

Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*

SARAH H. RAMSEY[†]

Introduction

The lawyer for a child is in an ambiguous position. Although our society generally accepts the idea that the typical child "is not possessed of that full capacity for individual choice"¹ which the adult is assumed to have, this presumed lack of capacity has not meant that a child is never entitled to a representative who will advocate for a position a child has chosen. However, imagine that you are representing the child in a case such as this:

Jim is a nine-year-old boy who lived alone with his alcoholic mother. Jim's mother, while drunk, beat him with a stick, leaving bruises on his upper body and face. His teacher noticed the bruises, and after an investigation, the Department of Social Services filed an abuse petition in juvenile court. The Protective Services worker asserted that, in addition to this beating, in the past year the mother had frequently left Jim alone for up to 48 hours without supervision, and that her behavior while drunk had recently been characterized by violent outbursts, resulting in one arrest for disorderly conduct.

To what extent should you treat Jim like any other client? What should you consider when you are puzzling over Jim's ability to make

* I am grateful for the suggestions offered by many colleagues and students about the ideas contained in this paper. I am particularly indebted to David L. Chambers for his patient and insightful criticism of earlier versions of this article and to Robert F. Kelly and Donald N. Duquette for their comments and support.

[†] Associate Professor, Syracuse University College of Law; J.D., University of North Carolina at Chapel Hill School of Law (1973); LL.M., University of Michigan School of Law (1982).

1. *Ginsberg v. New York* 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

... *Journal of Family Law Quarterly*, Volume XVII, Number 3, Fall 1983

a decision which will determine the objectives of a legal proceeding? Should you represent what Jim wants or what you think is best?

This article considers these questions in the context of a protection proceeding—a proceeding where the temptation to paternalism is strong because the very purpose of the proceeding is to help a child who has allegedly been harmed. The article recommends that even in protection proceedings the lawyer should represent the wishes of the child when possible and proposes a standard for assessment of the child's decision-making abilities which is related to the purpose of representation.

Part I of the article discusses procedural aspects of protection proceedings and discusses legislation which provides for appointment of representatives for children. In part II the goals of representation are considered. A standard for judging the child's decision-making abilities is proposed in part III and the application of the standard is discussed in part IV. Part V considers some of the problems involved with representation of the wishes of the child. The article concludes with suggestions for future research.

I. The Provision of a Representative

The position of the lawyer for the child in a protection proceeding is ambiguous not only because of confusion about the proper lawyer-client relationship, but also because the child is not formally a party. Once a petition has been filed requesting that the court take jurisdiction over a child in a protection proceeding, the court must determine if the child is abused or neglected; if the child is, the court must determine what, if anything, is needed to protect the child from further harm.² The child is neither plaintiff nor defendant but rather is the subject of the proceedings, the victim rather than an actor. An additional source of confusion is that the state is responsible for protecting the child's interests, but the child's lawyer also has this responsibility. In spite of these ambiguities, a majority of states now provide for the appointment of a lawyer for the child in protection proceedings.³

2. See, e.g., MICH. COMP. LAWS § 712A.18 (1981).

3. Kelly and 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, 408 (1983).

A major impetus for the states' adopting legislation that provided for counsel for children was the 1974 Child Abuse Prevention and Treatment Act.⁴ The Act made a state's receipt of federal funds for programs under the Act contingent on the state's fulfilling certain conditions, including a requirement that the state shall: "Provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian *ad litem* shall be appointed to represent the child in such proceedings."⁵ It is not clear from this requirement what role the child's representative is to play and the legislative history of the Act does not indicate what kind of representation was desired.⁶ Neither the Act nor the Department of Health and Human Services regulations require that the guardian *ad litem* be a lawyer.

Definitions of "guardian *ad litem*" are not helpful either. Although at one time the phrase "guardian *ad litem*" had a precise meaning, the definition has broadened to include a variety of kinds of representation, and therefore does not clearly indicate what is expected. This is especially true in a protection proceeding where the child has no real adversary in a legal sense, since the traditional guardian *ad litem* was appointed to represent a child who was a defendant in a lawsuit.⁷

Legal scholars disagree about the proper role of the child's representative⁸ and the little case law that there is in the area is not very enlightening.⁹ Most state statutes providing for a representative

4. 42 U.S.C. § 5101-06 (1974).

5. *Id.* § 5103(b)(2)(G).

6. The provision used in the Act was in a draft of the legislation proposed to the House Select Subcommittee on Education by the Child Welfare League of America on October 5, 1973. Martinez, *Guardian ad Litem Requirements of the Child Abuse Prevention and Treatment Act—Public Law 93-247—Should They Be Changed?* in FINAL REPORT: NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE I (ABA, 1980). For additional discussion of the legislative history of the Act, see Norman, *Should There Be Changes in the Guardian ad Litem Language Contained in P.L. 93-247 Child Abuse Prevention and Treatment Act*, in ABA FINAL REPORT; and Hoffman, *Policy and Politics: The Child Abuse Prevention and Treatment Act* in CRITICAL PERSPECTIVES ON CHILD ABUSE 157 (Bourne and Newberger eds. 1979) (hereinafter CRITICAL PERSPECTIVES).

7. The guardian's role was adversarial and was limited to defending against plaintiff's allegations. See Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W. L. REV 16, 27-28 (1976).

8. The National Legal Resource Center has prepared abstracts of 32 articles on the child's representation and has summarized differences in opinion about the role. National Legal Resource Center for Child Advocacy and Protection, ABA, Annotated Bibliography of Guardian ad Litem Law Review Articles (1980).

9. Two cases of tangential interest are *Dawley v. Butts Co. Dept. of Family and Children Ser-*

for the child do not clear up the ambiguities in the role. Some states simply paraphrase the federal statute.¹⁰ Some states require that the representative be an attorney, some do not.¹¹ In those states that do require a lawyer and do attempt to define the lawyer's responsibilities, ambiguity usually remains. One state statute, for example, indicates that the lawyer is to "represent the rights, interests, welfare, and well-being of the child, and serve as guardian *ad litem* for said child."¹² Another state requires the child's counsel to "represent the child" but also charges counsel "with the representation of the child's best interests."¹³ Three states that require the appointment of attorneys appear to mandate representation of the child's best interests rather than wishes¹⁴ by stating, for example, that "the

vices, 148 Ga. App. 815, 253 S.E.2d 235 (1979) and *In re Apel*, 96 Misc. 2d 839, 409 N.Y.S. 2d 928 (Fam. Ct., Ulster Co. 1978). In *Dawley*, the court ruled that an attorney could serve both as an attorney and as a guardian ad litem for children since "[T]he fiduciary relationship to the children is the same in both instances." 253 S.E.2d at 237.

In *Apel*, the court was concerned with whether the law guardian could be neutral or whether he should be an advocate for the disposition he felt was proper. In concluding that the guardian in *Apel* ultimately could take an advocate's role, the judge commented that "[a]t the outset of the case, a law guardian, who in addition to his role as counsel, advocate and guardian serves also in a quasi-judicial capacity in that he has some responsibility, at least during the dispositional phase of the proceedings, to aid the court in arriving at a proper disposition and should, like the Judge, be neutral." 96 Misc. 2d at 842-43. Although the judge did not consider what position the law guardian should take with regard to his client's wishes, his opinion implies that the law guardian's role should be to represent the child's best interest. However, the New York Legal Aid Society, which frequently serves as the law guardian, feels that the client who is old enough to direct the proceedings should do so. INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, 81 (1979).

Apel was briefly criticized in Ellison and Lynch, *Family Law*, 31 SYRACUSE L. REV. 281, 295 (1980) for ignoring the issue of the client's wishes. There are civil commitment cases which hold that having an attorney representing an adult client's best interests, rather than taking an adversary position in a civil commitment proceeding does not meet due process requirements for counsel. *Lessard v. Schmidt*, 349 F. Supp. 1078. (E.D. Wis. 1972), *vacated and remanded per curiam*, 414 U.S. 473 (1974), *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis. 1974). However, since the provision of counsel for children in protection proceedings is not constitutionally required, this reasoning would not be applicable. In *Interest of D.B.*, 385 So. 2d 83 (Fla. 1980). See *Lassiter v. Dept. of Social Services Durham Co.*, 452 U.S. 18 (1981). *But see* *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976).

10. *E.g.*, UTAH CODE ANN. § 78-3b-11 (Supp. 1981).

11. Virginia, for example, requires that the court appoint "a discreet and competent attorney-at-law as guardian ad litem to represent the child" in a protection proceeding. VA. CODE § 16.1-266(a) (1982). In contrast, Nevada requires that the court appoint a social worker, juvenile probation officer, officer of the court or a volunteer and states explicitly that the representative is to receive no compensation. NEV. REV. STAT. § 62.196 (1982).

12. ALA. CODE § 26-14-11 (1975).

13. MICH. COMP. LAWS § 722.630 (1979).

14. COLO. REV. STAT. § 19-10-113 (3) (1981); CONN. GEN. STAT. ANN. § 17-38a(f)(2) (1982); PA. CONS. STAT. ANN. tit. II § 2223(A) (Supp. 1982-83). Like Pennsylvania, Oklahoma and Wyoming also use the "charged with representation of the child's best interests" language, but both also say that the attorney is to represent the child. OKLA. STAT. tit. 21 § 846(b) (1981) (the

guardian *ad litem* shall be charged with representation of the child's best interests at every stage of the proceeding. . . ."15

One state would appear to put the choice of best interests versus wishes in the hands of the judge. If the judge determines that "representation of the child's best interests, to be distinguished from his preferences, would serve the welfare of the child," the judge should appoint an attorney "or other person" to be the child's guardian *ad litem*.¹⁶ If the judge wants the child's preferences represented, then an attorney, who would act as an attorney, should be appointed. The guardian *ad litem* could be appointed either in addition to or instead of the attorney.¹⁷ However, since the same person can be appointed *both* guardian *ad litem* and attorney, and is, confusion remains.¹⁸

II. Goals of Representation

Much of the conflict about the lawyer's role is due to the different goals meant to be achieved by having a representative. Representation of the child in protection proceedings has a dual purpose: to minimize the harm to the child, and to provide the child with an advocate. At times these purposes are congruent; at times, however, they diverge, resulting in confusion about the lawyer's role. Consider, for example, the choices of the lawyer representing Jim. If Jim wanted to stay with his mother, and his lawyer thought that this was the best placement for him, the lawyer could advocate for that result. But if the lawyer felt that Jim was unsafe at home and should be removed from his mother, even temporarily, then the lawyer would have to choose between advocating for Jim's wishes, or for his best interests. There are strong policy reasons that support either choice.

attorney is to "appear for and represent a child"); WYO. STAT. § 14-3-211(A) (the attorney is "to represent" the child and "any attorney representing a child . . . shall also serve as the child's guardian *ad litem* . . .").

15. PA. CONS. STAT. tit. II § 2223(a) (Supp. 1982-83).

16. ALASKA STAT. § 09.65.130 (Supp. 1982).

17. *Id.*

18. In the Matter of C.L.T., 597 P.2d 518 (Alaska 1979) (an attorney was appointed to serve as the counsel and guardian *ad litem* for a two-year-old child in a proceeding to terminate parental rights). Cf. Veazey v. Veazey, 560 P.2d 382, 387 (Alaska 1977) (the "guardian *ad litem* . . . is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously . . .").

Representing the Child's Best Interests

Much of the impetus for providing representation was the belief that the representative could help prevent harm to the child. The child who is the subject of a protection proceeding runs the risk of being harmed in several ways. First, there is the possibility that the gravity of the child's situation may not be realized, adequate protection will not be provided, and the child's parents will seriously injure or even kill him.¹⁹ Second, the child runs the risk of being harmed by too much intervention. The child's family life can be disrupted or even destroyed by coercive state action.²⁰ Finally, the child runs the risk of being neglected by the state once the state has taken jurisdiction over him. Although the state's removal of a child from his home may be appropriate in a given case, if proper follow-up is not provided the child may end up "lost" in the system, staying in a series of foster homes or other placements without a permanent home.²¹

The lawyer representing the child's best interests can reduce these risks by requiring a thorough investigation, and by arguing for the disposition and follow-up which is most suitable to the child's needs. The lawyer's advocacy for the child's interests is needed because the traditional representatives and protectors of the child are unable or unwilling to put the child's interests first.²² Although the judge, the department of social services, and the prosecutor are usually expected to be guided by considerations of the best interests of the child, fiscal concerns, public pressure and professional loyalties may overshadow the child's interests.²³ Administrative delays and oversight may be accepted without criticism. Time limitations and staff turnover can prevent an adequate exploration of the child's problems and possible solutions.²⁴ The child's lawyer, ideally, can be indepen-

19. For case histories of children killed by their parents see J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 141-186 (1979).

20. See Wald, *State Intervention on Behalf of "Neglected" Children: Search for Realistic Standards*, 27 *STAN. L. REV.* 985 (1975).

21. The state's treatment of J.L. and especially J.R. (who became a ward of the state when he was only three months old) illustrates this problem. *Parham v. J.R.*, 442 U.S. 584 (1979). See also CHILDREN'S DEFENSE FUND, *CHILDREN WITHOUT HOMES* (1978).

22. See Issacs, *The Role of Counsel in Child Abuse Cases*, *HELPING THE BATTERED CHILD AND HIS FAMILY* 225, 228-29 (Kempe and Helfer eds. 1972).

23. For example, publicity about mishandling of a case by the department of social services which results in a child's death can lead to increased removal of children from their homes across the state. Aber, *The Involuntary Child Placement Decision: Solomon's Dilemma Revisited*, *CHILD ABUSE: AN AGENDA FOR ACTION* 156, 166 (1980).

24. A department of social services mandate to "preserve and stabilize family life where ever

dent of these institutional constraints. Since the interests of parents or parents' counsel are likely to be in conflict with those of the child, they cannot be expected to represent a child's best interests.²⁵

The risk of undue, or overly long, separation of children from parents is particularly high because of the characteristics of the families who are brought to court in a protection proceeding. Generally they are poor families²⁶ and most cases involve more than one type of problem.²⁷ More often than not the facts of the petition are not in dispute; the issue is rather what is to be done.²⁸ Because the families are poor with many problems, intervention can be time-consuming and expensive. The example below illustrates the potential for inappropriate intervention by the state:

An eight-month-old child came to the emergency room with her mother, who complained of her inability to gain weight. The mother was poorly dressed and obviously depressed. Physical examination showed a tiny, emaciated child who did not respond to play. There were moderate hip and elbow contractures. Her weight and length were well below the third percentile. The mother was unmarried, and the patient was the fourth child of a fourth father. The mother was born and raised in North Carolina, where she left her oldest child on coming to Boston a year before to find work as a domestic. Both maternal grandparents were seriously ill in North Carolina. She had no child care for her two older preschool children. Mother and children were supported by Aid to Families with Dependent Children; the stipend was about \$235 a month, of which \$115 went for rent. The mother said her teeth ached constantly, but she had been unable to get to a dentist. She also complained of back pain, fever and listlessness, and a urinary tract infection was shortly discovered.

In this case, a young, depressed mother failed abjectly in her wish to settle her family in an alien metropolis. She could not get child care, dental care, decent employment or health care, including contraceptive services. Her child's neglect was not taken to be her fault, and a compassionately conducted family assessment permitted identifying a management program which enabled the child to thrive in her care. On discharge from the hospital, a homemaker came

appropriate" might be another source of conflict with the child's interests. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 529 (1978).

25. Issacs, *supra* note 22 at 229.

26. It has been stated that "[a]t present, socially marginal and poor children are virtually the only ones susceptible to being diagnosed as victims of abuse and neglect," Newberger and Bourne, *The Medicalization and Legalization of Child Abuse* in CRITICAL PERSPECTIVES *supra* note 6 at 139, 153.

27. Types of problems could be physical abuse, substance abuse, or neglect, for example. The North Carolina Study found a mean of 1.9 types of problems per case. Kelly and Ramsey, *supra*, note 3, at 425, Table 1.

28. The University of Michigan Interdisciplinary Project on Child Abuse and Neglect is conducting a study of attorneys for children in abuse/neglect cases. Preliminary results from attorney interviews and a court record survey indicate that there is seldom substantial disagreement about the petition allegations.

three days a week, a visiting nurse on alternate days. Weekly clinic visits were scheduled. Preschool services were found for her two older children. A social worker gave weekly counseling, which was associated with an increase in the mother's self-esteem. Dental and medical treatment, along with other elements in the management plan, were coordinated by the social worker.

At a five-year follow-up the patient was physically and psychologically normal. Her family, including a new younger brother, were happy and healthy.²⁹

This case has a happy ending; a child at risk was provided protection through long-term, necessary services which made it possible for the child to stay at home safely. But two other endings were also possible.

First, the infant could have been left in the home without adequate follow-up, and could have suffered physical harm as a result because the mother did not have the resources necessary to care for the baby without state assistance. If the mother wanted to keep her children, her lawyer might well have taken the position that there would be no further neglect and that the mother should have custody of her children without additional state intervention. Arguing for services might be tantamount to admitting that the mother was unable to care for her children and could be fruitless unless there were a statutory requirement that removal of a child from the home be a remedy of last resort, used only if services would not suffice to protect the child adequately.³⁰

Second, the infant, or all of the children, could have been taken from their mother by court order, and placed in temporary foster care until their mother was capable of providing care. Given the mother's many problems, the "temporary" placement probably would have been lengthy, and the mother would have had difficulty in maintaining contact with the children. The department of social services might have preferred foster care services for a variety of administrative reasons. For example, foster care might have been paid for primarily with state and federal funds whereas services might have been supported by local, more limited funds. A transfer to foster care might have meant that the caseworker would have "completed" the case and reduced his or her caseload by one, whereas the

29. Newberger and Hyde, *Child Abuse Principles and Implications of Current Pediatric Practice* in *CRITICAL PERSPECTIVES*, *supra* note 6, at 27, 29-30.

30. Effective October 1, 1983, a state's eligibility for certain federal foster care payments will be conditional on the state's requiring that "in each case reasonable efforts will be made (A) prior to the placement of the child in foster care to prevent or eliminate the need for removal from his home. . . ." 42 U.S.C. 671(a) (15) (Supp. 1975-82).

provision of services might have meant ongoing responsibilities.

Since poor families do not have the resources to buy the help they need, these choices are largely made by the department of social services. These families are not in a position to explore all options and to pursue the course which is best suited to their needs. The lawyer representing the child's best interests, however, can point out the faults in the way both the parents and the state are providing for the child.

The seriousness of the risks to the child and the lack of a true advocate for the child are reasons for the child's lawyer to represent the child's best interests. But there are also reasons for having the lawyer, to the extent possible, treat the child like any other client, advocating what the client wants, not what the lawyer thinks is best.

Representing the Child's Wishes

What arguments support having a lawyer represent the wishes of the child? Many of the same arguments used to criticize lawyers' paternalistic treatment of adults are applicable to the representation of minors as well. Respect for the individual, his values, his autonomy includes letting him make his own choices, even wrong ones.³¹ An individual should not lose this claim for respect simply because he is under age eighteen. Additionally, one of the purposes of having a representative for the child is to focus the attention of the judicial proceeding on the child rather than on parental behavior. Having the child's point of view represented would help achieve this goal.

Such representation would also help temper the class and cultural biases prevalent in protection proceedings. The protection statutes in most states contain language which is capable of highly subjective interpretation. For example, "a lack of proper parental care, control or guardianship" is a common ground for state intervention.³² Because these statutes are so broad, there is ample room for personal biases.

31. Andalman and Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and A Proposal*, 45 MISS. L.J. 43, 48-49 (1974); Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981). For a discussion of both theoretical and practical reasons for adult client control see D. Rosenthal, *Lawyers and Clients: Who's in Charge?* (1974) and Spiegel, *Lawyer and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

32. NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE ABUSE AND NEGLECT, VI A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES 46 (1977).

In fact, blacks and other minority groups are usually overrepresented in protection proceedings.³³ A recent study of protection proceedings in North Carolina, for example, found that blacks constituted 38 percent of the North Carolina court case sample even though they represented only 22 percent of North Carolina's population.³⁴ American Indians constituted 7 percent of the court cases although they made up but 1 percent of the state's population.³⁵

Of course, overrepresentation *per se* does not mean that the system is racially biased. However, a broad statute does allow a negative judgment on cultural differences in child-rearing practices. Having the child's point of view presented could allow these differences to be looked at from a different perspective. The North Carolina study found that when black children were represented by black attorneys, there was a substantial reduction in the odds that the children would be removed from their home.³⁶ Black attorneys may well have been able to accept and explain the child's wishes in these cases more readily than white attorneys. White attorneys may have felt more comfortable in representing their own view of the child's best interests.

The poor are also overrepresented. Nationally, 37 percent of the substantiated abuse/neglect reports are on families with an annual income of under \$5,000 and 67 percent of the families have an income of less than \$9,000.³⁷ That poor families are more likely to be classified as abusive or neglectful is not surprising since the stresses of poverty and unemployment can lead to abuse and the failure to provide adequate food, shelter, clothing, supervision or medical care constitutes neglect. Indeed, at least one state still has a statute which would allow jurisdiction over a child who is "dependent on the public for support . . ."³⁸ Whether this overrepresentation is because of dif-

33. Blacks and other minority groups are also over represented in reports of abuse and neglect. National reporting statistics indicated that 19 percent of the alleged perpetrators in substantiated reports are black even though blacks make up only 11 percent of the population. Eight percent of the alleged perpetrators have Spanish surnames although only 5 percent of the general population has Spanish surnames. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978) 24-25 (1980) (hereinafter NATIONAL ANALYSIS).

34. Kelly and Ramsey, *supra* note 3, at 436.

35. *Id.*

36. *Id.* at 438.

37. NATIONAL ANALYSIS, *supra* note 33 at 31.

38. ALA. CODE 12-15-1(10) (1975).

ferent outlooks on what constitutes acceptable child-rearing practices, poverty, or a higher level of abuse and neglect is still unclear.³⁹ However, class bias, like ethnic bias, could be lessened by listening to the child.

Another argument in support of representing the child's wishes is that doing so might result in wiser decisions. The court in a protection proceeding makes significant decisions about the child and his family relationships. These choices are difficult, and frequently the experts disagree about what should or can be done. Why not trust the child's judgment about what is right for him, at least to the extent of having his position freely advocated, especially since age is not an accurate predictor of capacity? Children do not necessarily think that their parents' actions constitute unreasonable treatment even if society as a whole does.⁴⁰ Additionally, to some extent society does not care if the treatment is abusive or not if the child manages to survive and "turns out all right." The names of Sirhan Sirhan and James Earl Ray are mentioned to support programs to decrease child abuse,⁴¹ but not those of Betty Smith or Claude Brown.⁴² The latter apparently did not think that the state should have protected them from their parents' treatment; perhaps they were right.

Moreover, decisions might be more accurate, not necessarily because the child's view was correct, but because another point of view would be presented. The representative for the child's wishes would be in an adversary position, requiring the other parties to prove that his client's position was wrong. One should note, however, that although this latter argument would hold true for some child protection proceedings, it would not be true when the child's wishes

39. Ziegler, *Controlling Child Abuse in America: An Effort Doomed to Failure?* in CRITICAL PERSPECTIVES, *supra* note 6 at 171, 186-87.

40. R. KEMPE AND C.H. KEMPE, CHILD ABUSE 40 (1978) (A school-age child may accept "his parents' discipline as the right way to bring up children, since its the only way he knows"). The victim's acceptance of punishment, however, can also be part of the pathology of abuse; the victim blames himself rather than the abuser, believing that the punishment is deserved. *See id.*

41. *To Establish a National Center on Child Abuse and Neglect: Hearings on H.R. 6379, H.R. 10552, and H.R. 10968 before the Subcommittee on Select Education and Labor, 93d Cong., 1st Sess.* 18 (1973) (statement of Dr. Brandt Steele).

42. In her autobiographical novel, Betty Smith recounts that her mother persisted in soaking her children's hair with kerosene to prevent lice in spite of their teacher's protest. B. SMITH, A TREE GROWS IN BROOKLYN 144 (1943). In his autobiographical account of his youth, Claude Brown describes the frequent severe beatings he received from his father, and the drinking sprees his father took him on while Claude was age 6. MANCHILD IN THE PROMISED LAND 18-19, 28 (1965).

coincided with the goals of another party, such as his parents, or if the other parties were inadequately represented.⁴³

Finally, a major reason for providing representation for children was the errors and misdirection of the judicial-social welfare system, and therefore the lawyer should take the role which is most likely to challenge this system. Even when this system is operating in good faith to produce the best results for a child, there are reasons for skepticism about the outcome because of the lack of reliability and validity in assessment and disposition. The surprising lack of ability of psychologists and psychiatrists to agree on proper diagnosis or appropriate treatment or to predict future conduct or dangerousness of the mentally ill has been well documented in several convincing reviews of empirical research.⁴⁴ However, the decision process in protection proceedings has not been treated as extensively, and since a lack of confidence about the experts' ability to determine a child's "best interests" is an important part of the rationale for having an attorney represent the child's wishes, two studies about the decision process in protection proceedings are discussed below.

The New York Study

The first study is an analysis of the factors used by New York caseworkers in placement decisions in general child welfare (not just abuse and neglect) cases.⁴⁵ The study intended to identify differences between children who were placed and children who remained at home.

Several of the researchers' findings about the differences in these two groups of children are particularly interesting. As part of the study, caseworkers rated the overall adequacy of parental care of the children in areas such as dress, feeding, protection from physical abuse, supervision, and warmth and affection. The workers had a choice of three categories—"adequate," "somewhat inadequate," or

43. States are not required to provide counsel for parents. See *Lassiter v. Department of Social Services, Durham Co.*, 452 U.S. 18 (1981). Those states which do provide counsel may not provide a lawyer for all hearings and the lawyer may provide only minimal services.

44. J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (1975); Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); See also Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

45. M. PHILLIPS, A. SHYNE, E. SHERMAN, AND B. HARING, *FACTORS ASSOCIATED WITH PLACEMENT DECISIONS IN CHILD WELFARE* (1971).

“grossly inadequate.” The category of “grossly inadequate” was to include conditions that were potentially or actually dangerous; “somewhat inadequate” was to describe conditions that were “somewhat problematic, but that did not constitute an immediate danger.”⁴⁶

Surprisingly, although the analysis showed that gross inadequacy of care in one or more areas was somewhat more common for children who had been placed, parental care was considered to be adequate even in a substantial proportion of the cases where the children had been placed. The most significant difference between the two groups was that in a majority of placement cases the parents had requested placement, while the parents of children who stayed home had not requested service. Although there were differences between the two groups on other factors as well, these differences were not marked and there was much overlap of decision factors between the two groups.

In addition to simply comparing placed and in-home children, the New York study considered whether any combination of the decision factors *predicted* placement. The researchers found inexplicable differences in the factors which predicted placement for one and two parent cases.⁴⁷

For an additional analysis, cases from the New York study were selected for review by an expert panel of three judges “each of whom had more than five years experience in making decisions regarding placement in the child welfare field.”⁴⁸ This latter part of the study presented an opportunity for measuring the degree of agreement among the judges on placement decisions. Each was required to review intake and decision schedules to decide whether or not the child should be placed and to give reasons for the decision. The researchers found that, although the agreement among judges was considerably better than chance, all three judges agreed in less than half (45 out of 94) of the cases.⁴⁹

The judges also differed in the reasons given for their decision, even in those forty-five cases in which they all agreed on the disposition. For example, one judge might have indicated that the child’s

46. *Id.* at 41.

47. *Id.* at 87.

48. *Id.* at 69.

49. *Id.* at 71-72.

behavior problems in school were a principal factor in his decision to place the child out of home, whereas another judge might not have considered school problems important.

The judges also differed in the interpretations that they gave the same factor, for instance, the effect of age:

The judge mentioning this often with regard to own home service tended to indicate that a child less than eight years old ought if at all possible to remain at home, while the judge mentioning age with regard to placement saw a need to remove young children because they are unable to protect themselves. Similarly, the own home judge saw children 15 and older as remaining at home because they would be independent at that age, while the placement judge saw removal as appropriate because the same independence would allow removal without adverse effects on the child.⁵⁰

The judges' lack of agreement on disposition and on the reasons for disposition is indicative of the general lack of understanding about placement decisions. The other findings of the New York Study suggest that caseworkers' placement decisions are frequently controlled by factors other than those identified as important by clinicians. That policy factors have a strong influence on placement decisions is clearly demonstrated by a study of court-ordered placements in abuse and neglect cases in North Carolina.

The North Carolina Study

The North Carolina study was conducted by a sociologist, Robert F. Kelly, and myself. Unlike the New York study which considered only three counties, the North Carolina study was a statewide survey. We used a random sample of twenty of North Carolina's one hundred counties and the sample was representative of the state as a whole.⁵¹ Consequently, the effect of county characteristics (socioeconomic, demographic, social service and judicial-administrative) on disposition could be considered in addition to factors such as the characteristics of the problem that brought the case to court, characteristics of the children named in the petition, characteristics of the parents, and characteristics of the attorney who served as the child's representative.

The North Carolina study sought to determine what variables predicted the following four aspects of a placement decision: (1) whether

50. *Id.* at 78.

51. Kelly and Ramsey, *supra* note 3, at 423.

or not the court issued an immediate custody order, (2) whether or not custody was *ever* removed (either by immediate custody order or other means), (3) whether or not, once removed, custody was returned, and (4) whether, once removed, custody was quickly returned to the parents or removal was continued for an extended period of time.⁵²

At the beginning of the study, we expected the nature of the petition problems to be the most significant predictor of outcome. To our surprise we found that the nature of the problem generally was a poor predictor of disposition. We had also thought that there would be a relationship between the kind of petition problem and the speed of return, but none of the problems (or their various interactions) had a significant impact on speed of return.⁵³

Although the nature of the petition problem turned out to be a poor predictor of disposition overall, various other characteristics of the cases did predict disposition. When the petitioner was the department of social services or when the children were black or Native American, for example, an immediate custody order was more likely to be issued. Additionally, county characteristics were *always* significant in predicting the four aspects of custody decisions analyzed. For example, in sparsely populated counties that experienced growth in per capita indigency caseloads and expenditures in their court system, the likelihood of immediate custody orders was reduced. Removal at a later stage in the proceedings was less likely to occur in these counties also. In other words, policy factors were more important than the type of problem in determining custody disposition.

What do these two studies tell us about the experts' ability to know and to do what is "right" for a child? The studies indicate that the cases in which children are removed from their home have many similarities with the cases in which children are not removed and that many of the differences between the two groups are difficult to justify clinically. Indeed, there is disagreement about what weight should be given various clinical factors. Instead of being clinically based, placement decisions are controlled by institutional constraints and individual biases. Caseload and race, for example, can be more important in determining placement than the presenting problem.

52. *Id.* at 425, Table 1.

53. *Id.* at 447-48.

Since there are good reasons for skepticism about the way the state and the experts determine the child's "best interests," it seems reasonable that the lawyer should take the role that is more likely to challenge their determinations. Unfortunately, lawyers representing the client's best interests do not present a challenge, but rather serve to reinforce the status quo. Lawyers who take the role of representing their clients' best interests tend to do little or nothing.⁵⁴ They apparently find the temptation to follow the lead of the state's "expert" in the proceeding to be irresistible and they shirk their responsibility to make an independent assessment of their clients' needs. Instead of being an advocate for his or her client, the lawyer becomes an extension of the judicial-social welfare system and complies with the needs of that system. In contrast, the lawyer who tries to provide the client with information, to present his or her own recommendations as but one alternative, to listen to the client, and to assess the client's capabilities against a presumption of competence is required to be more involved with the client and more aware of the issues from the client's perspective.⁵⁵ Instead of seeing themselves as an extension of the system, these lawyers view themselves as the client's representative.

On balance then, the lawyer who represents the child's wishes is more likely to effectuate the goals of representation than is the lawyer who represents the child's best interests. But clearly the lawyer cannot always represent the child's wishes. An infant, for example, could not even express a preference. A toddler would be able to talk, but perhaps would not be old enough to understand the lawyer's questions. But what standard should the lawyer use to assess the ability of the client to make a decision which would determine the lawyer's objectives in the proceedings? The first step in answering this question will be to consider the guidance given by the professional codes.

54. *Id.* at 451-54. Lawyers representing their adult clients in commitment proceedings for the allegedly mentally ill also do little or nothing. See Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 827-31 (1974).

55. Rosenthal's finding that adult clients who actively participated in their cases received better service from their lawyers and better outcomes in personal injury cases than clients who were passive provides additional support for this position. Rosenthal, *supra* note 31.

III. A Standard for Assessment

The principal code, the American Bar Association *Model Code of Professional Responsibility*, has been adopted with some variation by all states,⁵⁶ and lawyers are required to follow their state's code. Two other guides for professional conduct are also relevant to this discussion, although they are not binding on lawyer conduct. These are the *Model Rules of Professional Conduct* proposed by the American Bar Association Commission on Evaluation of Professional Standards, and the *Standards Relating to Counsel for Private Parties* prepared by the Institute of Judicial Administration–American Bar Association Joint Commission on Juvenile Justice Standards.⁵⁷ The Model Rules have been proposed as a replacement for the Code and would become binding if adopted by the states. The Standards have been approved by the American Bar Association and represent the views of a number of members of the legal profession.

Broadly speaking, these codes divide clients into two categories—normal clients and clients who lack the mental capacity of normal clients.⁵⁸ A minor would not necessarily be in the latter category since none of the codes state that a person of a certain age should be treated differently from other clients. Instead the relevant factors are the client's capacity to understand his or her situation and to direct counsel.

Overall the Code supports the view that the lawyer should follow the client's wishes whenever the client is capable of making decisions. The lawyer's duty "both to his client and the legal system is to represent his client zealously within the bounds of the law."⁵⁹ In addition, the Code imposes on the lawyer the obligation to make sure that his

56. See Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A. J. 1628, (1981).

57. Since this article went to press, the Model Rules were adopted by the ABA House of Delegates at the August 1983 Annual Meeting. The *Standards Relating to Counsel for Private Parties*, *supra* note 9, were approved by the ABA House of Delegates at the February 1979 Midyear Meeting.

58. The Code refers to the client who is "incapable of making a considered judgment on his own behalf . . ." *Model Code of Professional Responsibility* EC 7-12 (1979). The *Standards* refer to the client who is "incapable of considered judgment in his or her own behalf." *Standards Relating to Counsel for Private Parties* 3.1(b)(ii)(c) (1979). The *Model Rules* refer to the client whose "ability to make adequately considered decisions in connection with the representation is impaired . . ." *Model Rules of Professional Conduct* Rule 1.14 (August 1983).

59. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979).

client is informed of "relevant considerations" prior to making a decision.⁶⁰ The lawyer's advice does not need to be confined to legal matters: "A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint."⁶¹ Finally, the Code indicates that the lawyer is expected to actively elicit direction from the client. The lawyer "ought to initiate . . . [the] decision-making process if the client does not do so."⁶²

The Code does speak to the problem of the client under a disability. It states that if "the client is capable of understanding the matter in question or of contributing to the advancement of his interests regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid."⁶³ However, the Code does not discuss directly the problem of the lawyer who is representing a child. Overall the Code is more concerned with defining conduct which is prohibited than with prescribing the proper lawyer-client relationship.

Like the Code, the Model Rules do not classify minor clients as being incapable of decision making. Instead they state that "when a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁶⁴ Similarly, under the Standards when a minor 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."⁶⁵

In summary, these professional codes support the right of the client to determine the objectives of a proceeding when the client is capable of making a considered judgment. However, the codes are silent about what standard should be used to judge the client's

60. *Id.* ED 7-8.

61. *Id.*

62. *Id.*

63. *Id.* EC 7-12.

64. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (1983). Spiegel suggests that the Model Rules are even more favorable to client control than the Code. Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision-Making and the Role of Rules in Structuring Lawyer-Client*, A.B.F. RESEARCH J. 1003, 1005 (1980).

65. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(b)(ii)(b) (1979).

decision-making abilities, and the standards used in practice have varied widely. In the recent past, for example, lawyers for juveniles in delinquency proceedings represented their best interests rather than wishes, apparently comfortable in assuming that the alleged delinquents were incapable of directing counsel.⁶⁶ In contrast, current interpretations of professional responsibility favor representing the juvenile's wishes, an interpretation premised on the opposite assumption.⁶⁷ In the past, lawyers and judges assumed that it was proper for a lawyer to represent a client's interests, rather than following the client's direction, simply because the client was the subject of commitment proceedings, but this also has changed.⁶⁸ For example, the lawyer in the recent case of *Rennie v. Klein*⁶⁹ (a consent to medical treatment case) felt bound to follow his hospitalized client's wishes even though his client was in very poor mental condition and was deteriorating physically. Mr. Rennie was described by his treating psychiatrist as "floridly psychotic," and physical restraints had to be used to keep him from hurting himself or others. Nonetheless, his lawyer represented to the court that Mr. Rennie "still knowingly refused to consent to injection of thorazine" and proceeded to advocate his client's position.⁷⁰

Since the professional codes do not provide a standard for assessing a client's competence and the standards used by lawyers in practice are far from uniform, we are left with the question of what standard should be used. It seems clear that the answer to this question turns on the purpose of representation. Defining capacity in the abstract is not useful; the question of capability should be considered

66. Edelstein, *The Duties and Functions of the Law Guardian in the Family Court*, 45 N.Y. S.B.J. 183 (1973) (A minor under age sixteen "has not reached that amount of worldly experience to be able to assist the lawyer" in making a decision about goals. *Id.* at 184.) See Popkin, Lippert, and Keiter, *Another Look at the Role of Due Process in the Juvenile Court in THE YOUNGEST MINORITY* 173, 186-87 (1974).

67. See STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 8 (1979).

68. *In re Basso*, 299 F.2d 933 (1962) (The court ruled that Ms. Basso's guardian *ad litem* "did what any responsible and competent lawyer would have done, namely, he concurred in the necessity for treatment of [Ms. Basso] . . ." at 935); *Proschaska v. Brinegar*, 251 Iowa 834, 102 N.W.2d 870 (1960) (The court was willing to presume that counsel acted in a manner which he thought was in his client's best interests even though counsel neither met with nor consulted with his client). *Contra Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis.) (see note 9, *supra*). See Note, *The Role of Attorney in Civil Commitment Proceedings*, 61 MARQ. L. REV. 187 (1977); Note, *Development in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

69. 462 F. Supp. 1131 (D.N.J. 1978).

70. *Id.* at 1152.

in relation to achieving particular goals.

If the primary and overriding purpose of representation is to give the child a voice, then the measure of capability could be simply the child's ability to express a preference related to the question at issue. Thus, if the child could state his wishes, the lawyer would be directed by them. On the other hand, if the primary purpose of representation is to protect the child's interests, then the standard at its most stringent might require the child to make a "right" decision, a decision which is beneficial to him. Competency would be determined by the quality of the decision.

Both of these standards seem seriously flawed.⁷¹ The first places the highest value on having a person's choice presented, but seems meaningless without *some* consideration of the individual's capacity to understand the significance of the choice he is making. Although this article supports having a lawyer represent the child's wishes, it does not suggest that the lawyer ignore the client's decision-making capacity. Expecting a person to make a decision which he is not capable of making is not supportive of an individual's rights, even of an adult's. The ideal of autonomy depends upon the individual's being capable of shaping his life through his own choices. Although the use of this standard would minimize the chance that a capable person would be overlooked, it should be rejected because the ability to express a preference is not a sufficient test of capacity.

The second standard errs in the opposite direction, placing too little importance on autonomy. Even if the assessment of the quality of the child's decision were meant to be in relation to the child's own values, it seems inevitable that an absolute measure of what was "right" would be used. A determination, for example, of whether the child's decision did further the child's own goals would be the judgment of an outsider based on the outsider's knowledge and beliefs. This standard therefore places too much confidence in the ability of others to know what is "right" for a child and nearly ignores the place of choice entirely. As mentioned earlier, there are good reasons

71. For a discussion (and rejection) of these two standards as a means of assessing a patient's competence to consent to medical care see President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Patient Competence to Make Decisions About Medical Therapy*, 11-19 (discussion paper for Commission meeting, Feb. 12-13, 1982 Washington D.C.) (hereinafter *Patient's Competence*.)

for being skeptical about the decision making of others, even experts such as psychiatrists, psychologists, and social workers, because their determination of what constitutes a "right" decision is highly subjective and variable. A standard which assesses children's competence by the quality of their decision would virtually rule out representation of a child's wishes which were not substantially the same as the lawyer's view of the child's best interest. This standard is very appealing to lawyers in practice, however, because many are uncomfortable with advocating for an outcome for a child which they do not feel is "right."

A standard which represents a compromise between these two extremes of (1) being able to express a preference or (2) being able to make the right decision, is the standard which should be used. If the child has the mental and emotional abilities needed to make a decision which has a reasonable possibility of accuracy, the child should be considered capable. This standard has the advantage of combining a measure of best interests with the ideal of representation of the individual, so that neither purpose of representation is totally lost.

The question then is, what kind of decision has a reasonable likelihood of being "right"? Had either of the other two standards been chosen the measure of compliance would have been the decision itself. With the first standard, the mere expression of a decision was sufficient; with the second, the quality of the decision would be judged. But for the third, one must assess the child's decision-making ability by looking at the decision *process* rather than the outcome.⁷²

This method is based on the assumption that if the process is there, if the decision is a thoughtful one, the decision does have a reasonable possibility of being right. This assumption is not without its problems, because the existence of the process does not guarantee consistency or coherence in responses.

Research on adult decision making has demonstrated how easy it is to affect the choices made. For example, a recent study demonstrated that the way choices are framed can affect responses to

72. Assessment of the process is the standard chosen for determining a patient's competence in *Patient's Competence*. *Id.* at 14-18.

a problem even when the experimental subjects include two groups of physicians and university faculty.⁷³ In spite of the fact that the choices presented to each group were effectively the same, one group chose a disease-control program that would have very different consequences than did the other group's program, in terms of lives saved.⁷⁴ Each group presumably had the same ability to reason, to understand and to communicate as the other, but nonetheless reached different conclusions.

The way a choice is framed can affect not only the choice made, but the way the actual outcome is experienced.

For example, framing outcomes in terms of overall wealth or welfare rather than in terms of specific gains and losses may attenuate one's emotional response to an occasional loss. Similarly, the experience of change for the worse may vary if the change is framed as an uncompensated loss or as a cost incurred to achieve some benefit. The framing of acts and outcomes can also reflect the acceptance or rejection of responsibility for particular consequences, and the deliberate manipulation of framing is commonly used as an instrument of self-control.⁷⁵

Even a person's description of motives for a decision is suspect. Although consideration of motives has been proposed as a means for judging client competence,⁷⁶ expressed motives may be more indicative of a person's socialization than of the actual basis for his decision.⁷⁷

A satisfactory or adequate motive is one that satisfies the questioners of an act or program, whether it be the other's or the actor's. As a word, *a motive tends to be one which is to the actor and to the other members of a situation an unquestioned answer to questions concerning social and lingual conduct.* A stable motive is an ultimate in justificatory conversation.⁷⁸

As more is learned about decision making, it becomes clear that even with adults the existence of the *process* does not guarantee consistency, coherence, accurate explanation, or the integration of relevant information, much less the utility maximizing decision of the economists' "rational man."⁷⁹ But assessing the process is the best

73. Tversky and Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

74. *Id.*

75. *Id.* at 458.

76. Luban, *supra* note 31, at 477.

77. Mills, *Situated Actions and Vocabularies of Motive*, 5 AMERICAN SOCIOLOGICAL REV. 904 (1940).

78. *Id.* at 907.

79. For a discussion of people's tendency to avoid integrating information see Bar-Hillel, *The Base-Rate Fallacy in Probability Judgments*, 44 ACTA PSYCHOLOGICA 211 (1980). For an over-

method we currently have for achieving the goal of allowing the child some autonomy and avoiding needless paternalism.

IV. Assessment of Decision-Making Abilities

In order to assess the process, the components of decision making must be identified. Major components needed are an ability to understand, to reason, and to communicate.⁸⁰ Being able to use information received in life experiences and from others is necessary so relevant information can be used in evaluating events and understanding proposed alternatives. The decision-maker needs to be able to communicate requests for information and a decision once it is made. The ability to reason is needed to consider and judge alternatives based on values and possible outcomes. Another necessary component of decision making is a sense of values, or a sense of what the individual perceives as desirable for himself, which has some internal consistency.⁸¹ This sense of "good" is needed so that the individual can consider alternatives in relation to his view of what is beneficial or detrimental and so that he has a basis for adhering to a decision he has made.

An impressive list—indeed, if these components were given the most expansive interpretation, many adult's decisions would fall short much of the time. But in considering capacity to make a judgment, the degree of sophistication needed in these areas is related to the decision to be made. A complex decision would require more information and reasoning ability than would a simple decision.

What kind of decisions would be made in a protection proceeding? Generally, once the court has decided that a child is neglected or abused, the major issue is the child's placement. In a majority of cases the state is asking that the child be removed from home on a temporary basis. The North Carolina study found, for example, that removals occurred in 87 percent of the cases.⁸² Therefore, the child's lawyer would want to know whether or not the child wanted to stay

view of research and discussion of problems in the reasoning process *see* R. NISBETT AND L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

80. *Patient Competence*, *supra* note 71 at 7.

81. *Id.* This component is similar to Luban's concept of values in the sense he ultimately uses it—namely, as a means of testing an individual's ability to justify his wants. Luban, *supra* note 31 at 482.

82. Kelly and Ramsey, *supra* note 3, at 421.

at home. Usually, when children are removed from home they are placed with relatives or friends or with strangers in foster care. In such a case the child's lawyer would want to know the child's preference among alternative placements. Other issues in the proceeding might be related to visitation, special education, medical care, or mental health counseling.

The child's lawyer might well feel that the child was capable of arriving at a reasoned preference on some of these issues, but not about others. The lawyer therefore could represent the child's wishes in some matters, the child's best interests in others. Although the decision about capability does not have to be an all-or-nothing decision,⁸³ the lawyer needs to avoid choosing to represent the child's best interests on an issue simply because he doubts the wisdom of the child's desires.

A disadvantage of basing a decision about client capacity on an assessment of decision making in relation to a particular question is that such assessment is very subjective. One way to lessen this subjectivity would be to tie capacity to age. Although individual differences within age groups are too great to allow age to be an absolute measure of capacity, a presumption about capacity based on age would be a step toward an objective measure. The threshold question in developing an age-based presumption is whether children of a certain age would lack the skills needed to make a simple decision.

The best source of an answer to this question is research on child development, but before discussing this research it is important to note the bias in the way this question is posed. Because of my preference for having the lawyer represent the child's wishes, the research was reviewed with the intent of setting a minimum age at which children might possess decision-making capacity, not an optimal age. Hence, what I looked for was consensus among child development experts that children under a certain age would lack capacity. In other words, my goal was to err in the direction of overinclusiveness rather than underinclusiveness, and the following discussion of decision-making ability contains that bias.

83. That a person can be capable of one kind of decision, but not another, is generally accepted in law. For example, a man may be considered incapable of managing his business affairs, but nonetheless be considered capable of consenting to marry. *Fisher v. Adams*, 151 Neb. 512, 38 N.W.2d 337 (1949).

It is also important to note that there are some problems in using child-development research for the purpose of developing an age-based presumption about client capacity. First, the research which has been done was not designed to measure a child's capacity in relation to a legal standard for decision making. Hence, the research must be used in a somewhat speculative fashion. One must assume, for example, that an experimental measure of cognitive development is relevant to the child's ability to make decisions about his own family relations. Second, the components of decision making identified earlier require consideration of a number of different, and frequently separate, areas of research. Cognitive development, memory, language ability, and emotional development are each part of decision-making capacity, but the interrelationships of these aspects of development are not well understood. Researchers interested in cognitive development, for instance, have tended to slight affective development; hence, the primary development theories in each area are not integrated.⁸⁴

In spite of these problems the research in child development provides much information on children which is responsive to the question posed earlier: do children under a certain age lack the skills needed to make a simple decision? Taken as a whole, the research indicates that in general most children under the age of seven would probably lack the ability to make a decision which would meet the standard this paper proposes, but that by age seven the ability would be present to some extent.⁸⁵ For most children, the age of six or seven represents a developmental milestone in the journey to adulthood. By this age marked changes in brain substrate, in perceptual and

84. Bemporad, *Theories of Development*, CHILD DEVELOPMENT IN NORMALITY AND PSYCHOPATHOLOGY 3, 30-31 (J. Bemporad ed. 1980) (hereinafter CHILD DEVELOPMENT). For a critical overview of various child development theories, see R. THOMAS, *COMPARING THEORIES OF CHILD DEVELOPMENT* (1979). Since "experts" were criticized earlier in this paper, it should be noted why I rely on this research to determine an age-based presumption of capability. First, it is possible to be more accurate in talking about typical behavior of a group than when making predictions about one individual's behavior. Second, the scientifically controlled and replicable results of this child development research are very different from generalizations based on clinical impressions from undefined samples.

85. The average age of children in North Carolina protection proceedings was about age seven. Kelly and Ramsey, *supra* note 3 at 22. For estimates of the age of children in substantiated abuse/neglect reports nationally see *National Analysis*, *supra* note 32 at 28.

neurological development, in cognitive organization, and in emotional development have occurred.⁸⁶

The normal child of 7 ± 1 has reached a level of maturation and development that permits autonomy. He is emotionally less dependent on his family, and has at his disposal a neuromuscular apparatus that is ready for the challenge of environmental mastery; he has a new set of cognitive strategies to outwit and control his environment.⁸⁷

Research in cognitive development is particularly germane to questions about decision making. This research indicates that children make a major change in functioning at about age seven from an impulsive, noncognitive primary process to a more controlled and logical secondary process.⁸⁸

Much of our knowledge about children's cognitive development comes from the research of Jean Piaget. Piaget tested children's cognitive abilities by asking questions related to physical tasks which were designed to test their knowledge of certain concepts. Piaget's research has been criticized, however, for underestimating children's cognitive abilities by failing to take into account the other skills, such as language ability, which would be needed to successfully complete the cognitive task.⁸⁹

New research in social cognition indirectly supports this criticism. This research was not designed to replicate Piaget's tests, but rather was concerned with the relationship between behavior adjustment and a child's ability to solve interpersonal problems. This research has shown that even four-year-olds can consider alternatives, consequences, and causality in solving problems.⁹⁰

Nonetheless, age six or seven is still generally accepted as the period when the child becomes capable of logical thought.⁹¹ By six to ten years most children can understand the concepts of past and future, although not on an adult level.⁹² The child of this age is

86. See Shapiro and Perry, *Latency Revisited: The Age 7 Plus or Minus 1*, 31 THE PSYCHOANALYTIC STUDY OF THE CHILD 79 (1976).

87. *Id.* at 97.

88. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L. & CONTEMP. PROBS. 38, 68 (1975). In Piaget's terms, this would be the transition from the "preoperational thought" period to the "concrete operations" period which typically occurred by age seven. THOMAS, *supra* note 84 at 312-13.

89. Nielson and Dockrell, *Cognitive Tasks as Interactional Settings*, SOCIAL COGNITION 213 (G. Butterworth & P. Light eds.) (1982).

90. G. SPIVACK AND M. SHURE, SOCIAL ADJUSTMENT OF YOUNG CHILDREN 11-16 (1974).

91. Nielson & Dockrell, *supra* note 89 at 231.

92. Thompson, *Normal Child Development*, SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 219, 235 (K. Faller ed. 1981).

capable of understanding cause and effect,⁹³ and symbolic drawings.⁹⁴ The seven-year-old can understand verbal explanations which are presented in concrete terms.⁹⁵

The organization of memory process also changes at this age. The very young child remembers an event primarily in sensory-motor, rather than verbal terms. By age seven the predominant organization of memory has changed to a reliance on words.⁹⁶ This is not to say, however, that young children have poor memories, but rather that their memory processes are different. Experimental studies on children's ability to recall a staged event indicate that children of age five or six are not as likely to freely recall as many details as an older child, but, interestingly enough, that the details they do recall are more likely to be correct.⁹⁷ Other experimental studies have suggested that children "as young as age four or five perform as well as adults on recognition memory tasks, but that there are marked developmental trends in free recall ability."⁹⁸

By age six or seven many children have reached a stage in emotional development which is characterized by a "state of calm, pliability and educability."⁹⁹ The child of this age is able to exercise self-control so that he can cooperate and participate in a school setting. The latency age child has developed a conscience and has self-confidence and initiative.¹⁰⁰ He can size up a situation and conform his behavior to accord with what is expected. The child of this age has shifted from a "morality of restraint" to a "morality of cooperation."¹⁰¹ He no longer has to be controlled directly by parental orders, but rather is more self-governing, and can make decisions and act in a manner appropriate to his situation. The seven-year-old has made important advances in social understanding. He can recognize that others see physical objects differently, and that others

93. J. WESTMAN, *CHILD ADVOCACY* 83 (1979).

94. Thompson, *supra* note 92 at 234.

95. Sarnoff, *Normal and Pathological Psychological Development During the Latency Age Period*, *CHILD DEVELOPMENT* *supra* note 84 at 146, 162.

96. *Id.* at 160-161.

97. Melton, *Children's Competency to Testify*, 5 *LAW & HUM. BEHAV.* 73, 76 (1981).

98. *Id.* at 76-77. (citations omitted).

99. Sarnoff, *supra* note 95 at 146.

100. In terms of Erik Erickson's stages of psychosocial development, most six-year-olds would be at the upper limit of the "initiative versus guilt" stage, about to enter the "industry versus inferiority" stage. THOMAS, *supra* note 84 at 268.

101. Sarnoff, *supra* note 95 at 164-65.

can have different thoughts than he does. Children of this age are able to discriminate accidental from intended actions of others, and "there is also some ability to distinguish 'good' from 'bad' intentions in allocating blame."¹⁰²

The final component needed in the decision-making process is a sense of "good" for the individual. When does a child have a consistent sense of what he wants, of what he thinks is a benefit to himself? For this capacity, it seems that all that is needed is a sense of self and one's own desires, factors which normally develop very early in life. Although extensive work has been done on the moral development of children,¹⁰³ this research measures the child's development in relation to external, societal ideals of morality and hence is not relevant to this question. In evaluating capacity for decision making, the issue is rather the existence of the child's own value system, without regard to societal norms.

In summary, research in child development indicates that few children under the age of seven are likely to have the capacities needed to make even a simple decision which would meet the proposed standard, but that by age seven these capacities often would be present. Many seven-year-old children can consider cause and effect, can use information, can reason about alternatives, and can communicate the decision reached. This is not to say, however, that the child of this age is not lacking some intellectual capacities. Adult-level logical and abstract thinking, and an adult sense of time, are not achieved until the age of fourteen to sixteen.¹⁰⁴ Hence, young children are not likely to be able to give a chronologically accurate description of events or an abstract interpretation of their significance.¹⁰⁵ Information which was given abstractly, rather than concretely, might be incomprehensible. Therefore a child of this age would find it difficult to understand the temporal significance of three months placement in foster care and an abstract discussion of the effect foster care might have on the parent-child relationship. The seven-year-old's understanding of his emotions and the emotions of others is less com-

102. WESTMAN, *supra* note 93 at 90.

103. For a comprehensive review of Kohlberg's and others research on children's moral development see H. ROSEN, *THE DEVELOPMENT OF SOCIOMORAL KNOWLEDGE* (1980).

104. Thompson, *supra* note 92 at 236.

105. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § (Commentary at 100) (1979).

plex than that of older children. For example, young children have difficulty in conceiving that they can have two conflicting emotions simultaneously.¹⁰⁶ Also preteen children do not usually contemplate their own beliefs and plans. Their perceptions are “strongly influenced by preexisting sets, and by emotional reactions and attitudes.”¹⁰⁷

Even teenagers lack adult capacities. In an experiment in teenage decision making, for example, younger teenagers were shown to be less concerned about the risks involved in decisions and less concerned with the future consequences of decisions than were eighteen-year-olds. However, the research did not assess whether the younger teenagers would use information about potential risks and future consequences if such information were provided to them.¹⁰⁸ Teenagers may tend to be egocentric and to make irrational and emotional decisions about themselves and others. Although some child-development studies suggest that the developmental stage of adolescence is based more in our culture than inherent in the process of reaching adulthood,¹⁰⁹ this does not change the fact that our teenagers are influenced by their culture, education, and family life.

These gradations in intellectual capacity according to age are made more complex because children develop at different rates. Although one eleven-year-old child might be capable of making a particular complicated decision, another might not be able to do so at all. Additionally, a child's competency may not increase in direct relation to his age. That is, a particular fourteen-year-old may have been more capable of making a certain decision when he was younger, before the emotional upheavals of adolescence interfered with his judgment.

These problems in predicting capacity from chronological age are compounded in a protection proceeding because children in these

106. Harris & Olthof, *The Child's Concept of Emotion*, SOCIAL COGNITION, *supra* note 89 at 188, 191-92.

107. WESTMAN, *supra* note 93 at 91.

108. Lewis, *How Adolescents Approach Decisions: Changes Over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEVELOPMENT 538 (1981).

109. See Skolnick, *supra* note 88 at 61-63. Catherine Lewis points out that her own results may not be true for adolescents who have had more experience in making decisions and notes that the “Catch-22” of research on adolescents is that the relative inabilities of younger adolescents may be produced by the very legal status that is designed to “protect” them from making decisions. Lewis, *supra* note 108 at 543.

proceedings may exhibit even more variation. They are usually from families of low socioeconomic status, and such children generally perform more poorly in certain intellectual activities than middle-class children.¹¹⁰ Also, the trauma of abuse or of removal from the home can cause confusion and emotional distress which would further impair the child's thought processes.¹¹¹

What conclusions can be drawn from the research on child development? First, the research would support a rebuttable presumption that children of age seven are capable of making a considered decision, a decision in which reason was employed. Second, the great individual variation which exists means that trying to develop a graduated scale of capacity in relation to age would not be feasible. Thus, beyond the initial presumption, a child's capacity would have to be assessed on an individual basis. It must be emphasized that this presumption, formed from clinical assessments and testing of various groups of children, and based as it is on chronological age, represents only a probability. This is to say, it is more likely than not that children of this age would have these abilities, but not all children would. Also, some children under age seven would have these abilities.

What should the child's lawyer consider in making this individual determination about his client's capacity? 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.

A digression is necessary here to justify why more than the child's cognitive ability should be considered. When dealing with adults, tests of competency frequently relate only to reasoning ability. For example, a recent proposal suggests that a lawyer assess an adult client's decision-making ability by using the test set forth in a 1890 testament case, *Matter of Will of White*.

But if there are facts, however insufficient they may in reality be, from which a prejudiced or a narrow or a bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect.¹¹²

110. D. Pilling and M. Pringle, *Controversial Issues in Child Development* 310-11 (1978). Lower-class children have also been shown to have poorer problem solving abilities than middle-class children. G. SPIVACK AND M. SHURE, *supra* note 90.

111. See Elmer, *A Follow-up Study of Traumatized Children*, CRITICAL PERSPECTIVES, *supra* note 6 at 41, 41-51.

112. Luban, *supra* note 31 at 479 (quoting *Matter of Will of White*, 121 N.Y. 406 at 414, 24

The author argues that “[a]ll we can reasonably require is that the person be connecting beliefs to real facts by *some* recognizable inferential process. . . .”¹¹³ If the individual can give an account of his motives which passes the *White* test, his wishes must be respected. With the adult client, the proposed test of competence stops at this point,¹¹⁴ and it is beyond the scope of this paper to speculate about efficacy of this test as applied to adults.

Given what we know about child development, however, it seems clear that more than an ability to express motives should be taken into account when assessing a child’s abilities. To illustrate this point, let me suggest some reasons that Jim, the nine-year-old boy with the alcoholic mother, might give in support of a decision to stay with his mother: (1) he loves her; (2) she only beats him when she’s drunk. These reasons would seem sufficient to pass the *White* test, but do they prove that he is capable of making a placement decision? Should he be able to understand information about alcoholism, for example? What if he were terrified by the protective services worker’s suggestion that he go to foster care?

Suggesting that the lawyer make a more complex assessment has a serious drawback, though, because the consideration of additional factors allows for even more subjectivity. This increases the risk that the lawyer will allow his determination of the child’s capacity to be colored by his own beliefs about the child’s best interests. The lawyer could end up deciding that his client was capable only when he approved of the client’s decision—a measure of competence rejected earlier in this article. That this temptation is extremely hard to avoid is demonstrated by studies of lawyers representing delinquents and mentally ill clients.¹¹⁵ Many lawyers representing clients whose competence has been questioned (as a child’s always is) find the protective role of representing their best interests more attractive than that of representing their wishes.

Although having the lawyer consider more than cognitive ability is

N.E.2d 935 at 937 (1890)).

113. *Id.*

114. Luban’s discussion, however, does not end at this point, but rather proposes additional protections for the client who fails the *White* test. It is important to note also that Luban does not propose that his recommendations about determination of competency be applied to young children and indicates some doubts about it being so used. *Id.* at 492.

115. See notes 66 and 68 *supra*.

risky, omitting other factors such as emotional development or language development from the assessment seems even more reckless because of their interrelation with cognitive processes. Even though it is evident that cognitive ability and emotional state are interrelated the relationship is not well understood.

The relationships between emotion and cognition are complex and bidirectional; cognition and emotion are part of an interactive matrix. For a long time we have been aware that feelings influence the processing of stimulus events: Feelings may facilitate or interfere with learning; they may enhance attention to stimuli or they may bias perception and distort interpretation of events. When a child is joyful, he or she is likely to be aware of different aspects of a situation and interpret it differently than when angry.¹¹⁶

Children in protection proceedings who are likely to be fearful, or angry, or both may have difficulty in grasping new information, or may have a distorted thought process. Additionally, children who have undergone a traumatic experience may regress, or their development may be inhibited¹¹⁷ so that their chronological age may be misleading.

The child's ability with language is also important. The child's ability to communicate what he wants, and understand information the lawyer gives him is crucial to his ability to make and/or express a decision. However, the child's understanding of word meaning can be very different from the adult's and the child may be reluctant to admit a lack of comprehension.¹¹⁸ The relevance of the child's knowledge and experience to decision-making ability is illustrated by studies of the reactions of children to divorce. Children who have had a good relationship with one or both parents are more likely to be able to cope with the loss of divorce than children who have not had such a relationship.¹¹⁹ They can understand their parents and their own situation more readily, and are less apt to be suffering serious emotional complications. In addition, children who have been provided with information about the reasons for and consequences of their parents' divorce are less likely to feel guilty, and are more able to distance themselves emotionally from their parents' problems.¹²⁰

116. See Yarrow, *Emotional Development*, ANNUAL PROGRESS IN CHILD PSYCHIATRY AND CHILD DEVELOPMENT 31, 34-35 (S. Chess and A. Thomas eds. 1980).

117. Wallerstein and Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, 3 THE CHILD IN HIS FAMILY 479 (E. Anthony and Koupernik eds. 1974).

118. Nielson and Dockrell, *supra* note 89 at 213, 217-23.

119. L. TESSMAN, CHILDREN OF PARTING PARENTS 496-509 (1978).

120. *Id.* at 491-521.

These additional factors are relevant to the child's ability to make a decision that would meet the standard proposed, but how should the lawyer proceed to assess these factors? Unfortunately, at present the assessment must remain a highly subjective judgment by the lawyer. Although there are legions of psychological tests designed to measure such things as cognitive development, verbal competence, perceptual organization, memory functioning, personality traits, and socialization, these tests do not, and were not intended to predict a particular child's ability to make a decision in a child protection proceeding.¹²¹ There are also, of course, clinicians skilled in assessing a child's development, but for the most part their training and interest have been directed to assessing deviations from normal and to prescribing treatment.¹²² Clinicians who evaluate children and parents in divorce cases for the purpose of determining which parent should have custody of the child usually are interested in finding out which parent is the child's preferred custodian. However, ascertaining preference is not the same thing as assessing decision-making capacity. A two-year-old may well prefer one parent to another, but would not have the ability to make a considered decision. Even if it were desirable, cost and lack of personnel¹²³ would prohibit having an expert make recommendations about decision-making ability on a routine basis.

A more fundamental problem in looking to child development experts for an assessment of capacity, however, is that in this context capacity is basically a legal question. Additionally, it is a question which should be answered in relation to the decision to be made. Capacity is not an absolute but a relative concept. A child's ability to

121. For a brief description of various psychological tests, see Pogul, *Psychological Testing in Childhood*, CHILD DEVELOPMENT, *supra* note 84 at 477. An additional problem with testing intelligence is that there can be a substantial gap between performance on the test and actual capacity: "the ethnicity of the examiner, the style with which the examiner approaches the child, and the degree to which the child is familiar with the test circumstances, and test atmosphere all contribute to both the level of performance itself, and the degree to which the child's performance is a more or less accurate reflection of his capacity." Bortner and Birch, *Cognitive Capacity and Cognitive Competence*, ANNUAL PROGRESS IN CHILD PSYCHIATRY AND CHILD DEVELOPMENT, 166, 177 (S. Chess and A. Thomas eds., 1971).

122. See, e.g., Mehlman, *A Conceptual Model for the Assessment of Developmental Normality* and Hauptman, *The Assessment of Emotional Maturity in the Young Child—A Guide to Maturation and Development*, CHILD DEVELOPMENT, *supra* note 89 at 395 and 433 respectively.

123. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 2.3(b) Commentary at 73 (1979).

make a particular decision would depend on the child's ability to incorporate information about the legal options available and to communicate his desires to the lawyer so the lawyer will know how to proceed. Ideally the client's decision making and the lawyer's assessment of it would be part of an ongoing dialogue, an exchange of information, between lawyer and client.¹²⁴

V. Representation of the Client's Wishes

This article recommends that lawyers should represent the wishes of their child clients in protection proceedings when the clients are capable of making a considered decision. Since the lawyer who represents the child's wishes is more likely to effectuate the goals of representation, the article also proposes that lawyers operate under a presumption that children age seven and older are capable of decision making. This age-based presumption is meant to err on the side of overinclusiveness so that children who are capable of making a particular decision are less likely to be ignored.

The recommendation for representation of the child's wishes is based in part on philosophical reasons—namely a preference for individual autonomy and for the avoidance of needless paternalism. It is also based on practical reasons. First, in general, the risk involved in erroneously concluding that a client is capable of making a decision is minimal. The issue, after all, is not whether the child should be able to *decide* his fate, but rather whether his point of view, his wishes, should be advocated in a judicial proceeding. Second, having the child's wishes represented helps to focus attention on the child and to lessen class and race bias. Third, decisions might be more accurate if the child's position is represented. Finally, lawyers who represent their clients' best interests are too passive and are too ready to follow the direction of the state. In contrast, lawyers who represent their clients' wishes are more independent of state influence and are more involved with their clients and their cases. Since problems in the judicial-social welfare system were a major reason for providing representation for children, the lawyer should take the role that is

124. Robert Burt argues convincingly for the importance of dialogue between doctor and patient and for deference to a patient's choices. He also suggests that when dealing with a silent patient, the lawyer should facilitate discussion among those who are deciding the patient's fate (at 166-68) R. BURT, *TAKING CARE OF STRANGERS* 1979.

more likely to challenge that system. Too often lawyers representing the clients' best interests do not present a challenge but rather serve to reinforce the department of social services.

This preference for representation of the child's wishes is not without problems, however. There are some consequences or burdens which follow from this preference which should be noted—namely, problems of client manipulation, communication, and risk.

The lawyer needs to be sensitive to the problem of exercising too much control over the client. Although a lawyer is expected to exercise control over the legal proceedings, and to make recommendations to the client, he should not usurp the client's authority. Unfortunately, it is relatively easy for a lawyer to maintain that he is representing a child's wishes, but in fact to manipulate his client, or the situation, so he can pursue his own version of best interests instead. The methods lawyers use for manipulating their adult clients have been well documented.¹²⁵ The lawyer can slant his presentation of information to the client so that the option which the lawyer prefers appears to be the only reasonable choice; the lawyer can fail to mention or explain available options; and the lawyer can coerce the client into taking a particular position. Adult clients are controlled by these ploys, and children are even more vulnerable; "the risk of overreaching consciously or unconsciously is particularly acute with young, poor and uneducated clients."¹²⁶

Another way the lawyer can control a case is through the distinction between means and ends. Traditionally the client determines the objectives of a proceeding, and the lawyer determines the methods for achieving these objectives. However, the distinction between means and ends is often unclear.¹²⁷ For example, if a child wished to stay with his parents without court supervision, could his lawyer advocate for placement in temporary foster care over the child's objections if the lawyer felt doing so would be the best way to eventually

125. See Rosenthal *supra* note 31 and Spiegel, *supra* note 31.

126. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.2 Commentary at 114-15 (1979).

127. Luban discusses the case of *Nelson v. State*, 346 F.2d 73 (9th Cir.) *cert. denied*, 382 U.S. 964 (1965), in which an attorney's decision to waive his clients right to assert a defense based on the First and Fourth Amendments was deemed to be "trial strategy." Luban comments that if a defense based on the First and Fourth Amendments is nothing more than a trial tactic, it is hard to see courts as legitimate forums for arguing rights. Luban, *supra* note 30 at 459 n.9.

achieve the child's wish? Since the "means" in this example are clearly of great importance to the child, the client's wishes should be followed.

Even the lawyer who is a fervent supporter of client autonomy can inadvertently exercise undue control because of problems in communicating with the client. In order to accurately assess a child's capacity and represent a child's wishes, the lawyer must be especially sensitive to problems of communicating with children. Ascertaining what a child wants can be difficult because children are very influenced by their immediate circumstances. Additionally, children are likely to accommodate their opinions to what they think adults want to hear, and they are very concerned with the consequences of what they say.¹²⁸ Race and class can also be a barrier to effective communication.¹²⁹ Differences in speech patterns, in verbal skills, and a lack of trust can hamper communication between the child and his lawyer.¹³⁰

Accurate communication can also mean that the lawyer must say things he would rather not say and that he should be willing to let the client be silent. The lawyer may have the unpleasant task of providing distressing information to a child about his parents or his choices (although children, like adults, may find the truth easier to manage than subterfuge).¹³¹ The lawyer might also find the child would prefer not to make some choices. Children in divorce cases, for example, have indicated an unwillingness to choose between their parents.¹³²

In addition to the problems of manipulation and communication,

128. WESTMAN, *supra* note 93 at 93.

129. In his study of juveniles' comprehension of *Miranda* warnings, Grisso found that lower socioeconomic blacks performed more poorly on a measure of comprehension of *Miranda* rights than did lower socioeconomic whites. He suggests that differences in cultural and linguistic backgrounds may explain these differences. T. GRISSO, *JUVENILES' WAIVERS OF RIGHTS* (1981).

130. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 4.2(a) Commentary at 100 (1979). Racial matching of child and lawyer was found to be a positive factor in achieving a beneficial effect in protection cases in North Carolina. Kelly and Ramsey, *supra* note 3.

131. Gilder and Buschman give the example of an eleven-year-old boy whose parents were unable to discuss or accept his leukemia. The boy was exhibiting severe behavior problems but his behavior improved remarkably when a therapist honestly answered the boy's questions about his illness. The boy's positive and cheerful response to the bad news was: "It's about time a fellow gets answers." Gilder and Buschman, *Approaches to the Dying Child*, Bemporad, *supra* note 84 at 509, 519.

132. See Wallerstein and Kelly *supra* note 117 at 493-95.

there is another problem in representing the child's wishes—namely, that of risk to the client from the outcome of the case. The lawyer who has determined that his client is capable and is arguing zealously for the position that his client has chosen, may nonetheless doubt the wisdom of that position. Generally the lawyer is morally supported in taking the stance his client chose by the existence of the adversary system; his client's position will be challenged, not accepted without question. Furthermore, it is the judge's function, not the lawyer's, to decide which position should prevail. But what should the lawyer do who fears he is going to win, and that winning will result in harm to his client? Should he nonetheless represent his client's wishes?

Unfortunately, this is not an idle question in a protection proceeding. If the department of social services does not have proper legal representation,¹³³ the department's position might not be presented adequately. Additionally, if counsel for the child and counsel for the parents were both arguing for the same result, then the proceeding would be even more one-sided. If the child's lawyer were convinced that his client would suffer serious physical harm if he prevailed, what should he do?

The overall solution to this problem would be to ensure that adequate representation was provided to all parties to the proceeding. This would allow the lawyer to present his case, reasonably secure in the knowledge that the judge would hear all points of view. But what should the lawyer do in the immediate case? There seems to be no easy solution to this problem. The lawyer could proceed to represent his client zealously and pray that his assessment of risk to the client was wrong. Although this approach would be most consistent with the lawyer's role in the adversary system, it is not likely that it would be acceptable to most lawyers in practice.

Another possible solution for the lawyer would be to withdraw from the case. Withdrawal, however, would be difficult under the

133. In Michigan, for example, a staff member from the prosecutor's office might present the state's case; typically, however, they would not have prepared extensively for the case in advance of the hearing. Additionally, some prosecutors do not consider themselves to be the representatives of the department of social services, but to be representatives of the "state" or the "people." (Statement of preliminary results of survey of Michigan prosecutors in abuse/neglect cases by Philip Prygoski, December, 1981.) The department of social services itself may also fail to be a true advocate for the child. *See supra* note 24 and 25 and accompanying text.

Code. This is especially so since the case would already be before the court and consequently the lawyer could not withdraw on the basis that the conduct the client requested was "contrary to the judgment and advice of the lawyer. . . ." ¹³⁴ Possibly the lawyer could withdraw if he could show that the client's conduct "renders it unreasonably difficult for the lawyer to carry out his employment effectively." ¹³⁵ Withdrawal on this basis, however, would be tantamount to informing the judge that the lawyer thought that his client's position was wrong. Another basis for withdrawal is that the lawyer's "mental or physical condition render it difficult for him to carry out the employment effectively." ¹³⁶ Generally, however, it seems unlikely that disagreement with the client's position would have such a severe impact on the lawyer's ability to represent the client adequately.

In summary, withdrawal seems to be a problematic solution at best, especially for appointed counsel. The additional inconvenience and expense to the state coupled with the harm that could be caused to the child by delays would be reasons for a judge to deny permission for withdrawal.

Another possible solution would be to assess the client's capacity in relation to the risk to the client. ¹³⁷ The greater the risk, the higher the level of client competence required. As mentioned earlier, having the lawyer advocate the client's position is usually a low risk choice; the judge makes the final decision, not the client. But if, because of flaws in the judicial system, the client's position were likely to be the outcome in the case, clearly the risk has increased greatly. If there were a high likelihood both that the client's position would prevail and that serious harm would result, then the client could be held to a higher standard of competence. The serious drawback of this proposal is that it provides yet another basis for the lawyer to avoid representing his client's wishes. If the risk assessment is used only in very limited circumstances, however, then it seems to be the most practical solution to the problem of a lack of an opponent.

134. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(e) (1979).

135. *Id.* DR 2-110(C)(1)(d).

136. *Id.* DR 2-110(C)(4).

137. Gaylin proposes a concept of variable competency for determining when a child's decision should be controlling which includes weighing risk to the child and gain to society. Gaylin, *The "Competence" of Children: No Longer All or None*, 21 J. AMERICAN ACAD. OF CHILD PSYCHIATRY 153 (1982).

The lawyer who represents the wishes of a minor client when those are in conflict with his own assessment of the client's best interests has a difficult road to travel. The traps for the uncautious traveler rival the famed potholes of Buffalo: Providing the client with unbiased information about options, limiting the use of the means/end distinction, avoiding coercion of the client, communicating accurately, and the final trap—being fearful of winning. But traveling this road appears to be the best way of providing representation which is likely to produce a benefit for the child client.

VI. The Need for More Research

This article proposes a standard for judging decision-making capacity and suggests how the standard should be applied. It would be interesting to empirically and systematically test the use of the standard to determine what kinds of results are produced when it is used. For example, when lawyers use the proposed standard, how often do they determine that their client is incapable of making a considered decision and what factors caused them to make that determination? Additionally, the assessment process needs to be more fully developed.

Although this article presents a theoretical framework for the assessment of a child's decision-making ability, it does not provide a step-by-step picture of how this should be done. Developing a more comprehensive description of a proper assessment process is not an easy task because of the surprising dearth of empirical research on interviewing and counseling children. Most articles on interviewing children are based on clinical impressions and on generalizations from research in child development rather than on systematic study.¹³⁸ The legal profession needs to work with other professionals,

138. *Eg.*, Eaddy and Gentry, *Play With a Purpose: Interviewing Abused or Neglected Children*, 39 PUBLIC WELFARE 43 (1981). The most useful book I have found on interviewing children is John Rich's *Interviewing Children and Adolescents* (1968). Although this book is also based on clinical impressions, Dr. Rich is refreshingly humble about what he does and does not know and recommends that the interviewer consistently check his assessments and predictions against what actually happens. He notes that: "Interviewers all too seldom ask themselves the vital question, 'Does it work?' No matter how carefully you have planned your questions or designed the furniture, no matter how friendly you are, how much personal analysis you have had to iron out your own neurotic counter-transference, you are wasting your time unless you can prove that the information you are collecting is accurate, that their children you are selecting for particular responsibilities live up to the expectations, and that the behavior does in fact change in the intended direction." *Id.* at 87. A useful, although old, article which describes the benefits and hazards of the interview for research in child development is Yarrow, *Interviewing Children*, HANDBOOK OF RESEARCH METHODS IN CHILD DEVELOPMENT P. MUSSIN ed. at 561 (1960).

such as psychologists and psychiatrists, to develop studies of children in actual or experimental legal settings for the purpose of obtaining better information about interviewing and counseling children and about children's decision making generally.¹³⁹

Studying the use of the proposed standard and the assessment process in practice would allow for alterations and refinements which would further the goals of representation for children in protection proceedings. Consideration should also be given to whether the same standard and process should be used by lawyers representing children in custody disputes attending divorce.

139. Interesting research has been done on use of children as witnesses (Melton, *supra* note 97) and on the ability of juvenile delinquents to understand the *Miranda* warnings. (Grisso, *supra* note 129.) Additionally, some new research is under way to respond to requests from the legal system for help in assessing a child's competence in decisionmaking. See Tremper and Feshbach, "Ages of Consent" *Children's Competency to Consent and Attitudes Toward Adolescent Decision-Making*, 3 *THE NETWORKER* 1 (1982). Also, the Committee for Child Psychiatry of the Group for the Advancement of Psychiatry is preparing a report, *How Old is Old Enough?*, which considers the relations of age levels to competency to perform certain tasks. See also Lewis *supra* note 108.