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**The Role of Child's Counsel in State Intervention Proceedings:  
Toward a Rebuttable Presumption in Favor of Family Reunification**

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Andrew Hoffman\*

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*Scenario 1:*

*The Court appoints you to represent John, a six-year-old, removed by the State Department of Social Services ("DSS") due to allegations of lack of supervision, medical neglect, and a filthy home. John was found wandering outside at night -- hungry, cold, dirty, and confused. His mother could not be found. John looked emaciated. When the police arrived at the apartment, it was filled with garbage, dirty clothing, and a filthy mattress lying in the corner of a room. John spent the past few days in a foster home, where he has eaten everything in sight. He visited a doctor who determined that aside from an earache he is in good health. Although John transitioned well in the foster home, he cries himself to sleep every night, asking for "Mommy". When you visit his foster home, John shows no understanding of why he was removed from his mother's care. He states his foster mother is nice to him, but he wants to return to his mother. What position do you take on behalf of your client?*

*Scenario 2:*

*The Court appoints you to represent Lisa, a fourteen-year-old, removed from her mother's care by DSS due to alleged sexual and physical abuse by her mother's live-in boyfriend. Several times over the last few months, Lisa arrived at school badly bruised. She allegedly confided to a friend that her mother's boyfriend made unwanted sexual advances toward her. When confronted by school authorities about these remarks, Lisa denied them. Lisa's mother obtained a restraining order against her boyfriend, but dismissed it and he returned home. DSS placed Lisa in her friend's home. You visit Lisa at school; she tells you her mother's boyfriend hit her, denying sexual abuse. She appreciates her friend's family for accommodating her, but wants to return home. Lisa is aware the abuse will probably continue, but worries about her mother, because the boyfriend abuses her. Lisa feels the boyfriend is less likely to abuse her mother if Lisa is in the home. What position do you take on behalf of your client?*

*Scenario 3:*

*The Court appoints you to represent Reid, a nine-year-old removed from his parents' care after they were thrown out of a transitional living apartment through a homelessness program. Reid's family was transient for two years, and although he missed a lot of school and bounced between homes of various relatives and friends, he is reportedly reasonably emotionally stable and well-adjusted. You visit Reid in his foster home, in an upscale suburban neighborhood, where he is playing video games. Although he does not totally turn his attention away from the games, he does talk to you. Reid conveys anger at his parents for their situation. In his new environment, he can eat and play video games all he wants, provided he completes his homework. He says he*

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*wishes to live there forever. Reid tells you he hates his parents and refuses to speak with you further about his situation, turning sullenly back to his video games. What position do you take on behalf of your client?*

## **Introduction**

Should you advocate for John's return home? Lisa? Reid? Who decides the child client's position? What if adults involved in the case disagree as to the child's position? If you decide, how do you determine your client's position? What factors should you consider? How important is the client's expressed preference? What level of understanding of relevant legal proceedings might a six, eight, or fourteen-year-old child possess? How important are family ties? How important are material advantages or disadvantages? How important are ethnicity and culture? How important is socioeconomic status? Does the child have disabilities or unusual medical needs? Is the client's position ephemeral? Is the client's position conditioned on the occurrence or non-occurrence of certain future events?

The debate over the appropriate model for legal representation of a child in state intervention proceedings rages on. Despite the best efforts of many well-informed, well-intentioned people, we lack consensus as to the proper role for child's counsel in these cases.<sup>1</sup> Attorneys practicing in this field of the law are, perhaps, as rudderless as ever, with no clear direction regarding their responsibilities to the client. Scenarios like those described above, although troubling, are common. Attorneys for children are presented with similar excruciating ethical dilemmas on a daily basis.

Reasonable minds differ as to the proper approach for counsel in these cases. Models for child advocacy encompass a broad spectrum, from traditional client-centered advocacy where the attorney counsels the client, but ultimately advocates for the client's expressed preference, to

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<sup>1</sup> See, e.g., Bruce A. Green & Bernadine Dohrn, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1281-2132 (1996) (compilation of articles submitted by leading commentators for conference regarding ethical issues in the legal representation of children) (hereinafter "Green").

pure best interests advocacy, where the attorney accounts for a client's expressed preferences but ultimately advocates for what she perceives is in the child's best interests.<sup>2</sup> Today, few advocates occupy either extreme of this spectrum; virtually every model of representation combines elements of each, and falls somewhere in the middle. And, virtually every model of representation gives attorneys great discretion to determine the client's position in litigation.<sup>3</sup> With such a large degree of discretion, different attorneys inevitably reach different conclusions as to how to approach the case. Given this acceptance of broad attorney discretion, the debate seems utterly incapable of resolution.

Additionally, attorneys often make decisions regarding child clients that they are unqualified to make. Many questions posed by this article require a substantive, clinical understanding of children's social, emotional, and developmental needs, but an overwhelming majority of attorneys lack the background and training necessary to make these types of decisions.<sup>4</sup>

Perhaps the best way to eliminate attorneys' confusion in determining a child client's position is to decrease their sweeping discretion. Attorneys should not be divested of all discretion or decision-making authority; an attorney's exercise of independent judgment is the hallmark of the legal profession. Well-established standards are challenged in each case, and an attorney's ability to apply her understanding of legal standards to facts, and act accordingly, defines her role. However, to the extent the child's position can be prescribed to the attorney, this may clarify the role.

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<sup>2</sup> See generally, Green, *supra* note 1.

<sup>3</sup> The American Bar Association (ABA) and the National Association of Counsel for Children (NACC) promulgate standards for representing children in "abuse and neglect cases". The ABA adopted its "Standards Of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases" in 1996; NACC adopted the ABA's standards with amended Sections B-4 and B-5, effective 1999. These standards are fairly representative of the considerable degree of discretion vested in attorneys who practice in this field of the law.

<sup>4</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 104-105 (1997).

The appropriate model for child's counsel in state intervention cases is to presume the child's position in litigation is reunification with her family. Unless counsel is presented with credible evidence that rebuts this presumption, counsel should advocate for reunification on the child client's behalf. While unsolved issues remain with this model, it represents a vast improvement over other frameworks. The concept of a rebuttable presumption that favors family reunification informs a perpetually vexing issue for child advocates.

## **I. Legal Framework for State Intervention Cases**

### **A. State Intervention**

States provide governmental intervention in private family life to protect children from abuse and neglect.<sup>5</sup> Civil in nature, rather than criminal, these proceedings are referred to interchangeably as "state intervention" cases, "child welfare" cases, "abuse and neglect" cases, and "care and protection" cases.<sup>6</sup> The underlying principle in these cases, regardless of state-specific procedures, is the state should protect children from parental abuse or neglect and intervene in family life, on behalf of children, if necessary to protect them.<sup>7</sup>

The scope and duration of intervention depends on the child's need for protection. In many cases, the state intervenes minimally and temporarily to assist a family in resolving problems, and subsequently removes itself from their affairs. This is often done without initiating legal process. Sometimes the family's problems are addressed without removing the

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<sup>5</sup> Jean Koh Peters, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2001) (general survey of various child welfare statutory schemes).

<sup>6</sup> This article is concerned with involuntary rather than voluntary state intervention. Although states may have some system for families to turn to voluntarily for help, that type of state intervention is not the subject of this article. The sole subject of concern here is those cases in which the state acts of its own volition, without a request from the family.

<sup>7</sup> See, e.g., MASS. GEN. LAWS ch. 119 §1 (2003), "It is hereby declared to be the policy of this commonwealth . . . to provide substitute care only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual, and moral development."

child from the home. In fact, the state is obligated to first explore remedies short of removal.<sup>8</sup>

Unfortunately, the state often removes children from their homes to address abuse and neglect. To do so, the state must initiate legal proceedings and establish the necessity of removal.<sup>9</sup> Sometimes removal, and resulting separation, is of short duration, perhaps a few days or weeks. Other times, the child is removed from her parent(s) for several months, or years, prior to reunification. During the separation period, parents may address issues that led to removal, and eliminate further risk of abuse or neglect.<sup>10</sup>

In some cases, because parents fail to achieve sufficient progress, or because the child's best interests otherwise dictate, the separation becomes permanent; through adoption, guardianship, or long-term foster care, the child never returns to the parent.<sup>11</sup> In many of these cases, the Court terminates parental rights, meaning the parent no longer has a legal right to involvement in the care and upbringing of her child, who is freed for adoption.<sup>12</sup>

As the state must use reasonable efforts to address risks of abuse or neglect without removing the child, it must also employ reasonable efforts to assist in family reunification after removal.<sup>13</sup> The state must attempt to work with parents and children to address issues that led to

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<sup>8</sup> The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §620-628 (1980), mandates the state to make reasonable efforts to prevent removal of children from their families, or, alternatively, to reunify children with their families after removal. The Adoption and Safe Families Act ("ASFA"), 42 U.S.C. §671(a)(15), passed in 1997, contains further refinements of this concept. *See, also*, *Suter v. Artist M.*, 503 U.S. 347 (1992) (discussing general duty of state to make reasonable efforts).

<sup>9</sup> *See, e.g.*, MASS. GEN. LAWS ch. 119 §21-24 (2003), (setting forth Massachusetts' statutory scheme for the removal of children from the custody of their parents). In Massachusetts, the state must prove by a "fair preponderance of the evidence" at the initial removal that the child is at immediate risk of abuse or neglect. *Care and Protection of Robert*, 408 Mass. 52 (1990).

<sup>10</sup> 42 U.S.C. §671(a)(15)(B).

<sup>11</sup> *See, e.g.*, MASS. GEN. LAWS ch 210 §3(c), as an example of the factors a court must consider in determining whether the best interests of the child mandate termination of parental rights.

<sup>12</sup> *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113,119 (1984) ("When a child is adopted, 'all rights, duties and other legal consequences of the natural relation of child and parent . . . except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred.' G. L. c. 210, § 6. The allowance of a petition to dispense with a parent's consent to his child's adoption means that the parent no longer has the power to prevent the termination of these rights, duties, and other legal consequences of his relation to his child.")

<sup>13</sup> 42 U.S.C. §671(a)(15)(B).

removal. With limited exceptions,<sup>14</sup> only after the state clearly exhausts reasonable efforts to reunify, can the remedy shift from reunification to adoption, guardianship, or long-term care.

### **B. Fundamental Rights, Presumptions, and Due Process**

Individual and family autonomy to regulate affairs privately, without threat of unwarranted state intervention, is a constitutionally-protected fundamental right.<sup>15</sup> However, the right is not absolute, and must be compromised for competing rights.<sup>16</sup> Thus, the state may intrude on a parent's rights regarding her children but must justify its actions by proving the child is at risk of abuse or neglect.<sup>17</sup> It is not simply the parent's rights *vis-à-vis* the child at stake: the child is has a corresponding interest in family unity, in maintaining a fundamental liberty interest in her family's maintenance without unwarranted intervention.<sup>18</sup> The child shares the parent's right to state justification for a compelling need to interfere in her family life.

Unsurprisingly, the child welfare system places great emphasis on the importance of family unity and cautions against unwarranted state intervention. The status quo is family

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<sup>14</sup> 42 U.S.C. §671(a)(15)(D). (The state is not required to make reasonable efforts toward reunification in cases in which a parent: has subjected a child to aggravated circumstances (including but not limited to abandonment, torture, chronic abuse, and sexual abuse); committed, aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child of the parent; or had his or her parental rights to a sibling of the subject child involuntarily terminated.

<sup>15</sup> *Santosky v. Kramer*, 455 U.S. 745,758-759 (1982).

<sup>16</sup> *See, e.g., Custody of a Minor* 375 Mass. 733,748 (1978) ("[T]hese "natural rights" of parents have been recognized as encompassing an entire private realm of family life which must be afforded protection from unwarranted State interference. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842 (1977), and cases cited. In light of these principles, this court and others have sought to treat the exercise of parental prerogative with great deference." (citations omitted)

<sup>17</sup> "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation ... if it appears that parental decisions will jeopardize the health or safety of the child..." *Wisconsin v. Yoder*, 406 U.S. 205, 233-234 (1972) (citation omitted); *See also, e.g., MASS. GEN. LAWS* ch 119, §24, "If... there is reasonable cause to believe that the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child to [the state]..."

<sup>18</sup> *Santosky v. Kramer*, 455 U.S. at 760 ("...until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); *see also, Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 588 (1981) ("there exists a 'substantial and impressive consensus' among experts in the field of child development that 'disruption of the parent child relationship carries significant risks' for the child" (citations omitted)).

unity.<sup>19</sup> A parent is presumed fit, and a child's best interests are presumed served by remaining with the parent.<sup>20</sup> The state bears the burden of proving that altering the status quo would protect the child from abuse and neglect. Until it does so, the state may not intervene in private family matters.<sup>21</sup>

As a result, families in state intervention cases maintain considerable due process rights. In *Santosky v. Kramer*,<sup>22</sup> 455 U.S. 745 (1982), the Supreme Court applied the "clear and convincing evidence" standard to state intervention proceedings to terminate parental rights, holding that "Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence."<sup>22</sup> This is an intermediate standard, below the criminal "beyond reasonable doubt" standard, and above the civil "fair preponderance of the evidence" standard.<sup>23</sup>

The "clear and convincing" standard is often articulated in light of parental rights. However, a parent's rights to a child *and* a child's independent interest in family integrity are

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<sup>19</sup> See, e.g., MASS. GEN. LAWS ch. 119, §1 (2003) (It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself... [is] unable to provide the necessary care and protection...").

<sup>20</sup> *Santosky v. Kramer*, 455 U.S. at 760.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 747-48.

<sup>23</sup> Again, the scope and duration of state intervention depends on the circumstances of the case. The range includes: no separation of parent and child; short-term separation with custody vested temporarily in the state; longer-term separation with a finding of parental unfitness and "permanent" custody vested in the state prior to eventual reunification (permanent custody does not mean a final resolution - it is a legal construct intended simply to differentiate from temporary custody); or permanent separation with a finding of parental unfitness and resulting in adoption, guardianship, or long-term foster. While the standard for initial removal is the lower "fair preponderance of the evidence" (see, e.g., *Care and Protection of Robert*, 408 Mass. 52 (1990)), the high standard of "clear and convincing evidence" set forth in *Santosky v. Kramer* has been extended to apply not just to the termination of parental rights but to any decisions of parental fitness and permanent custody. See, e.g., *Custody of a Minor*, 389 Mass. 755,766 (1983). Further, it should be noted that the typical statutory framework allows for the entire range of above outcomes in the filing of a petition alleging abuse or neglect. In other words, the same proceeding that allows the state to obtain temporary custody of a child could eventually result in the termination of parental rights. See, e.g., MASS. GEN. LAWS ch.119, §§24-26 (2003).

both judged by this standard.<sup>24</sup> The state must prove by clear and convincing evidence that a child needs to be permanently separated from her parent to protect her from abuse and neglect.

## **II. The Attorney's Role in Our Legal System**

### **A. The Adversarial System**

A description of an attorney's role in the adversarial legal system may overstate the obvious, but in child welfare law these basic notions are frequently ignored. The adversarial system requires an impartial judge and a zealous advocate. The goal is a reasoned, informed decision upon full evidentiary review.<sup>25</sup> That a litigation position conflicts with justice, or another's perception of a client's best interests, does not excuse counsel from presenting that position in Court.<sup>26</sup> Furthermore, the Court is not bound by any party's voice. Through rules of evidence and procedure, checks and balances are designed to produce an informed decision based on proffered evidence.<sup>27</sup>

Certain signature attributes of the attorney's role are well-established. For example, the duty of loyalty to client is indispensable. The attorney must serve only the client, and must not commit to competing parties' interests or to the attorney's personal interests. Where the attorney's representation might be compromised by allegiance to a conflicting interest, she must discontinue that representation.<sup>28</sup> The attorney's representation of a client is not an endorsement

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<sup>24</sup> Santosky v. Kramer at 760.

<sup>25</sup> Some commentators have argued that an adversarial system is inappropriate for child welfare matters, and there does appear quite a bit of validity to this position. (See, e.g., Weinstein, *supra* note 4). Alternative models for dispute resolution, such as mediation or collaborative law, hold some appeal. This issue, however, is beyond the scope of this article. Regardless of whether the adversarial system is appropriate, or is preferable to other models, the reality is that our current system is the adversarial system and until that changes we must analyze the role of counsel in light of the adversarial model.

<sup>26</sup> MODEL RULE OF PROF'L CONDUCT R. 1.2(b) (2003) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.").

<sup>27</sup> MODEL RULES OF PROF'L CONDUCT, Preamble (8) (2003) ("...when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.")

<sup>28</sup> MODEL RULE OF PROF'L CONDUCT R. 1.7 (2003).

of the attorney's personal views or beliefs.<sup>29</sup> If the attorney cannot in good conscience advocate for the client's position because it runs counter to the attorney's views, the attorney may withdraw. The attorney is not permitted to subvert the client's position or interests to accommodate his conscience.<sup>30</sup>

### **B. Representing a Client with Diminished Capacity**

An attorney's role is premised on the assumption that the client is capable of understanding the nature of the proceedings and of directing counsel in the representation. There are a variety of contexts, however, in which clients are incapable. Many clients are unable to decide important legal matters or cooperate with the attorney in representation due to age or disability.

The Model Rules of Professional Conduct address this situation, but do not provide concrete guidance. Model Rule 1.14, "Client With Diminished Capacity", instructs attorneys to maintain a normal attorney-client relationship as far as reasonably possible; when impossible, an attorney may take reasonably necessary protective action, including consulting with individuals or entities that can protect the client and, in appropriate cases, seeking appointment of guardians ad litem, conservators, or guardians. Although well-intentioned, such language is imprecise. How can an attorney determine if a client is capable of making adequately considered decisions? What standard should an attorney employ in this analysis? What does an attorney do after consulting "individuals" or "entities" with input? Model Rule 1.14 provides no direction regarding use of information gained from this kind of communication.

### **III. The Attorney's Role in Child Welfare Proceedings**

In most legal proceedings, the determination of a client's position is fairly

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<sup>29</sup> MODEL RULE OF PROF'L CONDUCT R. 1.2(b) (2003).

<sup>30</sup> MODEL RULE OF PROF'L CONDUCT R. 1.7 (2003).

straightforward. However, child welfare cases are complicated by the question of the client's capacity for adequate decision-making with regard to representation. Child welfare proceedings are significantly different from other proceedings and the juvenile or family court, rather than a court of general jurisdiction, is accepted as their proper context.<sup>31</sup> Likewise, child welfare proceedings are not simply adversarial in nature, as normal standards for adversarial legal representation are altered for child clients.<sup>32</sup> The scenarios provided at the beginning exemplify situations in which normal modes of legal representation should be altered due to clients' competency. The manner and extent of alteration, however, remains disputed.

Some experts attest the proper model for child advocacy is the "best interests" approach, wherein the attorney considers the child's stated desire but ultimately advocates for what she believes is in the child's best interests.<sup>33</sup> In contrast is traditional client-directed advocacy, where, after full counseling and advice, the attorney advocates for the reasonably competent child client's expressed preference.<sup>34</sup> Most attorneys fall between these two poles and attempt to balance competing interests. All solutions are flawed.

#### **A. "Best Interests" Model**

Under the "best interests" approach, the attorney's asserted position may not be consistent with the child's expressed preference. Often, application of the best interests model empowers attorneys to diverge from clients' expressed preference due to personal discomfort. While this *per se* qualifies as advocacy, and may assuage an attorney's conscience, it retains few vestiges of the adversarial system; it reflects no true effort to ascertain a child's expressed preference,

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<sup>31</sup> See, e.g., MASS. GEN. LAWS ch. 211B, §1 (2003) (creating jurisdiction of the Juvenile Court)

<sup>32</sup> See generally Weinstein, *supra* note 4.

<sup>33</sup> See, e.g., Richard Kay and Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401 (1973).

<sup>34</sup> Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76,87 (1984).

leaving the child essentially unrepresented.

Some believe the adversarial system is incompatible with determining a child's best interests.<sup>35</sup> Regardless, there is no doubt the best interests standard is incredibly vague. It is "not a standard, but a euphemism for unbridled judicial discretion."<sup>36</sup> "Regardless of how it is measured, the best interests of children are generally indeterminate, and largely a matter of values."<sup>37</sup> Unsurprisingly, there is a well-established history of bias by various child welfare system actors, including judges, child welfare agencies, and service providers, on the basis of class, race, and lifestyle.<sup>38</sup> Whether the best interests of a child can be determined in an adversarial system remains questionable, and there are surely myriad cases where a child's future hinges solely on decision-makers' personal biases.

The notion that attorneys can objectively conclude what serves a child's best interests is preposterous. Attorneys are no more inherently objective than anyone else. They struggle to divest advocacy from prejudice, bias, and belief about how people should live, and how children should be raised. Attorneys hold different personal beliefs, and advocate based on their beliefs, resulting in divergent outcomes. That children's positions differ according to who is appointed as their attorney is untenable.<sup>39</sup>

An attorney's opinion should be irrelevant to a case. Attorneys forced to advocate for an outcome they find unacceptable should withdraw, rather than advocate an outcome that makes them more comfortable. The judge, not the attorney, is vested with broad discretion to exercise

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<sup>35</sup> See generally Weinstein, *supra* note 4.

<sup>36</sup> Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, CHILD, PARENT, AND STATE 3, 5 (S. Randall Humm et al. eds., 1994).

<sup>37</sup> N. Dickon Reppucci & Catherine A. Crosby, *Law, Psychology, and Children: Overarching Issues*, 17 LAW & HUM. BEHAV. 1, 4-5 (1993) (quoting ROBERT H. MNOOKIN, CHILD, FAMILY & STATE: PROBLEMS & MATERIALS ON CHILDREN AND THE LAW 163-64 (1978)).

<sup>38</sup> Dorothy Roberts, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8-9, 17, 19-25, 27, 35, 38, 50-51 (2002) (citing research studies documenting disparate treatment of children and families in the child welfare system on the basis of race and socioeconomic status).

<sup>39</sup> Guggenheim, *supra* note 34, at 77.

judgment for the good of the child.<sup>40</sup> The adversarial system in child welfare proceedings depends on the judge's wisdom, not the attorney's. In the event the judge is guilty of poor judgment, the appellate process is designed to remedy the error.<sup>41</sup> The system fails when the attorney, rather than the judge, focuses on best interests.

### **B. "Client-Directed" Model**

At the opposite end of the spectrum is the client-directed model. Clinicians argue that although a child might be old enough to articulate a preference, children lack the developmental capacity to appreciate the nature of proceedings and ramifications of their decisions, and thus, honoring their stated desires through legal advocacy is fruitless.<sup>42</sup> As clinicians often posit, children are not little adults; just as their bodies are not physically mature, children's minds have not developed full capacities for logic, reason, and judgment.<sup>43</sup>

Opponents of the pure adversarial model mischaracterize the approach as blind adherence to a child's directives. In response, proponents emphasize the counseling aspect of legal representation. An attorney should only take a client's direction after having provided the client with information and advice necessary to allow for a fully informed, carefully reasoned

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<sup>40</sup> The state child welfare authorities, and courts, are to be guided by the child's best interests. *See, e.g.*, statement of policy contained in MASS. GEN. LAWS ch. 119, § 1 (2003). "The health and safety of child shall be of paramount concern and shall include the long-term well-being of the child." *Id.* Although the state may have other agendas (e.g., financial or political considerations, desire to punish the parent, personal animus on the part of the case worker, administrative difficulties), at least in theory the child's best interests are included in the state's position. Often there is a guardian ad litem, court-appointed special advocated (CASA), court-appointed investigator, or other "best interests" advocate to advocate for what he or she believes is in the child's best interests. Thus, there are plenty of other actors available to advocate for the child's best interests; there is no need to assign yet another person for this purpose in the form of the child's attorney.

<sup>41</sup> *See, e.g.* MASS. GEN. LAWS ch. 119, §27 (2003) (allowing an appeal as of right from an adjudication by the juvenile court that the child is in need of the care and protection of the state).

<sup>42</sup> Sarah Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAMILY LAW QUARTERLY 287, 309-320 (1983) (discussion of means for assessing a child client's capacity to make decisions in regard to directing the litigation).

<sup>43</sup> *See, generally*, SHANNON BROWNLEE ET AL, *Inside the Teen Brain*, U.S. NEWS & WORLD REPORT, Aug. 9, 1999, at 44-54 (research has shown that adolescents' brains, studied through magnetic resonance imaging (MRI), actually work differently than adult brains).

decision.<sup>44</sup> Even if this is what the client-directed model means, it is doubtful that any child can make a fully informed and adequately considered decision in a complex child welfare proceeding. Problems with application of the client-directed model in child welfare proceedings arise when the child client is unquestionably immature or otherwise incapable of making adequately considered decisions. Codes of professional ethics, and other ethical codes promulgated by organizations like the ABA and NACC, unsuccessfully attempt to provide direction to attorneys for clients under disability.<sup>45</sup>

This advocacy model directs an attorney to ascertain, to the greatest degree possible from available information, the child's position if the child were capable of adequately considered decision-making.<sup>46</sup> To do this, the attorney must make subjective predictions regarding what the child would want in a given situation. This is commonly referred to as "substituted judgment".<sup>47</sup>

### C. Irrelevance of Distinction Between the Models

In many cases, both models -- "substituted judgment" and "best interests" -- result in the same outcome, though this is far from universal. Scenario Two presents a case where substituted judgment for a client incapable of making an adequately considered decision may result in a different litigation position than application of a best interests model. In this case, attorneys

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<sup>44</sup> See, e.g., Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures, § 1.6, at [www.mass.gov/cpcs/manuals/pcmanual/MANUALChap4Civil.htm](http://www.mass.gov/cpcs/manuals/pcmanual/MANUALChap4Civil.htm) (last visited April 22, 2004).

<sup>45</sup> See ABA and NACC standards, *supra* note 3. Nothing about these standards is manifestly unreasonable, however, due to unavoidable, inherent ambiguity, their application to real cases leaves them open to interpretation.

<sup>46</sup> See, e.g., Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures § 1.6, *supra* note 44.

<sup>47</sup> Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 751 (1977):

[W]e realize that an inquiry into what a majority of people would do in circumstances that truly were similar assumes an objective viewpoint not far removed from a 'reasonable person' inquiry. While we recognize the value of this kind of indirect evidence, we should make it plain that the primary test is subjective in nature – that is, the goal is to determine with as much accuracy as possible the wants and needs of the individual involved. This may or may not conform to what is thought wise or prudent by most people. *Id.* at 750-751.

applying best interests would advocate for Lisa to remain away from her mother due to the risk posed by the boyfriend. Alternately, attorneys using substituted judgment would advocate for Lisa's expressed preference to return to her mother's care.

The differences between substituted judgment and best interests are largely immaterial to the present discussion, because both involve projecting an attorney's judgment and opinions on their client. An attorney cannot ascertain the expressed preference of an infant or manifestly immature child. And, regarding older children who can express preferences, if the attorney doubts the child fully understands the nature of the proceeding, or doubts the child can make an adequately considered decision, she interposes her judgment for her client's anyway.<sup>48</sup> Thus, in the child advocacy context, the same problems underlying the best interests model often exist in the client-directed adversarial model.

#### **D. Other Difficulties**

##### **1. Terminology**

Difficulties in ascertaining the proper role for child's counsel in state intervention proceedings often stem from inconsistent definitions. The Child Abuse Prevention and Treatment Act (CAPTA)<sup>49</sup> conditions federal funding to states on the appointment of a guardian ad litem for children in abuse and neglect cases. However, CAPTA does not specify the role the guardian must play, and different states meet the requirement differently. Some states provide "counsel,"<sup>50</sup> while others provide "guardian ad litem,"<sup>51</sup> "attorney guardian ad litem,"<sup>52</sup> "lawyer-guardian ad litem,"<sup>53</sup> or "law guardians."<sup>54</sup> Of states that provide for guardian ad litem

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<sup>48</sup> MODEL RULES OF PROF'L CONDUCT R 1.14 (2002).

<sup>49</sup> 42 U.S.C. § 5101-06 (1974).

<sup>50</sup> *See, e.g.*, MASS. GEN. LAWS ch. 119, §29 (2003).

<sup>51</sup> *See, e.g.*, NEB. REV. STAT. § 43-272(2) (1998).

<sup>52</sup> *See, e.g.*, UTAH CODE ANN. §78-3a-912 (2002).

<sup>53</sup> *See, e.g.*, MICH. COMP. LAWS. § 712A.17d (2001).

<sup>54</sup> *See, e.g.*, N.Y. JUD. CT. ACTS LAW §241 (McKinney 1999).

or other representatives of a child's "best interests," some require the guardian ad litem be an attorney;<sup>55</sup> while others allow laypersons.<sup>56</sup>

Even if terminology were consistent, application remains murky. Whether "counsel," "guardian ad litem," "attorney ad litem," or another form of representation, there is no specific guidance regarding the role. Without qualifications or training, the advocate is expected to make decisions for children and, as a result, many decisions are based on personal values and opinions. To prevent this, regardless of whether a state provides "counsel", or a "guardian ad litem", the presumptive reunification model can and should be applied.

## 2. Lack of Accountability

Another problem is that an attorney's determination of a child client's position is unchecked.<sup>57</sup> While governing bodies can take disciplinary action against attorneys for ethical and professional lapses, the most minimally capable attorney can articulate colorable bases for subjective determinations of clients' positions. With such broad discretion vested in attorneys to make determinations, attorneys are rarely held accountable for unreasonable decisions.

Likewise, resort to judicial enforcement is of little avail. Ordinary clients rarely prevail on appeals based on ineffective assistance of counsel because counsel maintains such broad discretion.<sup>58</sup> In *Care and Protection of Georgette*, for example, Massachusetts' highest court dispensed with an appellant child's claim of ineffective assistance of counsel where counsel

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<sup>55</sup> See, e.g., WIS. STAT. ANN. § 48.235 (West 2003).

<sup>56</sup> See, e.g., FLA. STAT. ANN. §39.820 (2003).

<sup>57</sup> See, generally, *Care and Protection of Georgette*, 439 Mass. 28 (2003) (discussing standards and procedures for a child client's claim, on appeal, of ineffective assistance of counsel). While a mechanism for reviewing child's counsel's performance on appeal does exist, because of the broad latitude accorded counsel in determining the client's litigation position, it provides little opportunity for meaningful scrutiny.

<sup>58</sup> In Massachusetts, for example, the standard for ineffective assistance of counsel is 1) whether counsel's performance fell below that expected of an "ordinary fallible lawyer" and 2) if so, whether counsel's performance deprived the client of an otherwise available defense or claim. *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974); *Care and Protection of Stephen*, 401 Mass. 144 (1987) (applying *Saferian* standard to care and protection cases).

applied a best interests standard in his representation and the child could not establish the outcome would have been different had her attorney not done so.<sup>59</sup> The attorney's formulation of his client's litigation position was not subject to review in the normal course of appointment, and the child was unable to complain to a judicial body regarding her attorney's performance.

*Care and Protection of Georgette* reflects the inherent problem of a lack of accountability. The primary checks on attorney malfeasance -- the threat of grievance or a malpractice suit -- do not apply to appointed counsel for children. Given the volume of cases filed, any system that monitors or reviews methods by which counsel formulates litigation positions of child clients would be unduly cumbersome. Further, but for occasional appellate claims of ineffective assistance of counsel, as in *Care and Protection of Georgette*, there are no real means for reviewing a child's counsel's formulation of a litigation position.

#### **IV. Solution: Presumptive Reunification**

So where does all of this leave us? We have a poorly defined role of child's counsel, susceptible to various interpretations based on attorneys' personal biases and opinions, that evades extensive efforts at clarification. The debate cannot continue along the same lines; the parameters must be changed. The solution is presumptive reunification. The status quo is that a client desires reunification. Under this model, the attorney must remain true to reunification unless presented with clear, credible evidence supporting abandonment of the presumption.

##### **A. Public Policy Dictates Presumptive Reunification**

The presumptive reunification model finds its genesis in a basic tenet of child welfare public policy: where possible, families belong together, and children belong with their parents.<sup>60</sup> As a society, we recognize children are to remain with parents unless there is a clear need to

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<sup>59</sup> *Care and Protection of Georgette*, 439 Mass. 28, 28 (2003).

<sup>60</sup> *See, e.g.*, MASS. GEN. LAWS ch. 119, § 1 (2003).

remove them, and even after removal we must do whatever is reasonably necessary to reunify them.<sup>61</sup> Children's interests are best served by a safe, healthy, happy relationship with their family.<sup>62</sup> In an ideal world there would be no foster care, adoption, and or familial disruption. Foster care and adoption reflect crisis: death, illness, unwanted pregnancy, economic hardship, inadequate parenting. It is unassailable that a child's ideal situation includes loving parents who provide for their child's emotional, physical, and material needs.

The Supreme Court incorporated this public policy perspective in child welfare cases; through a heightened standard of clear and convincing evidence, parents are presumed legally fit to care for their children until otherwise proven.<sup>63</sup> It is impermissible to presume that child and parent have adverse interests prior to a legal finding that a parent is unfit.<sup>64</sup> The child welfare system thus contains an inherent, rebuttable presumption favoring reunification, which the judge considers in deciding a child's fate.

This presumption should guide attorneys' decisions regarding advocacy on behalf of child clients. If the legal analysis of a child's situation is based on a rebuttable presumption favoring reunification, it is consistent and appropriate for attorneys to incorporate the presumption in representation. The attorney does not determine the child's position starting from a blank slate -- the explicit status quo favors reunification. The attorney must recognize that absent factors indicating otherwise, the child has an interest in remaining with, or returning to, her family.

## **B. Prior Configurations of the Model**

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<sup>61</sup> *See, e.g.*, 42 U.S.C. § 671(a)(15)(B) (2000).

<sup>62</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>63</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>64</sup> *Id.*

Other notable commentators support this mode of representation. Martin Guggenheim broached this model for very young children,<sup>65</sup> drawing upon similar logic of other experts.<sup>66</sup> Although couched within a larger argument questioning the wisdom of appointing counsel for very young children in various legal proceedings, the reasoning is consistent with presumptive reunification. A child's interests are presumed best served by maintaining the family unit; the presumption remains that until there is a finding the parent neglected or abused the child, the child *per se* favors family autonomy; ergo, until there is a finding of abuse or neglect, counsel for very young children must advocate against state intervention.

Guggenheim's approach is more extreme and less flexible than the presumptive reunification model proposed here. For instance, he makes no allowance for rebutting the presumption. There are other problems with it, and other differences from the presumptive reunification model,<sup>67</sup> but the theory reflects how the model finds support in mainstream thought.

### **C. An Analogous Context: Involuntary Psychiatric Treatment**

Because child welfare proceedings are unique, few analogous contexts exist to compare the roles of counsel. However, one helpful context is that of involuntary psychiatric treatment. When the state interferes with an individual's right to personal autonomy for involuntary commitment to a mental health facility and/or involuntary administration of medication to protect a person from harming herself or others, the nature of the legal proceeding is a determination whether she is competent to make adequately considered decisions regarding her

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<sup>65</sup> Guggenheim, *supra* note 34, at 138-39.

<sup>66</sup> Douglas Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217 (1981); JOSEPH GOLDSTEIN, ANNA FREUD, ALFRED SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (Free Press 1980).

<sup>67</sup> *Id.*

own care.<sup>68</sup> Although the purpose of mental health proceedings is different than that of child welfare cases, both contexts maintain considerations regarding how the attorney should determine the client's litigation position.

Massachusetts is the only jurisdiction in which a real organized defense bar in mental health cases exists. As a result, there is little literature on the proper role for attorneys in these cases, and probably little consensus. In the absence of organized discourse on the matter, Massachusetts practice standards are instructive.

In Massachusetts, for attorneys representing individuals in mental health cases, there is a presumption that the client opposes the state's proposed course of treatment.<sup>69</sup> Here, an attorney appointed to represent an individual does not start from a clean slate. The attorney neither advocates for what she believes is in the client's best interests, relies on the client's instructions for direction in the representation, nor attempts to determine what the client would want if competent to articulate a preference. Instead, the attorney acknowledges the status quo; that the client wishes to remain free from government intrusion as to her ability to make decisions regarding psychiatric care, and advocates against granting such authority to the state.<sup>70</sup>

Attorneys in mental health proceedings cannot be expected to assess their clients' competence or ability to understand the nature of legal proceedings and relevant consequences. An attorney cannot determine a client's position according to her beliefs of what is best for the client, based on experiences, value systems, and biases. The result would be a cavalcade of inconsistency and unfairness, dictated by attorney whim rather than objective inquiry or

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<sup>68</sup> See, e.g., MASS. GEN. LAWS ch. 123, § 12 (2003) ("Any physician... who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person...").

<sup>69</sup> See, e.g., CPCS Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings, Standard 1, available at [www.mass.gov/cpcs/mhp/mhpstds.htm](http://www.mass.gov/cpcs/mhp/mhpstds.htm) (last visited Apr. 20, 2004).

<sup>70</sup> *Id.*

principled reasoning. Yet, such a system reflects the current state of legal representation in child welfare cases.

The mental health system avoids this problem by essentially assigning counsel's role. With few exceptions, counsel is not authorized to make critical decisions for the client and can only to force the state to bear its burden of proof.<sup>71</sup> Simply stated, counsel for respondents in mental health proceedings must presume the client is opposed to state intervention and must advocate accordingly. Adoption of a similar presumption for child's counsel in child welfare cases would alleviate much confusion.

#### **D. Rebutting the Presumption**

The presumptive reunification model, as explained thus far, specifies that absent credible evidence to the contrary the child's position is reunification. This begs the question: what constitutes this type of credible evidence?

To avoid the major cause of ambiguity under current practice standards, namely reliance on attorney discretion to determine the child client's position, we must seek objective factors. Absent objectivity, allowing for rebuttal of the reunification presumption will plunge attorneys back into the current morass. A rebuttable presumption is virtually meaningless unless there are well-defined criteria guiding its application.

In theory, there should be few instances of objective factors that dictate abandoning the reunification presumption. One example is drawn from the Adoption and Safe Families Act (ASFA),<sup>72</sup> which recognizes certain situations where the legal presumption favoring reunification should be forsaken. Specifically, ASFA exempts the State from making reasonable efforts to reunify if:

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<sup>71</sup> *Id.*

<sup>72</sup> 42 U.S.C. § 671(a)(15) (2000).

- (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
- (ii) the parent has--
  - (I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
  - (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
  - (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
  - (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
- (iii) the parental rights of the parent to a sibling have been terminated involuntarily...<sup>73</sup>

An attorney should presume reunification because our laws support it. Thus, it follows that if those same laws eliminate the presumption in specifically enumerated situations, the attorney should abandon it. Although this is logically consistent, the result may be somewhat harsh in its application to reasonably foreseeable situations. For instance, it seems unquestionably fair to dispense with the reunification presumption when a parent has subjected a child to extreme cruelty. However, reasonable minds might differ as to whether involuntary termination of a parent's rights as to one child should lead to a presumption that another child would not want to remain with that parent. This exception to the reasonable efforts requirement is efficient, but does not necessarily equate to a child's desire for her relationship with her parent.

Another ground for abandoning the presumption favoring reunification is that the child's position might constitute the clearly expressed preference of a mature child. This prospect leads back to the morass we seek to evade. What constitutes a mature child? How is an attorney qualified to make this determination? When should an attorney give full weight to a child's

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<sup>73</sup> 42 U.S.C. § 671(a)(15)(D)(i),(ii),(iii).

expressed preferences? How is this different than the models presently in place? There are no clear answers to these questions, and no concrete standards for determining if a child is sufficiently mature to direct the attorney to advocate for their stated desire against reunification. This realization highlights the very essence of the presumptive reunification model; if the attorney is unsure, the status quo is reunification.

An applicable analogy can be drawn from professional football, with its use of automatic replay to review referee decisions. The validity of the referee's call is subject to videotape review, and is overturned only if convincing evidence dictates. If the videotaped replay is inconclusive, the call on the field stands. The same standard can be applied to presumptive reunification in the representation of children. Absent conclusive evidence to the contrary, the "call on the field" -- reunification -- stands. If there is doubt regarding a child's maturity to direct counsel, or the child's statements are ambiguous, counsel must retain the reunification presumption.

In reality, the presumptive reunification model will be most helpful in "middle-of-the-road" cases.<sup>74</sup> In some cases, the evidence of maltreatment is so manifest, or the need to move toward termination of parental rights so apparent, that the final outcome is a foregone

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<sup>74</sup> A significant majority of child welfare cases involve neglect, rather than headline-grabbing allegations of physical or sexual abuse. See Administration for Children and Families, U.S. Department of Health and Human Services, *Child Maltreatment 1998: Reports from the States to the National Child Abuse and Neglect Data System* (2000), available at [www.acf.dhhs.gov/programs/cb/publications/cm98/](http://www.acf.dhhs.gov/programs/cb/publications/cm98/) (last visited April 20, 2004) (illustrating that in 1998, for instance, 54% of substantiated cases involved neglect, 23% involved physical abuse, and 12% involved sexual abuse). One commentator suggests that for children in foster care, cases can be viewed in three categories. The first is the most serious cases, which carry criminal implications because of the severity of the harm to the child. The second is cases that are serious but do not necessitate criminal proceedings (e.g., a single instance of physical injury to a child, such as an unexplained bruise or scratch). The third is those cases in which the risk of harm is relatively low, and the parents may be willing to some extent to work with child welfare authorities to address the issues that led to removal (e.g., substance abuse with no other protective concerns, lack of supervision, missed medical appointments). It is estimated that the first category of cases accounts for only 10% of the children in foster care. JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION* 124-25 (Harvard University Press 1998).

conclusion. However, child welfare agencies tend to overreact to perceived threats, and sometimes remove children based on ulterior motives like personal animus by a social worker.<sup>75</sup>

In most cases, there are compelling arguments that can be made for *and* against reunification, and reasonable minds could differ as to the outcome. In these cases, the presumptive reunification model would help. Under present standards allowing counsel to exercise broad discretion to determine the child client's position, the attorney would likely advocate for continued separation.<sup>76</sup> In contrast, under the presumptive reunification model, the attorney's direction is clear. In effect, the majority of cases will result in child's counsel advocating for reunification due to a lack of a clear rebuttal. If the factors rebutting the presumption are inconclusive, counsel adheres to the status quo and advocates for reunification.

## VI. Criticism and Doubts

### A. Why make the presumption rebuttable?

Why bother with a rebuttable presumption? If it is beyond question the preference is reunification whenever possible, why not assign counsel to advocate for reunification regardless of rebuttal? This is the protocol in mental health proceedings,<sup>77</sup> and in child welfare proceedings there is a strong interest in guarding against unnecessary state intervention. Why not assign an attorney to act as a quasi-guardian ad litem for the family's due process rights, forcing the State

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<sup>75</sup> Although guided by regulation, state child welfare agencies are nevertheless unavoidably dependent on the individual judgment of agency employees, and are therefore not immune from decisions that are based on ulterior motives rather than the best interests of the child. As an example of a child welfare agency's self-serving decision-making, see *Adoption of Natasha*, 53 Mass. App. Ct. 441 (2001), where the Massachusetts Department of Social Services (DSS) prosecuted a case in which the prospective adoptive parent was a supervisor in the DSS office that was purportedly making reasonable efforts to assist the family with reunification.

<sup>76</sup> This commentator's own anecdotal observation that children's counsel sides with the state in an overwhelming majority of cases is supported by other commentators and by the only available study of this issue. See Besharov, *supra* note 67 at 218; Robert Kelly, Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 451-452 (1982) (the presence of a guardian ad litem appointed for the child in a protective proceeding in North Carolina resulted in no overall effect on the litigation, as the guardian agreed with the recommendation of the state child welfare agency in 88% of the cases).

<sup>77</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

to meet its burden of proof in every case? This would eliminate attorney discretion and uncertainty, and distinctly clarify prosecution and defense roles.

From a theoretical perspective, forcing the state to meet its burden makes sense in an adversarial system, where the issue is whether or not to remove a child. This mechanism analogizes to mandatory prosecution of domestic violence cases, which disregards victims' preferences.<sup>78</sup> It becomes an inquiry driven by community exigency rather than parties' individual wishes. If we wish to address domestic violence systemically, we prosecute offenders regardless of victims' wishes.<sup>79</sup> Likewise, if we view child abuse and neglect as a community or systemic issue, we should prosecute alleged perpetrators and defend against unnecessary state intervention without regard to the parties' wishes.

Many factors determine a child's best interests, including a child's expressed preference.<sup>80</sup> This argument poses a problem when a child old enough to understand the nature of legal proceedings articulates that she wants to go home. While a child's expressed preference is not controlling,<sup>81</sup> it cannot be separated from a best interests analysis. Because the best interests inquiry incorporates the child's wishes, her wishes must be advanced. For this to occur, an advocate must be devoted to the child, free from personal motive or agendas of other parties

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<sup>78</sup> Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 216 (1999) ("With a no-drop policy, either the victim must testify or the prosecutor must use other evidence such as 911 tapes, other witnesses, and photographs of the injuries - but either way the case must proceed to trial. Basically, 'once the charges are filed, the state, and not the victim, becomes the party.'" (citations omitted)).

<sup>79</sup> See, e.g., Carol Bohmer, Jennifer Brandt, Denise Bronson, Helen Hartnett, *Domestic Violence Law Reforms: Reactions from the Trenches*, 29(3) Journal of Sociology and Social Welfare 71 (2002)(discussion of efficacy and appropriateness of mandatory-arrest and mandatory-prosecution laws for domestic violence crimes).

<sup>80</sup> See, e.g., MASS. GEN. LAWS ch. 119, § 1, "...[W]hen determining the best interests of the child, there shall be a presumption of competency that a child who has attained the age of 12 is able to offer statements on his own behalf and shall be provided with timely opportunities and access to offer such statements, which shall be considered... if the child is capable and willing."

<sup>81</sup> *Care and Protection of Georgette*, 439 Mass. 28 (2003), is a perfect example: the court was apprised of the child's stated preference, but ruled otherwise.

who purport to speak on the child's behalf, including parents and state agencies. Clients direct representation.

Another problematic situation is when a parent does not want her child to return home, or is otherwise unavailable due to death, abandonment, incarceration, deportation, or illness. In such cases, it is pointless to assign an attorney to strictly advocate for reunification. Sometimes reunification with parents is not an option. Instead, the fight consists of competing plans for the child, i.e. foster care vs. adoption, adoption by a relative vs. adoption by a foster parent, psychiatric hospitalization vs. specialized foster care. Here, strict instructions to advocate against state intervention and in favor of reunification, are inapplicable.

**B. Why even have child's counsel?**

If the only function of child's counsel is to argue against state intervention and in favor of reunification, why assign counsel? In most cases, a parent will advocate for reunification, rendering child's counsel unnecessary. The child is viewed as a third party beneficiary whose interests are subsumed by others' positions,<sup>82</sup> and protected by the Court. However, each party has an independent agenda and cannot argue in an uncompromised fashion against state intervention.<sup>83</sup> A child has interests separate and distinct from the state *and* her parents. In fact, child's counsel often serves as a "watchdog" for children served, or disserved, by overburdened, under-funded, or incompetent state child welfare agencies.<sup>84</sup>

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<sup>82</sup> Santosky, 455 U.S. at 760 (the interests of the parent and child are presumed aligned until there has been a finding of parental fitness).

<sup>83</sup> See CPCS Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings *supra* note 69.

<sup>84</sup> In Massachusetts, the state's decisions on behalf of a child in its custody can be challenged by any party to the case, including the child. The applicable standard of judicial review is "error of law or abuse of discretion, as measured by the 'arbitrary or capricious' test." Care and Protection of Isaac, 419 Mass. 602, 611 (1995); Care and Protection of Jeremy, 419 Mass. 616 (1995).

Other commentators raise the same question in the context of proceedings involving children too young to direct counsel in representation.<sup>85</sup> They argue that if the child is too young to direct counsel, the resulting representation will empower counsel to air her opinion on the case, rendering her role duplicative to that of a social worker.<sup>86</sup> The response to this question is the same. One cannot assume another party will advocate for reunification, or do so effectively. To ensure a child's interest in reunification -- which exists independently of the parent's -- is represented in litigation is to provide the child with an attorney who will advocate for it.

### C. Lack of Review

One of the most frustrating aspects of present models for the role of child's counsel also exists in the presumptive reunification model. As discussed earlier, under present standards of representation, the position an attorney adopts on behalf of a child client goes unchecked.<sup>87</sup> Absent an attorney's admission there was no attempt to comply with practice standards, or proof the attorney's conduct was manifestly unjustified, there is no reliable way to address an attorney shirking his responsibility to a child client. In cases where the issue is raised, because of ambiguity in present standards, a minimally competent attorney can articulate a colorable basis for the position he assumed on his client's behalf. Without clear standards, it is difficult to determine whether the attorney acted appropriately.

Under the presumptive reunification model, counsel must justify not arguing for reunification. When a statutory exception to the obligation to make reasonable efforts for reunification is met (e.g., the parent has murdered a sibling of the child client), counsel could easily explain his decision to advocate against reunification. When a mature minor

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<sup>85</sup> See, Guggenheim, Besharov, Goldstein et al., *supra* notes 59-61

<sup>86</sup> Interestingly, as previously stated, they posit that if an attorney is appointed to represent a child too young to direct counsel, he or she should "oppose the court's jurisdiction and seek to maintain the parent's control over the child" -- i.e., prevent separation of child and parent. *Id.*

<sup>87</sup> See, e.g., NEB. REV. ST. § 43-272 (2).

unequivocally states her desire not to return her parents, counsel could easily justify advocating against reunification.<sup>88</sup>

But, overall, it will be more difficult to justify departure from reunification under the presumptive reunification model, requiring counsel to explain departing from the status quo. At present, there is no binding status quo, and the attorney has no burden to justify a client's litigation position. Hopefully, this burden will deter attorneys who operate free from review of their decision-making process.

## **VII. Realistic Hopes for a Presumptive Reunification Model**

### **A. The Need for Courageous, Zealous, Principled Advocacy**

Clearly, the presumptive reunification model is not a panacea. There remain a number of details that must be addressed through trial and error. However, this framework can move the legal profession closer to defining the proper role for child's counsel.

Most importantly, this model demands attorneys' courage. The field of child advocacy attracts people who strive to “help children”, “speak up for a child”, “defend the defenseless”, etc. In action, this amounts to social engineering. Low-income children and children of color are systematically removed from parents, and moved to wealthier, white families.<sup>89</sup> The “lucky” ones find a family. Others suffer the ultimate in unsuccessful state intervention: long-term foster care.<sup>90</sup> One must question whether moving a child from family to long-term foster care is worse than no intervention at all.

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<sup>88</sup> Assuming for the sake of discussion that counsel is able to determine that the client is a mature child, an issue which, as stated earlier, is quite problematic in its own right. *See supra* note 38.

<sup>89</sup> Roberts, *supra* note 38.

<sup>90</sup> Richard Wertheimer, *Youth Who “Age Out” of Foster Care: Troubled Lives, Troubling Prospects*, Child Trends Research Brief 1 (2002) (in 2000 alone, more than 19,000 children “aged out” of foster care, meaning that they turned 18 without returning home or being adopted).

The scores of attorneys, mostly white<sup>91</sup>, striving to "save" children call to mind white, Christian missionaries and settlers who considered it their noble duty to "save" dark-skinned aboriginal peoples of the lands they conquered, or slaveholders who rationalized their trade as serving slaves' best interests. This paternalistic perspective deems that inferior life forms improve through the beneficent intervention of a superior human class; without white intervention, these savages are destined for self-destruction.

Obviously, not all white attorneys hold this view. However, child advocates often rationalize their participation in the racially and socioeconomically imbalanced, large-scale disruption of family life by conceiving of their legal actions as in their clients' best interests. Clearly there is an analogy to be drawn between this and the mindset of the missionaries, settlers, and slaveholders who rationalized what they did as benefiting those to whom they did it.

Some mainstream commentators espouse essentially the same philosophy:

She [Bartholet] proposes a vision of child welfare that would permit more poor Black children to be removed from their communities and adopted by white middle-class families...Bartholet assails just about every protection of Black children's ties to family, community, and culture as harmful to children and an impediment to adoption by more privileged people. She ridicules the interest in preserving Black cultural heritage as "romantic" by pointing out that most children in state custody come from "neighborhoods which are the least supportive environments for children and families." According to Bartholet, entire communities breed child abuse and neglect and should be treated as inferior venues to raise children.<sup>92</sup>

Statistics bear out the grim reality for minority families affected by child welfare. Families and children of color, especially blacks, are disproportionately represented in the system. One study found that although black children represent only 17 percent of the general

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<sup>91</sup> The American Bar Association's Office of Diversity Initiatives states that the legal profession is more than 90% white., at <http://www.abanet.org/leadership/diversity.html>.

<sup>92</sup> Roberts, *supra* note 38, at 168 (citing ELIZABETH BARTHOLET'S NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)).

population nationwide, approximately 42 percent of children in foster care are black.<sup>93</sup> In some communities, the disparity is more skewed.<sup>94</sup> Sadly, responsible parties defend their actions under the guise of "best interests." As such, children and families of lower income and darker skin fare worse with regard to state intervention than their white, wealthier counterparts:

- low-income children are more likely to be reported to state child welfare authorities and to have the report substantiated;<sup>95</sup>
- low-income children are more likely to be removed from their parents;<sup>96</sup>
- low-income children, once removed from their parents, are more likely to remain in long-term foster care;<sup>97</sup>
- black parents are more likely to have their children removed for the same behaviors;<sup>98</sup>
- black children spend more time in foster care and are far less likely to be adopted;<sup>99</sup>
- black families and children receive inferior treatment in adoption services, housing assistance, visitation, contact with case workers, mental health services.<sup>100</sup>

<sup>93</sup> Annie Woodley Brown and Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 74-75 (1997).

<sup>94</sup> Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000), note 11, citing New York City Admin. for Children's Servs., *Selected Child Welfare Trends* 81 (1998) (noting that as of the end of 1997, only 1,300 of the 42,000 children in the foster care system in New York City were white).

<sup>95</sup> Duncan Lindsey, *Adequacy of Income and Foster Care Placement Decision: Using an Odds Ratio Approach to Examine Client Variables*, 28 SOCIAL WORK RESEARCH AND ABSTRACTS 29 (1992).

<sup>96</sup> Mitchell Katz, Robert Hampton, Eli Newburger, Roy Bowles, Jane Snyder, *Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect*, 56 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 253 (1986) (noting that the best predictor of whether a child would be removed from his or her parents was Medicaid eligibility).

<sup>97</sup> Lindsey, *supra* note 95.

<sup>98</sup> One well-known context for this disparate treatment on the basis of race is in the removal of newborn babies from their mothers on the basis of prenatal substance abuse. *See, e.g.*, Ira Chasnoff, Harvey Landress, Mark Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENGLAND JOURNAL OF MEDICINE 1202 (1990) (finding that although there was little disparity between white and black mothers in the prevalence of prenatal substance abuse, black mothers were ten times more likely to be reported to state child welfare authorities); Daniel Neuspiel, Terry Martin Zingman, *Custody of Cocaine-Exposed Newborns: Determinants of Discharge Decisions*, 83 AMERICAN JOURNAL OF PUBLIC HEALTH 1726 (1993) (finding that of those mothers whose newborns tested positive for cocaine, blacks were 72 percent more likely than whites to have their babies removed by state child welfare authorities).

<sup>99</sup> Richard Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285 (1997) (stating that black children are five times less likely than white children to be adopted through state intervention proceedings); Wertheimer, *supra* note 72 (although black children comprise about 15% of the population nationwide, more than 35% of those children who "age out" of foster care are black).

<sup>100</sup> Mary Close, *Child Welfare and People of Color: Denial of Equal Access*, 19 SOCIAL WORK RESEARCH AND ABSTRACTS 13 (1983); Ann Garland, Bridgett Besinger, *Racial/Ethnic Differences in Court Referred Pathways to Mental Health Services for Children in Foster Care*, 19 CHILDREN AND YOUTH SERVICES REVIEW 651 (1997).

There are only two possible explanations for these kinds of disparities. Either (1) parents who are low income and/or of color are inherently worse at caring for their children, and warrant unequal treatment, or (2) those in the child welfare system responsible for identifying and responding to incidents of child maltreatment, and serving the families involved, are prejudiced by race and class.

Sadly, many agree with explanation (1), and dismiss explanation (2), even though the same behaviors that lead to removal of black and low-income children from their families occur with equal frequency in white, suburban neighborhoods.<sup>101</sup> Some wealthy families address these issues through nannies, preparatory schools, and other interventions available to those with means.<sup>102</sup> Others do not respond to problems at all. Regardless, few doctors, nurses, teachers, and guidance counselors notify child welfare authorities about wealthy families.

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<sup>101</sup> See, e.g., U.S. Department of Health and Human Services, *Mental Health: Culture, Race, and Ethnicity – A Supplement to Mental Health: A Report of the Surgeon General* (2001) (noting that major mental disorders like schizophrenia, bipolar disorder, depression, and panic disorder occur with similar prevalence among racial minorities and whites in the United States, although minorities have less access to and availability of mental health services, are less likely to receive needed mental health services, often receive a poorer quality of mental health care, and are underrepresented in mental health research); Jay P. Greene, Greg Forster, *Sex, Drugs, and Delinquency in Urban and Suburban Public Schools*, MANHATTAN INSTITUTE FOR POLICY RESEARCH EDUCATION WORKING PAPER 4 (2004) (noting that while our society has been inundated with statistics about the ‘urban underclass’ -- typically accompanied by compelling anecdotes designed to convey ‘the corrosive features of growing up in persistent poverty’ -- that have become part of our conventional wisdom, in both professional and popular writings, about the crisis that exists for families in the inner city, in reality the flight from city to suburbs has not changed the incidence rates of problematic behaviors: suburban public high school students have sex, drink, smoke, use illegal drugs, and engage in delinquent behavior just as often as urban public high school students (citations omitted)); JANE DOE INC. VOICES FOR CHANGE, [www.janedoe.org](http://www.janedoe.org) (noting that while domestic violence occurs at all levels of society, regardless of social, economic, racial or cultural backgrounds, the myth that most domestic violence occurs in lower class or minority communities is perpetrated in part by the fact that wealth allows for private help -- doctors, lawyers, and counselors -- that lower-income people cannot access in place of the police or other public agencies, and that because these public agencies are often the only available source of statistics on domestic violence, lower income and minority communities tend to be overrepresented in these statistics).

<sup>102</sup> A similar argument to that of the skewing of data on domestic violence, as set forth in the previous footnote, can be made with regard to the incidence of child abuse and neglect along racial and socio-economic lines. Low-income persons and persons of color are more likely to rely on public agencies for child care, medical care, cash assistance, etc., and therefore are exposed to a greater number of mandatory reporters. While private doctors and day care providers are also mandated reporters, because they depend on the business of wealthier, paying clients, it is reasonable to expect them to be less likely to report suspected abuse and neglect. Thus, any data that might suggest a higher incidence of child abuse and neglect among minority or low-income populations must be considered in light of the inherent population sample bias. ROBERTS, *supra* note 34, at 32-33.

Strengthening the family structure, and assisting a family to meet a child's emotional, developmental, and material needs, benefits a child more than placing her with a wealthy, white, unrelated adoptive family. Yet, that reunification serves a child's best interests is a rare sentiment in the child welfare system. Rarely does an attorney state, "I determined my client's position through applying a best interests approach, and I advocate for her to return home to her parents."<sup>103</sup> Participation in social engineering might ease an attorney's conscience, but it is an affront to children involved in the system to characterize it as predicated on their best interests.

The presumptive reunification model requires attorneys to risk their professional reputations, withstand the sanctimony and hypocrisy of self-appointed "guardians" or "saviors" of children, reject hysteria resulting from high-profile tragedies, and uphold ethical vows to represent a client's interests regardless of personal views. It requires attorneys to reject the system's institutional classism and racism, the notion that wealthy is better than poor, and that white is better than black. This model shifts the self-conceived characterization of child welfare practice from noble, beneficent, and non-confrontational, to zealous, and tenacious. It will make many attorneys uncomfortable and motivate imposters to find other employment.

### **B. The Misnomer of Wrongful Reunification**

Fear that presumptive reunification will result in wrongful reunification of children with dangerous parents, and will place children at risk, is the most commonly advanced argument against client-directed advocacy and in favor of the best interests model.<sup>104</sup> Many attorneys cannot bear that their efforts might result in wrongful judicial decisions that subject children to neglectful or abusive parents. The potential for their advocacy to place children at risk convinces

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<sup>103</sup> Kelley, Ramsey, *supra* note 70.

<sup>104</sup> This conclusion is not based on any empirical data. Rather, it is simply an anecdotal observation by this commentator, based on countless conversations with child welfare attorneys over several years, that this is by far the most common basis argued by attorneys in favor of the best interests model of representation.

them to argue their conscience rather than clients' desires. This position belies a fundamental misunderstanding of the adversarial system. It is not an attorney's job to personally endorse his client's desires. His job is to advocate his client's position and allow a judge to decide.<sup>105</sup> That the system can lead to harmful outcomes does not mean it should be defied.

Allegations against criminal defendants often horrify their defense attorneys. Many criminal defense attorneys believe their clients are guilty. However, it is patently improper to subvert a client's case for fear of acquittal. If an attorney fears her performance may lead to undesirable results, withdrawal is the cure, rather than predetermining a client's fate by refusing to represent her stated position. If reunification occurs when it should not, perhaps blame should fall on a child welfare agency attorney who failed to properly present the case, or a judge who made an improper decision, rather than on the child's attorney who advocated for reunification.

It is easy to frame the debate in terms of "wrongful reunification," when that drastically distorts the true dilemma. The possibility of harm to the child due to unnecessary family disruption, separation, and foster care placement should be the heart of the debate, along with the possibility of harm from reunification. Foster care is anything but a benign experience; yet, there is no outrage, no headlines, when a child is slowly and methodically harmed by forced separation from her family.<sup>106</sup> There are numerous instances of burgeoning numbers of children in foster care following high-profile cases of abuse at the hands of parents,<sup>107</sup> but credible evidence

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<sup>105</sup> MODEL RULES OF PROF'L CONDUCT R 1.2(b) (2002).

<sup>106</sup> Eagle, R., *The Separation Experience of Children in Long Term Care: Theory, Resources, and Implications for Practice*, 64 THE AMERICAN JOURNAL OF ORTHOPSYCHIATRY 421 (1994) (long-term foster care is associated with increased emotional problems, delinquency, substance abuse and academic problems); Wertheimer, *supra* note 80 (children in foster care are more likely than children living with their parents to experience behavioral and emotional problems, school adjustment problems, and physical and mental health issues, and are more likely to engage in risky behaviors).

<sup>107</sup> Guggenheim, *supra* note 76, at 1725-26 (documenting an increase of almost 55% in the number of abuse and neglect petitions filed in New York City over a period of four years following a highly publicized death in 1995, despite the lack of any evidence of a change in the rate at which child abuse was actually occurring).

suggests that children are more likely to be abused in foster care than with their parents.<sup>108</sup> Aside from acute harm, including physical or sexual abuse perpetrated in foster homes by foster parents and foster siblings, among others, it is the separation from family and its attendant emotional effects that make foster care so harmful in the long term. Foster care breeds attachment disorder.<sup>109</sup>

Too many child advocates are blinded by preconceived notions, and conveniently ignore obvious problems underlying their views. Instead of focusing on the “save the children” rhetoric, they should pay attention to the slow, steady, pervasive harm perpetrated upon thousands of children through unnecessary foster care placement. In a context where the modus operandi is to “err on side of caution”<sup>110</sup>, courts should place equal value on harm caused by unnecessary separation *and* harm caused by failure to remove children from families quickly enough.

## **Conclusion**

Though a host of procedural implementation questions remain, the presumptive reunification model for child’s counsel in state intervention cases represents a vast improvement over models currently in use. As with any new initiative, problems are best resolved through experience. We must implement and test presumptive reunification, and allow the results to speak for themselves. The alternative is the same arguments and defenses that lead only to confusion and animosity. Only by breaking this mold, and injecting creativity, can we aspire to competent, effective, ethical problem-solving for children.

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<sup>108</sup> See, e.g., William Spencer, Dean Knudsen, *Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children*, 14 CHILD. AND YOUTH SERVICES REV. 485 (1992) (finding that rates of maltreatment were higher for children in a variety of out-of-home settings than for children in their own homes).

<sup>109</sup> See generally, JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988).

<sup>110</sup> Roberts, *supra* note 34, at 122-123 (discussing the pressure on risk-averse child welfare authorities to opt for the harm of wrongful separation of child and parent over wrongful reunification, and the lack of consequences thereof).