

# CHILDREN'S ATTORNEYS' OBLIGATION TO TURN TO PARENTS TO ASSESS BEST INTERESTS

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## I. INTRODUCTION

Since the introduction of lawyers for children into child welfare proceedings, lawyers have struggled with how to determine their child clients' best interests. There has been widespread recognition that lawyers bring no particular expertise to such assessments. A sense of humility has led to calls to avoid imposing lawyers' subjective values on their clients. A desire for fairness has led to calls that like cases be treated alike. Sensitivity to the race, class, gender, and culture dynamics of today's child welfare system has led to awareness of the dangers of imposing our particular perspectives—however well intentioned—on clients.<sup>1</sup> Yet while there is much discussion of what to avoid doing as an attorney for children, still the pressing question remains of what lawyers can and should do to serve their young clients' interests. The *Recommendations of the UNLV Conference on Representing Children in Families*, offer an important, and-all-too-frequently ignored starting point: if you want to figure out what is best for a child, ask her parents.

Outside the legal realm, this starting point is so widely accepted, it goes without saying. What to get a child for her birthday? Ask her parents. What to feed a child when you're babysitting? What time to put her to bed? Ask the parents. If a teacher is concerned about a child's behavior in school? Consult the parents. Yet as soon as a child is subject to a court proceeding, the instinct to turn to the adults who know the child best and care most about her falls

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<sup>1</sup> See, e.g., JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS §§ 10-1 to 10-8 (1997) (cautioning against lawyers for children imposing race, class and gender biases and describing strategies to avoid doing so); Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L. Q., 441, 442, 447 (2000) (noting concern regarding children's attorneys' lack of expertise in assessing best interests and the danger of their making subjective value judgments); Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1705 (1996) (noting concern regarding lawyers' lack of expertise in assessing best interests); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV., 1399, 1414-15 (1996) (arguing that like cases should be treated alike and that the personalities and values of individual lawyers should not influence case outcomes).

away. It is easy to understand why this is so in the child welfare context.<sup>2</sup> Child welfare proceedings are the extreme cases in which we allow the government to intervene in the protected realm of child rearing because these are, by definition, the cases in which there is concern that parents are not fulfilling their minimum responsibilities. We generally defer to parents because we assume that the vast majority of parents are fit. Once there is reason to believe they are unfit, the usual deference no longer seems justified. These are exceptional situations in that we are focused on protecting the children from their parents. Consequently, they are the times when we do not automatically turn to parents to say what is best for their kids.

Yet, however counter-intuitive, even in child welfare cases, parents in fact remain the best ones to gauge children's interests. They are the best source of information available to courts, to foster care agencies, and to children's lawyers. There are exceptions, as will be explored below, but the exceptions are narrower than is commonly recognized. That parents may have fallen below our minimum standards for caretaking—as serious as that is—does not change the fact that they are best situated to determine their children's interests. That parents are accused of neglect or abuse should not cause us to abandon the many common sense reasons that we normally turn to parents when decisions need to be made for children. Typically parents know their children's needs, desires, strengths, weaknesses, personality, and history in nuanced ways that others cannot come close to approaching. In virtually all instances parents also care more deeply about their children's well-being than anyone else. The relationship is the least transitory of human relationships; indeed, parents' investment in children's well being is life-long. When parents fail to meet minimum standards, we must as a community step in to protect their children. But in protecting children, we need not deprive them of the great benefits that even troubled parent-child relationships can provide.

Related to, but distinct from, these common sense reasons for acknowledging that parents are best able to assess children's interests, are the legal reasons. The United States Congress, every state legislature, and the United States Supreme Court have indicated that the legal framework for state intervention in family life requires that we leave child-rearing decisions to parents except within narrowly carved exceptions. The exceptions are not justified by claims that better decisions could be made by someone other than the parent, not even where a majority has democratically determined that particular decisions are contrary to children's interests. Indeed, the Supreme Court has been quite clear that "[i]n light of [the] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>3</sup> Although the legal authority given to parents is

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<sup>2</sup> It is less obvious why parents are not treated as the experts on children's interests when children are involved in delinquency and status offense cases. But those issues are beyond the scope of this paper.

<sup>3</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (drawing this conclusion after a discussion citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978);

based to some extent on our belief that they will generally make the best decisions for their child, we give them that authority understanding that they will not always do so. Thus, parents have a legally protected right to make decisions for their children even when we may not agree they are doing what is best for the child.

Child abuse and neglect cases are the exceptions in which we allow the state to overcome the parents' constitutionally protected authority. Only after the state has proven that a parent's decision-making presents serious, imminent danger to a child, do we allow the state to intervene. As important as this limitation on parental authority is, however, it is the beginning, rather than the end of understanding the legal constraints on state intervention. The law does not treat parental authority and state authority over children as being an all-or-nothing choice. Rather, we allow the government to intervene in limited ways and generally restrict the state imposition on parental authority specifically to preventing the parent from harming the child. Our entire foster care system is based on the understanding that even when the extreme intervention of taking a child from her parents' care is justified, it is a temporary intervention. Parental rights remain carefully protected even in the most serious cases of parental misconduct unless and until an even greater showing justifies the ultimate state intervention of termination of parental rights.<sup>4</sup> As the Supreme Court put it: "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."<sup>5</sup>

In other words, the law takes a graduated approach—working as a rheostat, not an on-off switch<sup>6</sup>—in allowing the state to impose on parental authority. Rights of parental authority remain with parents except as specifically abrogated based on a showing of danger to the child. Although there is, of course, variation among the specifics of states' child welfare law, there is a universal underlying principle akin to the "least restrictive alternative" principle of commitment law: we allow the government to intervene in otherwise protected areas only to the extent necessary, reserving as much as possible of the right at issue to the individual.<sup>7</sup> This principle has particular ramifications

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Parham v. J.R., 442 U.S. 584 (1979); Santosky v. Kramer, 455 U.S. 745 (1982); and Washington v. Glucksberg, 521 U.S. 702 (1997)).

<sup>4</sup> See *Santosky*, 455 U.S. 745 (holding that due process requires a showing by clear and convincing evidence to terminate parental rights where there was an earlier finding that the parent was neglectful).

<sup>5</sup> *Id.* at 753.

<sup>6</sup> Thanks to Marty Guggenheim for this metaphor.

<sup>7</sup> See, e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding that the state cannot constitutionally confine a mentally ill person where less restrictive alternatives are available); Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983), supplemented by 712 F.2d 1428 (D.C. Cir. 1983) ("To justify restriction of constitutionally protected activity, the government must do more than show that such curtailment would promote, in a particular case, compelling governmental interests. '[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") *Id.* at 607 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (alterations in original)); see also Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, \_\_\_ N.Y.U. REV. L. & SOC. CHANGE (forthcoming) (arguing that the least

for children's lawyers who are involved in the exceptional cases in which some government intervention is allowed.

Just as we temper state intervention by allowing only the minimum intrusion necessary, the authority granted children's attorneys is limited as well. They must serve child clients' interests without overreaching to claim authority that has not been transferred to them. Consequently, even in those situations in which attorneys are required to assess children's best interests, they are bound to act within principled constraints.<sup>8</sup> Few children's attorneys would disagree, yet the nature of the proper constraints remains quite murky, leaving individual attorneys in an extremely uncomfortable position. They understand they are ethically constrained, but are unclear on the constraints. The graduated approach that the Constitution takes to infringements of parents' rights, however, goes a long way toward clarifying the constraining principles that govern children's attorneys and resolving the discomfort. Attorneys need not and should not take on responsibilities for which they are not trained and which they do not have the resources to meet. Attorneys are not required to comprehensively assess children's best interests—an impossible task given the concerns that such assessments not be subjective, not impose the attorneys race, class, gender or cultural biases, and not result in similar cases being treated differently. Rather than take on this impossible task, attorneys should ensure that the assessment of best interests is located where it should be. Most of the time, for all the common sense and legal reasons discussed above, that is with the parents, even when there has been a showing of unfitness.

Of course, there are times, discussed below, when direct legal conflicts preclude children's attorneys from deferring to parents' views. But to identify parents as the best assessors of children's interests is not to turn over the direction of the representation. It is, as the recommendation of the *UNLV Conference* suggests, to seek out and give special weight to parents' views and to actively encourage courts to respect those views whenever possible.

There is widespread acknowledgment that parents' and children's interests are inherently intertwined. But to reach the goal of the *UNLV Conference* of moving beyond lip service in our commitment to serving children through recognizing the importance of their families<sup>9</sup> requires establishing principled,

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restrictive alternative doctrine requires states to provide financial assistance to families when that would prevent the need to place children in foster care).

<sup>8</sup> As discussed in the text below, *see supra* text accompanying notes 13-14, the *UNLV Conference* reaffirmed the ethical principle that the legal representation of children should be client-directed whenever possible and, when not possible, attorneys should represent clients' legal interests. *Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616, pt. IV.D (2006); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, pt. I (2006). *See also Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1309-10 (1996). This Article does not advocate expanding the circumstances under which an attorney would formulate a position based on an assessment of best interests. Rather, it seeks to offer guidance to attorneys who are required to assess best interests. *See Report of the Working Group on the Best Interests of Child and the Role of the Attorney, supra* at 682, (2006) (noting that many children's attorneys are required by law to assess the best interests of their clients and stressing need to develop guidance for those attorneys, without endorsing a best-interests model of representation).

<sup>9</sup> *Report of the Working Group on the Role of the Family, supra* note 8, at pt. I.

practical guidelines that allow children's attorneys to work within their expertise and within clearly articulated legal constraints. This task becomes even more important when we recognize that cases of state intervention into family life are far from rare<sup>10</sup> and that the families at risk of intrusion are disproportionately poor and minority families.<sup>11</sup> The UNLV Recommendation on giving special weight to parents' assessments of best interests provides a significant step in the right direction, one that deserves attention and further discussion as we attempt to bring the Conference's broader aspirations into practice.

## II. THE RECOMMENDATION: WHEN A CHILD CLIENT'S CAPACITY IS DIMINISHED, CHILDREN'S ATTORNEYS SHOULD GIVE SPECIAL WEIGHT TO PARENTS' ASSESSMENT OF BEST INTERESTS

Participants at the *UNLV Conference on Representing Children in Families* enthusiastically reaffirmed the important guidelines established at the precursor conference held at Fordham in 1995 ("*Fordham Conference*").<sup>12</sup> Most significantly, the participating practitioners and scholars reaffirmed the principle that lawyers for children are ethically required to have their clients' direct representation.<sup>13</sup> At the same time, conference participants agreed that it was crucial to acknowledge the current constraints under which lawyers for children practice and the reality that in many jurisdictions lawyers for children are expected, and often required by law, to advocate for their clients' best interests. Consequently, one of the working groups was asked to focus specifically on questions relating to best interests and the role of the attorney.<sup>14</sup> In that working group, we set out to use the combined expertise of the conferences' practitioners and scholars to devise practical guidance for lawyers who feel constrained to determine their clients' best interests, as well as for those who act in a more traditional lawyer role.<sup>15</sup>

In developing protocols for lawyers who find themselves in a position of assessing the best interests of their child clients, the Working Group on the Best Interests of the Child and Role of the Attorney proposed, and the *UNLV Conference* ultimately adopted, several recommendations which virtually all lawyers for children would agree should guide a best-interests inquiry. These

<sup>10</sup> The most recent available federal government statistics show that there were an estimated 542,000 children in foster care in 2001. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2001 ESTIMATES AS OF MARCH 2003, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report8.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report8.pdf).

<sup>11</sup> See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

<sup>12</sup> *Report of the Working Group on the Role of the Family*, supra note 8, at 616; *Report of the Working Group in the Best Interests of the Child and the Role of the Attorney*, supra note 8, at pt. I. See also, *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, supra note 8, at 1309-10.

<sup>13</sup> *Report of the Working Group in the Best Interests of the Child and the Role of the Attorney*, supra note 8, at pt. I.

<sup>14</sup> I was privileged to be part of the Working Group on the Best Interests of the Child and the Role of Attorney. I am indebted to the other members of the group for insightful discussion, spirited debate, and two days that were far more fun than I expected.

<sup>15</sup> *Report of the Working Group in the Best Interests of the Child and the Role of the Attorney*, supra note 8, at 883-87.

recommendations usefully articulated principles to which most lawyers are already committed, such as the need to obtain information from a variety of sources, including expert evaluations when appropriate.<sup>16</sup> One of the recommendations, however, represents a more significant challenge to current practice. The *UNLV Conference* recommended that when a child client has diminished capacity, the attorney give special weight to the parents' assessment of the child's best interests.<sup>17</sup>

This recommendation is closely linked to another: attorneys should adopt positions requiring the least intrusive state intervention in family life.<sup>18</sup> As discussed above, the principle of minimizing state intrusion is one of the justifications for giving parents' views of best interests special weight.<sup>19</sup> At the same time, it is important to see that the two recommendations are distinct. They will often lead to the same result, but not always. When they conflict, the principle that parents' views are to be specially weighted should be given priority. For example, we generally should try to place children with kin rather than in stranger foster care in order to limit trauma to the children and state intrusion into the family life. And, of course, most often parents prefer kinship placements. But in those cases in which parents oppose a kinship placement, the parents' right to make decisions regarding the children's care should be paramount.

Incorporating parents' views not only tends to lead to the best decisions, the very process of preserving the parents' decision-making role benefits the children. This is true for a number of reasons. One is that to the extent that role is abrogated, the decision-making authority inevitably falls to state actors, such as judges and caseworkers.<sup>20</sup> No matter how well intentioned, hardworking, and knowledgeable about their cases lawyers become, they will never be the primary decisions-makers for their child clients. Lawyers will always have to support the decision-making of either the parents or state actors playing the parental role. The only alternative to having parents parent is to have the state do so. It is important to be honest about this choice and make it with full recognition that, however well motivated state actors might be, parenting is something they are ill equipped to do.

Yet another reason to leave decision-making in parents' hands is that in most cases in which we find parents unfit and children in need of alternate caretakers, the children ultimately will be reunified with their parents.<sup>21</sup> For all

<sup>16</sup> *Id.* at pt. II.A.3.a.

<sup>17</sup> *Id.* at pt. II.A.3.e.

<sup>18</sup> This recommendation, in turn, is closely linked to the recommendation that children's attorneys protect their clients' legal interests. *Id.* at pt. II.A.3.f.

<sup>19</sup> Indeed, the term "special weight" was used by the Supreme Court in one of its most recent decisions upholding the principle that state intrusion in family life is limited by the Constitution. In *Troxel v. Granville* the Court held that parents' assessments of children's best interests must be given special weight even where this limits the ability of states to facilitate something as widely valued as grandparent visitation. 530 U.S. 57, 68 (2000) (plurality opinion).

<sup>20</sup> See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005).

<sup>21</sup> See Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Welfare Outcomes 2002: Annual Report*, available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo02/chapters/chapterthree2002.htm> (indicating that reunification is the permanency goal achieved in a majority of foster care cases).

the emphasis on the importance of working to reunify families and using effective service planning to do so, a simple point is often forgotten: improving parenting requires practicing parenting. Parenting skills simply cannot be learned in a vacuum. A key component of planning for reunification is supporting parents as they work to implement improved parenting. Most evident is the need to maximize visitation and use it to provide parents with opportunities to parent effectively.<sup>22</sup> It is also important to maintain parents' involvement in and responsibility for educational and medical care, particularly when children have special needs. It is counterproductive to distance parents from these crucial aspects of parenting when it is hoped and expected that they will resume those responsibilities fully at the end of any out-of-home placement.

Even for families that will not ultimately be reunified (and, of course, there is no way to predict definitively which families will be), the on-going engagement of parents in permanency planning is advantageous. As Professor Annette Appell has highlighted, involving parents in adoption planning offers numerous benefits, including facilitating information sharing between the birth and adoptive families and increasing children's comfort with adoptions, as well as demonstrably increasing the stability of adoptions.<sup>23</sup> In addition, recent attention to the increasing numbers of young people who "age out" of foster care to independent living, has raised awareness that it is important that these young people maintain strong support systems. Research indicates that one third of all children who are discharged from foster care to independent living return to live with their families.<sup>24</sup> Consequently, regardless of the permanency plan, the children's lawyer should try to keep parents as involved as possible in the lives of their children and urge courts to do the same.

The recommendation concerning parents' role in assessing best interests does set certain limits. Special weight is given to parents' views except when: (1) a direct legal conflict exists, (2) the parent is incapacitated, or (3) heeding the parent's views would expose a child to serious harm. These exceptions are important, but they are also narrower than might be expected. Many of the issues on which lawyers for children develop positions do not involve direct legal conflicts with the parent. A direct legal conflict exists only when the parent will be *legally* disadvantaged by a particular outcome.<sup>25</sup> The primary

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<sup>22</sup> See Marty Beyer, *Parent-Child Visits as an Opportunity for Change*, PREVENTION REP. Spring 1999, at 2, available at <http://www.uiowa.edu/%7Enrcfcp/publications/documents/spring1999.pdf> (citing several research studies). Sonya J. Leathers, *Parental Visiting and Family Reunification: Could Inclusive Practice Make a Difference?*, 81 CHILD WELFARE J. 595 (2002) available at <http://www.aecf.org/publications/pdfs/cwla2.pdf> (finding that visiting frequency was a stronger predictor of reunification than parental substance abuse or mental illness); Admin. for Children's Servs., City of New York, *Implementation of the Adoption and Safe Families Act, Part III: ACS Best Practice Guidelines for Family Visiting Arrangements for Children in Foster Care*, Dec. 19, 2000 [hereinafter *NYC Visiting Guidelines*] available at [http://www.nyc.gov/html/acs/downloads/pdf/asfa\\_3.pdf](http://www.nyc.gov/html/acs/downloads/pdf/asfa_3.pdf).

<sup>23</sup> Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995).

<sup>24</sup> Casey Family Programs, *Outcomes for Youth Exiting Foster Care*, June 19, 2001, [www.hunter.cuny.edu/socwork/nrcfcp/downloads/outcomes\\_for\\_youths\\_exiting\\_foster\\_care.pdf](http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/outcomes_for_youths_exiting_foster_care.pdf).

<sup>25</sup> I emphasize that it is legal disadvantage that is at issue because the fact that a parent may benefit from a particular outcome is not itself a reason that the child's lawyer should be skeptical of the parent's position. The parent-child relationship is one in which the interests

examples are the issue of whether a parent should be found to have neglected or abused a child and the issue of whether parental rights should be terminated. In these determinations, parents have an obvious legal interest in particular outcomes (dismissals of the cases against them) that may be in conflict with the children's legal interests.<sup>26</sup> It is important, however, to keep in mind how many of the issues on which children's lawyers take positions do not involve such conflicts. That there has been neglect or abuse does not mean that the interests of the parents and children thereafter conflict.

Unlike the traditional plaintiff-versus-defendant structure of litigation, child welfare litigation always involves a third person, who is neither plaintiff nor defendant. Thus the children's lawyer represents a client whose interests are not inherently at odds with any particular party. Moreover, unlike most litigation, which is backward looking, with factual disputes being about past actions, child welfare cases are forward looking, involving as many decisions about what is to happen going forward as about what has already happened. Questions about whether neglect or abuse occurred end up being only a fraction of the issues addressed by courts in child welfare proceedings. Often these are the least contested issues, ending in settlement agreements. In many cases, the most important and most conflicted issues upon which children's lawyers take positions are the forward-looking issues on which there is no direct legal conflict and on which parents are particularly well suited to make assessments. A few of the most important examples include decisions about: (i) where children will be placed when not with parents; (ii) visitation; and (iii) various aspects of the out-of-home care provided children.

Frequently important decisions must be made about where children will reside while away from their parents. Sometimes the decision is between a kinship and a non-kinship placement. At other times, questions arise about which non-kinship foster care option best serves the children. These are all decisions on which parents' view should be given special weight for all the same reasons that parents generally have authority in child rearing. Moreover,

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are uniquely bound together. Indeed, it is a wonderfully beneficial aspect of the relationship that for a parent to behave altruistically in caring for a child is also self-serving (in that the parent has an emotional investment in the child's well being and that caring for a child facilitates the survival of one's progeny). In other words, it is a healthy, positive aspect of parenting for parents to see their interests and their children's interests as aligned. Lawyers for children are sometimes skeptical when a parent advocates something to benefit the child that also would benefit the parent, but mutual benefit, by itself, is not a reason to question the parent's assessment.

<sup>26</sup> Of course, even on those issues, children's lawyers will sometimes take the position that dismissal of the case against the parents is consistent with children's interests. The point is that, unlike the many other issues discussed in the text, the lawyer will not favor a dismissal solely on the basis of the parents' view of the issue. Children's lawyers may, however, still incorporate the parents' views of what is best when formulating a position. For example, if a parent argues that a neglect case against her should be resolved without a factual finding against her (perhaps through a suspended judgment or an adjournment in contemplation of dismissal), to the extent the rationale for that position is based on concerns for the child's well being, they should be given special weight by the child's lawyer. If, for instance, the parent is seeking a suspended judgment because that would avoid her having a record of child maltreatment which would put her at risk of losing her employment, the lawyer should weigh those considerations in developing a position on what outcome would be best for the child client.

there is additional justification for respecting parents' views on placement issues due to the role of temporary caretakers in facilitating continued contact between children and their parents. Such contact is a crucial element of the state's obligation to work toward family reunification whenever possible and is more likely to be advanced if parents' preferences regarding caretakers are heeded.

Children's lawyers generally have an obligation to advocate for optimal visiting plans that ensure as much continued contact between children and parents as possible in settings conducive to maintaining family bonds.<sup>27</sup> Thus, it is particularly important that attorneys seek out parents' views on questions regarding the frequency, location, and quality of visits.

Similarly, parents' views are entitled to deference on questions regarding the nature of out-of-home care. Parents are best positioned and sometimes have explicitly protected legal rights to make decisions regarding education, religious training and medical care.<sup>28</sup> All too often, these rights are ignored. Parents' concerns regarding the care provided in foster homes, even including concerns about possible abuse, frequently are disregarded. Such failures are as much an infringement of children's rights as parents' rights. Children's lawyers are obligated to fight for their clients' rights to have their parents' decision-making in these areas respected.

The second limitation in the Recommendation that children's attorneys give special weight to parents' views is when there is parental incapacity. This is an even narrower limitation. It applies only when incapacities are clearly demonstrated and should be tailored to the specific incapacities identified. Obviously, in the rare cases in which capacity is so impaired as to require a guardian ad litem for the parent, the parent is likely to not have the usual ability to assess a child's best interests. Far more frequently, parents' capacities are limited in very specific ways that do not change the fact that they are generally best situated to assess children's needs.

When, for instance, a parent has a substance abuse problem (one of the most common reasons child protective services intervene in families<sup>29</sup>), the parent's capacity is somewhat impaired, affecting the ability to make certain judgments. But it is important to recognize that, though extremely serious, an incapacity such as substance abuse does not *extinguish* the many advantages parents have in assessing children's best interests; it limits them, and the weight given their assessments should be limited commensurately. Children's lawyers should not defer to a parent's judgment about the drug problem itself when that

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<sup>27</sup> Erik Pitchal & Chris Gottlieb, *Family Values: How Children's Lawyers Can Help Their Clients by Advocating for Parents*, NACC CHILDREN'S LAW MANUAL, 2004, at 317, 327-30.

<sup>28</sup> See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); *In re Hofbauer*, 393 N.E.2d 1009 (1979) ("[G]reat deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same."); Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487 (2000 & Supp. 2005).

<sup>29</sup> Between one third and two thirds of child maltreatment cases involve substance abuse. NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE AND CHILD MALTREATMENT (2003), available at [http://nccanch.acf.hhs.gov/pubs/factsheets/subabuse\\_childmal.cfm](http://nccanch.acf.hhs.gov/pubs/factsheets/subabuse_childmal.cfm).

judgment is impaired by addiction<sup>30</sup> and obviously should not defer to judgments the parent makes while under the influence. But with respect to many issues regarding children, parents will continue to be best situated to assess best interests and, therefore, their views should continue to be prioritized. Here too, the least restrictive principle should prevail, with lawyers deferring to parents as much as possible in light of the particular incapacity. And children's lawyers must be careful to resist the temptation to infer incapacity from the fact that the lawyer might not agree with a parent's view. Incapacity that would justify a lawyer not giving special weight to a parent's assessment of best interests must be incapacity that is demonstrated independent of the parent's assessment itself.<sup>31</sup>

The recommendation's third limitation on the need to give special weight to parents' views is when doing so would expose children to serious harm. Again, lawyers must be careful to tailor this limitation strictly to demonstrated facts. The ethical guidelines on what constitutes harm sufficient to overcome another obligation of lawyers are instructive. An attorney may only breach the duty of confidentiality "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."<sup>32</sup> Similarly, in order to decide that harm is a reason not to give special weight to a parent's assessments of best interests, a lawyer must have reason to believe the threatened harm is serious and imminent, not speculative. And the lawyer must be careful not to draw conclusions outside her expertise.

### III. IMPLEMENTING THE RECOMMENDATION

Professional participants in the child placement process . . . are neither qualified nor authorized to act with a parent's discretion and prerogatives. . . . The professionals' challenge, as nonparents, is how to be caring without taking unwarranted control of the life of the child for whom they do not and cannot take full responsibility. The ability to locate the line between the usurper of parental authority and the caring expert characterizes the good professional.<sup>33</sup>

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<sup>30</sup> An inability to acknowledge that one has a substance abuse problem is, of course, a common feature of addiction. Thus, children's lawyers should not defer to parents on the questions of whether requiring a drug program and abstinence are appropriate components of a service plan. At the same time, those who have substance abuse problems often have a better understanding of their service needs (*e.g.*, what type of program would be most effective for them) than anyone else. Consequently, regardless of the limitations present, all of those involved in service planning should continue to seek information from parents and shape service plans to be responsive to their concerns.

<sup>31</sup> The caution required of children's lawyers in these situations is similar to the caution lawyers must exercise when determining whether child clients are capable of directing representation. As one recommendation states, a lawyer may not infer incapacity from the fact that the lawyer disagrees with the child's position. *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, *supra* note 8, at pt. II.A.

<sup>32</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002). See also ETHICS 2000 COMMISSION, FEBRUARY 2002 ABA AMENDMENT TO MODEL RULES, R. 1.6(b)(1), (Future Crimes Exception: "The new exception [to confidentiality] . . . is focused on preventing serious, imminent harms, and authorizes the revelation of client information when necessary to accomplish its ends.").

<sup>33</sup> JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 210 (1996).

One of the key purposes of the *UNLV Conference* was to provide guidance to lawyers for children that would have practical value in the circumstances under which lawyers for children actually work. Given the limited resources currently available for the representation of children, and consequent heavy caseloads, children's lawyers cannot possibly gather all information relevant to determining their clients' interests. Moreover, lawyers must be cognizant of the limitations of their expertise and risks of over-stepping their proper role. The recommendation that children's lawyers give special weight to parents' views offers children's lawyers a practical means to obtain information efficiently and lower the risk of making assessments that impose attorneys' personal value judgments and disserve their child clients.<sup>34</sup>

How then does one go about implementing this recommendation? First, lawyers for children must increase their communication with the parents of their clients. There is no way to assess children's interests without speaking to the most important individuals in their lives, which in the vast majority of cases are the parents.<sup>35</sup> Of course, there are ethical rules regarding communication between lawyers and represented parties.<sup>36</sup> But all too often these rules are used as an excuse for children's lawyers to avoid acquiring information that is crucial to making informed decisions about children's interests. The ethical rules do not bar communication, they bar communication without the consent of the attorney for the represented party.<sup>37</sup> It is incumbent upon children's lawyers to actively seek communication with parents in every case in which communication would benefit the child clients. In other words, in nearly every case.

In most cases, parents' attorneys should agree to at least some (and often to a great deal of) communication because that will be in the parents' interests. After all, one of the chief tasks of parents' attorneys is to help others in the court process see their clients as individuals with strengths. Typically it will serve both the parents' and the children's interests for the child's attorney to learn not only the parent's positions, but the reasons for those positions. Take two issues on which parents frequently have views different from the state: whether the child should remain in a particular foster home and whether a child should be on psychotropic medication.<sup>38</sup> In such cases, it serves both the child's interests and the parent's interests for the child's attorney to understand

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<sup>34</sup> As Erik Pitchal highlights in this volume, the *UNLV Recommendations* call on counsel for children to offer more comprehensive representation, which may increase the risk of attorneys over-reaching. Erik Pitchal, *Buzz in the Brain and Humility in the Heart: Doing it All, Without Doing Too Much, on Behalf of Children*, 6 NEV. L.J. 1350, 1351 (2006). The recommendation to give special weight to parents' assessments of best interests is one way to address the concern he raises.

<sup>35</sup> If other relatives are raising children when they come to the attention of the child welfare system, the child's lawyer will need to communicate with that person as well as with the biological parents.

<sup>36</sup> See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1980); N.Y. STATE BAR ASSOC., THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (2002).

<sup>37</sup> See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104 (1980).

<sup>38</sup> Decisions to put children on psychotropic medication raise particularly controversial questions. See, e.g., Jeffrey Kluger, *Medicating Young Minds*, TIME, Nov. 3, 2003, at 48; Claudia Kalb, *Drugged-Out Toddlers*, NEWSWEEK, March 6, 2000, at 53; Joseph T. Coyle, *Psychotropic Drug Use in Very Young Children*, JAMA, Feb. 23, 2000, at 1059. When

the parent's specific concerns. Perhaps the parent sees side effects of medication or signs that a child has regressed in a certain placement—signals the lawyer might otherwise miss. There is value in the information itself and there is additional benefit in the child's lawyer seeing the parent demonstrate desirable parenting traits through engagement with specific issues affecting the child.

Of course, parents' attorneys may wish to be present during the communication between children's attorneys and parents, and certainly have a right to be. But that is not a reason for children's attorneys not to take full advantage of opportunities to communicate. Moreover, it will frequently be in parents' interests for parents' attorneys to allow unfettered communication between their clients and children's attorneys. Parents' attorneys often have good reason to give permission for children's attorneys to speak to parents even without requiring that the parents' attorney be present for every such conversation. Not only does this ease logistics, it may build parents' credibility and allow them to develop more positive relationships with their children's lawyers. Concerns about protecting parents from making statements detrimental to their legal interests may often be alleviated simply by parents' attorneys limiting permission to speak to their clients to specific topics and children's lawyers agreeing to not discuss any allegations pending against the parents. Of course, parents' attorneys will have to make decisions about the parameters of such permission on a case-by-case basis. There may be risk in letting parents speak to their children's attorneys; more often, there is greater risk in not permitting such communication.

Direct communication between children's lawyers and parents is rare in many jurisdictions and requests by children's lawyers to communicate with parents may be met with skepticism. Changing this aspect of court culture would benefit all involved. The need to make child welfare proceedings less adversarial is widely recognized. Children's lawyers can make concrete progress in that direction through this simple step. Once lawyers for parents have some positive experiences with children's lawyers who are genuinely interested in understanding parents' views and limiting state abrogation of parental authority, trust is likely to increase. Over time, increasing communication can lead to greater openness and in turn to even more communication.

Children's attorneys should seek parents' input on virtually all issues on which attorneys will take positions that are not directed by the child clients. Some of the issues discussed above will deserve parental involvement in almost every case. It is the rare case in which a child's lawyer could reach a valid determination of her client's interests regarding visitation or the quality of care in out-of-home placements, including educational and medical care and any services the child might need, without soliciting the parents' input. These issues are often best addressed outside the courtroom and, to the greatest extent possible, children's lawyers should participate in out-of-court conferences and service plan meetings. At a minimum, however, if children's attorneys are not involved in developing service plans outside of court, they should be obtaining parents' views on these plans before taking positions in court.

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issues regarding the care of children are so highly contested, *i.e.*, when there is no consensus on them in the population at large, there is heightened justification to defer to parents.

Whether or not children's attorneys have direct communication with parents, they can ensure that parents' assessments of children's interests are given special weight by ensuring that parents' voices are meaningfully heard in court. Children's attorneys serve their clients by inquiring on the record about parents' positions on any issues before the court. Moreover, children's attorneys should advocate for courts to solicit parents' assessments of children's interests and for courts to give those assessments the deference the law requires. In other words, children's attorneys should protect their clients by protecting children's rights to have their parents' decision-making authority respected.<sup>39</sup>

To say that children's lawyers should support courts' respecting parents' rights is not to say the lawyers' obligation ends there. Children's lawyers have an obligation to *actively* pursue their clients' interests in specific issues as well, as their general interest in parental decision-making. All too often children's lawyers remain mute on, or provide pro forma support for, applications by parents that would benefit the children. Children's lawyers should proactively pursue any position of parents that would serve children's interests. This obligation is particularly significant given the advantages children's attorneys often enjoy. For a number of reasons, including that their clients are sympathetic and the focus of the courts' concern, children's lawyers often have greater credibility with courts than other lawyers in other roles. An application by a children's attorney is often more likely to be granted by courts than the same application by a parents' attorney. Therefore children's attorneys cannot simply wait for parents' attorneys to make applications that would serve both sets of clients.<sup>40</sup>

If the Recommendation that lawyers for children give special weight to parents' assessments of best interests is to be of the practical value intended, we must be frank about the challenges of implementing it. The Recommendation requires children's lawyers to defer at times to views with which they may disagree. Indeed, the Recommendation involves deferring to people whose judgment or behavior sometimes has been found wanting in some way. This is not always easy to do. But the law is clear. We do not only allow parents to make the right decisions for their children. We allow them discretion to make bad decisions with which we disagree. This commitment is so important in our system that the rights of parental authority remain constitutionally protected even after parents have been found to have neglected or abused their children.<sup>41</sup>

Thus, though sometimes counterintuitive—what adult does not want to do what she or he believes is best for a child?—an attorney's obligation is not to figure out what is best for a child client, but to figure out where that answer lies. The children's lawyer serves her clients' interests not by doing all she can to make the best possible assessment of children's needs, but by ensuring that those who should be making the assessment get to do so. We have long expected this kind of discipline from judges. We allow judges a great deal of

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<sup>39</sup> See Martin Guggenheim, *supra* note 1 (arguing that the role of children's attorneys stems from the substantive rights of child clients).

<sup>40</sup> See Pitchal & Gottlieb, *supra* note 27, at 324-25; see also *In re Jamie T.T.*, 599 N.Y.S.2d 892 (N.Y. App. Div. 1993) (finding ineffective assistance of counsel for a child client where the attorney took on a passive role rather than actively advocating when supporting the position of the state).

<sup>41</sup> See *Santosky v. Kramer*, 455 U.S. 745 (1982).

power on the understanding that they will impose self-restraint to limit their decision-making to explicitly granted authority. The rule of law requires that such limits be respected, distinct from the value of any particular outcome in a case. We must demand as much restraint of children's lawyers. The powerful role they have, heightened when their clients are not capable of fully directing representation, brings with it a responsibility to ensure that child-rearing decisions are made to the greatest extent possible by parents.