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# Independent Counsel for Children

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## I. Introduction

The U.S. Supreme Court first recognized the value of independent counsel for children in its landmark decision, *In re Gault*.<sup>1</sup> Since that time, the courts have appointed attorneys for children in a variety of legal proceedings. The legal profession is still grappling with difficult questions concerning the advisability of separate representation, the circumstances under which separate counsel should be appointed and the proper role of attorneys for children. The extent to which the attorney should be directed by the client's wishes presents perhaps the most controversial issue.

This article takes the position that appointment of separate counsel for children is a positive and necessary development. Under ideal circumstances, independent counsel should be appointed to represent children in any proceeding affecting their custody, placement or treatment. As a general rule, the attorney should advocate the wishes of the child—even if the attorney questions the correctness of the child's view. Only when the child is unable to articulate a reasoned preference should the attorney substitute a judgment for that of the client. The attorney should then advocate the position which she determines her client would take if the client were able to direct the litigation.

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1. *In re Gault*, 387 U.S. 1 (1967).

## II. Appointment of Independent Counsel for the Child

### A. *The Debate Over Separate Representation*

Most modern commentators agree that children who are the subject of legal proceedings benefit from independent representation.<sup>2</sup> The trend in favor of independent counsel reflects a growing awareness that the state, the courts, and even parents do not adequately represent the child's interests. The traditional role of the court as *parens patriae*, originally thought to adequately protect the child, has been widely discredited.<sup>3</sup> A judge cannot simultaneously act as an advocate for the child and as an impartial arbiter in the case. Nor can a judge independently investigate the circumstances of a case in order to assist in identifying the child's interests.

Neither the interests of parents nor of the state are always commensurate with those of the child. In protection proceedings, for example, our laws presume that parents generally act to advance their child's welfare. Yet their interests may well diverge from those of the child once the state has intervened on the child's behalf. Moreover, although social services agencies are charged with protecting the child, their recommendations are often influenced by institutional concerns which may overshadow the child's interests. These include budgetary constraints, large caseloads, public pressures, political loyalties, and bureaucratic inertia.

Despite the increasing practice of appointing separate counsel, however, its wisdom and utility are still debated. Many commentators feel that appointing an attorney for the child simply creates other problems. Some assert that counsel for the child is an extraneous figure whose position invariably duplicates the position of another party. These critics contend that this duplication of effort, combined with the typical deference of judges to the position of the child's advocate, injects a "critical degree of arbitrariness" into the proceedings.<sup>4</sup> This argument, though, rests on the misconception that there are two and only two possible resolutions in any proceeding involving a child. There are, however, any number of possible solutions with an equal number of possible

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2. Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REF. 341 (1987); Kerin S. Bischoff, Comment, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. PA. L. REV. 1383 (1990); Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 FAM. L.Q. 53 (1985).

3. See 387 U.S. 1 (1967).

4. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 104-05 (1984).

rationales. Thus, the child's position could easily differ from that of both parents.

When the child's position is different from that of his parents, an independent advocate is necessary to inform the court of that position. Even if that position substantially agrees with one held by another party, the child's counsel should still inform the court of the child's wishes. The child's position is never superfluous. If judges are overly influenced by the child advocate's position or the "majority" position, the solution is not to deprive the child of a voice. Rather, attorneys involved in these proceedings must challenge any apparent bias and insist that the court expressly provide the basis of its rulings.

The child's attorney is more than just a "mouthpiece" for her client. The attorney provides additional functions which further undermine the notion that she is merely an extraneous figure. One critical function is the protection of the child from any unnecessary harm that may flow from the proceedings themselves. Parents engaged in a bitter custody battle or a protracted child abuse proceeding, for example, are often blind to the child's need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order providing counseling or other supportive services for the child.

Others criticize the appointment of separate counsel for the child because it dilutes parental autonomy and that parents are the exclusive representatives of their children's interests.<sup>5</sup> While parental autonomy should be preserved, appointment of counsel for the child in and of itself does not interject the state into the parent-child relationship. Rather, it is the initiation of legal proceedings concerning a child that transfers decision-making power from the parents to the court. Thus, the parents' autonomy has already been diluted—either because they have waived exclusive authority over the decision by submitting it to the court, because allegations have been made which trigger the court's protective jurisdiction, or because the child faces the state as accuser in a delinquency proceeding. Once the court's jurisdiction has been invoked, appointment of counsel for the child merely ensures

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5. JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 112 (1979):

The appointment of counsel for a child without regard to the wishes of parents is a drastic alteration of the parent-child relationship. Indeed, it is in effect a disposition by the state. It intrudes upon the integrity of the family and strains the psychological bonds that hold it together. Therefore it cannot take place until the presumption of parental autonomy has been overcome—until the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for intervention.

that the court will be informed of all interests before it issues an order. There are better means for protecting parental autonomy than silencing children. The modern focus on family preservation and the least restrictive alternative protects parental rights without sacrificing independent child advocacy.

### *B. When Separate Counsel Should Be Appointed*

Although there have been attempts to define the circumstances under which separate counsel for children should be appointed, these efforts have not resulted in generally applicable guidelines. Pursuant to the Juvenile Justice and Delinquency Prevention Act,<sup>6</sup> the Department of Justice issued standards which provide that a child should have independent counsel "in any proceeding at which the custody, detention, or treatment of the juvenile is at issue."<sup>7</sup> The Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association similarly recommended the appointment of independent counsel for any child who is the subject of proceedings affecting her status or custody.<sup>8</sup> Strict application of either of these standards would require appointment of independent counsel in numerous proceedings, including guardianships, emancipations, adoptions, proceedings for the termination of parental rights, mental health commitment proceedings, child welfare proceedings, delinquency proceedings, marital dissolution proceedings, status offense proceedings, school discipline proceedings, special education proceedings, immigration proceedings, and others. Although independent representation is increasingly favored, in no jurisdiction is the practice nearly this comprehensive. The more typical approach is to statutorily authorize appointment of an advocate for children in specific types of proceedings. The most common statutes concern delinquency, child welfare, and custody proceedings.<sup>9</sup> These statutes, drafted by people familiar with specific types of proceedings, are concerned with the characteristics and purposes of those proceedings. Thus, these statutes do not reflect a comprehensive approach to the issue of separate counsel for children.

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6. 42 U.S.C. § 5657 (1982) (repealed 1988).

7. NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 3.132, at 273 (1980) [hereinafter DEP'T OF JUSTICE STANDARDS].

8. IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, COUNSEL FOR PRIVATE PARTIES (1980) [hereinafter IJA-ABA STANDARDS].

9. See, e.g., CAL. CIV. CODE § 4606; CAL. WELF. & INST. CODE §§ 317, 634 (West 1992).

The courts and child advocates should develop guidelines identifying the cases in which separate representation is most constructive. The crucial factor is the child's position in the litigation, and not necessarily the type of proceeding. One approach would be to appoint counsel for the child in any matter in which: (1) the child is the petitioner; (2) the interests of every other party potentially conflict with those of the child; (3) the child is accused of committing a criminal or status offense; (4) the proceedings are so contentious or prolonged as to subject the child to unnecessary trauma; or (5) the court determines that appointment of counsel for the child will advance the proceedings or facilitate resolution of the dispute. These proposed guidelines are necessarily based upon assumptions about the purpose and role of separate counsel. Before such guidelines can be drafted, however, it is necessary to reach a general consensus about the function performed by separate counsel. As will become clear, no such consensus exists.

### **III. The Role of Counsel for the Child**

In many cases, the role of the child's attorney is easily discernible. When parents seek services or damages on behalf of their child, for example, the attorney's mission is clear. However, when there is an actual or potential conflict regarding the child's best interests, the role of the child's attorney is not so evident. There is a wide divergence of opinion among legal scholars about the extent to which the role of a child's attorney differs from that of an adult's attorney. The primary controversy centers on the question of whether the child's attorney should advocate a specific outcome, and if so, how the attorney should formulate that position.

#### *A. Client-Centered Decision Making*

The function of an attorney in our legal system is to enable litigants to pursue and protect their legal rights. This approach furthers our system's emphasis on individual rights and personal autonomy. Thus, the Model Code of Professional Responsibility provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."<sup>10</sup> Client-centered litigation reflects society's consensus that individuals should control their own lives and make their own decisions, even if those decisions seem illogical or unwise.

The same principles of representation should apply when the client

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10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

is a minor. The Department of Justice practice standards provide that counsel for the child must "represent zealously that individual's legitimate interests."<sup>11</sup> The client determines his interests unless "rationally unable" to do so.<sup>12</sup> The IJA-ABA standards similarly provide that when "the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel."<sup>13</sup> This approach is consistent with the ABA Model Rules, which provide that an attorney for a minor "shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client."<sup>14</sup>

There are sound reasons to maintain zealous advocacy on behalf of child clients. The ability of children to reach "considered judgments" may be underestimated. Many children, particularly adolescents, are as capable of rational decision making as adult litigants. Moreover, we would hold children to a higher standard than adults if we were to insist that they articulate rational or "correct" choices. Indeed, attorneys are confronted daily with irrational adult clients, and there is no serious suggestion that such clients be stripped of their ability to control the course of their own litigation. Rather, the issue is one of "client control" or the ability of the attorney to educate the client about the options reasonably available to him. It is the attorney's duty to advise her client about the likelihood of achieving the client's objectives. The same approach should be utilized with minor clients.

Furthermore, one must realistically assess the risk of advocating a position on behalf of the child that is arguably ill-advised or irrational. Merely advocating a position does not guarantee its success. Judges are charged with issuing orders which comport with the child's best interests. If the child advocates an obviously unwise course of action, presumably the judge will not adopt it. Again, this is true of any litigant; one is free to advocate outrageous or unpopular points of view. On the other hand, if the child's viewpoint is debatable or reasonable minds might differ, the child's viewpoint should be considered along with other debatable viewpoints.

Advocacy that articulates the child's point of view is consistent with the structure and functioning of our legal system. The essence of the adversarial system is the idea that an equitable result is best reached through zealous and effective representation of all sides of an issue.

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11. DEP'T OF JUSTICE STANDARDS, *supra* note 7, § 3.134, at 278.

12. *Id.* at 278.

13. IJA-ABA STANDARDS, *supra* note 8, § 3.1(b), at 79.

14. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14(a) (1983).

Although one can convincingly question the wisdom of adversarial dispute resolution in cases involving children or families, it is unquestionably the system under which we operate. When a cooperative, mediative approach fails, these cases go to trial. The parents and the state are represented by counsel who vigorously defend their clients' positions. Failure to advocate the child's wishes undermines the court's ability to determine a just result.

The participation of the child in the decision-making process empowers him and his sense of alienation is decreased. In the best of circumstances, litigation can be intimidating and confusing to a child. The experience may be worse when the child feels totally powerless and has no meaningful input. This is especially true if the child knows that his attorney—the person who is supposedly his advocate—may take a position contrary to his wishes. If the child perceives that someone is on his side and the court has considered his views, even an unsatisfactory result will be easier to accept.

Although zealous advocacy on behalf of a child client presents the attorney with challenging ethical dilemmas, there is simply no workable alternative. The commonly proposed alternative models of representation fail to accomplish even the basic goals of advocacy and, therefore, are untenable. One such model is that of the neutral factfinder. A neutral factfinder is an impartial investigator appointed by the court who presents objective information to the court but does not offer opinions or advocate a particular outcome.<sup>15</sup> This model treats the child's attorney as an extension of the court and relies on the court's inherent power to protect the child's interests. One commentator aptly observes that the neutral factfinder model reflects a move away from the adversarial approach and toward the inquisitorial approach.<sup>16</sup> Simply put, it solves the dilemma of what position the child's attorney should advocate by removing the advocacy function entirely. Herein lies the model's main shortcoming.

“The fact-finder model fails totally to fulfill the requirements of representation and leaves the child in no better position than if he had a custody evaluator submitting a report as his only 'representation'.”<sup>17</sup> The inability of the court to protect the child's interests was one factor that led to the appointment of counsel for children in the first place. Indeed, a “neutral factfinder” may be worse than no attorney at all.

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15. Guggenheim, *supra* note 4, at 107–09; Eitzen, *supra* note 2, at 68; Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 690 (1987).

16. Guggenheim, *supra* note 4, at 108.

17. Eitzen, *supra* note 2, at 68.



While the factfinder's job is to present objective information to the court, the information he chooses to present and that which he chooses not to present will reflect his biases and values. Thus, what comes to the court in the guise of facts may actually be subjective information. Without an advocate, the child has no mechanism for challenging the factfinder's "facts."

Another commonly proposed model of representation is that of the guardian ad litem. Traditionally, a guardian ad litem is appointed to make decisions for the client when the client is under a legal disability. The term is used here to refer to an attorney who is appointed to advocate her own conception of the child's best interests, regardless of the child's wishes. This model assumes that children are incapable of identifying their own best interests but their attorneys are better suited to do so. Implicit in this questionable assumption is the more insidious premise that it is the responsibility of the child's attorney not only to articulate a viewpoint, but to articulate the *correct* viewpoint. If this were true, the judge would be superfluous. It is not the province of the child or his attorney to decide the case; rather it is the court's responsibility to do so after considering the viewpoints of the parties and experts.

By requiring the attorney to arrive at her own idea of the proper outcome, this model contravenes the traditional prohibition against attorneys expressing their personal views to the factfinder.<sup>18</sup> Typically, an attorney's personal view of the case is considered irrelevant. The guardian ad litem model also gives the child's advocate too much power and deprives the child of a voice. The child is heard only if his viewpoint is consistent with that of his attorney.

Like the neutral factfinder, a guardian ad litem may be worse than no attorney at all. The attorney is treated like an expert witness, except that she is not subject to qualification or cross-examination. Thus, the basis of her opinion cannot be challenged directly. One commentator observes that attorneys who purport to represent the child's best interests more often than not simply adopt the recommendation of the social worker or custody evaluator.<sup>19</sup> When this is true, the attorney serves no independent purpose, and no real advocacy is accomplished on behalf of the child.

Thus, the better view is that an attorney who represents a minor client should advocate the client's wishes if the client is able to articulate a reasoned decision. This conclusion, however, does not solve the more

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18. Guggenheim, *supra* note 4, at 101-02.

19. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 302 (1983).

difficult dilemma presented when the child client is either unable or unwilling to articulate a reasoned preference.

### B. Assessing Decision-Making Capacity

Even if one accepts the proposition that many, if not most, juvenile litigants are capable of directing their attorneys, it is undeniable that some are simply unable or unwilling to do so. An attorney may be appointed to represent an infant who is too young to communicate; a child who does not want the responsibility of choosing between his parents; or the child who simply is too immature to engage in the reasoning process. This raises the question of how an attorney determines whether her client is capable of directing the litigation.

Some commentators propose that a child's competency to direct his attorney is primarily a function of maturity, which in turn is roughly correlated to age. Thus, these writers propose that a specific age be identified before which it is presumed that the child is incapable of directing his attorney.<sup>20</sup> While two authors identify seven years as the age at which most children would have achieved sufficient cognitive development to make reasoned decisions,<sup>21</sup> many would find this age too young. Although an age-based presumption is somewhat arbitrary, it introduces an expedited, objective step in the assessment process. The presumption would be rebuttable, however, and would constitute only the threshold inquiry. Thus, each child's capacity would be assessed on an individual basis.

One commentator however, asserts that, in order to determine an individual client's capacity, the attorney should focus on the decision-making process rather than the decision itself.<sup>22</sup> She identifies the major components of decision making as the ability to understand, to reason, and to communicate.<sup>23</sup> She suggests that the "lawyer should assess the child's cognitive ability, emotional maturity, language development, and information and experience in relation to the decision to be made."<sup>24</sup> This approach makes sense for several reasons. First, the attorney, rather than the court, determines whether the client is capable of reasoned judgment. Because the attorney presumably has more contact with the client than the court, she is in a better position to assess the client's capabilities. Moreover, the matter is more appropriately resolved in the context of defining the attorney-client relationship.

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20. *Id.* at 312.

21. *Id.* at 312-15; Guggenheim, *supra* note 4, at 91.

22. Ramsey, *supra* note 19, at 316.

23. *Id.* at 309.

24. *Id.* at 316.

The suggestion that the court assess the client's capacity is intended to guard against subjectivity. However, the court is no more qualified to make this assessment than the attorney, and the risk of subjectivity is equally present. In any case, the effort to entirely eliminate subjectivity may be misguided; the assessment is inherently subjective to some degree because it involves one person's perception of another person's abilities. Every attorney-client relationship is defined, in part, by subjective judgments made by both the attorney and the client. The more insidious tendency with a child client is undue paternalism—the assumption that the child is incompetent simply because one questions the wisdom of his viewpoint.

Focusing on the ability of the child to engage in the decision-making process rather than the child's ability to arrive at the "correct" decision is the best prescription against paternalistic tendencies. It is not necessary that the child accurately resolve the disputed issues, only that he communicate and explain his position. This is true for any litigant and children should not be held to a higher standard. Thus, the lawyer should be primarily interested in the client's ability to reason and to articulate his motives.

Finally, although this approach seems to require some expertise in developmental psychology, it is actually a matter of common sense and common experience. Regardless of the vocabulary used to describe the process, an attorney who represents children must be able to evaluate her client's capacity to participate in the litigation. There is simply no substitute for the largely intuitive process one uses to define the parameters of each attorney-client relationship, nor is the process easily reduced to written guidelines.

Attorneys who represent children will invariably receive appointments to represent children who are incapable of reaching a reasoned decision. These children may need independent advocates even more than children who are able to articulate their wishes. Since the attorney cannot receive direction from her client, she must engage in a different process to formulate the position she will argue on her client's behalf. Some commentators propose that the attorney representing an immature child should advocate that which she determines is in her client's best interests. However, this approach essentially mimics the guardian ad litem model of representation and suffers from all the same inadequacies. Rather, the attorney should advocate that which best approximates the position her client would choose if he were able to direct the litigation.

One might argue that such an approach requires the attorney to develop powers of prescience not generally required for the practice of law. On the contrary, acting as a surrogate decision maker for another

is the essence of the doctrine of substituted judgment; it does not require magic, nor is it without precedent. Substituted judgment, while imperfect, provides the best model for representing very young or immature clients.

### C. Substituted Judgment

#### 1. ORIGINS OF THE DOCTRINE

In order to discuss the doctrine of substituted judgment and to answer the arguments against its application in this context, one must understand its origins. The doctrine was developed in the nineteenth century as part of the law of lunacy.<sup>25</sup> Under the common law, a “lunatic” was one who was mentally incompetent, but who was once lucid and who could potentially regain mental capacity.<sup>26</sup> An “idiot,” on the other hand, was mentally incompetent from birth and had no hope of regaining lucidity. Substituted judgment was developed to make decisions on behalf of lunatics.<sup>27</sup>

The court first applied substituted judgment to provide authority for disposing of a lunatic’s property. In *Ex parte Whitbread*,<sup>28</sup> the question was whether the court could make an allowance from the estate of Mr. Hinde (the lunatic in question) for the support of his niece. Mr. Hinde owed no duty of support to his niece and was incompetent to decide whether or not he wished to support her voluntarily. In order to grant the niece’s petition without running roughshod over Mr. Hinde’s property rights, Lord Eldon rationalized, “. . . the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.”<sup>29</sup>

The court in *Whitbread* did not explain the manner in which it divined “that which the Lunatic himself would have done.” However, application of the doctrine was subsequently restricted to cases in which there was sufficient evidence from which to infer the lunatic’s donative intent.<sup>30</sup> Thus, the court considered evidence of close family ties, mutual affection, prior statements of donative intent, and history of gift giving. Given that lunatics were once competent, there was often some evidence of their former statements and acts from which to such draw inferences.

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25. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990).

26. *Id.*

27. *Id.*

28. 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816).

29. *Id.* at 103, 35 Eng. Rep. at 879.

30. See, e.g., *In re Evans*, 21 L.R. Ch. D. 297 (C.A. 1882); *In re Blair*, 1 Myl. & Cr. 300, 40 Eng. Rep. 390 (Ch. 1836); *In re Frost*, 5 L.R. Ch. App. 699 (1870); *In re Darling*, 39 L.R. Ch. D. 208 (C.A. 1888).

For over a century, the doctrine of substituted judgment was only applied to dispose of property—both in England and in the United States. However, by the mid-twentieth century, American courts began to borrow the doctrine liberally to make all manner of decisions on behalf of those who lacked capacity. The distinction between lunatics and idiots had long since been discarded in favor of a more generic category called “incompetents.” Because many incompetents were more akin to idiots—that is, without a history or potential of competency—courts began to substitute their judgment even when there were no prior acts or statements from which to infer the intent of the incompetent. The first of these significant permutations occurred in *Strunk v. Strunk*.<sup>31</sup>

In 1969, a county court in Kentucky granted the petition of a mother who requested authorization for surgery to remove the kidney of her incompetent son, Jerry, for donation to his dying brother, Tommy.<sup>32</sup> The case was appealed and affirmed.<sup>33</sup> Citing *Whitbread*, the appellate court asserted that “. . . the right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward.”<sup>34</sup> In one fell swoop, the Kentucky Court of Appeals extended the reach of its substituted judgment from decisions to dispose of surplus income to decisions authorizing organ transplants.

Equally troubling was the court’s approach to determining that which Jerry would have done if he were able to decide. Jerry was mentally retarded and had never been competent. There were no prior acts or statements from which the court could ascertain his intent to donate his kidney to Tommy. Instead, the county court simply found that “Jerry was greatly dependent upon Tommy, emotionally and psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney.”<sup>35</sup> Thus, the court dispensed with the traditional evidentiary constraints and applied what amounted to a “best interests” test.

After *Strunk*, the doctrine of substituted judgment became firmly entrenched in the law of informed consent. Courts have provided proxy consent to terminate the life support systems of incompetents,<sup>36</sup> to autho-

31. 445 S.W.2d 145 (Ky. 1969).

32. *Id.* at 145-46.

33. *Id.* at 145.

34. *Id.* at 148.

35. *Id.* at 146.

36. *See, e.g., In re Quinlan*, 355 A.2d 647 (N.J. 1976); *In re Storar*, 420 N.E.2d 64 (N.Y. 1981); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986).

alize their sterilization,<sup>37</sup> and to force them to take psychotropic medications.<sup>38</sup> In some of these cases, the court engaged in an inquiry concerning the best interests of the incompetent person, along the lines of the *Strunk* decision. In other cases, the court took a stricter approach, requiring some evidence of the intentions or desires of the incompetent person, expressed when he or she had the capacity to articulate a preference.

A recent Supreme Court case signaled a return to the evidentiary constraints imposed in some of the early cases. In *Cruzan v. Missouri Dep't of Health*,<sup>39</sup> Nancy Cruzan's parents requested that the court authorize termination of Nancy's life support. The victim of a car accident, she had been in a persistent vegetative state for several years and had been maintained by a feeding tube. Evidence was presented that Nancy had told her housemate that if she were sick or injured and could not live normally, she would not want to continue her life. The trial court relied on this evidence to grant the Cruzans' request.

The Supreme Court of Missouri reversed and adopted a standard requiring clear and convincing evidence of the incompetent patient's former intent in order to terminate life support. The U.S. Supreme Court affirmed and held that, in cases involving informed consent to terminate life support, a state could constitutionally condition the application of substituted judgment upon clear and convincing evidence of the patient's former intent.<sup>40</sup>

The evolution of the law of substituted judgment has been controversial, and indeed, its application by the courts provides ample cause for skepticism. While the purpose of the doctrine is to act in the interests of the incompetent, there is no guarantee that such purposes are achieved. These concerns are heightened when the court is asked to authorize a nontherapeutic invasion of the incompetent's body, and there is little or no evidence from which to infer his or her informed consent. The consequences of mistaken judgment are potentially devastating and the risk of exploitation is disturbing.

Having acknowledged the dangers inherent in a court substituting its judgment for that of an incompetent litigant, one need not reach the same conclusions with respect to the use of substituted judgment by attorneys representing young children. There are fundamental differences between the role of an attorney representing an incompetent client

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37. *In re Grady*, 426 A.2d 467 (N.J. 1981); *In re Moe*, 432 N.E.2d 712 (Mass. 1982).

38. *In re Bryant*, 542 A.2d 1216 (D.C. 1988).

39. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

40. *Id.* at 284.

and a court making a final ruling in a case involving an incompetent litigant. These differences justify, and arguably require, substituted judgment by an attorney representing a child too immature to direct the litigation.

## 2. SUBSTITUTED JUDGMENT AND THE IMMATURE CLIENT

The central argument against the application of substituted judgment by attorneys representing children focuses on the concern that the attorney will make the "wrong judgment." However, if the adversary system works as it should, the dangers present when a court applies substituted judgment are not present when an attorney applies substituted judgment. When a court applies substituted judgment on behalf of an incompetent litigant, its determination is dispositive of the entire case. In a very real sense, the judge's job is to make the correct decision. When an attorney applies substituted judgment on behalf of a child client, however, she is developing her client's position, not deciding the case. The attorney is under no obligation to identify the "correct" position and may well place herself at odds with her client if she attempts to do so.

A more realistic concern is whether an attorney can accurately identify that which her young client would do if he were able to direct the litigation. The question is not whether the position identified reflects the correct outcome, but whether it correctly reflects that which the client would choose. Some commentators convincingly argue that substituted judgment does not make sense in the context of immature clients.<sup>41</sup> Young children, by definition, have never been competent and their past acts or statements are not considered competent evidence. The absence of evidence of past intent makes it difficult to infer intent in the present.

Even if an attorney determines her client is unable to direct the litigation it does not necessarily follow that all subjective evidence of the child's intent should be disregarded. Through the child and others who know him, the attorney can learn about the child's habits, attachments, values, and personality, all of which should inform the attorney's judgment. Nor should the child's stated wishes be disregarded. The attorney should consider the basis of any preference stated by the child, as well as the strength of the child's conviction.

The attorney should also refer to objective evidence in forming her substituted judgment. Some commentators attempt to identify that

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41. Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 CONN. L. REV. 211, 240-41 (1991).

which a reasonable child of the client's age would want;<sup>42</sup> others consider "evidence of what similarly situated mature people wish had been advocated."<sup>43</sup> While both of these formulations seem strained and unworkable, they hint at an approach that makes sense. It is possible to draw indirectly on the experiences of others to determine what reasonable or similarly situated persons would want.

The values which form the foundation of the law and social policy concerning children and their welfare are the product of society's collective experience. These values provide guidance for the resolution of disputes involving children. Such values include protection of the child's physical and emotional safety, preservation of the child's family of origin whenever possible, placement in the least restrictive alternative—preferring family, relatives, or a family-like setting over institutionalization—and minimizing disruption and exposure to prolonged or intense conflict.

In practice, there may be a fine line between applying generally accepted public policies to arrive at a position on behalf of the child and substituting one's own conception of the child's best interest. One might arrive at the same judgment using either process. However, the important distinction between substituted judgment and the "best interests" approach is not the decision reached, but the perspective from which it is reached. One decision is comparable to a decision by the child himself, and the other is one that is imposed on the child. The distinction is not merely academic. The approach taken by the attorney determines all aspects of case development, including which evidence the attorney gathers as well as the manner in which the attorney relates to her client, the other litigants, and the court.

In any event, any attorney who represents children must resolve the ethical dilemmas such representation presents. An inherent tension exists between traditional client-centered advocacy and the undeniable fact that some children are not capable of making decisions for themselves. None of the proposed models perfectly resolves this tension. Careful examination of the alternatives demonstrates that preservation of the traditional approach to client-centered decision making, to the greatest extent possible, best serves the interests of the child client.

#### IV. Conclusion

Increasing numbers of decisions about the treatment, placement, and custody of children are committed to the courts. Whether this is viewed

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42. *Id.* at 226.

43. Lyon, Comment, *supra* note 15, at 703.



as a positive or negative development, it is clear that protecting the interests of children must be the paramount concern. Because their interests are unique, children need vigorous, independent representation. Their experiences, perceptions and wishes are important and must be articulated. Whether the child is mature or very young, articulate or incompetent, the attorney should function as the child's spokesperson. Attorneys should not accept appointments in which they are expected to advance their own idea of the child's best interests. Such an approach skews the adversarial process and compromises the attorney's ability to serve her client. Only by serving as the child's voice can attorneys assist the court to reach fair and informed decisions.