if she remains with her father in Los Angeles, she will inevitably enjoy less contact with her mother. The child’s conclusion in the previous “closeness” analysis is helpful to the present inquiry. Assume, for example, that the child previously decided that she is closer to her mother. When balancing the loss of continuous contact with her mother versus the loss of continuous contact with her father, the child will probably award greater weight to the loss of contact with her mother given their closer relationship.

Of course, there are other factors weighing in the father’s favor in this scenario. Surely this child will be concerned about going to a new school and leaving her friends if she moves to San Francisco. These factors will likely count as substantial disadvantages to a custodial arrangement favor-

171. It should not be assumed that the child will inevitably be closer to one parent or the other. She may be equally close to each of them in which case other factors will be more influential to the final determination.

ing the mother. Significantly, the lawyer can serve a dual role here. First, he may be able to allay some of the child's fears about the potential move by discussing with the child the possibility of making new friends should she relocate. And second, a dialogue concerning whether or not the child makes friends easily could be valuable to the child in helping her to assess the proper weight to place on this factor.

Similarly, the team will surely discuss the fact that the child will miss her mother if she stays in Los Angeles. But the lawyer can ensure that the child understands that she can still get support from her mother over the telephone, or during periodic visits.

Obviously, closeness and continuity are only two factors of many to be considered by the child when formulating her overall preference. But by analyzing several of these sub-factors independently, the child is able to take a lot of disparate information and bundle it together into several distinct compartments. Once each factor has been evaluated in this way, the child's ultimate decision is broken down into perhaps seven substantial but manageable chunks, instead of 7,000 bits and pieces. Moreover, the child gains considerable experience along the way. By examining each factor in turn, she practices weighing costs and benefits, and evaluating short-term versus long-term consequences. Her competence for making decisions thus improves. It therefore seems reasonable to believe that this child will be better equipped to formulate a custody preference as a result of this experience than she was at the outset.

G. CREATIVITY AND THE IMPORTANCE OF CONSIDERING DIFFERENT ALTERNATIVES

Throughout this process, it is important for the lawyer to be creative and to consider alternatives not raised by the child's parents. For example, whereas in the present example the child cannot easily move back and forth between addresses, the same would not necessarily be true if the mother remained in Los Angeles.

In cases where the parents remain in close proximity to one another, a primary issue becomes the nature of the parents' relationship. If their relationship is cordial, an attractive alternative may be a custodial arrangement in which the child spends significant time with each parent, and where there is substantial interaction between the two parents. But all too often drop-off times turn into wartime for angry parents, and the child is made to feel like a traitor for crossing battle lines. In the present case, the parents are involved in contentious litigation. It is thus unlikely that their

interactions are friendly even if the child is present. Thus, if both parents stayed in Los Angeles, it would be essential for the lawyer to focus the child's attention on the potential ramifications of a lot of switching back and forth.

Joint custody may be an alternative worth considering in certain situations, even where each parent is requesting sole custody. The lawyer must always remember that the most compelling rationale for awarding separate counsel to children is the fact that children often have interests that conflict with those of their parents. In the above hypothetical, it may be best for the child to live in Los Angeles with her father during the school year and to relocate to San Francisco during the summer months. The lawyer should raise this possibility, and he and the child should engage in the same process with regard to this alternative as they did with the others.

H. PUTTING IT ALL TOGETHER: FORMULATING A PREFERENCE

After working through the appropriate sub-goals and considering a variety of both traditional and nontraditional alternatives, the child should be ready to formulate a preference. The lawyer's role in this final stage is to support and assist. For example, the lawyer should make sure the child understands that she should consider all of the previously examined sub-factors when making her final determination. The lawyer may also need to help the child with this compilation. The final decision, however, must be the child's.

By this point in the process, the child has acquired many valuable tools that will assist her with her final determination. She has gained important substantive knowledge and she has also improved her decision-making skills. Of course, formulating a custody preference will never be easy, but it is anticipated that after participating in this process, the majority of children will no longer find it impossible.

The Apprenticeship Model does not purport to address all of the complexities that arise when one undertakes to represent a child in a custody dispute. As the above hypothetical demonstrates, there is no formula for enhancing a child's competence for custody decisionmaking. And lawyers working with children in this process are entering somewhat uncharted territory. But it is undeniable that when it comes to making custody decisions, children have valuable information to contribute. Where this information can be accessed and utilized to enable children to participate in what is undoubtedly one of the most important decisions of their lives, we

should strive to facilitate that process. The Apprenticeship Model proposes one route to achieve this end.

V. CONCLUSION

Children should be given every opportunity to formulate custody preferences and to have those preferences advocated by their attorneys. After all, no one possesses more expertise about what it is like to live with mom or dad than the child. But whereas child development literature is replete with recommendations for eliciting information from children and providing instruction that enhances their abilities, existing law ignores these suggestions and instead classifies children based on inaccurate assumptions about their competence. The unfortunate result is the silencing of many children's voices.

The Apprenticeship Model addresses this problem by applying information from the field of child development in order to guide lawyers in making their clients' voices heard. Of course there is much more still to be done if we truly want to serve the best interests of child clients. But it is my hope that this Model serves as a meaningful first step in that direction.