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And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System

Janet Weinstein

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And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System

JANET WEINSTEIN*

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I. INTRODUCTION

Of all the matters which are brought to our legal system for resolution, determinations of the best interests of children in custody disputes

are among the most challenging.¹ These disputes arise in two basic scenarios. The first, and most familiar for the legal mind because it is a part of a larger dispute involving money and property, is the custody battle in family court, which is usually initiated when a couple is dissolving its marriage.² The second, tragic scenario occurs in a court sitting as a juvenile court and involves a determination as to what should occur with a child who is alleged to have been abused and/or neglected by his³ parents. In both situations, the court is asked to make determinations based upon the "best interests" of the minor.⁴ Although a variety of legal proceedings involving children require a judge to make a decision based upon the "best interests" of the child,⁵ this article deals only with family court cases where custody and visitation are at issue, and with child protection matters.

The legal literature has focused primarily on criticizing the best interests standard for being vague,⁶ and focused on the roles of chil-

1. For an idea of the magnitude of the problem and the number of children affected by these proceedings, see Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 51-52 (1994); see also U.S. COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION (1996) [hereinafter PARENTING OUR CHILDREN] (stating that "the number of children each year whose parents divorce increased by 16 percent from 870,000 in 1970 to 1,005,000 in 1990. The number of divorces increased by 67 percent between 1970 and 1990"). *Id.* at 12.

The U.S. Department of Health and Human Services, reported that cases of child abuse and neglect nearly doubled in the United States between 1986 and 1993. See THE THIRD NATIONAL INCIDENCE STUDY (NIS) OF CHILD ABUSE AND NEGLECT (1996). In that time period, the estimated number of abused and neglected children grew from 1.4 million to more than 2.8 million. The number of children who were seriously injured quadrupled. See *Child Abuse and Neglect Shows Sharp Rise, HHS Study Finds*, CHILD PROTECTION REP., Sept. 27, 1996, at 165.

2. In this article I deal solely with issues of custody and visitation; issues of child support, however, cannot be separated from the best interests of the child and should be considered as part of the systems described and in the proposals I make for reform.

3. I have purposefully chosen to use gender randomly throughout this article in referring to children, parents, and attorneys in order to avoid the tiresome use of "he or she, her or his," etc., and out of a desire to avoid the impersonal "the, they," etc. which would be inconsistent with the tone of this article.

4. See, e.g., CAL. FAM. CODE §§ 3114, 7890 (West 1994); CAL. WELF. & INST. CODE §§ 202, 350; N.J. STAT. ANN. § 30:4A-8 (West 1997); N.Y. FAM. CT. ACT § 1027(a) (West Supp. 1997).

5. For example, juvenile delinquency proceedings and private guardianships and adoptions use this standard.

6. See, e.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995) (arguing that the standard is vague and subject to arbitrary application and should not be used for decisions about whether to intervene); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in CHILD, PARENT, AND STATE 3, 5-6 (S. Randall Humm et al. eds., 1994) ("'[B]est interests of the child' is not a standard, but a euphemism for unbridled judicial discretion"); N. Dickon Reppucci and Catherine A. Crosby, *Law, Psychology, and Children: Overarching Issues*, 17 LAW & HUM. BEHAV. 1, 4-5 (1993) (regardless of how it is measured, the best interests of children are generally indeterminant, and largely a matter of values); Richard A. Warshak, *Gender Bias in Child Custody Decisions*, 34 FAM. & CONCILIATION

dren's attorneys in protecting these interests.⁷ Much less attention has been paid to the underlying question: the appropriateness of relying upon the traditional legal system to decide such matters. The purpose of this article is to examine whether the adversarial legal model serves the best interests of children⁸ and their families and what changes are needed to better protect those interests.

For many reasons, the adversarial system, and thus, the role of the minor's attorney within that system, may be contrary to a determination of the best interests of the child.⁹ While the adversarial process may not seem too damaging or consequential in most civil litigation, where the exchange of money is usually the outcome, litigation involving the welfare of a child and family encompasses more substantial concerns.

Our legal system relies upon the notion that two or more professional adversaries representing the parties to the dispute will draw forth all relevant information to the contest in the process of putting forward their clients' best positions, thereby allowing the decision-maker to determine the "truth" and to make the best decision.¹⁰ This process assumes that the only real interest of the parties is to "win." In that sense, it reflects an attitude about relationships where interactions are

CTS. REV. 396 (1996); Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 LAW & HUM. BEHAV. 289 (1996) (the indeterminacy of the standard vests judges with a great deal of discretion and very little practical assistance).

7. The Fordham Law Review recently devoted an entire, lengthy issue to the role of counsel for children. See 64 Special Issue, *Ethical Issues In the Legal Representation of Children*, FORDHAM L. REV. (1996); see also Judith Larsen, *Does the Child's Lawyer Owe "The Whole Truth" to the Court in Neglect-Abuse Cases?* 47 JUV. & FAM. CT. J. 49 (Spring 1996).

8. For more specific discussion in regard to the criminal justice prosecution of child abuse cases, see John E. B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1985-86).

9. But see Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996). Ross comments that "law for children should not result in a separate jurisprudential system—a 'children's law' which quickly deteriorates into the disparaging 'kiddie law'—but should instead rest squarely in our common law." *Id.* at 1574. My proposal focuses on the need for a new paradigm and new process; I do not consider the common law jurisprudence to be the heart of this problem. The real issue for consideration is how we go about the job of helping children and families. As so well stated by Nanette Schorr in *Law and the Politics of Meaning*, TIKKUN, July/Aug. 1996, at 34, 36:

[I]t is not clear that deciding cases according to the law prevents lawyers from presenting the stories of their clients, or judges from using empathic understanding to decide those cases. And so the question devolves to both the substantive nature of the justice being dispensed by the laws themselves and the type of empathic intelligence brought to the task by the court.

10. See generally Ross, *supra* note 9; STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975); M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* VIII (1975).

seen as part of a struggle for power or property, and where everyone must compete to "win" the power and its associated by-products.

Ongoing relationships between the contestants are not a consideration in this model. But, in cases involving the custody and welfare of a child, relationships are at the heart of the matter.¹¹ For that reason, among others, efforts have been made to direct custody disputes in family court toward a more conciliatory model which honors relationships.¹² Even mediation of child protection matters has been explored.¹³ Nevertheless, disputes involving the custody of children, particularly where abuse and/or neglect by one or both of the parents is alleged, tend to be among the most bitterly fought legal battles. Certainly, the strong sentiments underlying these cases are reflected in their contentiousness. Moreover, the fact that lawyers who represent the parties are trained as advocates within the adversarial model, not as peacemakers, compounds the problem.

The adversary system is not humane. It does not concern itself with the welfare of the parties involved in terms of how the process itself may affect them. Although much attention has been paid to attempting to create a more humane and child-centered courtroom,¹⁴ the process of engaging in a battle with family members cannot be a positive experience; certainly it is not for the children who are often placed in the middle of this internecine warfare. Nor is it generally friendly to the parents. The adversary system requires parties to refrain from addressing each other directly; they may communicate only through their attorneys. It forces parties to package their experiences in a way which will

11. See Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1482 (1996) ("While a web of relationships defines each person, children's dependence makes these connections even more salient") (citing HANNAH ARENDT, *THE HUMAN CONDITION* 3, 84 (1958)).

12. See, e.g., CAL. FAM. CODE §§ 3161, 3180 (West 1994); William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 *U. LOUISVILLE J. FAM. L.* 37 (1992-93); Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It Light at the End of the Tunnel or Is It a Train on the Track*, 70 *N.D. L. REV.* 255 (1994); Louise Everett Graham, *Implementing Custody Mediation on Family Court: Some Comments on the Jefferson County Family Court Experience*, 81 *KY. L.J.* 1107 (1993); Maggie Vincent, *Mandatory Mediation of Custody Disputes*, 20 *Vt. L. REV.* 255 (1995).

13. CAL. WELF. & INST. CODE § 350(a)(2) (West Supp. 1997) (encourages mediation of dependency cases).

14. See, e.g., CAL. FAM. CODE §§ 7891, 7892 (West 1996) (providing for testimony in chambers to explore the child's wishes); CAL. WELF. & INST. CODE § 350(b) (West 1996) (allowing testimony in chambers where the child is intimidated by the setting or afraid to testify in front of parents); CAL. PENAL CODE § 868.6 (West Supp. 1997) (providing for a nonthreatening environment for minors); see *id.* § 868.8 (providing for the comfort, support and protection of minors).

help them "win" their case, rather than to examine them contextually, in the unique and complex way in which experiences occur.

The confluence of the breakdown of both nuclear and extended families, community and other forms of traditional support for families, with an increased focus on individual rights, has positioned the legal system as the repository for all of society's problems. This extension of our traditional belief and trust in the legal system is probably misplaced. Our legal system has no special insight into the needs of children and families, nor do we have special training to deal with the complex and difficult issues which arise in these disputes. Ultimately, when conciliatory approaches do not work,¹⁵ the parties are thrown into the traditional adversarial process, a process which relies upon an ability to find a single right answer—to declare a winner and a loser.

Perhaps a history of distrust and jealousy toward nonlegal approaches to resolving problems has misled the legal community to see the issue of "best interests" as a legal problem. In practice, however, this is not a field which is "owned" by the law. Social work and mental health professionals play substantial roles in both juvenile and family courts.¹⁶ Nevertheless, the legal process seems to be running the show—a case of the tail wagging the dog.

For a variety of reasons, it is difficult to challenge the merits of the adversarial system in our legal culture. Perhaps since all of us, as lawyers, were trained to believe in it, we are comfortable with the idea of "fixing" it, but not with the idea of doing away with it.¹⁷ Even if no

15. The great majority of custody matters are settled between the divorcing parents either through negotiation or mediation. See, e.g., Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1233 (1992); Crosby-Currie, *supra* note 6. Although even privately settled custody issues raise questions about the best interests of the children, see discussion, *infra* notes 64-65, the focus of this article is on those cases which are currently resolved through traditional litigation.

16. My observation in attending child welfare conferences is that they have been dominated by social workers who consider themselves to be "the" child welfare professionals. The law and lawyers are often viewed as unfortunate inconveniences.

17. See Richard A. Garner, M.D., *My Involvement in Child Custody Litigation*, 27 FAM. & CONCILIATION CTS. REV. 1 (1989):

[T]he adversary system is primarily used in Great Britain and countries that were her former colonies (like the United States, for example). The rest of the world has recognized its deficiencies and has little tolerance for it. Law students in the United States and Great Britain generally are presented with the system without being provided this information. Usually, they uncritically accept adversarial litigation as the only (or optimum) way to resolve a conflict and rarely give consideration to alternative modes of dispute resolution, although these recently have been introduced into the curriculum in some United States law schools.

While my experience indicates that law students are currently very interested in alternative dispute resolution, I have found them to be quite averse to examining the underpinnings and rationale for the adversary system.

constitutional rights beyond the right to due process attached to civil proceedings, the dimensions of our loyalty to the system rise to religious proportions.¹⁸ Our allegiance seems even more stubborn if we consider that, in many proceedings, parties have no right to appointed counsel and, thus, are forced to represent themselves, sometimes against a party who is represented.

Additionally, special rules governing the relationship between the attorney and the client are an integral part of our adversary system. These are codified in many forms; all include a duty of confidentiality to the client. In addition, all jurisdictions have adopted evidentiary privileges which prohibit, with few exceptions, an attorney from testifying against her client. Confidentiality and privilege mean that some information may come to the attention of the attorney, but not to the attention of the finder of fact, regardless of how relevant or material the information is to the appropriate outcome of the case. In proceedings where the judge is supposed to assess all the facts and make a determination as to the best interests of the child, barriers to full disclosure are barriers to accomplishing this end.

Ultimately, proceedings which pit children against parents, or place children in the middle of a battle between parents, are antithetical to the best interests of those children. A significant body of social science research informs us that the best interest of the child is almost always to have an ongoing relationship with her parents.¹⁹ We need a system which encourages and assists such relationships. Professionals from the

18. See JOHN HENRY WIGMORE, EVIDENCE (3d ed. 1940):

The game of litigation is in part the continuance of a tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality.

Id. at 49.

19. See generally JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) [hereinafter WALLERSTEIN & KELLY]; Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment With the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990); Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation As An Alternative To Foster Care*, 4 STAN. L. & POL'Y REV. 183 (1992-93). But see Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538, 554-55 (1982) (arguing that these "friendly parent" provisions in joint custody statutes discourage opposition to joint custody).

Statutory law reflects this research. See, e.g., CAL. FAM. CODE § 3080 (West 1994) (presumption of joint custody); see *id.* § 3100 (West Supp. 1997) (visitation rights for noncustodial parent); see also CAL. WELF. & INST. CODE § 300 (West Supp. 1997) (legislative goal to maintain families); see *id.* § 16000 (West 1994) (family preservation).

many disciplines engaged in these areas of work need to help parents do their jobs rather than joining sides in a win-lose battle.

Because this article is about process and systems, rather than standards, a specific definition of best interests is not necessary to the discussion. I will examine the conventional legal paradigm, its operation in the context of child protection and custody matters, and propose changes to the systems, as well as to the ethical roles and professional responsibility duties of lawyers working in cases which involve the welfare of children, specifically a determination of the best interests of the child. I propose that we need a shift in paradigm, reflecting new values and focusing on custody and visitation matters as family and social problems, rather than legal issues and "cases." We need to start from scratch and design a system that makes sense. Part II examines the inherent conflicts between the adversary system and the best interests goal. Part III discusses the conflicts which, though not inherent to the system, occur in practice. In part IV, I look at the effect of the adversarial system on the children and their parents. Part V criticizes the legal profession's wrangling over the role of children's attorneys. In part VI, I make recommendations for the establishment of a new paradigm for these cases, one which still relies upon the advocacy of lawyers, but rests upon values of relationship and healing.

II. INHERENT CONFLICTS BETWEEN THE ADVERSARIAL PROCESS AND THE "BEST INTEREST" GOAL

The usual focus in best interest litigation, as in other litigation, is on the outcome of the case. Yet, the process of the adversarial system itself must be examined for compatibility with the best interests standard. The outcome of a case is determined primarily by what information is presented to the court. The adversarial system inhibits the court's access to information. The process alienates parties, delays outcomes, and focuses attention on matters extraneous to the child's best interests. In this section, I examine aspects of the adversarial system which are contrary to the best interests goal as specifically applied to child protection and custody/visitation cases.

A. *The Win or Lose Competition*

The adversary process is essentially a win or lose competition. Each party attempts to prove to the court why she should be the winner. If the winning prize is money or property, the concerns of the sought-after object are not relevant. Where the sought-after object is a child, however, the dispute is of a different nature. While this difference is widely recognized, the conflicts over the best interest of the child con-

tinue to take place in a win or lose framework.²⁰ The language of the process itself contributes to the attitude that this is a zero sum game. The parent who is awarded custody of the child considers himself to be the "victor in the war."²¹ Unfortunately, the child may be the loser in any event.²²

Because the adversary process rests upon the fight between opposing parties, it forces the parties into fixed positions from which it may be difficult to retreat.²³ In the child protection arena, this may mean that social workers are required to take more extreme positions in their cases than they might otherwise, in order to defend their actions to the court. In the family custody situation, parents may make extreme allegations about their ex-spouses to ensure victory.

Families are about relationship. A process which pits family members against each other is not conducive to relationships.²⁴ Likewise, a

20. See Vivienne Roseby, Ph.D., *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L.Q. 97, 97 (1995) (stating that "partly the adversarial framework dominates because attorneys, no matter how sophisticated their understanding of total family dynamics, can represent only one of two conflicting points of view").

21. *Id.* at 98; see also CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 711 (Robert H. Mnookin & D. Kelly Weisberg eds., 3d ed. 1995) [hereinafter CHILD, FAMILY AND STATE] (stating that "when courts award 'custody' incident to separation or divorce, the winner usually has less than all the rights included in custody within the on-going two parent family") (emphasis added); Marion Huxtable, *Child Protection: With Liberty and Justice for All*, 39 SOCIAL WORK 60 (1994). Huxtable asserts that:

When conflicts are settled through legal channels, one party wins and the other loses. When a child is removed from a parent's custody, the parent loses his or her rights, and the child, although protected, often loses also if out-of-home placement is prolonged and the family is not reunited.

Id. at 61.

Martha Fineman asserts: "Anecdotal evidence indicates that many women view joint custody as 'losing'—whereas many men view it as 'winning'—the divorce wars; as a result, many women bargain away needed property and support benefits to avoid the risk of 'losing' their children." Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761 (1988) (footnote omitted).

22. See WALLERSTEIN & KELLY, *supra* note 19, at 30 (believing that no one actually wins in these cases).

23. See, e.g., *id.* (Wallerstein and Kelly state that "the adversary proceeding sharpens and consolidates the parents' differences, and once it was initiated, compromise, flexibility, and civilized exchange are neither valued nor possible.").

24. See Fineman, *supra* note 21, at 748-50. Fineman provides a number of citations to social science literature about the acrimony of the adversarial process and its effects on families in custody disputes. Fineman, though, is critical of the result of reform, with its emphasis on alternative dispute resolution and away from the traditional legal problem solving, in that its effect has been a change in the substantive law which is harmful to the mother-child relationship. While her criticism is justified in part, she discounts the damage created by the adversarial process in her focus on substantive rights. Although she sees the process and substantive law changes as part and parcel, this is not a necessary result of process change. As discussed in this article, the problem is that we now have a bastardized system which performs neither the legal nor the therapeutic function well. I believe there is a better way to integrate the two interests.

process which pits family members against those who are attempting to strengthen the family in order to safely maintain the relationship, makes little sense.

B. *Focus Is on Parents' Rights Instead of on Child's Welfare*

The adversary system tends to camouflage issues of concern to the child by directing the discussion at the rights of the parents.²⁵ Commentators and practitioners in the custody dispute arena have expressed the sentiment that child custody matters are really not about the best interests of the child, but instead are about the interests of the parents²⁶ (i.e., a contest between the rights of the two parents). Concerns regarding gender equality have further focused the discourse on parental rights; many believe the end product has been court orders which fail to honor family relationships.²⁷ This focus on the rights of the parents often occurs without a discussion of the responsibility adults owe to their children.²⁸ On the other hand, the focus of these proceedings on the best interests of the child may create some pressure for parents' attorneys to couch their arguments in terms of what is best for the child, rather than rigidly on their clients' interests.²⁹ Section 202(a) of the California Wel-

25. See, e.g., Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures, and Professions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975 (1996). Cervone and Mauro assert that:

The dilemma is whether to reveal information that is good for the child but bad for the case. This conflict is best seen in domestic relations custody cases, theoretically posited as a quest for the child's best interest, but rooted in parental self-interest. . . . In the lawyer's model, family secrets and events of questionable meaning give way only to the press of the adversary. The lawyer's ethical obligation is to answer the adversary's questions honestly, not to gratuitously offer information which may be helpful to the other side.

Id. at 1980-81.

26. See, e.g., Charlow, *supra* note 6, at 5-6. Charlow describes research regarding parents' motivations for seeking custody—motivations which include revenge, avoidance of sense of loss, continuity of parental identity, self-esteem, and dependence on the child. She suggests that the judge's inquiry should be on why the parents have not resolved the custody dispute, given that conflict is not in the best interests of their child, and custody should be given to the parent who can justify the dispute (except where one or both are unfit). See *id.* at 13; see also Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 *GEO. L.J.* 2665, 2667 (1993) (arguing that current codes of ethics focus on rights, giving little attention to considerations of care).

27. See, e.g., Catania, *supra* note 15, at 1234-35 (law ignores fiduciary values which develop between family members).

28. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747 (1993). Woodhouse asserts that:

Courts and philosophers writing about parental rights often trace the legitimacy of these rights to the role parental authority plays in the exercise of parental responsibility. Rights rhetoric, however, has tended to obscure this foundation of adult power. Our focus on these adjunct rights rather than on their basis has distracted us from carefully examining the nature of responsibility itself.

Id. at 1818.

29. See, e.g., Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child*

fare and Institutions Code could be interpreted to require parents' attorneys to consider the best interest of the child in child protection proceedings:

Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public *and the best interests of the minor* in all deliberations pursuant to this chapter. *Participants in the juvenile justice system shall hold themselves accountable for its results.* They shall act in conformity with a comprehensive set of objectives established to improve system performance in a vigorous and ongoing manner.

Nevertheless, in both child protection and family court matters, the issues are often drawn in terms of individual rights rather than focused on relationships and connections.³⁰

A scenario demonstrating the conflict between the traditional rights-based approach of the adversarial process and the protection of the child is illustrated by *In re Maurice M.*³¹ In that case, the Baltimore City Department of Social Services filed a petition asking the court to take jurisdiction of baby Maurice, after he had been brought to the hospital with a suspicious broken leg injury at the age of three months. Maurice was returned to his mother after several months under court-ordered conditions, and remained as a child in need of protection under the court's jurisdiction. Maurice's mother violated the ordered conditions, and the Department was ordered to remove Maurice. Approximately eight months passed and the Department had been unable to see Maurice. The Department asked the court to order the mother to produce Maurice for an inspection by the Department to ensure that he was safe and unharmed. The mother refused to produce the child, protesting that such an order was a violation of her Fifth Amendment right against self-incrimination. The case was eventually heard by the Supreme Court, which upheld the contempt order against the mother.³² Seven and one-half years later, baby Maurice has not been produced; his mother

Welfare Cases, 64 *FORDHAM L. REV.* 1621, 1626-27 (1996) [hereinafter *Ethical Issues*] (noting that "interests have come to be seen as fundamentally divergent, even in circumstances where children have significant attachments to their parents").

30. See Martin Guggenheim, *The Best Interests of the Child: Much Ado About Nothing?*, in *CHILD, PARENT, AND STATE*, *supra* note 6, at 27, 29 [hereinafter *Much Ado*] (arguing that child custody cases are not really about children, but are about which parent shall be given legal entitlement to raise a child); see also Fitzgerald, *supra* note 1, at 60 (stating that "the 'best interests' of any particular child always yield to the constitutional claims of their parents").

31. 550 A.2d 1135 (Md. 1988).

32. See *Baltimore Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549 (1990); see also Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 *MICH. L. REV.* 2625 (1996); *Mother Ends 7-Year Jail Stay, Still Silent About Missing Child*, *N.Y. TIMES*, Nov. 2, 1995, at A18.

was released from custody late in 1995, after spending more than seven years in prison, although she has never been found to be criminally guilty of any act of child abuse. Whatever price the mother has paid in this situation (if she cannot produce Maurice because he is injured or dead, her price is small), Maurice may have paid more. The mother's attorney in this case may have believed there was a duty to counsel the client to not produce Maurice if producing him (or the inability to produce him) would be damaging to the client.

Because the adversary process limits parties to fighting for their own interests, arguments made about the best interests of the child can be seen as mere manipulations to benefit the positions of the parties making them.

C. *Zealous Advocacy and Client Confidentiality*

The zealous advocacy and client confidentiality requirements of attorneys create artificial barriers to sharing information with other parties and, more seriously, with the court. Important information may never come to light in a proceeding, creating an obstacle to achieving the best interests of the children.³³

1. THE ZEALOUS ADVOCACY REQUIREMENT

The lawyer's ethical obligation to zealously represent her client is probably the cornerstone of the adversary system. In the name of zealous advocacy, lawyers may engage in behavior for their clients which would be immoral if committed on their own behalf. For reasons discussed above, attorneys trained in this tradition have a difficult time considering alternatives. The American public shares this ambivalence, at least in terms of imagining the role of their own attorneys,³⁴ as opposed

33. Additionally, attempts to work in multidisciplinary teams to advance the child protection and family services goals may be blocked by concerns of the individual attorneys who must protect the separate interests of their clients. For instance, attorneys representing child welfare agencies may be reluctant to share information about a case which could result in potential client liability for some misfeasance. The value of a multidisciplinary team for resolving systemic problems which will effect the best interests of many children, is thus diminished by the stifling effects of client confidentiality and loyalty.

34. See, e.g., Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance With Outcomes: A Study of Alternatives to the Standard Adversary Trial Procedure*, 18 LAW & HUM. BEHAV. 361, 362 (1994):

In their comprehensive review of the procedural justice literature, Lind and Tyler (1988) . . . raised concerns with the standard adversary model. They noted that although the adversary model is often rated as the most fair, research has also shown that it is the most objectively biased; adversarial, as opposed to inquisitorial, attorneys are more likely to select from the available evidence that which favors their party, rather than to provide a representative sampling of the available evidence. Lind and Tyler characterized the problem for policy makers as "a

to their feelings about the ethical behavior of lawyers in general. The zealous advocate protects the "rights" of the client. In a rights-based system, the client, as a separate and autonomous individual, is the subject of concern. The lawyer cannot, according to principles of professional responsibility, do anything which would diminish the "rights" of the client.

In order to comply with the requirements of zealous advocacy, and confidentiality rules which support that role, the court and the attorneys sometimes go through machinations of role playing which serve form but not substance. For example, the court in a child protection case may ask the parent's attorney to state on the record the last contact the attorney had with a client who is not present in court. The court has an interest in knowing if the attorney is in contact with the client, is representing the client's wishes, and is fulfilling his counseling role. An attorney who has not been contacted by the client since the last hearing and has been unable to make contact with the client³⁵ faces a dilemma when asked about client contact. If the attorney advises the court that he has not been able to locate or contact the client, the attorney is, in essence, testifying that the client is not responsible. The solution is for the attorney to provide the court with the bare statement that there has been no contact with the client without giving information about the attorney's efforts to make such contact. This way, the court should not conclude that the failure to make contact was the fault of the client. Naturally, this is a fiction; it does not allow the court to acquire information regarding the kind of work the attorney is doing, a relevant concern considering that most of the attorneys are provided at public expense and that the ultimate outcome of the proceeding may result in termination of parental rights with due process implications.

Similar issues are raised when the attorney believes that the parent client is unable to competently participate in the process, necessitating the appointment of a guardian *ad litem*. Certainly, raising the issue of the parent's competence diminishes the likelihood of an award of custody to that parent, at least in the short term. The attorney is caught on the horns of a dilemma, having to serve the client's interest and harm it at the same time.

Children's attorneys are not exempt from these problems. Those who maintain that the child's lawyer must take the role of zealous advo-

dilemma of whether to choose the procedure that is seen as fairer . . . or whether to choose a procedure that provides the decisionmaker with the most accurate picture of case events." *Id.* (citation omitted).

35. Many child protection cases involve parents who live a very transitory life style and have difficulty functioning at a level which would allow them to comply with the requirement to be in touch with their attorney or the social worker.

cate³⁶ face equally, if not more difficult, moral dilemmas.³⁷

Existing codes of conduct and standards for child welfare practice do not provide much guidance for the attorney who is faced with such a dilemma.³⁸ In fact, the adversary system is based upon the notion that attorneys should, and must, engage in role-differentiated behavior (i.e., perform acts for their clients that would not otherwise be moral).³⁹ The issue here is whether this kind of behavior is appropriate for matters in which the court is required to determine the best interests of the child. Complete and objective information is vital in both child protection and family law cases. It is two-faced to claim that attorneys may press the wishes of their client because their role is not that of a decision-maker, while at the same time rationalizing the withholding of information from the decision-maker. In fact, in some cases, the attorney might be a better decision-maker, simply because the attorney has knowledge which may never become available to the judge.

36. See, e.g., Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259 (1995) (arguing that the law supports the modern concept of zealous child advocacy in order to serve the needs of the child in the legal system).

37. See generally Boyer, *supra* note 29.

38. See *id.* at 1640-41. Boyer states that:

Because of the subjectiveness and vagaries of the legal standard of best interests that governs most juvenile court hearings, only in extreme circumstances will a client's objective be unsupportable by any good faith argument. . . . If the concerns of the lawyer stem from the belief that advocating the parent's cause is not in the best interests of the child, such concerns will generally not rise to the point of compelling mandatory withdrawal. Initially, the lawyer typically focuses advocacy on an end—returning the child to the custody of the parent. Although this end may increase the likelihood that a child will be victimized by abuse, it is not in itself unlawful.

Id. (citation omitted). Boyer does believe, however, that very few cases actually present such serious moral dilemmas. *Id.* at 1644. See also Ronald L. Solove, *Confessions of a Judicial Activist*, 54 OHIO ST. L.J. 797 (1993):

Canon 7 of the Code of Professional Responsibility requires a lawyer representing a client in a matrimonial dispute to represent his or her client zealously within the bounds of the law. In a custody dispute, the lawyer often must do what is best for the case, as opposed to what is best for the kids.

Id. at 802.

39. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1664-65 ("The legal profession . . . protects role-differentiated behavior through the promulgation of ethical codes that promote moral nonaccountability as a necessary adjunct to adversariness.") (footnotes omitted); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER* 150, 157 (David Luban ed., 1984) (arguing that there are many "proper" behaviors which impede the search for truth).

Rules of professional conduct which require attorneys to engage in such behavior also serve the personal interests of lawyers by keeping them from having to make difficult ethical decisions. See generally Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

2. CLIENT CONFIDENTIALITY AND THE WORK-PRODUCT DOCTRINE

The relationship between the client and attorney within the traditional adversary process results in a number of situations not conducive to protecting the best interests of the child. Even assuming that the best interest might be achieved through the gathering of available information about the family, the process places barriers to information sharing, and thus, inhibits correct decision making. The primary obstacle to information sharing is the ethical rule requiring the attorney to maintain the confidences of the client.⁴⁰

One example of how attorney-client confidentiality limits information sharing is the use of private psychological evaluations. It is quite common in child protection and family court custody proceedings to use psychological evaluations of the parents as evidence to assist the court in making its orders. A psychological evaluation may be useful in determining what kind of services may be appropriately provided to a parent in order to alleviate the risk to the child, and useful in pointing out potential parenting problems which might affect the best interests of the child in a custody dispute. Lawyers like to use psychological evalua-

40. See Robert J. Kutak, *The Adversary System and the Practice of Law*, in THE GOOD LAWYER, *supra* note 39, at 172, for an interesting historical explanation of the development of confidentiality and disclosure rules. According to Kutak, the adversary system is a competitive, rather than a cooperative system of jurisprudence, being based upon underlying societal values of unrestrained competition and individualism. He explains that "the American adversary process . . . is in most respects Darwinian. The principles of individual monopolization of personal competence and indifference to the incompetence of others imply a 'survival of the fittest' theme. In the adversary system, there is no obligation, as a general rule, to aid others." *Id.* at 177-78.

A study of gender differences provides another way of looking at the development of the adversary system. Carol Gilligan describes the responses of Jake and Amy to the "Heinz" dilemma of whether it is morally correct for a man to steal from a pharmacist in order to acquire a life-saving drug, which he could not afford, for his dying wife. The responses of the boy and girl reflect differences in problem-solving that reach beyond tests of morality.

In resolving Heinz's dilemma, Jake relies on theft to avoid confrontation and *turns to the law* to mediate the dispute. Transposing a hierarchy of power into a hierarchy of values, he *defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims*. In this way, he *abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute*. But this hierarchical ordering, with its imagery of winning and losing and the potential for violence which it contains, gives way in Amy's construction of the dilemma, *a web of relationships that is sustained by a process of communication*. With this shift, the moral problem changes from one of unfair domination, the imposition of property over life, to one of unnecessary exclusion, the failure of the druggist to respond to the wife.

CAROL GILLIGAN, IN A DIFFERENT VOICE 32 (Harvard University Press, 2d ed. 1993) (emphasis added). Male domination of the legal system throughout its development may help to explain our valuing of a system which translates moral problems into a hierarchy of rules and abstracts the lawyer from the personal dilemma. See Zacharias, *supra* note 39, at 368-69 (arguing that confidentiality may be contrary to client dignity; by contributing to the notion that "the client can get away with anything," the client is demeaned as a moral individual).

tions to argue that a client is, or has the potential to be, a good parent. On the other hand, a psychological evaluation which raises substantial concern about the ability of the client to parent, would be undesirable to the parent's advocate.

An attorney may suggest that his client submit to a psychological evaluation in the hope that the evaluator's conclusion will be that the client is a good parent who does not pose a risk to the child. While the evaluator cannot predict actual behavior,⁴¹ she may report on evidence of the client's proclivities which may raise concerns about the safety of the child should custody be awarded to that parent. If the evaluator in such a case concludes that the client may be a pedophile or a violent person who is unable to control his impulses, or self-centered and unable to put his child's interests before his own, a written report could be most damaging to the client. If the evaluation has been performed as a result of a court order, the evaluation will be delivered to the court and accessible by the attorneys. On the other hand, if an attorney hires the evaluator hoping that the report will be favorable to her client, the report is not discoverable, and the findings of the evaluator will never be made known to the judge or to the other parties. The attorney is precluded by the requirement of zealous advocacy from disclosing information which would harm her client's chances of winning the case. The evaluator is precluded from disclosing the results of the evaluation to any other party or to the court through the application of the attorney work product doctrine, an aspect of the confidential nature of the attorney-client relationship.⁴²

Similar considerations attend the evaluation of a child. In determining the needs of the child, lawyers may need to consult with mental health or social work experts. Information the lawyer has gathered about the child is confidential and, therefore, may only be shared with members of the lawyer's "team" if confidentiality is not to be breached.

When lack of resources or other factors make such a consultant impracticable, the lawyer may look to experts already involved with the client, or occasionally court-appointed experts. These latter

41. For a good discussion of the problems of relying upon psychological evaluations as predictions of future behavior, see the Dissenting Opinion in *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976):

Both the legal and psychiatric communities recognize that the process of determining potential violence in a patient is far from exact, being fraught with complexity and uncertainty. In fact, precision has not even been attained in predicting who of those having already committed violent acts will again become violent, a task recognized to be of much simpler proportions.

Id. at 360-61 (citations omitted).

42. See generally Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994).

experts, however, do not share the lawyer's duty of advocacy with respect to the child client's wishes and perspectives, often have other institutional loyalties, may have important ongoing relationships with the child that must not be damaged, or may not offer opinion to the lawyer in a timely fashion.⁴³

The rules of confidentiality require this kind of strategizing and information hiding which seem nonsensical outside of the adversarial context.

At stake is the welfare, and perhaps the actual physical safety, of the child, whose best interests the court has a duty to protect.⁴⁴ Under the operation of the attorney work product doctrine, the work of the evaluator hired by the attorney belongs to the attorney and is confidential and privileged unless the evaluator was hired as an expert witness.⁴⁵ The attorney will not hire the evaluator to be a witness if the report is unfavorable. In fact, in all likelihood, the unfavorable report will never be written.⁴⁶

Some attorneys, recognizing they may not have the requisite skills, hire experts to interview children, particularly in difficult cases. This creates a similar confidentiality problem regarding the discoverability of the interview. Additionally, ascertaining which parties need to be advised and present if the child's attorney interviews one of the parents is a concern which arises under the traditionally adversary-based rules of confidentiality and discovery.⁴⁷

43. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1568 (1996).

44. The evaluator will not report pursuant to a child abuse and neglect reporting act because there is no present suspicion of a risk of abuse or neglect to give rise to the duty to report. Similarly, there is no imminent danger which would give rise to a duty to warn under the rule in *Tarasoff*, 551 P.2d at 342-51.

45. *But see* Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW 45 (the "attorney-client privilege did not bar discovery of evaluating psychologist's report in a termination of parental rights action, even though expert was appointed at mother's request, because mother knew report would produce [sic] important to the proceedings and could not have expected the communications to be confidential"). *Id.* at 49, n.17 (citing *In re O.J.S.A.*, 844 P.2d 1230 (Colo. App. Ct. 1992)).

46. The attorney will ask the evaluator for a telephone report. If the evaluator states that the report will be unfavorable, the evaluator may be directed not to write the report. Obviously, this places the evaluator in an awkward position, knowing that the court will not be informed of this assessment and that the potential exists for some danger to come to the child if the court decides to return the child to that parent. The courts are aware of this dilemma. Attorneys, having no duty to report under many reporting acts, and no duty to report if it would breach their clients' confidences or potentially harm their clients' cases, would not, and perhaps could not, report.

47. *See* Parley, *supra* note 45, at 53. Parley states that:

[T]here are reasons why the child's counsel might want the information received to be treated as confidential, or at least subject only to such disclosure as he or she desires. These reasons range from merely strategy and tactics to wanting to encourage parent interviews with the child's counsel so that the information may be used by counsel to represent a child who cannot otherwise provide information, to

Another demonstration of the barrier created by attorney-client confidentiality is the dispute over whether attorneys should be mandatory reporters under the child abuse reporting laws.⁴⁸ In many states, attorneys are noticeably absent from the list of professionals who are required to report suspicions of abuse. Even in the states where attorneys are included, either specifically or as part of a universal mandate, ethical considerations of client loyalty conflict with statutory mandates. A parent who discloses abuse of a child during an interview with his attorney may not be reported by that attorney unless the attorney believes the abuse to be a continuing crime, for which there is no confidentiality safeguard.⁴⁹ A child who discloses to her attorney that she has been abused by one of her parents may similarly have her disclosure held confidential by her attorney, regardless of how that may affect the outcome of the case.⁵⁰

The underlying premises for the rule of confidentiality are subject to attack.⁵¹ In fact, little empirical evidence exists in either direction for supporting, abolishing or diminishing the rule. It is not clear that clients rely on the rule in disclosing information to their attorneys. Most prac-

wanting child's counsel to have the information to work toward a non-litigated outcome.

Id.

48. See Boyer, *supra* note 29, at 1632-36, for a good discussion of attorney reporting vis a vis the attorney-client privilege and the duty of confidentiality.

49. Jurisdictions differ in their approach to this situation. In California, for example, section 6068 of the Business and Professions Code states: "It is the duty of an attorney . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1997). Even where a parent's actions might be considered an ongoing crime, such would not be an excuse for the attorney to report the parent.

Under the ABA's Model Rules of Professional Conduct, however, an attorney "may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1996). Yet, even under the Model Rules, it is unclear whether ongoing incest or emotional abuse would fall within this exception to client confidentiality. See also Robert H. Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) as Criminal Lawyers? A Morality Play*, 1 J. INST. FOR STUDY LEGAL ETHICS 141, 144 (1996).

50. It is not yet clear whether attorneys are under a duty to warn similar to the duty established for psychotherapists in *Tarasoff*, 551 P.2d at 342-51. In this situation, the question is to whom the duty would run, since the victim has the information. An argument could be made that the duty should run to an adult who is in the position of protecting the child; if that adult happens to be the perpetrator, the warning should be to an authority who has the duty to protect. Thus, the civil liability potentially imposed by *Tarasoff*, might result in the same kind of reporting that should occur in a mandatory reporting statute or in those jurisdictions which require attorneys to report ongoing or future crimes.

51. See Zacharias, *supra* note 39, at 356-70 (providing extensive documentation regarding the development and rationalization of the confidentiality rule, stating that it may have greater justification in criminal matters because of constitutional implications).

ticing attorneys are aware that their clients may lie, or withhold information from them, even when informed of the confidentiality rule.⁵² Some lawyers would rather not obtain full disclosure from their clients, as knowledge of the truth might jeopardize the lawyer's ability to put on a convincing case, either from a professional ethical code perspective or from a personal moral concern. Whether the law should be protecting clients from disclosures which are harmful to their cases is an issue which should be examined rather than taken for granted.⁵³ It is extraordinary that we permit an attorney to divulge a confidence to defend himself in a malpractice action, but not to protect the best interests of a child.⁵⁴

52. See DAVID A. BINDER ET AL., CLIENT COUNSELING 35-36 (1991) (discussing ego and case threats which motivate clients to conceal information from their attorneys).

53. For a clear analysis of the rule and its implications, see Zacharias, *supra* note 39. Zacharias concludes that the application of the confidentiality rule should not be absolute. I cannot imagine a more convincing case for exceptions to the rule than matters regarding the best interests of children.

54. The Working Group on Confidentiality at the Fordham Conference (see description of the conference beginning at 64 FORDHAM L. REV. 1290 (1996)) examined Model Rule 1.6, which states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

The Working Group proposed to amend the rule to allow an attorney to reveal information to prevent an unimpaired child client from engaging in conduct likely to result in imminent death or substantial bodily harm. *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367 (1996); see also Randi Mandelbaum, *Rules of Confidentiality When Representing Children: The Need for a 'Bright Line' Test*, 64 FORDHAM L. REV. 2053 (1996); Kevin M. Ryan, *Reforming Model Rule 1.6: A Brief Essay from the Crossroads of Ethics and Conscience*, 64 FORDHAM L. REV. 2065 (1996). Ryan states:

The Model Rules do not provide a confidentiality exception for the welfare interests of a client when his own behavior is imminently dooming, perhaps reflecting the view that as to matters of the client's welfare, the client knows best (unless such behavior involves a criminal act likely to result in imminent death or substantial bodily harm). When a child client confesses to the attorney an intention to engage in noncriminal behavior that could quickly lead to the child's death, the attorney typically may not reveal that information absent the client's consent. For example, in jurisdictions that have not criminalized attempted suicide, an attorney may not disclose the suicidal intentions of a child client if the information, in any sense, relates to the representation. To be sure, self-destructive behavior may be

D. *The Process Is Not Dynamic*

In the usual criminal or civil case, the court makes a finding about something that has already occurred in order to decide who was "right," and thus, who wins. Child protection and custody and visitation disputes are about the future welfare of the child. Although past acts may provide some help in thinking about the welfare of the child, they are not determinative. The family is a living entity, dynamic in nature, involving personalities and relationships which will change depending upon how the family is reordered.⁵⁵ Parenting may change after a divorce, so that an examination of parenting at the time of divorce is not necessarily a good indicator of what will occur later.⁵⁶ The traditional legal approach requires a snapshot judgment of the family structure which does not serve the best interest of the child.

E. *The Process Is Not Contextually Oriented*

The traditional adversary process, bound by definitions of legal causes of action, remedies and relevance, is limited in its ability to examine problems contextually. Something either fits a definition or it does not. Lawyers, judges, and the law in general, have no appreciation for the ecological perspective of family dynamics.⁵⁷ Greater understanding of cultural mores, for example, has no place in a system bound by the act of fitting evidence into the fixed definitions of a cause of action. The legal system's need for this neat fit forces the law to be "crystallized," conflicting with the changing and multiple forms of fam-

indicative of an impairment that requires the attorney to seek the appointment of a guardian *ad litem* for the child. In exigencies where time and process are elusive, and the attorney cannot rely on a guardian's appointment, the decision to remain silent or to disclose and prevent the child's death takes on moral and ethical dimensions of extraordinary proportions. To the extent that attorneys confront this dilemma, anecdotal evidence seems to indicate that many practitioners disregard the Model Rule.

Id. at 2067-68 (footnotes omitted). The amendment proposed by the Working Group was not adopted, due to concern that it created a "slippery slope" which would erode client autonomy. *Id.* at 2073.

55. See Catania, *supra* note 15, at 1238-40 (arguing that the child custody determination process does not recognize "these dissolving and reforming individual familial relationships"). *Id.* at 1239.

56. CHILD, FAMILY, AND STATE, *supra* note 21, at 11.

57. The ecological approach is a popular model used for understanding the etiology of abuse and neglect. See, e.g., PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, NATIONAL RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 133 (1993) at 106-40 [hereinafter NRC]. It is also important for planning treatment. See ANTHONY N. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS 8 (1986). Context is just as significant in examining the dynamics of a family engaged in a custody dispute. See generally PARENTING OUR CHILDREN, *supra* note 1.

ily. The need to fit life into categories also creates reality gaps which limit our ability to serve children and families experiencing difficulties. Whether a matter is defined as a family law custody case or as a child protection case may have fundamental ramifications for the future relationships of family members. For example, in custody disputes where there is no immediate "protective issue," children, nonetheless, may lose access to one parent as a result of a family court custody award combined with a custodial parent who prevents visitation. The loss of meaningful parental contact is not in the best interest of a child, and the child may be emotionally damaged because of this loss. Yet, the need for clear distinctions between child protection cases and family custody cases has created a chasm into which this child's needs will fall. It is additionally troubling that no low-cost or free services may be available to an economically disadvantaged parent who has lost a custody battle because of attitude or skill deficits that are amenable to treatment.

Relationships and individuals are different depending upon the context in which they are examined.⁵⁸ Furthermore, legal intervention itself will change the dynamics and relationships—the very facts upon which the court must base its decision.⁵⁹ Rules of procedure and evidence also work to distort the "facts" upon which the decision will be made.⁶⁰ Parties may be frustrated, feeling that they have not been able to "tell their stories," as their lawyers attempt to make the "facts" fit into the categorized requirements of the law. What seems to be relevant to the parties, what they need to say in order to feel "heard," may be left out by their attorneys, seen as irrelevant to the proceeding.

58. See Charles P. Barnard & Gust Jenson, III, *Child Custody Evaluations: A Rational Process for an Emotion-Laden Event*, 12 AM. U.J. FAM. THERAPY 61, 61 (1984) ("Too often the custody decision has been based upon an individual clinician's evaluation of the children and/or one of the parents, or perhaps both parents, but usually a thorough consideration of the individuals, their relationships and their contexts has not been made."); see also Jennifer A. Freyer, *Women Litigators in Search of a Care-Oriented Judicial System*, 4 AM. U.J. GENDER & L. 199 (1995) (arguing that the adversary system does not allow for a contextual approach); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985) (making custody modifications easy and subject to best interests standard leaves too much room for decision-making without understanding context of child and parent situations, particularly given the difficult transitions that family members must make after divorce).

59. See Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1564 (1995) (discussing three recent, notorious adoption cases in which "the courts themselves altered the facts, rights and relationships by needlessly prolonging the legal process"). The impact of a lengthy appellate process on the best interests of children is portrayed in these cases and continues to be a major impediment to protecting the best interests of children. See, e.g., *Adoption of Haley A.*, 56 Cal. Rptr. 2d 505 (Cal. Ct. App. 1996) (during appellate process, which took over a year, the child became more attached to foster parents), *rev'd*, 57 Cal. Rptr. 2d 36 (Cal. Ct. App. 1996).

60. See Catania, *supra* note 15, at 1241-42 (stating that the adjudicator is limited to skewed versions of evidence, "laboriously reconstructed" and "editorially enhanced or laundered").

F. *The Process Is Not Inclusive*

The adversary process is a battle between the parties to the proceedings. Although others may participate as witnesses, third party interests are not relevant to the outcome. While the law may define the family as consisting of parents and children, others, including relatives, friends, counselors, and neighbors, can play substantial roles in the family. Particularly for cultures within our society in which extended family includes relatives as well as nonrelatives, the legal barriers that exclude these members from participating in any decisions, restricts the ability to understand the family, its needs, and options for maintaining its integrity.

G. *Other Professionals Are Forced into Advocacy Roles*

The adversary system forces many helping professionals to become advocates for one position.⁶¹ Therapists, evaluators, teachers, physicians and others often find themselves being called upon to present information that will help one side win the case. These other professionals, not trained to be advocates in the legal sense, are usually more aware of the dynamic and contextual nature of the family, and are uncomfortable taking such a position.

The imposition of the legal system upon social work requires social workers to make a convincing case, disregarding their training and impeding their necessary flexibility, in working with the family in an effort to resolve difficulties. Forced from the beginning to decide whether the facts are sufficient to take a legal position, social workers become adversaries to the families they are supposed to serve.

Mental health professionals, who have testified frequently in best

61. See, e.g., Roseby, *supra* note 20, at 98-100:

The win/lose framework has driven professionals in the mental health and legal communities to attempt to answer questions about which parent is healthier or more competent without questioning the assumptions of the framework itself. . . .

Although the mental health profession in general and individual practitioners in particular have set high professional standards for their work with families in cases of contested child custody, the pressure to answer the questions which are implicit in the win/lose framework is significant. Not surprisingly, mental health professionals have at times been criticized for exceeding the limitations of empirically based scientific knowledge in their efforts to be responsive.

Id. at 98-99; see also Gardner, *supra* note 17, at 6:

Even though I was formally viewed by the court as an impartial examiner, after my findings became known, I was usually considered to be the advocate of the person whose position I supported and was treated as such regarding courtroom procedures of examination. . . . Over the years, I became increasingly appreciative of the fact that, when I serve as a mediator, I was more likely to protect parents from the depravities of the adversary system, exploitation by attorneys and the psychopathology that inevitably resulted from such exposure.

interest cases, have been known to adapt to the process with frightening success.⁶² Mental health professionals who rely upon the adversarial legal system as a source of income are concerned with more than the threat of being embarrassed by skillful cross-examination. Faced with having to report to an attorney that an award of custody to the attorney's client may not be in the best interest of the child, the mental health professional may fear losing future referrals. This mutual dependence creates the potential for expert evidence to be less than objective. Where more than one mental health expert is involved, the fact that they may be testifying for opposing parties may also tend to draw them into the role of adversaries rather than neutral, objective witnesses.⁶³

Discussions among mental health experts are also impeded by the adversarial system. "[I]f each evaluator knows that what is said to the other in an effort to try to help resolve the case may be used against him or her, the candor needed to achieve the resolution may be lost."⁶⁴ Opportunities for collaborative problem solving are foregone in allegiance to the adversarial process.

III. CONFLICTS IN PRACTICE

The barriers to serving the best interest of the child, as discussed in the previous section, arise due to the inherent nature of the adversary process. Other conflicts arise because of the way the adversary system actually operates in the context of child protection and custody proceedings. Additionally, unchallenged customs in court practice, and funding and training problems, affect the best interests of the child consideration. Most significantly, the inability to truly protect children comes from a

62. See Gardner, *supra* note 17, at 2. Gardner states that:

I gradually reached the point where I found it an enjoyable game. . . . I often compared it to a fencing match. I learned the rules and I played rather well. I didn't even view it as a fencing match between equals. Rather, it was a match between a person with a longer sword and more protection (the lawyer) and someone with a shorter sword and less protection (the witness). The rules of cross-examination put the witness, even the so-called expert, in the weaker position. The witness is competing with an intrinsic handicap, built into the rules of the sport—which is what adversary litigation basically is (at least for the lawyers). Accordingly, when the witness wins, it is an even greater victory. The cross-examining attorney was allowed to confine me to yes-no responses, select and focus on out-of-context material and pose questions in a way that distorted and misrepresented my opinions. Getting across one's point under such circumstances was indeed a challenge, and I often felt successful in accomplishing this. And this brought an ego-enhancing gratification to many of my court appearances.

63. See, e.g., Philip Stahl, *Second Opinions: An Ethical and Professional Process for Reviewing Child Custody Evaluations*, 34 FAM. & CONCILIATION CTS. REV. 386 (1996).

64. Parley, *supra* note 45, at 60.

tension between the legal and psychosocial arenas, which results in role confusion and ineffective problem solving.

A. *Inconsistent Treatment of the Right to Appointed Counsel*

The justification for our adversary system rests, at least in part, upon the representation of clients by attorneys. The system can be complicated and sophisticated, relying upon rules of law and procedures which require knowledge acquired through legal training and experience. Attempting to maneuver the system on one's own would be a difficult challenge in any situation; asking people who have difficulty functioning in everyday life, or people in the midst of an emotional upheaval, to represent themselves makes a farce of the adversary process.

The right to appointed counsel is not universal in child protection proceedings. Courts have been inconsistent in their holdings regarding when the right to counsel attaches, applying a balancing test based upon the particular facts of the case.⁶⁵ The low functioning of many of the parents involved in child protection proceedings exacerbates the imbalance of power favoring the state. Parents need early counseling by their attorneys to encourage them to engage in services where the system appears to be the "enemy" who is trying to take away the children. It may be that the parent's attorney is the only trusted voice who can provide such counseling. If an attorney is not provided until the termination proceeding itself, chances of overcoming the impetus toward termination are greatly limited. Thus, parents who are able to hire their own attorneys would appear to have a significant advantage.

Similarly, the inconsistency among jurisdictions in providing coun-

65. A constitutional right to counsel has been determined on a case-by-case basis, using the three-prong test derived from *Mathews v. Eldridge*, 424 U.S. 319 (1976), and enunciated in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). See, e.g., *In re A.S.A.*, 852 P.2d 127 (Mont. 1993) (holding that indigent parents have right under state constitution to court-appointed counsel in proceedings to terminate parental rights); *Bauer v. McClure*, 549 N.E.2d 392 (Ind. Ct. App. 1990) (holding that there is a right to counsel in termination proceedings of the parent-child relationship); *Farmer v. State of Oklahoma*, 784 P.2d 89 (Okla. Ct. App. 1989) (indigent, incarcerated father's right to counsel includes right to court-appointed counsel on appeal); *In re K.L.J.*, 813 P.2d 276 (Alaska 1991) (denying a biological father's request for court-appointed counsel violated his procedural due process rights under State Constitution). But cf. *In re Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993) (federal Due Process Clause does not confer upon an indigent parent the automatic right to court-appointed counsel in case of parental rights termination; rather, trial court, in exercise of sound judicial discretion, must decide whether due process requires appointment of counsel for indigent parent under circumstances, subject to review on appeal). A California Court of Appeal in *In re Arturo A.*, 8 Cal. App. 4th 229, 238 (1992), held that the decision depends upon the "complexity of the issues presented and the likelihood that counsel might sway the outcome." More recently, in *In re Malcolm D.*, 42 Cal. App. 4th 904 (1996), an appellate court held that the right to counsel is statutory, not constitutional, even in termination of parental rights cases.

sel for children in child protection proceedings⁶⁶ imposes barriers to hearing the child's voice. Even where lawyers are appointed, they are often underpaid, have high caseloads, and work in a system which has low expectations about what they can do.⁶⁷

While attorneys may be appointed for parents in child protection proceedings by statute, they generally are not provided in family court.⁶⁸ Further, the burden of proof for determining the best interests of the child is merely a preponderance of evidence. Courts apply this standard,

66. In commenting upon the inconsistent grant of counsel for children who are subjects of protective proceedings, Ellen Wells states:

The Fourteenth Amendment to the Constitution guarantees the right to meaningful access to the courts, to be provided by "adequate, effective, and meaningful" judicial procedures. Most state constitutions also contain a provision guaranteeing meaningful court access.

The constitutional right to access is not a substantive right, but a procedural right to a judicial remedy available whenever the legislature creates a substantive right. If the proposition that a minor has a substantive due process right to preserve family relationships is accepted as valid, then any state action that impedes access to the judicial process in relation to those family relationships is suspect and must survive strict scrutiny.

Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. L. 95, 104-05 (1995) (footnotes omitted). A minor's right to counsel in dependency cases has been held to be statutory, not constitutional. See *In re Elizabeth M.*, 232 Cal. App. 3d 553, 567 (1991); *In re Richard H.*, 234 Cal. App. 3d 1351, 1367 (1991); *In re Candida S.*, 7 Cal. App. 4th 1240, 1252 (1992).

In California, minors have been considered to be parties to dependency proceedings by statute since January 1, 1995. See CAL. WELF. & INST. CODE § 317 (West Supp. 1997). Minors are appointed counsel under the Code whenever it appears to the court that the minor would benefit from the representation. See *id.* § 317(c). Since the right to counsel is statutory rather than constitutional, there is no constitutional right to competent counsel. All parties who are represented in dependency matters are entitled to competent counsel. See CAL. WELF. & INST. CODE § 317.5; see also Ross, *supra* note 9, at 1574-76 (stating that federal law requires representation for children in some matters; little consensus among states); Federle, *supra* note 39, at 1679 (noting that the Supreme Court has never found a constitutional right to counsel for minors, and that federal law requires guardian *ad litem*, but the role is not clarified); Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 405-06 (1996) [hereinafter *Public Role*]; William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195 (1996) [hereinafter *Standards of Appellate Review*].

67. See, e.g., Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child Is My Client, But Who Am I?* 64 FORDHAM L. REV. 1917, 1925 (1996) (noting that "a 1983 study of attorney GALs representing children in North Carolina child protection proceedings concluded that the attorneys 'were not only ineffective but even tended to substantially delay a child's return home'") (citing Robert F. Kelly & Sarah H. 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, 407 (1982-83)).

68. Only Wisconsin mandates the appointment of a representative for the child in custody disputes. See Federle, *Ethics of Empowerment*, *supra* note 39, at 1685; see also Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L.Q. 417 (1993).

even though social science research has demonstrated that custody and visitation orders may be determinative of the future parent-child relationship.⁶⁹

In both types of cases, the confusion over the role of the child's attorney, if provided, and the role of the guardian *ad litem* may seriously impact the welfare of the child. Uncertainty about whether the point of representation should be the empowerment of the child or the protection of the child, and about what any particular attorney sees as her role, leaves the question of the child's best interests not clearly addressed. This situation is aggravated when appointed counsel do not receive direction from the court about the role they are to play; information provided to the court by the child's counsel is ambiguous as to its content and purpose. This confusion led the American Bar Association ("ABA") to adopt a Practice Guideline for attorneys representing minors.⁷⁰ However, any clarity offered by the standards further entrenches the best interests determination in the adversarial process, as discussed in Section IV.

B. *Lack of Training by Professionals Who Work in the System*

The literature is abundant with accounts of the sorry state of professional training, in both knowledge and skills, for work in the areas which deal with the best interests of the child.⁷¹ All professionals involved suffer from this training deficit. Judges, attorneys, social workers, physicians, mental health experts and other child advocates are inadequately trained about the many issues which affect this type of work. Poor training leads to poor decision making.

Paradoxically, professionals are called upon to perform tasks which

69. Research shows that when custody and visitation has been decided against them, parents, especially fathers, tend to disappear from their children's lives. See PARENTING OUR CHILDREN, *supra* note 1, at 15.

70. In August 1995, the ABA Family Law Section adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. See *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995). In February 1996, the American Bar Association adopted those standards.

71. See, e.g., Katharine Cahn & Paul Johnson, *Reaching Timely Permanency Decisions: A Recapitulation*, in CHILDREN CAN'T WAIT: REDUCING DELAYS FOR CHILDREN IN FOSTER CARE 129 (Katharine Cahn & Paul Johnson eds., 1993) [hereinafter CHILDREN CAN'T WAIT]. Cahn and Johnson state:

The authors of chapter 1 ranked turnover on the bench and among the ranks of legal professionals with dependency caseloads as a major obstacle to permanency for children. The lack of judicial and legal expertise in dependency matters is a problem that was dealt with in some fashion by all the projects, and all found some benefit in offering training for judges on particular aspects of child welfare timelines and legal work.

Id. at 135.

they may never have intended to perform when they chose to enter their respective professions. Judges and attorneys find themselves involved in the lives of families in an intimate way for which they never prepared in law school.⁷² Professionals are asked to assess parenting abilities and risks to children, to determine the qualifications of the experts on whom they rely, and to make many decisions beyond their training and knowledge. The best interests standard, which has been criticized for being vague, and for being an illusory determinant of the child's welfare, exaggerates the training deficiencies because those who make the decisions are forced to rely upon their personal biases and experience. Without basic training in an area such as child development, judges are left to their own intuition.⁷³ Judges and attorneys are also forced to rely upon the word of other professionals who have more specific training in issues relating to parent-child relationships, child development, and risk assessment.

The legal profession, and the adversary process itself, rely too much on medical and mental health professionals who do not escape criticism for their lack of training about specific issues in child protection and custody determinations.⁷⁴ The complexity of the family dynamics which arise in these cases is often beyond the basic course material covered in graduate programs. Just because a professional person is licensed, or even has experience in this field, it is no guarantee of expertise. Most importantly, the pressure exerted by the legal system for these "experts" to push the edge of known, reliable scientific data, requires training on dealing with the adversary system. Further, because of their own inadequate training, neither judges nor attorneys may be capable of determining the quality of the advice they are receiving from other professionals, nor of meaningfully choosing between conflicting experts.⁷⁵

In many jurisdictions, juvenile court is used as a training ground for

72. For example, see Myers, *supra* note 8, at 246, where he states that "nothing in the lawyer's training or expertise qualifies him to make psychological assessments or judgments."

73. See Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1889 (1996).

74. See, e.g., Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 *NOVA L. REV.* 711 (1992). Koocher believes that many of the issues which mental health experts are asked to address are more properly within the purview of the judicial fact finder, since there is no hard scientific basis for addressing those issues. *Id.* at 725.

75. Some courts have attempted to acquire some control over the quality of mental health treatment and evaluation related to dependency cases by creating training requirements or establishing lists of approved providers from whom services must be obtained in order to qualify for funding and/or be admitted into evidence. For example, Santa Clara County in California, under the guidance of Judge Leonard Edwards, has established a court-run coordination system. Also, San Diego County has a county-funded agency which determines which therapists and evaluators qualify to perform these services for dependency matters.

public sector attorneys;⁷⁶ attorneys who have developed knowledge from their experience are then rewarded with a transfer to a more prestigious area of practice.⁷⁷ Thus, the experienced attorneys are regularly replaced by neophytes and the system, again, adapts by moving backwards and slowing the process for children and families.

Judges are routinely rotated through juvenile and family courts with the same effect.⁷⁸ Moreover, the value of experience is lost to the children and families as these judges move into civil or criminal departments.⁷⁹

Social workers find themselves performing law enforcement-type investigations, having to determine whether they have sufficient "evidence" to legally intervene in a family's life, and having to provide ongoing monitoring of court orders. They may carry a caseload of quasi-criminal matters for which they have no reasonable expectation of providing meaningful help.⁸⁰ Worse, many social workers have never actually received graduate or even undergraduate training in the field of social work.⁸¹

Social workers, too, are affected not only by the lack of sufficient training in their own field, but also because they receive little, if any, training about the legal process.

More often than not, they are unschooled in adversarial methods and uneasy with this approach. Understandably, a social worker who has been trying to help a parent improve finds it difficult to change roles and speak against the parent's ability in a TPR [termination of parental rights] hearing. The lawyer's logic and process orientation seem cold and passionless to the social worker. At the same time, lawyers may not understand the social worker's dilemmas or approaches and may feel frustration at the social worker's "emotionalism" or lack of appreciation for the rules of the court situation. One project coordi-

76. See David Herring, *The Michigan Agency Attorney*, in *CHILDREN CAN'T WAIT*, *supra* note 71, at 18. The San Diego Juvenile Justice Commission made a similar finding in its 1995 Court Report, recommending that promotion opportunities be created within the juvenile system for both the District Attorney and the Public Defender offices, so as to reward those attorneys who develop expertise in, and a commitment to, this work. San Diego Juvenile Justice Commission, COURT COMMITTEE REPORT (1995) [hereinafter JJC Report] (on file with author).

77. See, e.g., Edwards, *supra* note 68, at 419 (stating that more senior attorneys assigned to work with children's issues may see it as punishment).

78. OREGON TASK FORCE ON FAMILY LAW, STATUS REPORT 3, May 8, 1996, at 3 [hereinafter OREGON STATUS REPORT] ("[I]n most jurisdictions, family law cases are often given the lowest priority and are usually assigned last to whatever judges are available to take them.").

79. See, e.g., MARK HARDIN, JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORM: ONE COURT THAT WORKS (1992) (suggesting that the presiding judge of a juvenile court have a minimum 10-year commitment to the position); Jim Morales, *Reinventing Children's Rights: ABA Promotes New Advocacy Efforts for Children*, Del. B. Found. (1994).

80. See Solove, *supra* note 38, at 804.

81. See Huxtable, *supra* note 21, at 64.

nator remarked that watching members of the two professions try to collaborate was almost like watching attempts at communication between alien species.⁸²

Attempts to reduce adversarialness in the system have left professionals, particularly attorneys and judges, in an awkward void. Trained in the adversary process and the zealous advocate role, lawyers are uncertain about the role they are to play in an undefined, but less adversarial process. Often, the result is that they do not zealously advocate, but do retain their adversarial posture, a confusing situation for all involved. Trial skills become sloppy, and records on appeal are incomplete and/or undiscernible. Role confusion creates tension and results in counter-accusations of poor performance. The judges, too, are uncertain about what should occur in these proceedings. Should they demand that attorneys perform in the same manner as would be expected in other courtrooms? Should they try to create a less formal, and more comfortable, atmosphere for the participants? There appears to be little uniformity in answering these questions. Some attorneys complain that judges do not take control of their courtrooms, creating inefficiency and unfortunate delays for children and parents; others react to judges who pull in the reigns and may be less flexible, particularly in introducing evidence and in granting continuances.

Lack of training is also reflective of the low status afforded to work involving the best interests of the child. Family law and child protection cases are among those most disliked by judges. Attorneys practicing in these areas tend to be lower paid and have a lower professional status than attorneys involved in cases where money is involved.⁸³ Social workers are also notoriously underpaid and undervalued as a profession. Even mental and physical health professionals who work with children are undervalued, in part because the compensation for their services often relies upon public funding. This issue of status, when combined with the difficult nature of the cases presented, contributes to a demoralized atmosphere among the various professionals participating in the systems.⁸⁴ These conditions cause lackluster work, in-fighting, and hier-

82. See Katherine Cahn & Paul Johnson, *Critical Issues in Permanency Planning: An Overview*, in *CHILDREN CAN'T WAIT*, *supra* note 71, at 1, 7; see also Debra Ratterman, *Changing Agency Procedures*, in *CHILDREN CAN'T WAIT*, *supra* note 71, at 39 (stating that agency workers are not confident enough in their knowledge of legal requirements to file petitions for termination of parental rights).

83. See Edwards, *Coordinating Council*, *supra* note 68, at 418 ("Trained attorneys are critical to an effective child advocacy system, but children's attorneys often have the least experience, the lowest status, and receive the lowest compensation within the legal community.").

84. Richard Gardner, M.D., has stated, in regard to his experience in family court custody disputes:

I have seen judges sleeping in the courtroom while the lawyers are going through

archical power conflicts, as well as draw attention away from the shared goal of protecting the welfare of the children. The training necessary to do this work well requires time and resources which are not available.

C. *Predominance of Psychosocial Concerns Over Legal Issues*

The first real legal issue in a child protection case is whether the child is at significant risk of harm to justify state interference into this family's life. The second issue is whether the parents are unfit so that their rights may be terminated. In a family custody and visitation proceeding, the determination of who has the legal right to the child (i.e., custody) becomes a legal issue only because the parties bring the issue to the court for lack of another resolution. Then, the child is seen as a piece of property and a legal issue to be determined in a win or lose combat.

On the other hand, numerous psychosocial issues about the welfare of the child and the parents are presented in these cases, including concerns about development, relationship and self-esteem. The law may be able to force parties to behave in a desired way in some situations, but more often it cannot,⁸⁵ as evidenced by the number of fathers who lose touch with their children after losing a custody dispute, or after being resigned to the role of visitor in their children's lives.

The law is not the appropriate forum for assisting dysfunctional families to function better. Resolution of the legal case does little to resolve the underlying family dynamics which will haunt the parents and children into the future. The hurt, frustration, anger and fear, and the loss of familiar support systems are not healed by the adversary process; instead, the parties and the children are on their own to deal with these concerns.

D. *Best Interests Are Difficult to Determine*

1. THE STANDARD IS VAGUE

The best interests of the child standard has been attacked for being no standard at all because of its vagueness.⁸⁶ In an effort to make decision-making more certain, a number of psychological theories were converted into legal presumptions only to be challenged by other theories so

the motions of the trial, making believe that the judge is still awake. On the stand, I have seen judges reading newspapers and magazines in the course of the testimony and only I, sitting close to them, was able to observe what they were doing.

Gardner, *supra* note 17, at 5-6.

85. See Myers, *supra* note 8, at 242 ("The machinery of the legal system is simply not capable of dealing effectively with so complex a socio-psycho-legal phenomenon.").

86. See *supra* note 6.

that, in the end, uncertainty remained.⁸⁷

In child protection proceedings, one of the biggest issues in best interests cases is the tension between leaving the child with, or returning the child to, parents who are minimally functional, and placing the child permanently with adoptive parents who probably could provide much more in material comfort and psychological stability. Essentially, this is a debate between the "psychological parent" school and the "biological roots" school.

In family custody and visitation proceedings, this tension arises because there is often very little difference between the capabilities of the two biological parents to provide decent parenting to the child. The best interests standard forces the court to make a decision as if this were not the case. The parties, through their attorneys when available, create issues out of every aspect of their former mate's personal life in order to prove the best interests of the child. They also engage in speculation about external matters which are contended to affect that interest.⁸⁸ This kind of uncertainty may encourage litigation, as both parents can believe they have a chance to "win."⁸⁹ Again, the child may not be the focus of these proceedings; many other interests are involved.⁹⁰ "The power struggle between women and men in the courts and legislatures, constitutional issues such as race and religion, and the subjective perspective of the judge deciding any particular custody case all obscure and finally prevent examination of any real child's interests in custody disputes."⁹¹

87. Fineman explains that:

No permissible, easily applied guidelines remain under the best interest test, and questions exist as to which rules should govern. Without the old gender presumption, the legal system is asked to do too much. Judges and attorneys feel ill-equipped to make determinations about what placement will be in the "best interests" of children. This discomfort has set off a search for more determinate rules.

Fineman, *supra* note 21, at 740 (footnote omitted).

88. See, e.g., Ellen J. Effron, *Fighting Over a Good Education: Quality of Schools Can Be a Key Factor in the Outcome of Custody Cases*, A.B.A. J., July 1996, at 78 (advising attorneys on the process of acquiring useful information on "educational opportunities" for their custody cases). While there is no question that a child's education is important, I fear that the child's benefit is less in the minds of these attorneys than is "winning" for their clients.

89. See Charlow, *supra* note 6, at 5 ("In fact, the relitigation rate in divorces that include children is ten times greater than in those without children.") (citation omitted).

90. Fitzgerald comments that:

Judicial intervention in custody determinations and imposition of the "best interests" standard is jurisprudentially unsound. The standard is also inherently political, identified less with any individual's interest than with the state's. The "best interest" standard is peculiarly malleable to diverse political agendas precisely because it reflects no individual's interest. Instead, the standard is a vessel which judges and legislatures may fill with their own changing definitions.

Fitzgerald, *supra* note 1, at 56.

91. *Id.* at 59-60.

In the end, the personal biases of the judge may be the deciding factor.⁹²

2. POOR INVESTIGATIVE RESOURCES

Even if we understood how to determine the best interests of the child, both the child protection and family court systems lack the resources to gather all pertinent information. In both systems, high caseloads, as discussed below, and insufficient funds to pay for qualified experts are obstacles to the collection of meaningful data. Training in investigation techniques is missing or inadequate. Confusion about the rules and ethics of confidentiality between social workers and families may create artificial barriers to effective investigations.⁹³ Attorneys, too, may lack critical investigation skills for these kinds of cases. Additionally, because the law recognizes a child's need for stability within the child's developmental time frame, decisions need to be made as quickly as possible. Little time is available for studying the welfare of the child in the context of the family's dynamics.

Inadequate investigation at the initiation of a case almost inevitably brings problems as the case moves along, as well as surprises which slow the progress of the case toward the goal of a stable, permanent home for the child.⁹⁴ Furthermore, the lack of formality at the hearings, the admission of hearsay evidence, and the lack of resources at later stages of the cases all limit the reliable information upon which decisions are made.⁹⁵

92. See *id.* at 62. The "best interests" standard is integrally related to the concept of parental fitness which is subject to similar ambiguity. See also Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 249-50 (1994) (judges making decisions in termination cases have their own conceptions of "adequate" regarding parenting, based on their own racial-ethnic background, as do the experts who are providing advice).

93. For example, a social worker investigating a report of suspected child abuse may fail to contact neighbors to gather information for fear of breaching the relationship between the social worker and the family which is being investigated.

94. See, e.g., Herring, *supra* note 76, at 8-9. Herring states that:

As a consequence of poor child welfare casework, children wait while social workers go back to find fathers or identify other relatives. . . . A child may have been placed with, and become bonded to, an unrelated foster parent when relatives were available as a permanent resource. Resolving these dilemmas is heart-wrenching and challenging to the children, communities, and professionals involved.

Id. at 9.

Because a child cannot be freed for adoption without first terminating parental rights, it is essential to undertake a search for the child's father in order to obtain consent or, if need be, make a finding of his unfitness. Unfortunately, thorough searches do not often begin until adoption is the selected permanent plan, resulting in substantial delays in permanency.

95. See Larsen, *supra* note 7, at 50.

3. INABILITY TO ACCURATELY PREDICT FUTURE BEHAVIOR

Decisions about the best interests of the child rest upon an effort to predict what will occur in the future. In child protection proceedings, this translates into a conclusion that returning the child to her parents will not place the child at substantial risk of harm, and that the parents will not engage in activities which will endanger the child. In family custody proceedings, it is a determination that one of the parents will be better for the child than the other; that the actions taken by that parent will be, among other things, more loving and protective.

Clearly, neither judges nor attorneys have the training to make such predictions; therefore, they rely upon "experts" whom they hope can provide these answers. While mental health professionals can test, evaluate and tell us quite a bit about a person's current state of mind and emotion, they cannot predict future behavior.⁹⁶ They can discuss potential behavior, but they cannot tell us whether the potential will be realized. Nevertheless, the legal profession's lack of knowledge and abhorrence for uncertainty, particularly in a matter as serious as the welfare of a child, cause us to overvalue what mental health experts can say. Pressure is placed on mental health professionals to provide us with answers about parental fitness and the future welfare of children. These "experts," at times, have little more than their own experiences and biases on which to make such a determination.⁹⁷

E. *There Is Often No "Correct" or "Just" Answer to These Problems, Making Decisions Artificial, Unresponsive and Unfair*

Family issues, whether in child protection proceedings or in custody cases, are rarely clear cut.⁹⁸ Because family relations are dynamic

96. See, e.g., Appell & Boyer, *supra* note 6, at 78 ("[l]ongitudinal studies have shown that predictions made about the development of particular children were wrong two-thirds of the time.").

97. See, e.g., Azar & Benjet, *supra* note 92, at 251. The authors comment that:

Fundamental to [the termination] decision is the ultimate labeling of a parent as unfit and incapable of improvement within a reasonable enough time period to meet the child's needs. Though the duration of a reasonable time frame has been specified in a few states' laws . . . the criteria for fitness have not. Consequently, the courts have turned to expert witnesses with the assumption that such criteria *do* exist within the mental health field. This assumption may not be sound. Well-documented, universal criteria are not available. Only loose frameworks and poorly specified models exist, leaving room for individual evaluators' own conceptions of adequate parenting to influence their testimony.

Id. (citation omitted).

98. See, e.g., Catania, *supra* note 15, at 1241 (commenting that the "facts" of family life are unlikely to be objectively provable); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7-11 (1987).

and contextual, and the legal process is unable to incorporate these characteristics into its decision-making process, the solutions may not fit the problems.⁹⁹ We are attempting to fit square pegs into round holes for lack of a better place on our game board to put the pegs.

Arriving at a "correct" answer also requires some sense of certainty about the underlying situation. Although facts in litigation are often uncertain or ambiguous, the court decides upon a set of facts and draws its legal conclusion from that factual fiction.¹⁰⁰ The law cannot hold ambiguous or contradictory information; something must be discarded or ignored in order to resolve the case.¹⁰¹ Social workers, on the other hand, are accustomed to working with ambiguity and uncertainty. The legal answer, along with the operation of sequentiality, as discussed in the next section, distorts the actual picture of the family.

Striving for the right answer also results in disregarding information which may be significant for the family, but not important in the eyes of the law. Cultural differences which affect family dynamics have no real place in the law, but are an essential factor for consideration by social workers and therapists.¹⁰²

F. *Sequentiality and Risk Aversiveness*

Sequentiality describes the effect of the first decision on later decisions when the decision-making follows a standard pattern.¹⁰³ In the context of both child protection and family custody proceedings, the effect of sequentiality is that the first decision is often determinative of later decisions, and thus, "an error at one stage is more likely to be maintained or exaggerated than reversed."¹⁰⁴ This occurs without con-

99. Social work relies on systems theory. Systems theory is a framework for examining situations. It incorporates the reality that many factors are involved in the family dynamic and that changing any one factor may result in changes in other parts of the family system. The theory is itself dynamic and contextual, recognizing the influence of factors which are external to the family. See Cervone and Mauro, *supra* note 25, at 1978 (citing NAOMI I. BRILL, *WORKING WITH PEOPLE: THE HELPING PROCESS* 63 (5th ed. 1995)).

100. See Elster, *supra* note 98, at 29 ("A judge is not paid to throw up his hands and say that since the law offers no guide to the decision, he will impose a compromise or . . . take account of such other considerations as seem relevant.").

101. See Catania, *supra* note 15, at 1236 ("The 'binary' nature of the common law adjudicatory process resolves conflicts between competing values in such a way as to demean the less dominant value.").

102. See, e.g., Cervone & Mauro, *supra* note 25, at 1977.

103. For an excellent discussion of sequentiality and risk aversion, see Peggy Cooper Davis and Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995). The discussion in the text is based upon this article as applied to my personal observation of the child protection process.

104. *Id.* at 146. The authors continue:

Hence, an error that is made in the pre-trial custody decision, whichever way it goes, will tend to be self-strengthening, so that the decision in the final stage of the

scious acknowledgment and has a serious impact on the ultimate welfare of children and families. The influence of child development knowledge, especially the child's need for stable caretaking, and, conversely, the detrimental effect of custodial change, reinforces the significance of the status quo and the operation of the sequentiality effect. Therefore, "to the extent that judges in child abuse cases are vulnerable to this bias, they will be inclined to continue an existing custodial arrangement, and they will be inclined to do so in at least some cases in which a custodial change is warranted."¹⁰⁵

Child protection proceedings are often long-term affairs, given the statutory preference for reunifying families. In the many cases where the evidence is not clearly weighed on one side, the sequentiality effect may play a determinative role. Thus, in spite of the policy preference for reunification, the initial decision to remove a child is reaffirmed and gains significance as the child bonds with his or her substitute caretaker. The ultimate return of the child to the biological parents becomes more problematic as the new bond is solidified.

In addition to the bias for retaining the status quo, there is a bias in risk assessment in which the risks for not intervening will be exaggerated in cases of indigents, who do not have the resources to prepare a convincing case. On the other hand, where parents have the resources to hire counsel, "it is likely that risks of intervention will be exaggerated."¹⁰⁶ Even where the resources are equal on both sides, judges are likely to skew their decision-making based on the fear of harming a child by placing him with parents who could hurt him.¹⁰⁷

People are more likely to take risks when they know they will not learn the outcome. In these cases, the bias is toward taking the risk of

case is more likely to go in the direction of the initial decision. We will call this phenomenon the "sequentiality effect."

Id.

105. *Id.* at 149.

106. *Id.* at 151. The authors assume that the parents may have appointed attorneys, but that those attorneys will not have the same skills and resources as does the "prosecuting agency." The authors do not consider the situation caused by lack of agency resources which might cause the agency to seek to avoid intervention, and to dismiss the pleas of a child advocate who believes intervention to be necessary.

While the authors are applying the sequentiality effect to judicial decision-making, the same process occurs on the part of social workers within the child protection agency. "The consequence of blaming caseworkers for harm to referred children is that children are likely to be prematurely removed from their homes, with the attendant loss of parental rights and possible psychological harm to children." Huxtable, *supra* note 21, at 64. Huxtable notes that this is much more likely to occur in borderline cases.

107. See Davis & Barua, *supra* note 103, at 151 ("Judges cannot fail to take account of the risk of neglect or abuse in the respondent's home, but they may neglect to take account of the not-insignificant risk that the child will suffer harm as a result of being in official care.").

unnecessarily separating the child and parents—"the course that poses less risk of regret."¹⁰⁸ Judges are sure to learn of their mistakes when a child who is left with, or returned to, biological parents is seriously injured. Furthermore, the mistake is likely to be widely broadcast through the media. When a child who is unnecessarily removed from parents suffers from the break in the parent-child bond, the judge is much less likely to learn about that mistake.

In child protection proceedings, the first decision is about the detention of the child outside of the family home. This takes place in an emergency hearing within seventy-two hours from the time the child is removed. Given the nature of the risk to the child, the burden of proof for detention is a preponderance of the evidence—a burden not usually difficult to meet since the child protection agency has screened its case to be sure it meets this burden. Usually within two weeks, the court must determine, by a preponderance of the evidence, whether it has jurisdiction over this child. Once the court takes jurisdiction of the child, the allegations in the petition are deemed to be true. In California, the result of the jurisdiction hearing is called a "true finding."¹⁰⁹ As mentioned earlier, there are no compromise positions in the win/lose adversary system. Once the "true finding" is made, evidence inconsistent with that conclusion is basically disregarded.

At the disposition hearing, it is foreseeable that the court will find that the child cannot safely be left in the home, since the language defining jurisdiction includes language regarding "substantial risk of harm."¹¹⁰ A dispositional placement of the child out of the parents' home requires a finding by clear and convincing evidence of substantial danger to the child.¹¹¹ It would be nearly impossible for a judge to make the jurisdictional finding without also being able to make the required dispositional finding, given the influence of risk aversiveness and the sequentiality effect.¹¹²

108. *Id.* at 152. See also David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 207-08 (1995) (concluding that because judges are risk-averse, they may over-rely on experts so they don't have to take the blame for a decision. He also believes that they may not understand the harm a child can suffer from being in foster care).

109. This means that the allegations stated in the petition, basically that the child is within the court's jurisdiction under section 300 of the California Welfare and Institutions Code, are true.

110. See CAL. WELF. & INST. CODE § 300(a), (b) (West Supp. 1997) (requiring a finding of substantial risk of serious harm in regard to physical abuse and neglect).

111. See *id.* § 361(b). There are other reasons for removal of the child, not relevant to this discussion.

112. Huxtable argues that:

[The clear and convincing standard of proof] may be insufficient to protect parents from a mistaken or false charge of child abuse. Much depends on the evidence

A parent who thereafter continues to deny the abuse is labeled as "uncooperative." A parent's refusal to engage in services may be reason to continue to find the parent unfit.¹¹³ At subsequent hearings, this evidence will reinforce the initial decision to remove the child and to accept jurisdiction of the case. In the end, the parent's rights may be terminated.

The combination of the sequentiality effect, system biases, risk aversion, burdens of proof, and the application of labels such as "denial"¹¹⁴ and "uncooperative," work together to create a process with its own momentum from which parents and children need protection. I have observed this phenomenon at operation in dependency cases and in my students as they work through simulated cases in our Interdisciplinary Training Program in Child Abuse and Neglect.¹¹⁵ In our classes,

presented or omitted, making the efforts of the parent's attorney critical in complex cases or those in which the evidence is open to differing interpretations.

[M]ost existing laws allow preventive action to protect a child from threatened harm, so that proof of past actions is not a condition. The lower standard of proof combined with the relaxed rules of evidence permits wide discretion in dependency hearings, thus increasing the likelihood that there will be false findings of child abuse.

Huxtable, *supra* note 21, at 61-62.

113. In California, with regard to status review and 18-month hearings, the "failure of the parent or guardian to participate regularly in court-ordered treatment programs shall be prima facie evidence that return [of the child] would be detrimental." CAL. WELF. & INST. CODE §§ 366.21(e)-(f), 366.22(a) (West Supp. 1997). Parents can end up in a no-win situation, since an admission to something the parent does not believe to be true may be seen as a sign of the parent's progress, but at the same time, may reinforce the original, possibly inaccurate, concept of the problem in the family. See Huxtable, *supra* note 21, at 63 (discussing how parents are confused about what is the best way to get their child returned—by confrontation or cooperation).

114. "Denial" is a term which is often misused in the child protection arena. The term, used in substance abuse treatment to describe a person who is known to have a substance abuse problem, but who is denying the existence of the problem, fits only loosely in the child protection context. While it may be true that real healing can only occur when the patient admits (i.e., no longer denies) the existence of the problem, the term refers only to the actual "patient" or, in this case, perpetrator. One example of misuse is labeling a parent in a child protection case where a true finding has been made by a preponderance of the evidence. In situations where the evidence is not clear and no one knows for certain that the parent was a perpetrator, the use of the "denial" term keeps the parent from moving forward on a reunification plan if that parent refuses to admit having perpetrated the abuse. See, e.g., *Blanca P. v. Superior Court*, 45 Cal. App. 4th 1738 (1996). In this case, when it was ultimately determined that the father had not molested his child, the court, discussing the "Confession Dilemma," stated that "the very fact that Blanca and Rogelio have continually denied that Rogelio is a child molester is now asserted by the social services agency as evidence supporting the detriment finding." *Id.* at 1752. The court then described the situation as "Kafkaesque." *Id.* at 1753.

Another example of misuse of the term is its application to family members who are not considered to be the perpetrators. A grandmother who has a hard time believing that her son or daughter has abused her grandchild may be considered in "denial," and thus, incapable of protecting the child. Clearly, this is a misuse of the term which can create barriers to appropriate intervention and the child's best interests.

115. Concerns about the inability of professionals from multiple disciplines to work effectively

we referred to this process as "tracking"—an analogy to "a train getting on a track and continuing to move down that track no matter what." Regardless of what name it is given, it is a worrisome phenomenon in which all the professionals participate.

In family court custody and visitation proceedings, sequentiality is reflected in the tendency of the court to continue custody with the parent who receives the initial custody of the child pending the final determination of the case. This phenomenon occurs when mental health professionals and court "mediators" and conciliators participate in the proceeding, since these professionals would be subject to the same decision-making influences discussed above.

G. *The Child Rarely Has a Voice in These Disputes*

Many commentators note that children are often not heard in these conflicts.¹¹⁶ While it is best to keep children out of the conflict arena where possible,¹¹⁷ in most cases children are well aware that their parents are involved in a dispute concerning them. In these situations, commentators disagree about the role of the child in this dispute and about what place attorneys have in accomplishing that end. Children may come to court and be forced to take sides against one or both parents, or they may have their concerns expressed to the court by their attorney or guardian *ad litem*. Sometimes, children may speak in court only to have their voices unheard because the system does not understand their signif-

together in child welfare cases gave rise in 1988, to the award of a number of federal grants by the National Center on Child Abuse and Neglect. The grants were to provide seed-funding for interdisciplinary training in child abuse and neglect. I am fortunate to have been participating in such a training program since that time. Law students, graduate students in social work and psychology, and a handful of other graduate students from departments, including education, counseling, and law enforcement, engage in simulated interdisciplinary case work for two semesters to prepare them for this kind of collaboration. The course is co-taught by myself, a professor of social work, and a psychology professor. Each year we watch as our students struggle with these phenomena.

116. See, e.g., Emily Buss, "You're my What?" *The Problem of Children's Misperceptions of their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1747 (1996):

The courts' process of ascertaining best interest is flawed, not only because it often produces bad results, but also because it tramples children's dignity along the way.

Children are made to feel irrelevant and even worthless, by a court process that pays no attention to them and presumes that they have nothing valuable to say.

Id. (footnote omitted) (Buss also cites reports about how seldom children speak in court and how little time is given to these hearings deciding crucial matters for children). *Id.* at n.154. See also Ross, *supra* note 9, at 1572 ("Courts frequently decide matters affecting children's essential interests without providing an adequate opportunity for them to present their views, preferences, or justifications."); Federle, *supra* note 39; Fitzgerald, *supra* note 1, at 82-83 (arguing that the law denies the existence of the child's perspective and categorizing cases as struggles between state power and individual rights).

117. See Appell & Boyer, *supra* note 6, at 75 (stating that parenting issues are adult questions).

icance. Despite the absence of important participants in the case, hearings are conducted and decisions made.¹¹⁸ The traditional assumption that the parents represent the interests of the child are challenged by common sense in both custody and child protection matters.¹¹⁹

Even where the court may inquire of the child as to his or her wishes,¹²⁰ the child's voice may be muffled. Many judges would prefer to avoid these interviews.¹²¹ Huge caseloads create pressure to rush through these matters, not taking the time to conduct an in-depth inquiry into the child's reasons for her or his stated preference.¹²² Even with full disclosure by the child, what training does the judge have to assess what the child has said? The legal process values logical thinking. Judges are apt, because of this bias, to value decisions which are based upon logic. Thus, they are more likely to listen to children who can frame their wishes in a logical structure than to children who cannot. Unfortunately, this is no guarantee that the child's best interest is served—the child's position is merely more convincing because we value that kind of thinking.

118. Take, for example, the case of Bobby, age 12, a foster child:

At his most recent court appearance, Bobby spoke eloquently in his own behalf. He told the court of his eight years in foster care, the difficulties with his brother (who had been physically violent with him), and the uncertainties he faces every day. Unfortunately, at this, his chance to have his voice heard, many of the critical parties were absent: his regular attorney was ill, the social worker did not attend the hearing, and the sitting judge was a pro tem judge (a substitute judge). Other than his foster mother, there was no one at that hearing who had ever seen or spoken to Bobby before that day. Without the appropriate parties present, what could have been an opportune moment for Bobby to alert the court and its officers to his real interests failed.

VOICES FOR CHILDREN, INC., THE VOICES OF THE VOLUNTEERS (Ct. Appointed Special Advoc. Program, San Diego County), Summer 1996, at 1.

119. See, e.g., Ross, *supra* note 9, at 1583. Ross states that:

A clear example of a situation in which parents cannot represent their children's interests occurs when the parents are at odds with each other. In bitterly contested custody disputes, for example, each parent has an interest in the outcome of litigation that does not neatly line up with the child's independent interest.

Id. See also Fitzgerald, *supra* note 1, at 65 (arguing that a child's interest is not coterminous with parents or state). In the child protective system, the child's interest is obviously divergent from a parent who has harmed or failed to protect the child, at least in the short term.

120. See, e.g., Crosby-Currie, *supra* note 6. ("[I]n 1995, all 50 states allow for . . . consideration [of the child's wishes] . . . [T]he important question in 1995 is exactly *when* and *how* they are involved."). *Id.* at 293. The study conducted by Crosby-Currie found: "The likelihood that a child would be asked about his or her wishes and the weight given any wishes were highly and consistently related to the child's age." *Id.* at 305. The distinguishing age level differed, however, between jurisdictions. *Id.* at 305-06.

121. See generally Solove, *supra* note 38.

122. See Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 829 (1984).

H. *Inadequate Resources*

Court time is costly. Judges are paid for their expertise in the law and their skill in managing the trial process. Disputes over the best interests of the child require different skills. Additionally, attorneys fees for litigation involve preparation time and time spent in court waiting for cases to be called. There is a good deal of inefficiency in this expense.¹²³

Once cases do get called, the heavy calendars in both types of proceedings require cases to be moved through quickly. There is no time for thorough and careful consideration of all the facts and concerns. Giving too much time to any one case disrupts the entire calendar. Neither the judges nor the attorneys can be completely familiar with these cases because of the number of cases which they handle. The attorneys who practice regularly in the system may hesitate to make "waves" by creating conflict or asking for special consideration in a particular case.

The focus on the litigation process drains resources from where they are really needed, which is in the delivery of services to families who are experiencing disruption.¹²⁴ In child protection matters, the cost of attorneys fees might be paid from the same budget which pays for services or social workers. In family court cases, parents might have to choose between having legal counsel and some other service, such as therapy.¹²⁵

123. See, e.g., Elster *supra* note 98, at 22-23. Elster points out that the cost of decision-making is rarely considered by the decision maker who is called upon to arrive at the "correct" decision:

She will call expert witnesses to the extent necessary; she will allow the parties to call character witnesses; she will have to allow postponements and appeals within the limits of the law. Although she may resist attempts at strategic procrastination, she cannot object to bona fide moves that just happen to be time-consuming, if she can distinguish between the two.

Id. at 23 (footnote omitted). In its study of the local juvenile court, the San Diego Juvenile Justice Commission found that long delays in court hearings meant that large numbers of professionals spent an inordinate amount of time waiting, taking them away from productive work. See JJC Report, *supra* note 76.

124. See Duncan Lindsey, Ph.D. & Cheryl Regehr, M.S.W., *Protecting Severely Abused Children: Clarifying the Roles of Criminal Justice and Child Welfare*, 63 AM. J. ORTHOPSYCHIATRY 509, 510 (1993). The authors note that:

Historically, most children who come to the attention of public child welfare agencies have not been battered or sexually assaulted, but are victims of neglect or inadequate care. Given the new set of priorities, these children are now virtually left out of the system.

. . . Requests for service or aid to families in distress or chronic crisis receive low priority and, in some instances, no response at all.

Id. (citation omitted).

125. See, e.g., Solove, *supra* note 38, at 800 ("Parents can often expect to spend as much on

1. HIGH CASELOADS

The caseloads maintained by most professionals working in these systems is too high to expect quality performance.¹²⁶ Caseloads are high because insufficient resources are expended on both the child protection and family court systems to enable them to truly protect children and support families.¹²⁷ In some jurisdictions, these cases compete with criminal and other civil matters for docket time.¹²⁸ Even in courts with specialized departments, caseloads are often so high that none of the professionals, including the judge, have much time for advance preparation.¹²⁹ It is not unusual to see judges reading through case files during

attorneys and expert fees and costs as a year or more of college might cost."'). See also OREGON STATUS REPORT, *supra* note 78.

126. It has been indicated that:

The sheer volume of cases is causing the family court system to collapse. Children are treated like property while parents clog the courts with bitter fights over money, assets and support. The combative atmosphere makes it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce is final.

Id. at 1.

For child welfare workers, the situation is even worse. "The Child Welfare League of America recommends that a case worker handle a maximum of 15 cases. But in many cities, workers now have 50 to 70 cases apiece." David Stoesz & Howard Jacob Karger, *Suffer the Children: How Government Fails its Most Vulnerable Citizens—Abused and Neglected Kids*, WASH. MONTHLY, June 1996, at 20.

127. I consider support of the family an essential component to the protection of the child's welfare, as the child's welfare ideally is best protected with its family. "[M]ost child welfare workers aren't uncaring or indifferent, and they aren't necessarily incompetent. They're simply overwhelmed. The problem is less individual misfeasance than institutional breakdown. Stoesz & Karger, *supra* note 126, at 21. Stoesz and Karger also note that "few government services are in as much disarray, and as starved for resources, as child welfare services." *Id.*

128. Even within family courts, issues regarding children may receive less time than issues of asset distribution. "It is a place where motions for emergency relief—to get a restraining order for an abused spouse or temporary support for a child—are scheduled in 15-minute increments, while divorces involving substantial assets, but no children, occupy weeks of courtroom time." Lee M. Robinson, *The View from the Minors*, A.B.A. J., Sept. 1996, at 74, 75.

129. Solove asserts that:

Many problems plague the domestic relations court system. The press of the caseload creates a feeling on the part of the litigants that no one really cares. The problems that they bring before the courts involve the very core of their emotional being. They come to court seeking vindication for wrongs they perceive to have been done to them by one once loved and now often despised. They want to see the judge and tell their stories. Cases often get continued, and the litigants feel that they are being shunted aside.

Solove, *supra* note 38, at 806. See also Buss, *supra* note 116, where Buss asserts that:

The best argument against bringing children to court is that the process they observe is an abysmal and chaotic one. For the most part, children will not see a decorous or thoughtful adversarial process [due to lack of resources]. They will see long waits in dreary, toyless waiting rooms, followed by brief hearings, at which hallway agreements are hastily presented. They will see families herded up to the bar of the court and sworn in *en masse*.

the presentation of the case, nor to have critical reports distributed on the day of the hearing. In ordinary litigation, that would be sufficient reason for delay. In these cases, however, each cause for delay means that a child's life is put on hold.

The work of attorneys, too, is impacted by high caseloads. Attorneys may be unable to investigate their cases, consult with experts, or prepare for hearings.¹³⁰ It is typical for cases to settle just before a scheduled hearing, not because the parties suddenly discovered a way to resolve their differences, but simply because this may be the first time all of the attorneys have had the opportunity to discuss the case with each other.¹³¹ This conduct, though "necessitated by staff shortages and limited court time, usually extends the amount of time children remain without a permanent home."¹³² Inadequate resources have much to do with the fact that the concept of permanency planning in child protection cases has never been fully implemented.¹³³

High caseloads prevent social workers from designing case-specific services for families, as required by the reasonable efforts mandate; instead, families often receive "boilerplate" service plans which can add to, rather than alleviate the families' problems, waste valuable resources and time, and heighten levels of frustration for all participants.¹³⁴ The

They will see lawyers trying to out-yell each other to get the judge's attention, and judges making decisions with little or no reference to the governing legal standards. They may see their own lawyers derided for trying to force the court to follow a more formal legal process, or to articulate a clear legal basis for its rulings. They may even see the judge taking phone calls, or speaking with court personnel, while important evidence or argument is being presented.

Id. at 1760 (footnote omitted).

130. See Edwards, *supra* note 68, at 419.

131. This dynamic adds to the inefficiency and frustration with the process, as social workers, family members and experts interrupt their busy schedules to attend the hearing, only to have it settled without them. Meanwhile, the courtroom, which has been scheduled for a trial, sits idly at taxpayer expense.

132. Ratterman, *supra* note 82, at 58, citing E. SEGAL, EVALUATING AND IMPROVING CHILD WELFARE AGENCY LEGAL REPRESENTATION (Washington, D.C., National Legal Resource Center for Child Advocacy and Protection, American Bar Association 1988). According to the report that Ratterman cited to, forty to fifty child welfare cases is a reasonable caseload for a full-time attorney, and more than sixty is unmanageable. Few jurisdictions meet this standard of reasonableness; in San Diego, for example, the Public Defender's Office, Child Advocacy Division, expects its attorneys to handle a caseload of 200 children. It is not clear whether the ABA study considers a caseload to be a child or a family, which may explain the huge discrepancy.

133. See Herring, *supra* note 108, at 199-200.

134. See *id.* Herring asserts that:

Such poorly formulated and implemented case service plans render it impossible for courts to monitor the implementation and effectiveness of the plan. Courts lose focus on the true problems while monitoring a parent's participation in the standard laundry list of services. As a result, courts often give up on monitoring case-specific problems as they review a large number of cases which all appear

sheer number of children and families to be served creates shortages in services which would be appropriate for them, but social workers have little time to attend to the individual needs of parents placed on waiting lists and children placed in unsatisfactory "temporary" care.

2. LIMITED SERVICES

Support services for families are very limited. This is especially true in family court matters, as there is little, if any, public funding for services which could assist the family in working through its problems. In the child protection arena, services are mandated by the federal requirement of "reasonable efforts," but are under funded and often inadequate or unavailable to families due to long waiting lists or inconvenient locations. "By early 1996, the public services to care for children had so deteriorated that child welfare agencies in 21 states and the District of Columbia were under court supervision."¹³⁵

3. DOCUMENTATION REQUIREMENTS

A further strain on resources presented by the use of the adversary system in child protection matters is created by the need to document extensively in order to prepare for the adversarial proceeding. Documenting both the efforts made and the bases for opinions are important to professionals, both for liability and billing purposes. The statutory imposition of additional documentation requirements, particularly in response to the need to prove that reasonable efforts have been made to reunify families, have created an immense burden on child welfare workers and courts. Social workers are forced into choosing between making a necessary or required visit to a child or family, and sitting in

similar in terms of case service plans. If a court stays involved with a case, it will often penalize parents by requiring the completion of unnecessary services prior to reunification with the child.

Id. at 201 (footnotes omitted).

135. Stoesz & Karger, *supra* note 126. Stoesz and Karger further state that:

Reports of child neglect and abuse have sky-rocketed since the early '70s, but public funding has stagnated. Therein lies much of the problem. Most federal funding for child protection comes through Title XX, a social services appropriation that was capped in 1974 at \$2.5 billion. Today, Title XX is funded at only \$4 billion. If it had been indexed for inflation between 1977 and 1992, appropriations would have been \$36 billion.

Id. The authors report that the adoption of the Child Abuse Prevention and Treatment Act ("CAPTA") and the 1980 Adoption Assistance and Child Welfare Act ("AACWA") added further demands on the system. *Id.*

While the funds for services have been capped, funds for foster care have not; thus, the goal of P.L. 96-272, to provide services whenever possible to avoid out-of-home placement of children, has been unintentionally circumvented by the funding structure.

the office completing paperwork.¹³⁶ The result is that social workers are excessively concerned with paperwork, which takes time away from delivery of services and places emphasis on justifying one's actions rather than doing good casework.

I. *The Public Forum Is Inappropriate for the Resolution of Family Issues*

While we recognize the need for privacy in child protection matters, primarily to protect the interest of the child, we open family law proceedings to the public. This seems contrary to the underlying value of family integrity, and seems demeaning to the participants, including the children. What argument can be made that the public has more interest in observing the family court process than it does the child protection process? At least in the former, the dispute is before the court because the parties have brought it there. In child protection proceedings, the matter is before the court because the government has decided to intrude into people's lives. Yet, we understand the sensitive nature of these proceedings and keep them private, while we do not in family law cases.

J. *The Adversarial Process Is Not Appropriate for Solving Problems Where the Parties Will Be in Ongoing Relationships*

The adversary process makes enemies and exacerbates existing controversy. There is no healing element in the process to help to mend relationships which have been damaged or to promote future healthy interactions.¹³⁷ The effects of these broken relationships on children and parents are devastating and long-lasting.

As legal professionals, we have the responsibility to ensure that our work benefits our clients; perhaps this is the true sense of what it means to be zealous advocates. Yet, as demonstrated above, participating in the adversary process does not appear to truly benefit the great majority of family members involved in best interests cases.¹³⁸ Perhaps it is

136. See *id.* The San Diego Board of Supervisors, in July 1996, adopted a measure which requires social workers to do all of their own clerical work, including the word processing of court reports, in an effort to make the Department of Social Services more financially efficient. The measure was proposed by a board of business people who examined the Department with an eye towards finding ways to save money. No comments in their report indicated an awareness of the effect this would have on the social workers' ability to perform their statutorily mandated duties.

137. See, e.g., Catania, *supra* note 15, at 1239-40; Solove, *supra* note 38, at 800 ("if the dispute is not resolved and goes to trial, that experience may well destroy any remaining possibility that the parents can learn to communicate or cooperate in the care of their children.").

138. Even Stephan Landsman concedes:

[T]here are settings in which adversary procedure does not seem appropriate. When the parties must continue to work or live together in intimate contact or in a cooperative relationship, the adversary method may not be the best means of

reflective of the system that we do not take the Hippocratic Oath, as do medical professionals, vowing to do no harm. The adversary role seems to force us to do harm. From the perspective of therapeutic jurisprudence,¹³⁹ we are failing our clients and ourselves.

The inadequacies of the adversarial system, in dealing with matters relating to the best interest of a child, are pervasive and obvious. The unavailability of vital information to the court, the inability to share information for effective problem solving, the lack of resources and training to attend to serious familial problems, and the inappropriateness of attempting to apply traditional legal process to contextual and dynamic situations, are some of the barriers to reaching our goal. However, my concern about the use of the adversarial system goes beyond case outcome; it includes the damage caused to the parties by participating in the process.

IV. THE EFFECTS OF THE ADVERSARIAL SYSTEM ON THE CHILDREN AND PARENTS

The adversarial system affects all who touch it. Most parties, especially family members, typically experience acrimony, increased misunderstanding, frustration, and anger. While the purpose of this article is to examine the specific impact of the process on the best interests of children, it would be artificial and misleading to ignore the impact of the process on the parents; after all, children are part of the family, are dependent upon their parents, and are affected directly and indirectly by what happens to their parents.

A. Children

The adversarial process is hard on kids.¹⁴⁰ Zealous advocacy, as it has been practiced, focusing on rights and strategy, heightens and pro-

resolving their dispute. Adversary procedure may exacerbate rather than resolve tensions and may not foster the kind of compromise essential to the restoration of harmony.

Landsman, *supra* note 10, at 52. Landsman specifically refers to disputes between members of intact families in this regard, reflecting, I believe, a failure to understand the dynamics of "reordering" families and the needs of children and parents for continued relationships.

139. See David B. Wexler, *Putting Mental Health into Mental Health Law*, 18 LAW & HUM. BEHAV. 27, 32 (1992) (footnotes omitted):

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or antitherapeutic rules, legal procedures, or form the behavior of legal actors (lawyers and judges). In other words, one may look at the law *itself* as being a therapist—or at least a therapeutic agent or tool. Likewise, like iatrogenic disease in medicine, the law may itself produce psychological suffering ("law-related psychosocial dysfunction" or "juridical psychopathology").

140. See Myers, *supra* note 8, at 182 ("Involvement in the legal system is hard on children.").

longs conflict. Delays and uncertainty in the system are also difficult on children, creating anxiety and problems in developing secure relationships. The effects of the adversarial process exacerbate the detriment caused by the original, underlying problem: the abuse, the neglect, or the marital discord. Children may also be subject to the whims of judges and attorneys who do not understand their needs because they lack training and/or the time and resources to competently deal with the case.

The heightened conflict between the parents, created by the adversarial system, will also impact the children. Frustration and stress may detract from the parents' attention to the children. Litigation costs drain resources which could otherwise be used for the children's needs. Ironically, the very system which is intended to protect the best interests of children, ultimately injures those children.

1. CHILD PROTECTION PROCEEDINGS

There is not a great deal of literature on the effects on children from participating in a contested hearing regarding their safety and welfare.¹⁴¹ We know from a growing and substantial literature on custody battles in divorce cases, that children are deeply affected when placed in the middle of a war between their parents.¹⁴² Children's loyalty to their parents is normally so strong that even children who have been seriously abused or neglected, long to be with their parents and feel guilty about playing any role in the separation.¹⁴³ For a child who is old enough to have some idea of what is taking place in a child protection proceeding, the conflict must be great. Participation in the proceedings, for children who are old enough and found competent to do so, is usually stressful.¹⁴⁴

Although Myers was speaking primarily to the criminal justice system, the same criticisms apply to dependency proceedings, as well as custody battles.

141. See generally CYNTHIA CROSSON TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 290-91 (3d ed. 1996) [hereinafter TOWER]; J. A. Lipovsky, *The Impact of Court on Children*, 9 J. INTERPERSONAL VIOLENCE 238-57 (1994); Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119 (1988).

142. See, e.g., Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982); Joan B. Kelly, *Conflict and Children's Post-Divorce Adjustment: A Closer Look*, 14 FAM. L. NEWS 1 (1991) [hereinafter *Conflict*]; Hugh McIsaac, *Reducing the Pain of a Child Custody Struggle*, FAM. ADVOC., Spring 1992, at 26.

143. See, e.g., TOWER, *supra* note 141, at 255; David M. Siegel & Suzanne Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1 (1977); Katherine G. Levine, *The Placed Child Examines the Quality of Parental Care*, 67 CHILD WELFARE 301, 306 (1988).

144. Buss argues that:

While coming to court can provoke considerable anxiety in children, we fool ourselves if we think that *avoiding* court protects children from those anxieties. Much of the anxiety is created by the *existence* of the court process (a process whereby a child's future is determined by a judge) and the issues underlying the court's involvement (the abuse, neglect, foster care placement, or divorce). Lawyers' conversations with their clients tend to fan those anxieties, whether or not

The proceeding in some sense pits the child against the parent, for the child's welfare is the standard by which we judge the parent's behavior. Yet, in most cases, the child's interests are bound up with her return to her family.

For children who are too young to understand the nature of the proceedings, the separation, which may be protracted because of adversarial strategies, is often traumatic, or, perhaps worse, irreparably damaging to the child-parent relationship. The child's sense of stability, which is one of the goals of the family preservation movement and the Federal Adoption Assistance and Child Welfare Act of 1980, can only be threatened by ongoing litigation. Sometimes protection disputes are purposefully prolonged as a strategy to buy the parent more time to "get his act together."¹⁴⁵ Even where the delay is not tactical, it may arise by virtue of the attorney's perceived sense of duty to pursue every possible objection, appeal and writ as a zealous advocate.¹⁴⁶

Delays mean that the determination as to the best interest of the child is not made as soon as it might otherwise be. There is little doubt that the consequences of uncertainty and instability can devastate a child, and affect functioning and performance in all areas, particularly the ability to form satisfying relationships as an adult.¹⁴⁷ While it is important that the process not be "steam-rollered" so as to result in injustice to the parents and child, delays which have no real positive role in the determination of the best outcome for this family and child are not justifiable.

the child appears in court, because these conversations inevitably (if grounded at all) focus on the court process and the decisions the judge will have to make. Realistically, a child is not shielded from the court process until the court dismisses his case.

Buss, *supra* note 116, at 1759.

There is debate as to whether testifying at criminal child abuse proceedings is part of the healing process for child victims. See TOWER, *supra* note 141, at 290; Karen J. Saywitz & Gail S. Goodman, *Interviewing Children In and Out of Court: Current Research and Practice Implications*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 297 (John Briere et al. eds., 1996) [hereinafter APSAC]; Cathy J. Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43 (1984); Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988).

145. The statutory scheme requires a permanent plan by the 18th month from the day of removal of the child, but attorneys are ingenious at creating delay. In spite of federal funding incentives, cases have been drifting in the system for years, noticeably more so in some jurisdictions. See generally Judge Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3 (1994).

146. See Ratterman, *supra* note 82, at 39 (commenting that the process of freeing children for adoption is plagued by delays from drawn-out court hearings, excessive adjournments, suspended decisions and long appeals).

147. See, e.g., NRC, *supra* note 57, at 224 (finding that some of the long-term consequences of child maltreatment include interpersonal problems, such as isolation and fear of intimacy); TOWER, *supra* note 141; APSAC, *supra* note 144.

The quality of care received by a child while placed out-of-home is often less than desirable and less than we would expect from a loving parent. Some believe that the harms from intervention outweigh the benefits to the child in many protection cases.¹⁴⁸ Intervention by the system creates the danger of iatrogenic damage.

When the state interferes with the parent-child bond, it imposes a disinterested caretaker upon the child. Over a long period of time, the service rendered by a caretaker who is motivated by the bonds of affection and/or a close alignment of interests with the child is likely to be quite different than the service rendered over the long term by a disinterested party. Caretakers with professional expertise in some specialty may have a more refined clinical approach to some facet of a child's development, but professionals have no special systemic motivation to apply their services to obtain the maximum benefit for a particular child when assistance requires a significant personal, emotional, or financial investment or risk.¹⁴⁹

2. FAMILY COURT

The movie *Irreconcilable Differences*, about a child caught in the middle of a custody tug-of-war, accurately portrays the difficult situation of children involved in custody disputes.¹⁵⁰ The child is subject to ongoing conflict between the two people the child loves and depends upon the most. The protracted nature of custody disputes¹⁵¹ worsens the impact on children, whose notions of time make perceptions of instability even greater.¹⁵² Numerous studies have elucidated the short- and long-term effects of marital and divorce conflict on children.¹⁵³ Inten-

148. See James Donald Moorehead, *Of Family Values and Child Welfare: What Is in the "Best" Interests of the Child?* 79 MARQ. L. REV. 517, 523 (1996) (disagreeing with the Wald and Goldstein group which calls for a minimalist approach to state intervention, stating that there is no empirical research for either side of the debate, since we cannot measure what happens without intervention).

149. Daniel E. Witte, Comment, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 B.Y.U. L. REV. 183, 187 n.4 (1996).

150. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1559 (1994) (arguing that custody rules encourage parties to treat children as property and that "bargaining occurs in the shadow of hierarchy and exclusion").

151. See WALLERSTEIN & KELLY, *supra* note 19, at 30. In child custody and visitation matters in divorce cases, there is no specific time frame for decision-making. In fact, these cases can continue to return to the court to litigate each time the parents fail to cooperate. The result is no sense of stability; no permanence for the children involved.

152. See Catania, *supra* note 15, at 1239-40.

153. See, e.g., Roseby, *supra* note 20, at 99-100 ("[c]hronic exposure to parental conflict more predictive of serious behavioral and emotional disturbance in children in divorced families than any other factor."). Cf. Kelly, *supra* note 142. Kelly notes that:

It appears that rather than discord per se, it is the *manner* in which parental conflict

tionally or not, children are often forced to take a side in these disputes.¹⁵⁴ "Parents, unable to take responsibility and decide what [is] best for their children, [place] that responsibility on the shoulders of their hurting and often terrified youngsters."¹⁵⁵ What impact the appointment of an attorney has on the child in this situation is not clear.¹⁵⁶

No matter how helpful evaluations and other studies of the parties and the child may be, it is important to keep in mind the fact that involving the child in such evaluations is not a neutral event in the child's life. It forces the child to take notice of the fact that the parents [sic] engaged in a substantial dispute. At least one prominent study of the effects of divorce on children has suggested that the best thing a lawyer for a child can do is to keep the child out of the case so that she can get on with the important activities of her life, such as growing up and going to school and playing with friends.¹⁵⁷

Studies have also documented the serious loss of parent-child contact for many parents who are not awarded custody.¹⁵⁸ This means that a child loses a meaningful relationship with one of the most important

is expressed that may affect children's adjustment. High interparental discord has been found to be related to the child's *feeling caught* in the middle, and this experience of feeling caught was related to adjustment.

Id.

154. Roseby reports that:

A study of high-conflicted divorcing families reported that children were preoccupied with surviving in the battle zone and conflicted about what is true and what is not true with respect to the allegations and expressed fears of their opposing parents; whether to trust their own or each parent's perception of the other parent; and about having and expressing feelings, loyalties, and identifications which might result in retribution or rejections by one or both parents. These conflicts and preoccupations arouse intense anxiety which can distort the child's capacities for reality-testing, trust, and self-integration.

Roseby, *supra* note 20, at 102 (footnotes omitted). Roseby also cites other authorities finding these children to be "clinically hypervigilant, unable to trust or depend on other people, and chronically overwhelmed by the demands placed upon them," as well as "profoundly emotionally and cognitively constricted and [having] seriously distorted perceptions of human relationships." *Id.* at 104 (footnote omitted). See also RICHARD A. GARDNER, M.D., *THE PARENTAL ALIENATION SYNDROME* (1992) (discussing the author's controversial assertion of a syndrome by which a child is purposefully alienated from one parent by the other, usually custodial, parent).

155. Solove, *supra* note 38, at 800.

156. I have observed a child taking notes for his attorney while visiting a parent. Children may come to view the attorney as protection against one or both parents, even where the child's safety is not at issue.

157. See Parley, *supra* note 45, at 59 (citing JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 288-94 (1989)).

158. Committee on Psychosocial Aspects of Child and Family Health, 1993-94, *The Pediatrician's Role in Helping Children and Families Deal With Separation and Divorce*, PEDIATRICS, July 1994, at 119 [hereinafter Committee]. ("Approximately half of all children do not see their father after divorce and few have spent a night at their father's home in the past month.") (footnote omitted).

adults, usually the father, in his or her life.¹⁵⁹ Children begin to feel the effects of separation from a parent in a short time, with young children reacting most quickly. Irregular visitation circumstances exacerbate the unpredictability of parental contact and its effect.¹⁶⁰

As the parents battle with each other, the child's own concerns may be unheard, and the child's needs ignored, even in day to day parenting.¹⁶¹ The change of dynamics in a family following a divorce can result in new roles for children, as well.

The non-custodial parent and the children assume the roles of visitors. The custodial parent assumes the role of single parent and monitor of the visitation. The children assume roles such as "advisors, practical helpers, buffers against loneliness and despair, replacements for other adults—in other words, parents for their own parents."¹⁶²

Furthermore, children left to be raised in single parent families suffer

159. The U.S. Commission on child and Family Welfare reported that

[A] large percentage of children who live with only one parent have little contact with the other parent. The National Survey of Children found that 49 percent of the children in its national sample who lived with only one of their parents in 1981 had not seen their nonresidential parent in the last year, and only one in six averaged contact once a week or more often.

PARENTING OUR CHILDREN, *supra* note 1, at 15. "Children who have contact with their nonresidential parent are more likely to receive child support." *Id.* See also Warshak, *supra* note 6, at 407. Walshak reports that:

Children in conventional mother-custody homes will tell you, as they told our investigators in Texas and in every other study I can think of, that the worst thing about their parents' divorce is the loss of regular contact with their fathers (Warshak & Santrock, 1983). Despite their parents' reassurance that divorce is just between grown-ups, these children discover that they must wait 12 days before seeing their fathers for only 2 days and undergo the ordeal of lengthy separations twice each month for the duration of their childhood.

This practice of restricting contact to every other weekend uproots the father-child relationship from the fertile soil of natural, daily interaction and transplants it to the artificial turf of weekends crowded with entertainment and gifts. Homework, chores, and routine errands fall by the wayside. It is not possible to compress 2 weeks' worth of living into 2 days.

Id. The reluctance of the legal system to acknowledge that it may not have the power to control these relationships was demonstrated in the extreme by an Illinois court, which ordered a 12-year old to jail, and grounded her 8-year-old sister, for refusing to visit their father. See Mark Hansen, *Minor Adjustments*, A.B.A. J., July 1996, at 38, reporting on *Marshall v. Nussbaum*, No. 93-MR-6538. The court of appeals held that the "judge had the right to jail the . . . child for refusing to comply with a visitation order, but should have done so only as a last resort." *Id.*

160. William J. Dess, Ph.D., *Childhood Development and the Reaction of Infants and Toddlers to Divorce*, Presentation at a 1993 Training Seminar, "The Kids' Lawyers," sponsored by the Certified Family Law Specialist Committee of the San Diego County Bar Association.

161. See WALLERSTEIN & KELLY, *supra* note 19, at 30 (asserting that child experiences diminished parental care because the parents are focused on their own needs and depression; child may fear abandonment).

162. Catania, *supra* note 15, at 1247 (footnotes omitted).

from a greater likelihood of poverty¹⁶³ and a greater risk of being harmed by physical neglect or abuse.¹⁶⁴

B. Parents

1. CHILD PROTECTION PROCEEDINGS

When a court in a child protection proceeding examines a parent's ability to care for his child, the court is using a minimal standard, or what I would refer to as "barely adequate" parenting. The state's ability to intervene in the private life of the family is limited to those cases where that standard is not met—where the child is at risk of abuse or neglect as defined by statute. For a parent who needs services in order to be able to parent adequately,¹⁶⁵ the sooner the services can be delivered, the sooner a reunification may occur. Often, however, these parents are resistant, rather than receptive, to the services, making it more difficult for them to receive immediate benefit.¹⁶⁶ For example, a parent denying that she is or has been abusive or neglectful, will probably not be receptive to services. In fact, the parent may see the acceptance of services as an admission of "guilt."¹⁶⁷ If a parent's attorney gives the impression that there are some possible "legal loopholes" to the situation, or that the attorney may be able to manipulate information or present a case that appears favorable to the client parent, the parent is encouraged to continue denying that there is any abuse or neglect involved. This legal advice also encourages the parent to be uncooperative with social workers, and perhaps even to believe that she is a victim

163. See PARENTING OUR CHILDREN, *supra* note 1, at 15 ("Children in single-parent families are much more likely to be poor than children in two-parent families.").

164. See CHILD PROTECTION REPORT, September 27, 1996, at 165 ("Children of single parents had an 87 percent greater risk of being harmed by physical neglect and an 80 percent greater risk of suffering serious injury or harm from abuse and neglect.").

165. An array of services is available to parents to assist them in learning to care for their children. Services include parenting classes, anger management training, counseling and therapy, respite care, and homemaker services. Parents may also be required to undertake drug testing and participate in substance abuse programs.

166. See, e.g., TOWER, *supra* note 141, at 296-98.

167. See, e.g., Boyer, *supra* note 29 (discussing the dilemma of attempting to achieve vindication at trial and demonstrating amenability to services). Boyer states that "[i]f the higher objective of the client is to reunify the family, this tension will often compel a parent to make admissions at trial and cede the issue of the court's jurisdiction." *Id.* at 1648. This admission can be troublesome for the client throughout the proceeding, particularly if the client later seems to be retracting the admission. In jurisdictions which accept a plea of *nolo contendere* from a parent, clients may be led by their attorneys to believe that they are not admitting wrongdoing, when, in fact, the court and the child protection agency will treat the plea as an admission for purposes of proceeding with the case. In one San Diego case, the parents' *nolo* pleas to a molest allegation, which was later proven to be untrue (the actual molester confessed), almost cost them their parental rights. *James W. v. Superior Court*, 17 Cal. App. 4th 246 (1993).

of the system, and that the system and the social worker are the "enemy."

This is a difficult situation. On the one hand, these parents are often among the most unempowered people in our society. They tend to be poor, often on some kind of welfare (usually AFDC), relatively socially isolated, and often with no support system.¹⁶⁸ It is important for them to know, at this critical time when it may appear to them that they are being victimized by the system, that there is someone who is "on their side," listening to them, and there to help them. On the other hand, when a parent truly is in denial about abuse or neglect, and an attorney engages that parent in the adversarial process, making the protection system look more like a game or a battle, it distracts the parent from the real work that needs to be done. Twelve to eighteen months to reunify is not a long time for making significant progress on deeply entrenched problems, such as substance abuse. The majority of child protection cases are about neglect; neglect tends to be the most deeply embedded and difficult to treat,¹⁶⁹ so these parents need to get working as quickly as possible. While most parents' attorneys realize this and know that the best interest of their clients is tied to an early reunification which requires receptive utilization of services, some attorneys are still too conditioned by the adversarial process to move away from adversarial tactics.¹⁷⁰ This is especially true of attorneys who have not had special training in the dynamics of abuse and neglect, substance abuse, and other issues common to these cases. These attorneys need to assist their clients in understanding the need for services and empower them to engage cooperatively with the system.

It is understandable that attorneys do face the dilemma of having to fulfill their ethical obligations by being zealous advocates. The issue of what they are zealously advocating for (i.e., their clients' interests) is not always clear, and this is an area where short-term interests may easily defeat long-term goals. Where a client does not want to admit abuse or neglect, the attorney must follow the directions of the client.

The problem is even further complicated by the threat or pendency of criminal charges arising out of the same behavior. In such cases, attorneys and their clients have a most difficult time determining best

168. See NRC, *supra* note 57, at 106-44; TOWER, *supra* note 141.

169. See TOWER, *supra* note 141, at 316-17.

170. In one recent case decided by an appellate court in California, the father had not received services even though the child had been removed for more than two years. Apparently, there were some unsuccessful attempts at mediation. The court found that the failure to receive services was not a reason to overturn the termination of parental rights, because the father partly caused the delay in getting the case to the point where services would be provided. *In re David H.*, 33 Cal. App. 4th 368 (1995).

interest. Contested criminal proceedings, especially those involving high profile topics such as child abuse, are not resolved quickly. Each delay increases the potential for the termination of parental rights.

Finally, adversarial litigation increases the risk of loss of the child-parent relationship due to protracted out-of-home placement.¹⁷¹ During this time, a very young child is likely to attach to its caregiver in kinship or foster care.¹⁷² This is exacerbated by the prevailing practice of providing minimal visitation under artificial conditions which does nothing to promote the parent-child relationship.¹⁷³

2. VISITATION AND CUSTODY IN DIVORCE

Nothing better illustrates the law's role in aggravating pre-existing problems than does divorce litigation.¹⁷⁴ For most couples, the decision

171. The relationship between the parents and the child protection agency is likely to become more adversarial, adding to the obstacles to reunification.

172. See 1 JOHN BOWLBY, *ATTACHMENT AND LOSS: VOL. 1* (1969); see also MICHAEL COLE & SHEILA R. COLE, *THE DEVELOPMENT OF CHILDREN* 202 (1989) (stating that attachment to primary caretaker begins at about 7 months of age).

173. Reunification plan language regarding visitation tends to be boilerplate, with minimal visitation allowances due to transportation and supervision difficulties, as well as the needs of foster parents. There may be additional practical obstacles to visitation, such as great distances to travel, limited public transportation to foster homes in rural areas, and conflicting attendance requirements for other mandated services. Unfortunately, the importance of meaningful visitation has not been adequately recognized. See, e.g., MALUCCIO, *supra* note 57, at 80 ("Parental visiting of children in foster care is the best single predictor of the outcome of placement.").

174. See Andrew Shepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131 (1993) (footnotes omitted). Shepard states that:

Despite a child's overriding need for conflict management, the prevalent adversarial model of courtroom confrontation rewards parental conflict. The adversarial system implicitly assumes that all parents who bring their dispute to court are incapable of cooperation. Given the parents' completely conflicting relationship, the only function the legal system can perform is to prevent violence by deciding which parent is entitled to a greater right to make decisions and have access to the child. This decision is made through the traditional adversarial process, perhaps preceded by a forensic evaluation of the child and the family by a mental health professional.

Few custody cases result in a trial. The adversarial mentality, however, can permeate the custody dispute and the thinking of parents and counsel. Precisely when children need parents to lessen the degree of hostility and behave cooperatively, the specter of courtroom combat—and especially the conflict over the vague legal standard of the "best interests of the child"—encourages conflict.

....

... The adversarial process encourages parents to denigrate one another, rather than to cooperate on the essential task of post-divorce child rearing. Embattled parents demand, and sometimes seek to buy, the loyalty of their hopelessly torn children. The custody dispute also drains resources from limited marital assets at a time when those assets could better be used to preserve the family's standard of living.

Id. at 145-47

to divorce comes after prolonged problems. Once the decision is made, it is difficult for many couples, who have had problems working out their disagreements in the past, to work together toward a peaceful settlement. One incentive to do so might be the widespread reputation of the family court and divorce attorneys to make matters worse at great emotional and financial cost to the parties. Another incentive might be to minimize the trauma to the children. Unfortunately, not all parents can place the needs of their children before their own needs for revenge, or other "satisfaction."¹⁷⁵

It is probably unrealistic to expect parents in high conflict cases to be able to objectively and clearly assess the needs of their children. Such cases tend to create "villains" of adversaries, making it difficult to imagine how the best interests of the child could be served by any contact with the other party. The adversarial nature of divorce litigation fuels the fire of the dispute, treating it as a zero-sum game,¹⁷⁶ and using the child as a "bargaining chip."¹⁷⁷ "The process itself can [intensify]

175. See Roseby, *supra* note 20:

Studies of . . . highly conflicted families suggest that these types of entrenched disputes often represent a response to overpowering feelings of shame and vulnerability which are evoked by the marital separation as well as by the perception that professionals are increasingly in charge of what was once the family's private life. Vulnerable parents frequently manage these feelings of shame and helplessness by projecting all incompetence and badness onto the former spouse and holding all competence and goodness for themselves. From this dynamic evolves a wish that the judge, Solomon-like, will erase the shame by publicly answering, once and for all, the question of which parent is good and competent and which parent is bad and incompetent.

Id. at 97-98 (footnote omitted). See also OREGON STATUS REPORT, *supra* note 78:

The Medea-like anger that often spills into the courtroom over child custody, visitation and financial support amazes even judges and attorneys. Medea was the Greek goddess who sought revenge on her husband for rejecting her for a younger woman. Her anger had no bounds; she felt there was no course of action that could save her pride. Carried away by rage, she murdered her children.

Modern Medeas do not want to kill their children, but they do want revenge on their former wives or husbands, and they exact it by destroying the relationship between the other parent and the child. There is a great deal of evidence that such anger and conflict severely injure children at every age.

Id. at 1.

176. See Appell & Boyer, *supra* note 6, at 75 n.54 ("[T]he child is treated like a prize in a zero sum game between the two sets of parents."). See also Margulies, *supra* note 11, at 1484-85:

The involvement of the judicial system . . . raises the stakes for everyone and can elicit posturing from many parties that would otherwise not surface. This is clearly true in adults, for example, when fathers seek custody as a bargaining chip in divorce. It can be true of children, too. The difference is that with adults, posturing may be the product of a desire to exploit children for strategic purposes. With children, posturing may be the product of being exploited.

Id.

177. See Charlow, *supra* note 6, at 15-16. ("Under the current system, parents can threaten to contest custody or visitation to obtain a beneficial property settlement or decreased child or

pre-existent psychopathology and [cause] psychiatric disorders even when they didn't exist previously."¹⁷⁸ Rather than assisting people in letting go of the past and getting on with their lives, it holds out the possibility for ongoing and repeated attacks, often in the guise of the best interests of the children. Rather than teaching parents to communicate and collaborate effectively after divorce for the benefit of their children, it builds higher walls.¹⁷⁹ As with child protection proceedings, the adversary process forces parties into positions from which it may be difficult to retreat, worsening already damaged relationships. Social science research has concluded that the child benefits from an ongoing relationship with both parents if that can be accomplished with minimized ongoing conflict; the adversary system, by naming the parties as opponents, damages relationships and creates a barrier to collaborative future dealings between the parents.

The litigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves.¹⁸⁰ Further, the process is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcome for the child or the parents.¹⁸¹

spousal support. The case may be settled out of court, but not until one parent has forfeited valuable rights in order to avoid a custody battle."'). See generally Elster, *supra* note 98. Elster describes how treating the child as a bargaining chip, combined with the notion that joint custody is in the best interest of the child, operates so that parents who ask for sole custody may be seen as unfit, thus necessitating some rather contorted strategizing by the parties. *Id.*

178. Gardner, *supra* note 17, at 3. "I have seen normal people become neurotic, and neurotic people become psychotic, as a direct result of embroilment in adversarial proceedings associated with their divorces." *Id.* Gardner also describes the increases in litigiousness, resentment, rage and hostility, including an urge to murder, which can develop in custody litigants. *Id.* at 6-9. This may explain why metal detectors were in place in many family courts long before they were installed in other courts. See also Solove, *supra* note 38, at 807 ("Courtroom security is a constant concern.").

179. Many divorce attorneys do everything they can to avoid this kind of outcome. Yet, the zealous advocate, directed by the client's immediate perception of personal interest, may be required to play this role.

180. See Schepard, *supra* note 174. Schepard asserts that:

[O]ne parent usually leaves the courtroom having been stigmatized as the less important parent in the child's life and embittered as a result of what the parent may perceive as lies told by the other spouse. These feelings may lead to either of two extremes: withdrawal by the parent from the child's life, or obsessive relitigation that prolongs parental hostility and involves the courts in the perpetual management of the family's relations.

Id. at 148.

181. In the end, parents may be so angered by the process that they continue to do what they can to make life miserable for each other including resisting paying child and spousal support and making it difficult for the non-custodial parent to visit the child. See OREGON STATUS REPORT, *supra* note 78, at 3. Divorcing couples who go through mediation may be less likely to carry these negative attitudes into their future relationship. See also Dane A. Gaschen, Comment, *Mandatory*

From the perspectives of the children and the parents, the adversarial process does not promote healthy family functioning. The unavoidable conclusion is that the adversarial system is inapposite to the best interests of children.

V. THE DEBATE OVER THE ROLE OF THE CHILD'S ATTORNEY
DISTRACTS FROM ATTENTION TO THE BEST INTERESTS
OF CHILDREN

Lawyers and academicians have spent a great deal of time debating the role of the child's attorney.¹⁸² The debate is necessitated by our unquestioning commitment to the adversary system as the proper forum for resolving family issues and is based upon assumptions that are neither empirically based, nor necessarily true.¹⁸³ The importance given to the attorney's role may be based on false premises, and is an arrogant usurpation of the proper roles of more qualified professionals. Perhaps the best reflection of the gap between our professional arrogance and an understanding of the needs of children is the ABA's adoption of a Practice Guideline requiring that "competent" children be treated as adults for purposes of representation.¹⁸⁴

While attorneys give lip service to the developmental needs of children, they do not have the training to identify them, particularly in the complex context of best interest litigation. Lawyers have not been trained to measure a child's capacity.¹⁸⁵ For example, the expectation

Custody Mediation: The Debate Over Its Usefulness Continues, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995) (discussing the study by Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 393 (1991)).

182. See Ventrell, *supra* note 36.

183. See, e.g., WALLERSTEIN & KELLY, *supra* note 19, at 314-15:

Although the wishes of children always merit careful consideration, our work suggests that children below adolescence are not reliable judges of their own best interests and that their attitudes at the time of the divorce crisis may be very much at odds with their usual feelings and inclinations. . . . [T]he fact that several of the youngsters with the most passionate convictions at the time of the breakup later came shamefacedly to regret their vehement statements at that time, have increased our misgivings about relying on the expressed opinions and preferences of youngsters below adolescence in deciding the issues which arise in divorce-related litigation.

184. See *supra* note 70.

185. See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems With the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. L. 57, 61 (1995). ("The recognition by psychologists that competency is contextual, incremental, and changing, even for adults, makes the attempt to label a child as either "impaired" or "unimpaired" *in toto* a misleading and disempowering responsibility, and one for which the attorney *qua* attorney has no particular qualifications."). The authors are critical of the Academy's adoption of standards which would have the attorney for an impaired child take a diminished role, not arguing for any position. *Id.*

that a child's competence—and thus, a child's qualification to have a true zealous advocate represent his expressed wishes—should depend upon the child's ability to explain his reasoning about a decision in a way that an adult would understand, is misguided. The American Academy of Matrimonial Lawyers Standards for the representation of children requires such an approach.¹⁸⁶ The determination of the child's capacity is the pivotal point for activating the lawyer's zealous advocate role.¹⁸⁷ Some have suggested that it is the lawyer's role to develop the capacity of the child through counseling.¹⁸⁸ An even more unrealistic approach would require the attorney "to formulate a position based on what the child-client would advocate if able to comprehend the situation and express himself adequately."¹⁸⁹

Katherine Hunt Federle goes even further, claiming that the child must be an empowered participant regardless of capacity.

[B]y empowering the client, the lawyer ensures that the child, and no other, has truly made her own choice. Of course, this may mean that some decisions will be made by the child that the lawyer believes are wrong or ill-conceived, but then, all clients, not just those of a certain age, are capable of making and have made bad choices. Nevertheless there is value in allowing a client to speak in her own voice and to determine her own goals. This is the essence of empowerment and of ethical lawyering.¹⁹⁰

Only a legally trained mind, with its focus on rights, could reach such a conclusion about the welfare of a child.¹⁹¹ Adults have a moral obligation to protect children.¹⁹² But, "adultmorphizing" children (imposing

186. See Margulies, *supra* note 11, at 1486.

187. The Academy of Matrimonial Lawyers would have lawyers for minors take a purely fact-finding approach in any case where a minor does not qualify under its adult capacity standard to make the critical decisions which guide the attorney. *Id.* This position is in reaction to the concern that children may be particularly susceptible to being persuaded by their attorneys about what position to take.

188. See, e.g., Peters, *supra* note 43, at 1564 ("To the extent that the child's developmental status creates obstacles to communication and understanding, it is part of the lawyer's job to overcome them creatively in order to provide the child client with the benefits of an advocate who listens, informs, counsels, and answers questions.").

189. Jinanne S. J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, BOSTON B.J., Jan./Feb. 1991, at 6, 9 (footnote omitted).

190. Federle, *supra* note 39, at 1696.

191. See Cervone & Mauro, *supra* note 25, at 1981. ("Unbridled rights theory . . . is like the unbridled adolescent himself. Even incorporating the compelling arguments that children deserve competent and aggressive advocacy to the full extent of the law, one must question whether the adversarial model works as an approach for the representation of children.").

192. Recently adopted legislation in California requires minors' attorneys to "advocate for the protection, safety, and physical and emotional well-being of the minor." CAL. WELF. & INST. CODE § 317(c) (West Supp. 1997). In addition to advising the court of the minor's wishes, "[c]ounsel for the minor shall not advocate for the return of the minor if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor." *Id.* § 317(e).

adult values and roles on them) may, itself, be a form of child abuse¹⁹³ caused by unrealistic expectations about children.

Certainly it is important to consider a child's cognitive functioning in determining what role the child should take in the resolution of a family problem.¹⁹⁴ Lawyers, however, are not the professionals to be undertaking this task. Even mental health professionals versed in child development face difficult issues in these cases. For instance, how much is known about how children's cognitive functioning is influenced by other tensions in their lives such as abuse, neglect, and parental conflict? Even in the case of adolescents whose general cognitive functioning may be at an adult level, decision-making is often clouded by other concerns, such as the struggle for individual identity and peer pressure.

The rules of confidentiality, which are an essential component of our adversary system¹⁹⁵ and are bound up with the attempt to treat chil-

193. See Cervone & Mauro, *supra* note 25. The authors state that

Self-determination . . . does not always work for children.

. . .

The Conference [Fordham] recommended that the unimpaired child set the goals of the representation as would an adult client. Under this rule, once competent and verbally capable of communicating, the child should be entitled or empowered to make her own decisions, regardless of age, developmental abilities, or impact of the choice. Certainly for young children and even for older children, however, it remains the intuition and experience of many that this freedom to direct their course of their case does not work. For example, some decisions may be too large a burden for a child to make (such as a choice between two parents, or between a stable foster family and a mother who has just now become "clean" of drugs). Assuming that we cannot divorce the advocacy role from the fact-finder role of the judge, how far do we let children go in assessing the long-term consequences of their actions? The limits of a child's cognitive abilities and emotional control suggest that ethics alone are not sufficient to resolve this conflict.

. . .

. . . Somehow, someone must play the role of the adult in the process.

Id. at 1981-87.

194. See, e.g., Mlyniec, *supra* note 73, at 1874.

195. See Mandelbaum, *supra* note 54. Randi Mandelbaum states that:

Nothing is more fundamental and important to the operation of our advocacy and legal systems than the relationship between attorney and client. The confidentiality of a client's statements to an attorney is at the core of this relationship and therefore also at the center of an effective advocacy system. Traditionally, the need for confidentiality has been argued through a three-step syllogism. First, people must use lawyers to resolve disputes and the lawyers must be able to represent their clients effectively for the adversary system to operate. Second, lawyers need full information in order to be effective. Third, clients may not fully disclose all of the information in their possession unless confidentiality is guaranteed. Strict adherence to confidentiality rules also has been found to improve the quality of the relationship between attorney and client, especially the rapport and trust between them.

Id. at 2057. This argument presumes that the adversary system is the only way to resolve disputes, that advocacy is the same thing as the adversary system, and that only lawyers can be

dren as adult clients, result in absurdities regarding the safety of children. Most of the contributors to the Fordham Conference review favored a confidential relationship between the child's attorney and the child.¹⁹⁶ This position cannot be supported by its contribution to a best interests outcome. Rather, it is supported by the child's need to know that she has a voice and can trust an adult to express her will.¹⁹⁷ We must ask why the child's lawyer should play that role. The team of adults who are working to mend the family and protect the child could express the child's voice; so could the child's therapist. Putting these children into an adversarial system where they can only trust the lawyer, thus making the others "untrustworthy adults," is antithetical to a child's best interests. Similarly, it is unclear why it should be the lawyer's job to empower the child. Certainly, the lawyer can be part of the team, but there may be some negative effect to empowering a child falsely (i.e., when the court will really know that the child's desire is not in her best interest) or dangerously (i.e., when maintaining the confidence will place the child at risk). The relationship of trust and empowerment (in the sense of having one's position expressed) is not clearly any more the lawyer's job than that of some other professional. We must ask what is the ultimate benefit of such a role assignment. Lawyers may be practicing as unlicensed child development experts by determining that these values are more important than some other interests of the child, such as safety and long-term developmental concerns. We lack the foundation for making that judgement. As officers of the court, it is our job to make sure that the best interests of the child are served, which is the equivalent of doing justice in other proceedings. Perhaps all this is merely an attempt by lawyers to satisfy our own need for clarity and certainty in our work; in spite of our need to be comfortable with the gray areas, lawyers love rules, definition and structure. However, the profession's position regarding how these cases should be handled reflects a lack of understanding as to the complexity and contextuality of these cases.

A good parent would not sacrifice his child's safety for the sake of privacy. The scenarios discussed in the Fordham Conference debate over confidentiality make this point.¹⁹⁸ Whether the case is one of a

advocates. Placing confidentiality at the core of the adversary system is essential because of the win/lose nature of the process which requires withholding information for strategic advantage.

196. See, e.g., *id.* at 2060.

197. See *id.* at 2057. Mandelbaum states that confidentiality is especially important to children who have been abused because they have a "need to feel and believe that they can trust and confide in their lawyer." *Id.*

198. See, e.g., *id.* at 2056-57 (giving the "hypothetical" example of a foster child who runs away from his placement because he is being abused and calls his attorney from a dangerous neighborhood, but desires his attorney to keep his whereabouts confidential). Is the empowerment

sexually molested child who wishes to stay in the custody of her molester, or of an adolescent who has run away from a foster home and is prostituting herself on the streets, common sense would dictate protection over privacy.¹⁹⁹

While empowerment of children is a laudatory goal,²⁰⁰ it is a meaningless one if the child is injured or killed by making an immature choice. In a process which focuses on rights, the child must have rights and the power to assert those rights by having a voice in the process; but, both rights and power must be viewed within the context of protection and the child's welfare. A system, such as our adversarial system, distorts this conversation by its focus on rights and the need to pit the

of the child the significant interest in such a situation? In proceedings where the focus is the protection of the child, a rule which prohibits that protection cannot be consistent with effective representation.

199. See Ryan, *supra* note 54. Ryan states that:

Our jurisprudence and its processes have undervalued, and often disparaged, the empowerment of children. It is academic excess, however, to suggest that our pursuit of integrity for child clients requires the professional community to empower children to death. Of what value is autonomy to a cadaver? Despite our studied embrace of professional amorality, we transgress a basic humanistic, moral standard when we sacrifice clients' lives in the name of their own volition, however short-sighted or impaired it may be.

. . . Empowerment—which should be a humanizing process that gives ear to the child's dreams, plans, and aspirations—becomes a counterhuman force when lawyers invoke it as a rationale against rescuing a child in immediate danger of dying who also demands confidentiality. Passivity and silence work a fundamental unfairness to the child client because they indulge a despair, a gross recklessness, a short-term consciousness, which threaten to destroy childrens' [sic] lives. Unlike transformative mistakes with adverse consequences that can yield valuable lessons, life-threatening behavior risks an irreversibility that demands intervention. To do otherwise, the attorney affirms behavior that screams out: "I am worthless; I do not deserve nor want a future." The attorney can never act neutrally in this context; the child client has too much at stake. The lawyer becomes, even in her passivity, a source of affirmations, nodding in assent that the child does not deserve tomorrow. Nothing could be less fair to the child client.

Id. at 2069, 2072 (footnotes omitted). Critics of proposed reform which would allow divulgences of such confidences fear the slippery slope affecting eventual erosion of the confidential relationship. My concern is that this kind of confidential relationship between the attorney and the child sets up the child to think in terms of the child protective services worker or parents being "against" him, while his lawyer is "for" him. I believe it is a mistake to lead the child to think that others are not acting in his interests. What good is it to the child or the profession if the child knows that others are trying to protect his safety in spite of his self-destructive wishes, yet his lawyer will support his unsafe acts? What is the long-term effect on the child and society if we do not do everything we can to protect the child? Lawyers are not trained to engage in therapeutic helping behavior, and the rules of confidentiality may prevent a child from receiving it elsewhere.

The adversary system forces this kind of immoral line drawing, and the apparent amorality of the profession which follows from it. See Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*, *supra* note 39, at 38, 53.

200. See generally Federle, *supra* note 39.

parties' rights against each other.²⁰¹

Even assuming that all relevant information is presented to the court, the judge lacks the ability to make these crucial decisions in the many cases where the facts do not clearly favor one side or the other. Our arrogance leads us to assume that somehow we are possessed of an all-encompassing skill which enables us to engage in all kinds of decision-making, regardless of the consequences to people's lives. This arrogance demeans the other disciplines which participate in family law and child protection matters. It exemplifies lack of respect and the reality of the hierarchical roles of professionals.²⁰² This hierarchy, and the accompanying antagonism and poor morale among people who are required to work together, create barriers to effective collaboration, and thus, to achieving our common goal.

In essence, the awkward limitations on, and rationalizations for, attorney conduct in these cases, and all the energy spent agonizing about the right role for children's lawyers, arise because we cannot envision ourselves in another system—a system designed specifically with the needs of children and families in mind.

VI. RECOMMENDATIONS

There is clear evidence that the adversarial system is inappropriate for dealing with the best interests of children in the context of child protection and family law matters. We need a new paradigm, one that truly focuses on the children, as children, rather than as small adults. The paradigm must protect the interests of the parents, but not allow the interests of the parents to trump the child's needs. The shift must be drastic. It requires our willingness to abandon what does not work, to see that the patchwork quilt approach to "fixing" the problems in the current system does not solve the underlying values problems of the adversarial process.

A. *Start Over*

It is hard to imagine that any civilized society would not claim to care for and nurture its children. Certainly, the United States claims to do these things and to place a high value on families and children. An examination of our willingness to "put our money where our mouth is" might indicate otherwise. As previously discussed, the child protective system and the family court system are both lacking in resources neces-

201. See *id.* at 1658 ("Lawyering models implicitly engage in rights talk: what the lawyer is to do (or not) for the client depends primarily on how one constructs and values rights.").

202. See Herring, *supra* note 108, at 208 (arguing that judges have difficulty valuing social work).

sary to support the families they see. Issues of privacy and inhibitions about "intruding" into family matters remove us further from providing that support. We understand that parenting is difficult and that relationships are challenging, yet we maintain a "hands-off" approach to these concerns until a child is discovered to be endangered or until the matter is brought to the court by the parents. Even worse, poverty aggravates the situation.²⁰³

Our society needs to help children and families live more functional, healthy, and productive lives. While there is some disagreement about the role of government in family life, there should be no disagreement that when the government, including the courts, must play a role, it should do so without creating additional harm.

Criticisms of the adversary process are based primarily upon the intensification of conflict which occurs through that process. The criticisms also build upon what we understand about the needs of families and children for support, stability, and new ways to maintain connections where traditional structures no longer work.

The adversary system is not inviolate; there is nothing inherent in our tradition which demands its use, particularly in noncriminal matters.²⁰⁴ We must look with new eyes to consider what kind of system we would design to deal with these kinds of problems if we were not

203. The Third National Incidence Study (NIS) of Child Abuse and Neglect made the following finding:

Children from families with annual incomes below \$15,000 were more than 22 times more likely to experience maltreatment than children from families whose incomes exceeded \$30,000. They also were 18 times more likely to be sexually abused, almost 56 times more likely to be educationally neglected and more than 22 times more likely to be seriously injured.

Child Abuse and Neglect Shows Sharp Rise, HHS Study Finds, CHILD PROTECTION REPORT, Sept. 27, 1996, at 165.

204. See, e.g., David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 39, at 83, 111. However, Luban would probably place child protection cases in the same category as criminal cases, due to the interests involved and the fact that there is state intervention. See also Kutak, *supra* note 40 (arguing that the adversary system is one of many competitive institutions in our society reflecting individualistic values fostered by competition and that this does not mean it is the kind of justice system we must have); Schwartz, *supra* note 39. Schwartz states that:

No earthly adjudicatory system can be confident of total accuracy. To come as close to that objective as possible, the rules of the system should be designed to maximize the probability of an accurate result [N]either the idea of the adversary system nor its effectuation requires the use of truth-defeating techniques. . . . The point is that all . . . rules of professional behavior should be analyzed and evaluated by reference to their potential for increasing the probability of an accurate result.

Id. at 157-58. Unfortunately, I believe the adversary system has been interpreted to require exactly those kinds of truth-avoiding behaviors on the part of attorneys. As explained in this article, I have concluded that the best interests goal is not achievable within the adversary context.

constricted in vision by the usurpation of this area by the adversarial legal system.²⁰⁵ The focus should be on the psychosocial nature of the problems, with the legal issues in proper perspective and appropriately handled,²⁰⁶ but not driving the entire system and not eating up its resources.²⁰⁷ It should be a hybrid system which combines the protections of the legal system and advocacy with the healing goals of the therapeutic and other helping disciplines.²⁰⁸ The change should be from an adversarial process to a process which focuses on collaborative problem solving,²⁰⁹ including the valuing of complete information.

An important part of this change would be a shift in the expectations of the professional and client participants with regard to both sub-

205. See Solove, *supra* note 38. Solove explains that: "a few short months on the bench convinced me that the adversarial atmosphere of the courtroom was absolutely the wrong place to make determinations about the welfare of the children of divorce." *Id.* at 801; see also Myers, *supra* note 8, at 258 (non-adversarial approach is preferred because it has more hope of meeting the goals of protecting children, treating deviant behavior, and supporting families).

206. Note that I do not propose to eliminate traditional legal values. The right to a hearing is transformed, in a sense, into a duty to participate in the process, yet it retains the due process safeguards of an impartial decision-maker, should a resolution not be achieved by the family itself. It also includes a protection of the interests which underlie the right to cross-examine witnesses, in that it calls for complete sharing of information, dialogue, and careful consideration of all evidence. I do not share Fineman's belief that the process should be public. See Fineman, *supra* note 21, at 770. Sufficient checks to abuse are provided within the political system without exposing the private lives of children and their parents to a public audience.

207. I disagree with Catherine Ross, who believes that it is useless to attempt nonlitigation alternatives with families who have demonstrated their inability to resolve their own disputes by the mere fact that they have presented themselves in court. See Ross, *supra* note 9, at 1577 ("Courts provide a regulated framework for resolving disputes that have already transcended the ability of the parties to resume more temperate discussion."). There is no evidence to indicate that lawyers are the best or most appropriate problem solvers in these situations. In fact, all evidence indicates the contrary—that the adversarial process exacerbates disputes. The court does not have a mechanism for healing relationships. When we are discussing the best interests of children, a functional, if not completely healed, relationship must be our goal. See JOSEPH GOLDSTEIN ET AL., FREUD AND SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 8 (New ed., 1979) ("[L]aw is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child.").

208. See Cahn & Johnson, *supra* note 71, at 131 ("[T]he best outcomes may be preserved by applying a collaborative, win-win decision-making process at some points, as long as all parties' rights are protected."). Note that I do not propose the turning over of the decision-making task to another professional group as Fineman discourages. See Fineman, *supra* note 21, at 729. Rather, my proposal calls for attorneys and judges to be a part of the larger group of child welfare professionals.

209. In the problem-solving model, the participants are assisted in focusing on their actual objectives and looking for creative ways to meet their mutual needs, "rather than . . . focusing exclusively on the assumed objectives of maximizing individual gain." Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984); see also Myers, *supra* note 8, at 259 ("The premium on hostility and denial will be reduced in favor of the positive approach of professionals trained in cooperative problem solving.").

stance and procedure.²¹⁰ The changed expectations must include societal expectations for the system, professional practices and ethical standards, and personal expectations among the participants. Changes in the language used to describe these family disputes is another necessary component for transformation.²¹¹ Typical legal pleading formats which require parties to be named as plaintiff or petitioner, and defendant or respondent, and set off against each other ("versus"), are inappropriate for a nonadversarial environment.²¹² Family members and the professionals who assist them must see resolving the problems, not "winning," as the goal of the participants, directly focusing on the best interests of

210. People's expectations can be quite powerful in determining events. Studies in schools have demonstrated that students perform in accordance with their teachers' expectations of their abilities. See RONALD B. ADLER & NEIL TOWNE, *LOOKING OUT/LOOKING IN: INTERPERSONAL COMMUNICATION* 79 (1981). People experience what they expect to experience, at least in part because they behave in reaction to their expectations. See Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 110 (1993) (citation omitted). ("Individuals enter mediation with expectations about the other party, the process, the lawyers, the courts, and so forth. These expectations may have a favorable, neutral, or unfavorable impact on the process of mediation and the outcomes.").

Specifically, in the legal context, our substantive and procedural laws create expectations. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 143 ("[C]onstitutions, laws, and courts do have a modest bearing on habits and attitudes. And nowhere are these legal influences more a factor to be reckoned with than in the legalistic society of the United States."). See also Menkel-Meadow, *supra* note 209. Menkel-Meadow argues that:

The orientation (adversarial or problem solving) leads to a mindset about what can be achieved (maximizing individual gain or solving the parties' problem by satisfying their underlying needs) which in turn affects the behavior chosen (competitive or solution searching) which in turn affects the solutions arrived at (narrow compromises or creative solutions).

Id. at 760.

People also tend to conform to the expectations held for them, particularly to conform to the norm of the group with which they identify. See SHARON S. BREHM & SAUL M. KASSIN, *SOCIAL PSYCHOLOGY* 393 (1990); see also Robert A. Cooke and Janet L. Szumal, *Measuring Normative Beliefs and Shared Behavioral Expectations in Organizations: The Reliability and Validity of the Organizational Culture Inventory*, 72 PSYCHOL. REP. 1299 (1993).

211. See OREGON STATUS REPORT, *supra* note 78, at 10. ("Language changes: Considering language changes to replace terms such as 'custody' and 'visitation,' with 'parenting plans,' 'mom's house' and 'dad's house,' and other words that are less adversarial. The language change would reflect the fact that divorce does not end a family; it reorganizes it.").

212. According to Fineman, helping professionals "view law itself as possessing vast power to transform people's behavior." Fineman, *supra* note 21, at 734 (footnote omitted). If this is so, then a transformation of the law should serve to shift people's behavior accordingly, from an adversarial attitude to a collaborative problem-solving approach. In support, Fineman cites Meyer Elkin, who states:

[T]he elimination of "fault" has made it possible for the Court to play a much lesser part in banking the fires of hostility. It is a well-known fact in role theory that people cast in the roles of adversaries probably will live up to those roles. . . . [T]he elimination of adversary proceedings eliminated adversary roles and therefore reduced the need to fulfill antagonistic roles and the need to strike out at each other.

Id. at 746 n.85 (citation omitted).

the children.²¹³ In short, there must be a shift in legal paradigm,²¹⁴ from a system based upon competition and selfishness, to one based upon collaboration and the incorporation of larger interests, namely, children and families. Rather than set out a new, rigid procedure to replace existing systems, my focus in this section is on the values which should be incorporated into whatever process is designed to help children and families through their difficult times in child protection and family custody disputes.²¹⁵ Relying upon the wisdom of experience, we can safely say that no one process will suit every case. The new design should include a range of procedures, from family counseling, mediation, and family group conferences, to a more coercive, involuntary process where protecting the child is the primary goal. The roles of the court, judges and attorneys should be played in the background and be supportive of the important healing work in which the family is engaged.

B. *What the Process Would Look Like*

I recommend a hybrid process which takes into account the substantial role played by other professionals in serving children and families in trouble. At the same time, the underlying legal issues concerning the family relationship are protected by safeguarding fair process, because ultimately, the concern of the courts is to ensure that whatever action is taken, it is done fairly.

Others recommend removing the best interests decision-making

213. Catania has suggested that a negotiation-based resolution system be adopted for custody disputes:

The law must be premised upon an understanding of family as existing beyond the point of legal dissolution of the husband/wife relationship. And it must encourage the individual members of the reordering family to accept that fiduciary interdependence is in their mutual self-interest. . . . The law should regard the family, at least insofar as it involves children, as a lifelong commitment and the process of divorce and custody determination as "a serious and carefully considered remedy for an important problem" in the family. Such a remedy is "purposeful and rationally undertaken" and "indeed succeeds in bringing relief and a happier outcome" for the family.

Catania, *supra* note 15, at 1258-59 (footnotes omitted).

214. See Schorr, *supra* note 9, at 34, 35 (arguing that a change in the system can only be achieved through a change in the dominant paradigm).

215. For an interesting proposal regarding the adaptation of therapeutic techniques to the legal resolution of these disputes, see Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1 (1996). See also Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. (1997) (family law jurisprudence inconsistent with real family life and social science research in child development and family relations); Mary A. Duryee and James Garbolino, *Family Law: Is the System Broken?*, 7 AFCC CALIFORNIA NEWSLETTER, Fall 1996, at 15 (mismatch between the kinds of disputes brought to the court and the procedures available for resolution).

from the adversarial process altogether.²¹⁶ The New Zealand "Family Group Conferences" rely heavily on the notion that families can and should be supported to make the right decisions regarding the welfare of their children.²¹⁷ When intervention is determined to be necessary because a child is believed to be endangered, the extended family is called in to be a primary part of the problem-solving process. Teamwork and the provision of support resources to the family are integral aspects of the process. These elements are essential to my proposal. While I do not set out a detailed description of any process, there are some general guidelines which would be appropriate to most situations.

1. CLIENTS WITH NEEDS WOULD BE REFERRED TO A TEAM

Clients entering the system because of alleged child protection issues would enter the system upon referral from a social worker, following preliminary investigation.²¹⁸ The child may or may not be removed from the parent on an emergency basis. In the case where a child had been removed, a petition would be filed and a meeting would

216. See, e.g., Gardner, *supra* note 17. Gardner recommends a three-step procedure of mediation, arbitration panel, and appeals panel for determining child custody issues in divorce situations. His procedure would include attorneys in their role of providing representation at the arbitration and appeals levels, but would not provide a traditional adversarial forum. Instead, it would call for "free and open discussion." The expert panels (arbitration and appeals), consisting of specially trained mental health professionals and attorneys) would control the proceedings and gather data according to procedures used by mental health experts. *Id.* at 9-11.

217. The notion that families are generally in the best position to make these decisions is not new. Family decision-making is based upon the premise that each family is the "expert" on itself. This concept is reflected in the family group conference process, as discussed in Harry Walker, Whanau, Family Decision Making, The Value of Trust; Denis Smith, Family Group Conferences—The Process; Grant Allan, The Family Group Conference—A Lawyer's Perspective; Denis Smith, Child Sexual Abuse in the Context of Family Decision Making; Judge E.T. Jurie, Ancestral Law, Civil Law & the Law of Gifts. Series of papers prepared for the "Beyond the Bench VII" Conference in Oakland, California (1995) (on file with author) [hereinafter collectively referred to as The New Zealand Papers]. See also HARDIN, *supra* note 79.

218. John Myers, in advocating for a shift from the criminal prosecution of child abuse cases toward a more therapeutic approach, states:

The most promising way to accomplish this goal is to shift the focus of the response by restructuring the system so that cases originate in the therapeutic realm as opposed to the adversarial.

. . . .

A therapeutically oriented system in which the commitment to nonadversarial problem-solving is genuine cannot be administered by attorneys, especially attorneys who serve as or under prosecutors. The training, experience and disposition of the lawyer pulls him toward reliance on litigation, and prosecutors are particularly steeped in the adversarial approach. It is as unrealistic and unfair to expect lawyers to administer a therapeutically oriented response to child abuse as it would be to ask mental health professionals to litigate.

Myers, *supra* note 8, at 262. Myers raises questions about whether the juvenile court is capable of administering a nonadversarial system. *Id.*

be scheduled within seventy-two judicial hours of the removal, as is customary under the current statutory scheme, in order to protect the relationship interests of the family members. The purpose of the initial meeting would be to set the tone for the process by having the judge explain it, including the role of the advocates, to the family and appoint lawyers for the parents and child. The parents would be entitled to contest the initial removal at this time, if the parents believe the removal was a mistake. The social worker would explain the concerns to the judge, including contradictory information, and would explain why removing the child was necessary. The judge would affirm that decision unless she finds it to be arbitrary and capricious. If the social worker and immediate family could not agree upon a plan of action, a group meeting would be scheduled as soon as possible, preferably within two weeks. The initial group meeting would include the parents, the advocates, the social worker, and any other person who is available and whose participation is believed to be relevant to the family. This may include, among other support people, step parents²¹⁹ and other adults living in the home, relatives, neighbors, physicians, mental health providers, and clergy. At this time, all available information would be shared, while being sensitive to the family's need for privacy.²²⁰ The major topic of discussion for this first meeting would be to set forth all known information and to gather additional information from the participants. Additionally, the group might decide what other information would be useful in helping to resolve the problem and make plans for gathering such information.²²¹ The second major topic for discussion would be where the child should be placed until the matter is resolved. One reason for including friends, neighbors and relatives so early in the

219. This would eliminate the controversy over who qualifies as a *de facto* parent, a controversy that exists in determining who has standing to participate in the traditional adversarial process. These determinations have led to some bizarre results. See, e.g., *In re Kieshia E.*, 6 Cal. 4th 68 (1993) (blended families on inconsistent reunification plans). The only limitations regarding participation should be whether someone's participation creates a danger to one of the participants and/or whether someone's behavior is so disruptive to the process that it inhibits forward movement. If such a person happens to be a parent, court intervention might be necessary to issue orders for contempt purposes.

220. It might be determined that certain of the participants would be excused during discussions where the family members desired privacy, unless the information to be discussed is necessary for the group problem solving.

221. The desire for expert opinions, including psychological evaluations and second opinions about causes of injuries, would be included in this process. All experts would be "hired" by the group, rather than by an individual, as the group's goal is to gather all the information it can which will assist it in taking wise action. Thus, experts will not be placed in the position of having to be adversarial advocates for parties. This would be consistent with Gardner's thoughts that it should be unethical to even serve as an impartial evaluator in the current adversary system, because it serves to perpetuate the system that is psychologically detrimental to clients, violating the Hippocratic oath—"Above all, do not harm." See Gardner, *supra* note 17, at 4.

process is to expand the possibilities for placement in an environment familiar to the child. It must be clear from the tone set at this first meeting that the process is about assisting the family, and not about winning or losing. While it may be difficult to explain this to a parent who has had a child removed, the inclusion of participants who are not "parties" to the conflict would make it clear that this is different from a normal adversarial contest.

Families entering the system because of family court custody disputes would be referred to the system upon the filing of a contested custody petition, or earlier through self-referral. Family law attorneys should encourage their clients to engage in the process at the earliest possible time, in an effort to avoid conflictual situations for the children. Within five days of referral, a meeting would be scheduled.

In both situations, the initial meeting would be facilitated by a professional, preferably someone trained in mediation. At the end of the first meeting, another meeting would be scheduled for a time agreed upon by the participants as appropriate, given the number of tasks to be accomplished in the interim. Naturally, the advocates would be monitoring this scheduling to ensure that it is sensitive to the needs of the parent-child relationship. Plans would be in place regarding visitation, including provisions for safety concerns.²²² Where agreed upon, a service plan could be initiated at this point.

2. REGULAR MEETINGS OF CLIENTS AND PROFESSIONALS IN DIFFERENT GROUPINGS, DEPENDING UPON NEEDS

Meetings would continue to be scheduled as needed, with attendance varying according to the purpose of the meeting. Services would be provided as agreed upon, with attorneys monitoring to be sure their clients are participating in services and seeking assistance from the group process if that is not the case.²²³ While the process is not adversarial, parents do need to be advised of the consequence of their failure

222. Family custody contests may involve allegations of domestic violence, substance abuse, or child abuse which give rise to safety concerns regarding visitation. As part of this proposal, I am recommending that services be provided for families who are involved in contested custody matters. Where psychological testing reveals characterological problems in one or both parents which are likely to create ongoing conflict, experts can help the family develop a very structured and specific plan which "can obviate, as much as possible, the need for parents to cooperate in making decisions when they literally do not have the capacity to do so." Roseby, *supra* note 20, at 105.

223. Roseby, in regard to custody evaluations, insists that an important part of the process is to "minimize parents' sense of shame and maximize their understanding of the child's needs and experiences." *Id.* at 102. The author comments that custody evaluations can exacerbate parents' sense of shame and helplessness when delivered in open court. She suggests that the process should be more private. *See id.* at 110.

to take steps to ensure their child's welfare. In child protection cases, clear warnings regarding the possibility of termination of parental rights need to be given and included in the record of the process. These warnings should serve as motivation and as satisfaction of the due process notice requirement.²²⁴

All professionals should seek to maximize opportunities for safe parent participation in the lives of their children (rather than mere "visiting") and seek to connect parents and children who are separated.²²⁵ Parent education would play an essential role, particularly education which teaches parents the effect of conflict and, if appropriate, abuse and/or neglect, on their children. Many courts now require parents to attend programs of this sort.²²⁶ The process would involve a dialogue among the interdisciplinary group of professionals with an attempt to engage the parents in an examination of their parenting and how they might be assisted, instead of engaging in a win/lose combat. Again, the

224. To the extent that a parent attempts to revisit the initial decision regarding the intervention, in spite of contrary advice from counsel, that parent should be advised of the consequences of delaying compliance with the plan. However, continued denial of the underlying jurisdictional facts should not be labeled as "denial" in the psychological sense, unless there is very clear supporting evidence. Strong professional skills will be required to walk the tightrope between discouraging manipulation by a parent truly in "denial," and closing the door to the consideration of alternative hypotheses as the case moves forward.

Parents must be given specific and clear information about what they must do in order to reunify their families. See, e.g., Herring, *supra* note 76.

225. To effectuate this recommendation in the child protection arena, I would propose the development of neighborhood family centers. At these centers, parents would spend time interacting with their children on a daily basis, if possible. Many parents involved with child protective services are unemployed and would be available to participate on a full-time basis. Pre-school age children in out-of-home placement could be brought to the center each morning, the same way any child might be taken to daycare. A residential community might also be appropriate for such a center. School age children could be brought after school. The center would provide both recreational and educational activities, as well as facilities for preparing meals and bathing. It would be a central location for provision of the most commonly utilized services, including classes in parenting, anger management, substance abuse, drug testing, and counseling. Professional personnel would be available to model parenting skills in the course of their interaction with the parents and children. At the same time, they would be supervising the interactions and observing the progress of the parents and children.

The benefits of such centers are numerous. Current reunification plans often list, in boilerplate fashion, a number of services for parents. Such services are often located inconveniently, particularly for those who use public transportation, and are of unknown quality. Centralizing the provision of services would remove one more obstacle in the parent-child relationship. It would provide meaningful contact between the family members in a supervised setting. It would give those with responsibility first hand knowledge about the family's dynamics and allow services to be provided according to the family's development, rather than according to a plan on paper. Where parental rights must be terminated, observation could assist the group in reaching that conclusion expeditiously and fairly, with greater confidence.

226. Oregon, for example, gives counties the option to require parents to attend Parent Education Programs which include this kind of information, as well as information about other relevant topics, including parenting tips and dispute resolution. See OREGON STATUS REPORT, *supra* note 78, at 8.

group discussion must focus on needs, not on rights.²²⁷

The group meetings would be confidential among the members of the group. All experts called upon to render opinions would be included as part of the team to allow for free-flowing communication among them, tearing down the illogical obstacles which now keep such communication from occurring.²²⁸ All information would be shared, except where it may pose a danger to someone, in which case it would be shared among appropriate participants to ensure the protection of parties.

3. THE CHILD'S INVOLVEMENT

As discussed earlier, just how much involvement children should have in child protection and custody proceedings is a matter of debate. In the proposed process, the child would be a participant in the group conferences to the extent the child wishes and the child's caretakers,

227. It may be that this kind of ongoing dialogue and involvement of parents in the process will naturally result in consensus more often than we can expect from the present adversarial system. See Ratterman, *supra* note 82, at 39. Ratterman describes a project in Chemung County, New York, where permanency planning meetings were held with all service providers and the family at the 12-month review stage. *Id.* at 43-44. Positive results achieved at that time lead me to conclude that they would be available much sooner in my proposal.

Zwier suggests a process for physician-assisted suicide cases, which seems apropos to best interest cases:

The care perspective identifies the central issue of care, asking what caring demands in this particular situation with these particular persons to strengthen (or at least maintain) the primary relationship and to avoid hurt and harm. This step can be taken only after identifying the interdependent parties and the primary relationships. One then must consider the view of both the one cared for . . . and the one caring.

. . . .

Using this care perspective and these procedural steps, consider what would likely happen The care counselor will very quickly and directly involve all the family members. There would need to be a joint meeting with the patient, the client's other siblings and friends, the medical practitioner, and anyone else who might have a strong caring interest.

The result is that the "do it/don't do it" [referring to physician-assisted suicide] dichotomy may immediately be broken. The possible solutions multiply greatly when the focus turns to what will create, maintain, or maximize the healthy relationships already present in the situation. At the same time, care would not automatically rule physician-assisted suicide out of bounds. The role of care-providers more likely will force the asking of tough questions. Who cares about the patient? What does caring demand? Where do these individuals live? What is each party's capacity to care? What is fair for each to contribute? Depending on the answers to these questions, the counselor and decision-makers can cut through the adversarial rights-based analysis and frame a more tailored, particularized solution.

Paul J. Zwier, *Looking for a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199, 233-36 (1996) (footnotes omitted). Replacing the patient with a child and the question of physician-assisted suicide with a question of removal from a parent, the process seems appropriate for best interests cases.

228. To the extent the ethical codes of the involved professionals require confidentiality inconsistent with this goal, they will need to be revised.

therapist and/or attorney believe appropriate. In any event, the child's voice would be heard through the child's advocate, therapist, social worker, family members, and other concerned participants. The child would never be forced into the position of having to make the difficult decision.²²⁹

It is an important part of this process that the parents hear about how the situation affects the child, from the child if possible, so that the parents can hold this information in the forefront at all times when making decisions. Solutions would be flexible and creative to meet the needs of individual children,²³⁰ rather than the current boilerplate approach.

Intervention should be a healing process. Additionally, if developmental assessments can be done without further disrupting the children, they would be helpful to ensure that the children are doing well and receiving the services they need. The needs of children for stability and a sense of security must drive the process and serve to motivate the family to resolve its problems. This may lead to a triage system for cases where it is clear that the developmental needs of the child, and the long-term problems of the parents, will not coincide in the foreseeable future. Cases of severe mental health problems, long-standing substance abuse problems, and chronic domestic violence might be considered in this category. In such situations, decisions could be made by the professionals in the interests of the children, with the idea of moving to swift resolution. There is no constitutional requirement for providing custody or reunifying parents where their actions have proven them to be unfit. Neither is there a constitutional requirement for providing services in extreme cases where it is highly unlikely that reunification would ever be accomplished.²³¹

C. *Base the Problem-Solving Approach on an "Ethic of Care" and Focus on Relationships*

The term "ethic of care" may have been coined by Carol Gilligan in her work describing the differences in the moral development of girls

229. See Mlyniec, *supra* note 73, at 1908 (citation omitted). ("[C]hildren choosing to state a preference for a custodial parent should be heard. On the other hand, because custody issues may be very disturbing for young children, courts should not encourage litigants to present such testimony.") Even with older children, it is important to look at the dynamics and context to determine the kinds of influences which might be affecting the child's stated preference. Because children have been known to make dangerous choices based upon inappropriate influences, I disagree with Mlyniec's position that the child's preference should be determinative.

230. See, e.g., Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1670-71 (1995).

231. See, e.g., CAL. WELF. & INST. CODE § 361.5(b) (West Supp. 1997) (listing circumstances in which reunification services need not be provided).

and boys.²³² The proposed paradigm shifts focus from individual rights to relationships, incorporating notions of connectedness and responsibility among family members and between family and society.²³³ The problems to be resolved in the system arise "from conflicting responsibilities rather than from competing rights"²³⁴ Our traditional focus on rights has fallen short in terms of assisting parents to overcome their self-centered concerns on behalf of their children.²³⁵ An ethic of care describes not only what we expect from parents toward their children, but what we expect from society, and those who would intervene in families' lives.

232. See GILLIGAN, *supra* note 40, at 30. Gilligan describes the responses of Jake and Amy to Heinz's dilemma: "Amy's judgments contain the insights central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach." See also Ellmann, *supra* note 26, at 2682. Ellmann proposes an ethic for lawyers which would require the responsibilities of the lawyer to the client to be commensurate with considerations of care.

233. See Annette Baier, *Trust and Antitrust*, in *ETHICS* 231 (Jan. 1986).

Men may but women cannot see morality as essentially a matter of keeping to the minimal moral traffic rules, designed to restrict close encounters between autonomous persons to self-chosen ones. Such a conception presupposes both an equality of power and a natural separateness from others, which is alien to women's experience of life and morality. For those most of whose daily dealings are with the less powerful or the more powerful, a moral code designed for those equal in power will be at best nonfunctional, at worst an offensive pretense of equality as a substitute for its actuality. But equality is not even a desirable ideal in all relationships—children are not but should not be equal in power to adults, and we need a morality to guide us in our dealings with those who either cannot or should not achieve equality of power (animals, the ill, the dying, children while still young) with those with whom they have unavoidable and often intimate relationships.

Id. at 249 (citations omitted).

234. GILLIGAN, *supra* note 40, at 19. Gilligan was referring not to our legal system *per se*, but to the moral development and practice of girls. Her description, however, is quite appropriate in this context, as it reflects current attempts to modify the traditional adversary process and a rising interest in the concept of responsibility. See, e.g., GLENDON, *supra* note 210; Woodhouse, *supra* note 28, at 1841 ("[A] child-centered perspective calls for a rhetoric that speaks less about competing rights and more about adult responsibility and children's needs.").

235. See GLENDON, *supra* note 210. Glendon argues that:

Traditionally, it has been women who have taken primary responsibility for the transmission of family lore and for the moral education of children. As mothers and teachers, they have nourished a sense of connectedness between individuals, and an awareness of the linkage among present, past, and future generations. Hence the important role accorded by many feminists to the values of care, relationship, nurture, and contextuality, along with the insistence on rights that the women's movement in general has embraced. Women are still predominant among the country's caretakers and educators, and many are carrying insights gained from these experiences into public life in ways that are potentially transformative. Their vocabularies of caretaking are important sources of correctives to the disdain for dependency and the indifference to social bonds that characterize much of our political speech.

Id. at 174.

1. THE NEW SYSTEM WOULD RECOGNIZE THAT THESE PROBLEMS
OCCUR IN CONTEXT AND NEED TO BE
TREATED CONTEXTUALLY

Families and children live within a context within the larger society.²³⁶ Members relate to each other within this context.²³⁷ To work effectively with families, the system must also be able to deal with their contexts, and must avoid pigeon-holing, stereotyping, boilerplating, and snapshotting. People's stories must be heard,²³⁸ and we must meet them where they are, not where we would like them to be.²³⁹

Children's needs vary depending upon their age, stage of development, prior experiences, personal coping capabilities, support systems, and other factors. We cannot continue to act as if all children are the same and have the same requirements. An understanding of the interdependent nature of relationship and its context, for each particular child, is essential to serving the best interests of children.²⁴⁰ Furthermore, children must be allowed to be children and to have their perspective respected, including their "claims as children to dependence on adults, as well as parents' claims as parents to nurturing children."²⁴¹

2. THE PROCESS MUST ALLOW FOR A DYNAMIC APPROACH

The process must be flexible to accommodate the changing family situation, yet careful to provide the child with a sense of security and stability. As discussed earlier, a court is required to make a finding of facts which then becomes the "truth" in the case, even though the facts may not be clear and though there may be at least two plausible realities.

236. See NRC, *supra* note 57, at 109-39. The developmental, ecological, and transactional model of etiology examines the individuals, the family, the community, and the macrosystem of the culture and society in which the abuse/neglect occurs. *Id.*

237. Brooks, *supra* note 215, at 4-8.

238. See GILLIGAN, *supra* note 40, at 19 (arguing that moral problems require a contextual and narrative mode of thinking, rather than formal and abstract).

239. I particularly appreciate the Hasidic saying which addresses this thought:

If you want to raise a man from mud and filth, do not think it is enough to stay on top and reach a helping hand down to him. You must go all the way down yourself, down into mud and filth. Then take hold of him with strong hands and pull him and yourself out into the light.

MARTIN BUBER, TEN RUNGS: HASIDIC SAYINGS 84-85 (1947).

240. See Federle, *Looking for Rights*, *supra* note 150, at 1564-65; see also Barnard & Jensen, *supra* note 58, at 62, in which the authors recommend a consultation model for custody evaluations, which includes extended family, friends, and support networks, in gathering relevant information which is then presented to the parents and the court. My process more directly involves the members of this larger context in the problem-solving activity. See also Fitzgerald, *supra* note 1, at 105 ("Perhaps our legal touchstone for family disputes should not be the 'child's best interests,' but some new understanding of 'family interests.'").

241. *Id.* at 22.

Unlike the judicial process, the proposed model would allow the participants to "hold" apparently contradictory facts at the same time as part of the larger, dynamic picture. These facts would not be lost because they are inconsistent with the preponderance of the evidence.

The family is a living, changing entity. In the process of a child custody or child protection case, the family changes as do its members.²⁴² Relationships which may have been nurturing or supportive in the past may become less so, and vice versa.²⁴³ New circumstances may arise which require changes in plans.²⁴⁴ The process must be available for quick responses and accommodating change.

3. THE SYSTEM MUST INCORPORATE BROAD-BASED PARTICIPATION FOR FAMILY SUPPORT

The system must include extended family, incorporating cultural concepts of family. It would also include friends, neighbors, and the community to whatever extent is helpful to supporting the family.²⁴⁵ We might borrow, from other cultures, helpful notions of the role of

242. See Lawrence S. Kubie, M.D., *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964) (discussing how the needs of children change as they develop and as new situations arise in their families and environments).

243. See Charlow, *supra* note 6, at 11 (citation omitted); see also Kenneth J. Rigby, *Family Law: Alternative Dispute Resolution*, 44 LA. L. REV. 1725, 1751 (1984) (primary emphasis on discovering and serving the child's changing needs). Rigby suggests a committee system for resolving custody disputes. The committee would include various professionals, including a special "friend" for the child. The committee would engage in discovery and focus on serving the child's changing needs. *Id.* at 1750. This is similar to the suggestion made in Gardner, *supra* note 17.

244. See Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 416-17 (1995).

245. See Woodhouse, *supra* note 66. Woodhouse argues that:

Families do not exist in a vacuum, but are embedded in their societies and deserve support because they are its only source of self renewal. Responsible parenting is something that we learn to do, in part, from our own parents and, in part, from the extended families, neighborhoods, religious, and political communities that shaped our parents' parenting and in which our own parenting is necessarily embedded. All these communities play an important role in modeling a collective concern for children and in fostering our capacities to care for our own, as well as for other people's children. They play a role as well in protecting our children from harm and in marking out the point at which parents' rights to privacy begin to intrude on the rights of children and on the compelling interests of the community in the welfare of all its children. . . . In order to avoid the high costs to society and the even higher costs to individual children, our social and political institutions must continue to play a positive and supportive role in creating family-friendly communities and in fostering the responsible parenting on which our children's lives depend. *Id.* at 420-21.

community in raising and safeguarding our children.²⁴⁶

Some societies have moved in this direction in helping families to solve problems. One interesting and useful example is the Family Group Conference developed in New Zealand for working with Maori families. In that process, extended family members are given extensive freedom to solve problems based upon complete disclosure of information surrounding the situation. Social workers and lawyers have found that families can generally rise to the occasion and arrive at solutions which would not have been available within the traditional governmental structure.²⁴⁷ Authorities in New Zealand soon learned that the process was useful for all their clients, not just the Maoris, and its use was incorporated into law.²⁴⁸ A similar problem-solving model, subsequently adopted in Australia for dealing with juvenile delinquency problems, has been imported to the United States.²⁴⁹ Several jurisdictions within the United States have implemented some form of the Family Group Conference process.²⁵⁰

We must set aside our rigid adherence to concepts of privacy and individualism in favor of a broader-based duty toward our children, adopting an "it takes a village" attitude; issues of rights, empowerment, and capacity need to yield to concerns about communication, connection, and resources. We might acknowledge that some people, particu-

246. See, e.g., HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* (1996). See also Woodhouse, *supra* note 66. Woodhouse states that:

I have argued that parental rights should be reconceptualized as flowing from parents' responsibilities, and that parenthood is not a form of ownership but rather of stewardship of children. I have suggested a scheme of children's "needs-based rights," conceptualized not as rights of autonomy but as rights to receive basic nurture and protection, not only from their parents but also from their communities, states, and nations.

Id. at 394-95. I echo this sentiment. We must further safeguard our children's needs by ensuring that the process we use to achieve that end does not injure them.

247. See *The New Zealand Papers*, *supra* note 217.

248. See generally CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT (1989).

249. See Mark S. Umbreit, Ph.D. & Susan L. Stacey, J.D., *Family Group Conferencing Comes to the U.S.: A Comparison with Victim-Offender Mediation*, 47 JUV. & FAM. CT. J. 29 (1996); see also, Judge F.W.M. McElrea, *Accountability in the Community: Taking Responsibility for Offending* (May 1995) (paper prepared for the Legal Research Foundation's Conference, Rethinking Criminal Justice: a Conference on New Initiatives in Criminal Justice) (on file with author), which reports on the use of the group conference model for delinquency cases in New Zealand.

250. Oregon uses various types of decision-making meetings, including the Family Unity Model, the New Zealand Model (Family Group Conference), the Roseburg Model (Family Resource Model), and the Mediation Model. See Salem/Woodburn CSD Family Meeting Study Group, *Commonly Asked Questions About Family Decision-Making Meetings* (on file with author). The Family Unity Project, one variation of the family decision-making model, has been conducting training for social service agencies throughout the United States. Discussion with Jim Nice, Family Unity Project (Oct. 1996).

larly the very young, may need to be treated with paternalistic/maternalistic care and concern.²⁵¹

This broad-based approach requires a cultural shift—the abandonment of a focus on “rights,” with its concomitant concerns about power, privilege, and rules. It imposes a collective responsibility for children on family, friends and the community.²⁵² It presents challenges to our traditional ways of relating to each other and our notion of personal responsibility. It also challenges us to develop new kinds of support for those without extended family and for parents afflicted with substance abuse and/or mental health problems, which prevent them from attending to their children’s needs.

4. THE SYSTEM SHOULD HELP THE FAMILY TO SOLVE PROBLEMS BY EMPOWERING THE FAMILY MEMBERS AND ENGAGING THEM IN THE PROCESS WITHOUT STIGMATIZING THEM

Parents involved in the child protection system or in custody disputes find themselves caught in a process where they are forced to become dependent upon professionals who claim to know more about their child’s needs than they do. For many families who are already disempowered by poverty or dysfunctional behavior, the adversarial system becomes one more disempowering experience. Children, in particular, are historically and developmentally disempowered, as reflected in the uneven approach to children’s participation and representation in the disputes which are so central to their welfare.²⁵³ The proposed system tries, as one of its central principles, to empower the family, including the children, by having them participate in the problem-solving process, and allowing them to engage with specially-trained professionals who have the knowledge, self-awareness,²⁵⁴ and commitment to deal with all family members in a respectful and empowering fashion.²⁵⁵

Those who experience a sense of control over the outcome of their problem are more likely to feel that the process has been fair.²⁵⁶

251. See Ellmann, *supra* note 26. Ellmann states that: “[I]t does not at all follow that the caring lawyer will refrain from paternalistic intervention when she believes that the very knowledge she has gained from her close engagement with her client demonstrates the need for action.” *Id.* at 2704.

252. See Woodhouse, *supra* note 28, at 1841.

253. See Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995).

254. Personal biases distort the way we view and work with others. The professionals who work with clients in best interests cases need to be aware of their own feelings and biases and “learn how to handle their reactions in a constructive way.” MALUCCIO, *supra* note 57, at 112.

255. See *id.* at 85-86 (emphasizing the need to shift from focus on family problems to enhancing family strengths and regarding parents as partners in the helping process).

256. See Poythress, *supra* note 34, at 361-62. The author describes a dichotomy between

Accordingly, requiring the family to fully engage in the process, including requiring the other participants to listen to what they have to say,²⁵⁷ should have the additional benefit of the process not merely being fair, but also being experienced as fair by the parties. This experience of fair treatment should result in a better chance for future cooperation,²⁵⁸ as well as secondary benefits of enhancing self-respect.

D. Work Involving the Best Interests of Children Should Be Considered a Separate Professional Field, Interdisciplinary in Nature, and Requiring Specialized Training for All Participating Professionals

To some degree, the social workers, attorneys, mental health professionals, and other specialists who spend the majority of their time working in child protection and/or family custody matters, have become specialists.²⁵⁹ The next step is for these professionals to become sufficiently educated in the interdisciplinary aspects of their work so they can function effectively in collaborative problem solving.²⁶⁰

litigation and alternative dispute resolution models, where traditional litigation is perceived by parties as the process which gives them most control, while it is not the process which provides the decision-maker with the most information. In fact, a party has far more control in a process which engages her and respects her voice. The combined values of shared control and complete sharing of information are reflected in the proposed process. *Id.*

257. Trained mediators understand the value of participants being heard. Professionals must be trained to listen. "A 'listener' recognizes that moral persuasion can best occur only after a person has been understood." Zwier, *supra* note 227, at 231 (footnote omitted).

258. See Thomas A. Bishop, *Outside the Adversary System: An ADR Overview*, FAM. ADVOC., Spring 1992, at 16. ("[B]ehavioral scientists and researchers [have found] that couples who determine their post-divorce judgment rights and obligations are more likely to follow them.").

259. See Haralambie & Glaser, *supra* note 185, at 74 (footnote omitted). ("Child advocacy, particularly as it relates to abused children, has emerged as a recognized specialty, with its own multidisciplinary professional organizations, periodic professional literature, ongoing professional conferences, and resource centers.").

260. See, e.g., Schepard, *supra* note 174, at 133. Schepard describes an interdisciplinary volunteer (Parent Education and Custody Effectiveness) effort by Hofstra University, lawyers, and mental health professionals, in cooperation with the New York court system, to help divorcing parents manage conflict for the benefit of their children. Schepard quotes Chief Judge Judith S. Kaye of the New York Court of Appeals:

Interdisciplinary efforts of this kind . . . , to my mind, promise us and offer us a splendid model for addressing the sort of social problems, new societal problems that are increasingly coming into our courts. Pervasive problems that reach far beyond simply litigation and deciding an isolated finite dispute between two private parties.

Id. at 133. Elkin describes the Los Angeles Conciliation Court from its inception as "a unique and pioneering interdisciplinary approach on the part of the law and the behavioral sciences to the contemporary social problem of family breakdown." Meyer Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, FAM. COORDINATOR, Jan. 1973, at 63.

1. ATTORNEYS AND JUDGES WHO WORK IN THESE AREAS
SHOULD HAVE DUAL DEGREES FOCUSING ON CHILDREN
AND FAMILIES

While the value of experience and a smattering of special courses goes some way in helping attorneys and judges deal with cases regarding the best interests of children, they are not enough. Perhaps it is reflective of the professional arrogance discussed above that leads us to think we can ply our trade in any subject, and upon any subject (e.g., child and family) without specialized training. To be effective advocates, lawyers must have more than a superficial understanding of the many dynamics which underlie these family issues.²⁶¹ Requiring a graduate degree in an area such as child development, social work, counseling, or family studies, would go a long way toward achieving the goal of a well-trained professional.

Judges should be selected from among these dually-trained professionals. The awful unpreparedness of the judiciary to handle these most difficult cases has been discussed time and again.²⁶² I have been amazed and dismayed to observe the reluctance of the bench to move toward a specialized system, be required to receive training from other professionals, or to self-impose in an institutionalized way their own

261. One of the major benefits of requiring that children's attorneys be specially trained is that attorneys will have particular competence to fulfill advocacy roles which are somewhat different than those ordinarily performed by attorneys for adult clients. They will have more knowledge to make objectively child-oriented decisions in cases of 'impaired' children.

Id. at 75. The removal of the adversarial process under my proposal does not diminish, but rather increases the need for specialized training for advocates. See Dennis P. Ichikawa, *An Argument on Behalf of Children*, 2 CHILD MALTREATMENT 202, 209 (1997) (mandatory training, including sociopsychological issues, should be a prerequisite to allowing attorneys to represent children).

262. See Mlyniec, *supra* note 73, at 1906-07 (footnote omitted) ("If statutes or court rules required judges to develop some expertise about children before they begin to decide cases, then the decision making in [these] types of cases might occur differently. Serious initial and in-service training should be required of all judges assigned to hear children's cases."); see also Christopher Allan Jeffreys, Note, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 HOFSTRA L. REV. 115 (1986) (discussing a "special judge" model in which "a behavioral psychologist judge would be appointed to hear custody cases with a legal judge in order to promote the psychological best interests of the child, and to compensate for the legal judge's inadequate psychological training"). *Id.* at 127 (footnote omitted). Jeffreys also discusses what he believes to be due process problems when delegating decision-making in such a system, and talks about another "behavioral panel" model which:

calls for child custody disputes to be resolved by panels dominated by trained behavioral specialists. These panels would be comprised of psychiatrists, psychologists, and members of the bar who have specialized in family law. Determinations made by this panel would be binding on a court and subject to limited review.

Id. at 128 (footnotes omitted).

training.²⁶³

2. ALL PROFESSIONALS ENGAGED IN THIS WORK SHOULD HAVE
INTERDISCIPLINARY TRAINING WHICH INCLUDES TRAINING
IN EFFECTIVE COLLABORATION

Many authors have noted the dire need for interdisciplinary training for judges, attorneys, social workers, and mental health professionals.²⁶⁴ This need was recognized by the federal government in 1988, when the National Center on Child Abuse and Neglect ("NCCAN") awarded grants for interdisciplinary training in academic institutions to prepare graduate students for work in this area. The similarity of issues arising in family custody cases warrants the same training requirements for professionals working in family courts.

The knowledge required by participating professionals covers a

263. I would acknowledge the efforts of some San Diego judges who have put great time, energy, and thought into creating a training program for juvenile dependency judges.

264. See Herring, *supra* note 76, at 922-23; Ratterman, *supra* note 82, at 21-22. Herring asserts that:

The importance of this interdisciplinary training cannot be overemphasized. The agency attorney must have a background in child welfare to be able to provide the counseling, support, and zealous advocacy required by the private model of legal representation. The attorney must speak the language of the social worker and must have the knowledge required to assist in developing and assessing the social worker's case plan. The attorney must know what services are effective and available in the particular community to help reunify a dysfunctional family. Only with this knowledge can the attorney identify cases where the social worker should currently be reaching a permanency decision, and then help her or him to make a timely decision.

This interdisciplinary training is necessary even to understand child abuse and neglect legislation. . . . To fully understand and implement this law in individual cases, the agency attorney must know why it is important for children to have a permanent home and when they need such a home. The attorney also must be aware of the damage that can be done to children by disrupting their previously permanent parental home, even if that home presents some risk to a child.

Training is also essential for the agency attorney to participate effectively in periodic social worker case conferences, which may include professionals from other relevant disciplines such as psychiatry, psychology, and medicine. The attorney must be able to operate beyond the role of a legal mechanic to get the social workers and other professionals to come to concrete case plan recommendations and to address permanency planning issues from the very beginning of the case. The training enables the agency attorney to realize that attendance and full participation at social work and multidisciplinary case conferences are vital.

Id. For excellent discussions of the need for interdisciplinary training and collaboration in child welfare work, see Lynn M. Akre, *Struggling With Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the "Best Interest of the Child" Standard*, 75 MARQ. L. REV. 628 (1992); George J. Alexander, *Big Mother: The State's Use of Mental Health Experts in Dependency Cases*, 24 PAC. L.J. 1465 (1993); Cervone & Mauro, *supra* note 25; and Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Sexual Abuse*, 23 FAM. L.Q. 451 (1989).

broad spectrum. It includes human behavior, intervention methods, family dynamics, child development, substance abuse and mental health issues, an understanding of the legal requirements for intervention and the process by which legal decisions are made,²⁶⁵ and effective collaboration skills.²⁶⁶

Some fear that this broad training would blur the distinctions between the professionals' roles and create the danger of overstepping professional boundaries.²⁶⁷ These concerns, rather than serving to block the needed training, should be addressed as part of the training. We have found in our own interdisciplinary training course that explicit discussion of professional roles must be accompanied by an examination of the specialized training, both didactic and practicum, of each profession. Law students have been very impressed by the number of clinical hours required of social work and psychology graduate students, particularly when compared to the minimal practicum training (often not required) provided in law school. Knowing the rigorous training that the other professionals have undergone, including a basic understanding of what that training consists of and what kinds of tasks the other professionals are specifically trained to perform, helps clarify roles. It also lays a foundation for mutual respect and collaboration which does not now exist. In turn, the hierarchical structure in child welfare and family law cases can be broken down, creating further opportunities for effective collaborative work and positive morale for participants.

Other areas which need to be included in interdisciplinary training for professionals are sensitivity to race, class, gender, and cultural issues.²⁶⁸ Schools of social work are generally quite aware of this need and include these topics in the required curriculum. Mental health professionals may or may not be trained to the extent required for this work. Certainly lawyers and judges are not.

265. See MALUCCIO, *supra* note 57, at 224. See generally CHILDREN CAN'T WAIT, *supra* note 71.

266. See MALUCCIO, *supra* note 57, at 207. ("Collaboration among different organizations, disciplines, and persons is highly regarded in the human services field, since it is a means of utilizing community resources efficiently and meeting client needs effectively.").

267. See Boyer, *supra* note 244. Boyer states that:

The effectiveness of participation by persons of different disciplines in the child placement process depends on their learning from one another. A workable child placement process will provide for a conscious, restrained, open and reviewable use by professional participants of knowledge acquired from a discipline not their own. The art of collaboration grows out of a recognition that borders do exist, even if they cannot always be sharply defined, and that under certain circumstances they may be crossed.

Id. at 410 (citing GOLDSTEIN ET AL., IN THE BEST INTEREST OF THE CHILD 54 (1986)).

268. See, e.g., Cervone & Mauro, *supra* note 25, at 1982-83.

E. *Teamwork and Consensus Building Should Be Emphasized*

Collaborative problem solving requires teamwork and consensus-building skills.²⁶⁹ As mentioned above, mutual respect is one requirement for effective teamwork; but, an ability to communicate between disciplines is also essential. The failure to recognize that members of a profession share a common language which is foreign to outsiders gives rise to misunderstandings and creates barriers to serving children and families. Interdisciplinary training is vital to achieving effective communication, allowing for dialogue and power sharing, diminishing hierarchical barriers to teamwork.²⁷⁰

A team is not effective if its members merely divide up the family issues according to discipline. True effectiveness comes from an interaction which produces a cumulative result—the work of the whole should be greater than the sum of its parts. For this to happen, professionals must feel confident enough in the underlying subject areas to question each other and require explanations for opinions, decisions, and actions which may not be obvious to them. Only in an atmosphere of mutual respect can this occur.²⁷¹ The existing hierarchical nature of practice prevents such collaboration. Instead, professionals defer to each other, with physicians receiving greatest deference, and social workers the least. Qualified professionals fail to challenge one another for fear of looking stupid (asking the “stupid” question), and avoidable mistakes are made. When professionals do challenge each other, they often do so in an adversarial manner that arouses defensive behavior and further inhibits teamwork.

At the same time, training must be provided to guard against the dangers of “group think”²⁷² and sequentiality, or “tracking,” which would be even more dangerous in this setting than in the traditional adversary system. As guardians of the process, lawyers in particular need to be trained to look out for these behaviors and to work with others in ensuring their recognition and avoidance.

Confidentiality issues will need to be reconceptualized in this work

269. See, e.g., MALUCCIO, *supra* note 57, at 213 (“collaboration is enhanced as service providers adopt a team approach, . . . pooling their resources and expertise to help a particular child or family.”); Cahn & Johnson, *supra* note 71, at 138-39 (asserting that interagency collaboration holds great promise for improved outcomes for children).

270. See Myers, *supra* note 8, at 260 (arguing that attorneys must share power with mental health professionals).

271. See Cervone & Mauro, *supra* note 25, at 1987.

272. “Group think” has been defined as “a mode of thinking that people engage in when they are deeply involved in a cohesive group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.” BREHM & KASSIN, *supra* note 210, at 505-06.

to be consistent with the new paradigm of nonadversarial problem solving. Information must be shared among the members of the problem-solving team, which most likely will include professionals, as well as lay people. The notion of child protection teams²⁷³ can be a starting point for this work, but the most significant change will be in the attitudes of responsibility and care imbued in all discussions.

F. *The Court and Its Role*

Our notions of what a court looks like and does must be adapted to accommodate the needs of families and children. As discussed earlier, "judges" would have specialized training for dealing with the issues raised in child protection and family law matters concerning the best interests of children. They should be specifically selected, based upon their experience and training, as well as their expressed commitment to this area of the law. The appointments should be permanent rather than rotated.²⁷⁴ Multidisciplinary panels of judges also would be appropriate (although not as essential as having judges with appropriate training), as well as a consultant panel of specialists to assist with particular concerns.

Because there are narrow, but significant, legal issues involved in best interests cases, the court's role must be clearly defined and understood. The place of the law in the overall process must not be allowed to determine the tenor of the process as is now the case. Thus, the court must be seen as the safeguard of process, but must also reinforce the family-centered, problem-solving approach in its rulings.²⁷⁵ The court must set the tone for the rest of the system—a fair process that includes sharing information and empowering participants. The court should be involved only where the problem cannot be resolved by less formal processes.²⁷⁶ Even then, the court process must not take on an adversarial tone, but rather one of expressing its affirmation or concern with what has occurred and keeping the process in motion. The court, itself,

273. See, e.g., CAL. WELF. & INST. CODE §§ 18961.5, 18965 (West Supp. 1997) (allowing members of multidisciplinary teams to cross confidentiality boundaries when working together toward a best interests result for a child). In practice, however, confidentiality and liability concerns about sharing information prevent free-flowing collaboration.

274. See HARDIN, *supra* note 79 (suggesting minimum 10-year commitment for presiding judge of juvenile court).

275. See Gary A. Weissman & Christine M. Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D.L. REV. 263, 266 (1985) (quoting Chief Justice Warren Burger) ("[C]ourts should resolve only what can't be resolved in some other way. . . . [W]e must consider whether the court system is the best way to resolve many of the matters now handled in the adversary system.").

276. But see Elkin, *supra* note 260, at 66 (arguing that court authority is important for providing external structure, particularly important for people in crisis).

might be in the form of an administrative law court, or in some other way different from the traditional adversarial arrangement expected in a court of law. The specialized training of the judges and other professionals participating in the process would provide a principled basis for eliminating most "rights" to appeal. Whatever appellate review is provided should also be done by a specialized panel and within extremely expedited time limits. All challenges would be reviewed using the abuse of discretion standard.

While some have been concerned about the potential for agency abuse in a legal process where the court defers to agency judgment,²⁷⁷ the proposed process would not incorporate such deference. Agency judgment may be appropriate in a situation where the agency can be said to have superior expertise in the area. Under this proposal, however, all professionals are specially trained in the field and may legitimately raise concerns. Further, family participants have a significant role in determining the right steps for them in correcting the situation. For this reason, disputes about the plans for the family should be handled by a group process and, where facilitation may be required, something like mediation. Only disputes about the process itself should go to the court. Such hearings would not require trials in the traditional sense, but only reports of the process to date and the expression of concerns regarding that process.²⁷⁸ Due process does not require a trial *de novo*. So as long as the group process operates fairly, providing notice and an opportunity to be heard to the parties, due process is met. The court, with its expertise as required above, should be able to decide the matter without a fact-finding hearing, unless the process employed by the group in delineating its concerns is itself in dispute.

At first glance, it might seem that one role for the court would be to decide upon disputed facts. Fact-finding, a term best suited for a court, or court-like, hearing, will occur in a different way in this process. Because the process will be dynamic and will revolve around family conferences where all information will be shared, one clear set of indisputable facts may not be produced. Rather, the entire array of facts, consistent and inconsistent, will be examined by the participants to

277. See, e.g., Boyer, *supra* note 244, at 401-02.

278. It is conceivable that one process question might be whether a participant was adequately "represented" by his or her advocate in the proceeding. Notions of traditional advocacy can be expected to contaminate the process until a new tradition has been established. Some alternative process, perhaps something like an ombudsman, should be created to examine these concerns. Advocacy in this system does not mean that the lawyer will argue for what the client wants; it does mean that the lawyer will ensure that the client's voice is heard and that the client has a fair "hearing" (using the term "hearing" here, in both a literal and a loose sense, as the process calls for family members to truly be heard, but in meetings or conferences rather than formal hearings).

determine what the next steps should be to help the children and their families. While a particular decision will necessarily be supported by some of the facts but not others, it could be said that certain facts are not "found," in the legal sense, but rather provide the basis for concern and action. Reliance upon such facts does not eliminate the inconsistent information from the group awareness or preclude it from future consideration; it merely represents a considered decision about what should be done now in light of current information.²⁷⁹ One significant advantage of the proposed process is its ability to allow inconsistent and contradictory information to be "held" by the group throughout the process. As discussed earlier, the law's need for categorization and finality in decision-making forces decisions to be made even when the information presented is not complete. Rather than discard information which does not conform to an initial course of action, the group would be able to return to that information as the context and dynamics of the situation unfold. This does not mean that patently untrue information will continue to be raised, but that where evidence does not clearly favor either side, such evidence will continue to be considered where appropriate as further decisions are made. As long as the group decision can be supported by the information available, the existence of contradictory information does not threaten group action which is not arbitrary or capricious. The only question for the court is whether the process used by the group in arriving at its decisions was fair—that is, whether the participants were allowed to voice their concerns and present relevant information, and whether the group's narrative explanation of its action demonstrates appropriate exercise of discretion.²⁸⁰

279. The process should require the group to document the considerations used in reaching its "decisions." This narrative, rather than having to support group actions by omitting contradictory evidence or making the supporting evidence appear more certain than it is, would include the real dialogue and uncertainties of the case and the reasons why the plan of action was selected. This kind of decision-making reflects reality rather than the imaginary black and white world of the law. It also lends itself to flexibility as matters develop. Further, it does not have the danger of being misused for related criminal proceedings.

280. The standard of review proposed here, arbitrary and capricious, is similar to reviews used for other administrative decisions. Assumedly, one of the advocates would bring the matter to the attention of the court if that advocate was unable to persuade the group of the need to reexamine its decision.

If resort to the juvenile court follows the full treatment of the issue in an administrative proceeding, where all parties have had notice and an opportunity to be heard in a setting affording due process protections, then the court has the benefit of a fully developed record to explain and support the agency's conclusions.

Boyer, *supra* note 244, at 420.

G. Role of Attorneys

1. PROTECTORS OF PROCESS

While attorneys may not be experts in determining the capacity of children or what is in a child's best interests, they are specially trained to attend to process, particularly, to ensuring that process is fair.²⁸¹ In the proposed system, lawyers would be available to all parties and appointed where necessary to ensure fairness. This would include the appointment of attorneys for all children.²⁸²

The attorneys' first job would be to set a tone of "care" for the process. Because people are so accustomed to lawyers playing the adversarial role and to courts being the arena where the win/lose game is played, attorneys will need to educate their clients about the nature of this system with its emphasis on problem solving and assisting families and children. Clients will need to learn that their attorneys will not conceal damaging information on their behalf or assist them in making an argument that is clearly contrary to the best interests of the child.²⁸³ Rather, the attorney will counsel the client to engage in the process and

281. See Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER* 25, *supra* note 39, where he discusses the appropriateness of reexamining the lawyer's role:

I think that the way in which most roles operate to restrict moral reasoning could be altered so as to make them less restrictive without impairing greatly the systems and the systemic justifications within which they are embedded and vindicated. Just as we can ask whether it is right that a certain role exist at all, so we can also ask whether it is right that the role continue to exist in its present form.

. . . The precise dimensions and specific features of the lawyer's role that are truly justifiable seem to me to be uncertain, even if there is a persuasive argument of some sort for some kind of role to structure the kind of moral deliberation that is to occur within it.

Id. at 36.

282. Some thought needs to be given to whether separate law offices should specialize in representing parents and children. While this separation and "specialization" appears to have some logic, or at least convenience, identifying a group of attorneys as "parents'" attorneys or "children's" attorneys may concretize positions and encourage adversarial behavior. The interdisciplinary training called for in this proposal should make each attorney qualified to represent both parents and children. One attorney who has represented both expressed her concern to me that attorneys who work in an office representing only parents or only children lose perspective about their roles.

283. See Zacharias, *supra* note 39. Zacharias states that:

Absolute confidentiality can enhance lawyer client relations. It often makes the client *feel* as if the lawyer is a true fiduciary, with loyalty to no one other than the client. It also avoids the unseemly situation in which a lawyer induces the client to be open and then informs on the client.

But these considerations alone do not justify the strictest of rules. . . . Arguably, client distrust will increase if the lawyer insists that she will always act in accord with the client's wishes. So long as the attorney informs the client at the outset of the relationship that she may feel compelled to disclose particular types of information, subsequent disclosures are not unseemly. The client may more readily accept her as an ally *within the defined boundaries*, both because the lawyer has

take whatever steps may be necessary to put the family into a workable situation. Of course, the client will not be prevented from speaking up on her own behalf where she disagrees with her lawyer's advice.²⁸⁴ In some situations, attorneys would participate in group meetings with their clients and ensure that the client's voice is being heard. Preferably, this would occur by empowering the client to speak for herself. Where the client is unable to do so, the lawyer can express the client's concerns.²⁸⁵

The role of counsel who represent the children is simplified in this process, since the elimination of the adversarial system also removes issues of competency, capacity and role conflict.²⁸⁶ In this process, all information is to be brought to the table. If a child has something to say, the child can say it and the group can evaluate for itself what kind of weight to give to the child's wishes.²⁸⁷ The lawyer will not be in the position to hide information which may be critical to the group in helping to resolve the family's problems. The child will have a voice in the

exhibited integrity and because the limitations on the alliance make the total package more believable.

Id. at 367-68 (footnote omitted). *Cf.* LANDSMAN, *supra* note 10. Landsman states that:

It has frequently been suggested that the attorney can serve his client and, at the same time, ensure that the truth is disclosed. This position fails to preserve attorney zeal and loyalty because it requires the attorney to act as an agent of the court whenever there is a potential conflict between his client's interests and the pursuit of material information. The likely results of casting the attorney in this impossible situation are unethical conduct if the lawyer chooses to act on behalf of his client in a doubtful case and substantial discouragement of client candor, cooperation, and trust if the lawyer chooses to act on behalf of the court.

Id. at 38-39.

284. Ensuring the client's active participation in the process, rather than mere representation by an attorney, mitigates the danger of inappropriate attorney influence on the client. *See* Boyer, *supra* note 29, at 1650 (cautioning that clients "handicapped by a dependence born of economic and social powerlessness and ignorance of judicial systems" are particularly subject to influence from attorneys). It also eliminates the ambiguity and arbitrariness of a system which would allow attorneys to follow their own moral instincts. *See* Zacharias, *supra* note 39, at 361.

285. As discussed earlier, there is some debate about the role a child should have in these proceedings. This debate might be somewhat quieted by a transformation of the process from an adversarial one, to a collaborative, problem-solving approach. *See, e.g.,* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996). Nevertheless, there will probably be times when, because of the child's developmental needs, it would be inappropriate for the child to participate in group meetings.

286. This process would not necessarily be inconsistent with the empowerment focus suggested by Katherine Hunt Federle, *supra* note 39, in that it does away with considerations of capacity and the potential for the child's voice to go unheard. The "coherent account of rights" called for by Federle, is probably far different from what I am suggesting, but not necessarily contradictory. *Id.* at 169. The child's "rights" to be safe and cared for are the focus of my proposal. However, by taking the process out of the adversarial system, the discussion is focused not on rights, but on the needs of the child and family.

287. Of course, the situation must be made safe for the child to speak. An underlying rule of the Family Group Conference is that the situation be safe for all participants. Interview with Jim Nice, Family Unity Project (Oct. 1996).

process, and not be dependent upon the lawyer's determination of the child's capacities. There will be other professionals participating in the process who will be better trained at assessing the child's maturity and needs. Thus, the child's voice will be considered in the context of the child's developmental issues. The child's lawyer would be responsible for ensuring that the child's voice and needs were being considered in the discussion.²⁸⁸ In this way, the role combines aspects of the guardian *ad litem* and the advocate. The attorney would be free, as a part of the team, to see the *whole* child, not just to hear the child's words. The team, including the attorney, would respect the child's views and values, but would not necessarily be compelled to abide by them if they do not believe them to be in the child's best interests.²⁸⁹

Another important process issue, and one usually harmed, rather than protected, by attorneys, is the need to keep the case active and moving, rather than stagnant or drifting.²⁹⁰ Delays could be avoided by advocating for the timely and effective provision of services to the parties. Further, since the lawyers are not involved in the adversarial process, delays for strategic purposes would be unnecessary. Rather, if an attorney believes that the client needs more time to achieve one of the family's goals, this issue can be discussed in the group and a decision can be made based upon all relevant information. At all times, the group would consider the child's need for timely resolution,²⁹¹ balanced against the desirability of maintaining important family connections. Advocating for and achieving meaningful visitation, discussed *supra*, would mitigate some of the difficulties of temporary separation.

2. INFORMATION GATHERING AND ASSESSMENT

While lawyers would not be the primary investigators in these

288. This role is consistent with the role suggested by Jean Koh Peters and includes helping to create other support mechanisms for the child. See Peters, *supra* note 43.

289. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *FORDHAM L. REV.* 1785, 1795 (1996) (favoring guardian *ad litem* role by opining that it is the guardian who is to act *in loco parentis*, not the judge).

290. See, e.g., Kelly & Ramsey, *supra* note 67, at 407, 447 (describing a study on the use of attorneys as guardians *ad litem* in North Carolina). The authors state:

Regrettably, the North Carolina study found that for the most part attorneys for children were not only ineffective [measured by the ability of the child's attorney to prevent removal of the child from the home and to facilitate the child's return to the home] but even tended to substantially delay a child's return home. An encouraging finding, however, was that those attorneys who spent more hours on their cases did expedite return.

Id. at 407. The longer the case was in the court system, the less likely the child was to be returned to her parents. *Id.* at 444.

291. See, e.g., Peters, *supra* note 43, at 1554 (stating that the lawyer must strive to see options from the child's perspective).

cases, their training in critically assessing information and their ability to attach more than one inference to a fact is essential to fairness in these matters.²⁹² As discussed earlier, the effects of the sequentiality, or "tracking" dynamic can be disastrous for a family. The lawyer's training in the role of devil's advocate can be very useful in ensuring that the group continues to look at all information presented to it in an objective manner. Though the attorney would not necessarily "press" for a particular inference or interpretation, the job is to ensure that all plausible inferences are considered.²⁹³

Because of their focus on process, another important role for lawyers is to protect against the misuse of information. Although the process is informal and "hearsay" evidence might be discussed, attorneys can remind the group of the importance of not over relying on information which may not be reliable or trustworthy. Attorneys can also elicit important information, through their critical thinking training, in the questioning of experts. Additionally, attorneys can monitor for biases among the professional participants or within the system.

Attorneys would not, however, be agents of deception or ruse. The process proposed calls for complete disclosure of information with the goal of achieving the best possible result for the child and family. Old notions of the zealous advocate as synonymous with the hired gun have no place in protecting the best interests of children. When counseling one's client does not succeed in eliciting the kind of forthcoming discussion of pertinent information required, the attorney herself must provide to the group whatever information is known that should be considered in solving the problem.²⁹⁴

292. The need for professionals to rely on facts, rather than merely impressions, is fundamental to fair process and is a role lawyers are well trained to handle. Cf. *CHILD WELFARE: CURRENT DILEMMAS, FUTURE DIRECTIONS* (Brenda G. McGowan & William Meezan eds., 1983) (discussing the need for increased formality in juvenile court proceedings as part of the need to rely upon facts).

293. See David R. Mandel et al., *Should This Child Be Removed from Home? Hypothesis Generation and Information Seeking as Predictors of Case Decisions*, 18 *CHILD ABUSE & NEGLECT* 1051 (1994).

294. See Schwartz, *supra* note 39. Schwartz states that:

Those rules [rules which might achieve "the correct result"] would require a lawyer to report to the court and opposing counsel the existence of relevant evidence or witnesses the lawyer does not intend to offer; prevent or, when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any material omissions; and question witnesses with purpose and design to elicit the whole truth.

Id. at 159. Schwartz's suggestions may appear to some to be outrageous in the context of adversarial litigation. The process proposed in this article occurs, for the most part, outside of the court. Those who cannot envision the role of the lawyer as an advocate apart from the traditional adversarial process will probably be equally outraged by the suggestion in this context.

3. ACTIVELY PARTICIPATE IN THE PROBLEM-SOLVING PROCESS

The attorneys, as guardians of process, would ensure that their clients are being heard, are counseled,²⁹⁵ and are treated fairly. As discussed above, the law's emphasis on fair process warrants this special role for lawyers. System abuses, which gave rise to legal interventions and case law setting forth due process requirements, usually arose in the absence of counsel for the parties. While appointing counsel may appear to be an expensive reaction to history's lessons, it does seem to be the only guarantee that bureaucratic forces will not overcome best intentions. If the proposed process works as a problem-solving and collaborative system,²⁹⁶ empowering families and reducing adversarialness between parties, the result may be that problems are handled more efficiently and rapidly, reducing the time that any family requires the attention of the system and compensating for the resource costs at the front end. While each professional brings a particular set of skills to the table, the group works together, collaborating toward solving the concerns which brought the family into the system.²⁹⁷

Perhaps the greatest service the lawyer can provide is to be an advocate. Being an advocate is not synonymous with being an adversary. In a family system, there are family members, not adversaries. The advocate in this process works with the client to make the system work as designed. Since this system is not designed to be adversarial, the attorney must not take on an adversarial role. Rather, the attorney will do the counseling, encouraging, etc., as mentioned above, and will actively participate in the process to ensure that the client is receiving the services necessary to resolve the problem. In the child protection

Kutak, *supra* note 40, discusses the uneasy balance between the need for confidentiality and public/moral concerns:

In a collective society where, at least in theory, the greater good is achieved by cooperative endeavor in pursuit of the common interest, a rule of full disclosure would logically prevail.

. . . Full disclosure leads to the discernment of truth; knowledge of truth permits justice to be done; and doing justice advances the common good.

Id. at 173. I would argue that the best interest of children is in the common interest, requiring full disclosure.

295. See, e.g., Margulies, *supra* note 11, at 1494 (stating that the lawyer's job is to enhance the competence of his client).

296. See Cervone & Mauro, *supra* note 25, at 1987 ("The representation of children is, or should be, an enterprise of collaboration.").

297. See Margulies, *supra* note 11. Margulies states that:

The better, more contextual approach to dealing with the problems of attorney arrogance identified by the restrictive view [of attorneys' roles] is to allow the lawyer to play a range of roles, including fact finder, mediator, and advocate, while offering both training and some substantive guidance to reduce the effect of invidious biases on the advocate.

Id. at 1501.

system, this means that the client is receiving counseling, substance abuse treatment, parenting courses, assistance with housing, or whatever other services the client needs, in a timely and appropriate fashion.²⁹⁸ It also means that the attorney is advocating for meaningful visitation between the parent and child. These service issues are the most important aspect of child protection cases which are on a reunification track.²⁹⁹ Failure to provide the services results in heartbreaking delays in reunification, and sometimes in termination of parental rights, because of loss of the parent-child bond. There is little else more important that an attorney can do than to advocate for these services.

In the family custody context, few jurisdictions provide services to families. The unfortunate result is that many children are deprived of a meaningful relationship with one parent because services are not available or affordable. As part of this recommendation, services would be available to all families participating in the system, whether there is a child protection issue or not. The building of strong family connections is well worth the investment, as numerous studies have demonstrated that children raised in single-parent homes suffer great disadvantages, including a higher risk for delinquent behavior.³⁰⁰ While the services may not result in an "intact" family, as it is traditionally viewed, they might result in a connected, but newly arranged, family which can still work together for the best interests of the children.

H. *Changes Which Must Occur*

A shift in paradigm and in its concrete implementation will require a number of changes at all levels of participation. Societal commitment to the best interests of children will have to be demonstrated, particularly in the area of resources. Traditional legal and bureaucratic systems will have to let go of old, ineffective ways of doing business. Professionals will be required to commit themselves to appropriate training in both substance and collaborative processes, and parents will have to give up self-interest based expectations in favor of looking at the needs of their children.

298. See Boyer, *supra* note 244, at 384 n.18. ("[L]itigation has proliferated charging agencies nationwide with a failure to provide minimal services for children and families enmeshed in the child welfare system."). Attorneys, as protectors of process, can help the system avoid mistakes which delay the case. See Herring, *supra* note 76.

299. See, e.g., Herring, *supra* note 108, at 200-01.

300. See, e.g., PARENTING OUR CHILDREN, *supra* note 1; NRC, *supra* note 57, at 225; TOWER, *supra* note 141, at 78, 104-5, 126; Kathleen M. Heide, *Why Kids Keep Killing: The Correlates, Causes and Challenges of Juvenile Homicide*, 7 STAN. L. & POL'Y REV. 43 (1996); Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1900 (1994); Linda J. Waite, *Social Science Finds: 'Marriage Matters,'* RESPONSIVE COMMUNITY, Summer 1996, at 26.

1. RESOURCES MUST BE PROVIDED

The system must be supported by resources for solving the problems which arise in consideration of the best interests of children. Professionals who work in these areas must be acknowledged and compensated for their expertise. In other words, society must put its money where its mouth is in regard to our concern about children and families.³⁰¹ We need to address poverty as an underlying cause of family problems.³⁰² Home visiting from birth should become routine. Family centers need to be created in communities so that parents and children can receive services on a voluntary basis without stigma. These centers would provide places for parent-child interaction, parenting classes, respite care, counseling, and other support.

Families involved in custody disputes should be eligible for such services, as well. Counseling, education, and support services are sorely needed by parents and children in times of conflict.³⁰³ The arbitrary distinction between which families receive help and which do not is foolish when examined according to the needs of children and the needs of society for healthy, functioning families and future adult citizens.

Preventive measures which might strengthen families must be

301. See Myers, *supra* note 8. Myers states that:

While the positive aspects of the legal response to abuse are important, the negative consequences of increased reliance on prosecution and the adversarial process often outweigh the benefits. The belief that the legal system can cope with child abuse is unfounded because reliance on the law ignores the deep social and psychological roots of abuse. The legal system has an important role to play, but the ultimate solution lies in a greater understanding of human behavior, a genuine societal commitment to programs aimed at prevention, education and economic equality, and a humane and therapeutically oriented approach to deviant behavior. The law is a blunt and punitive instrument, ill-suited to the achievement of such far-reaching social reorganization.

Id. at 179 (footnotes omitted).

302. See Federle, *supra* note 253, at 1603; Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1828 (1987) ("[O]nly when there is a national commitment to provide families with sufficient resources to ensure adequate child care can the least drastic alternative for needy children truly be achieved."); Myers, *supra* note 8, at 179 n.103 (stating that a therapeutic approach deals with the "stark relationship between poverty and maltreatment").

303. See WALLERSTEIN & KELLY, *supra* note 19, at 317. This need has been acknowledged in Oregon which created its Task Force on Family Law, charged with creating "a non-adversarial system for families undergoing divorce that provides the families with an opportunity to access appropriate services for the transition period." OREGON STATUS REPORT, *supra* note 78, at 1. The Vision created by the Task Force is:

Oregon families involved in divorce or related family conflicts are served by a comprehensive family law system that provides non-adversarial dispute resolution, counseling, education and related legal services. This system is staffed by highly skilled practitioners who acknowledge the importance of the family, understand family law, and strive to serve the best interests of all family members.

Id. at 4.

included as resource needs. A Task Force in Oregon issued a report listing a number of suggestions in this regard, including school curricula (conflict resolution, relationship management and family life skills), pre-marital education, family resource centers, and conflict management services.³⁰⁴

2. A SEPARATE CODE OF ETHICS FOR PROFESSIONALS PRACTICING IN THIS FIELD

This is probably the most controversial aspect of this proposal, though it is not necessarily a new idea.³⁰⁵ It requires professionals to share information and to consider the goal of their representation in a different manner.³⁰⁶ Competition and strategy would have no place in this process. Loyalty to children and families, rather than to a particular client, represents a huge deviation from the current ethics practice which leads us to absurd conclusions regarding the duties of advocates for children and parents. Attorneys practicing in best interests cases could not be held to the same standard of client loyalty, as it has been defined, while practicing within the proposed system.³⁰⁷ I would discard the

304. See OREGON STATUS REPORT, *supra* note 78.

305. See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (calling for a new code of ethics requiring lawyers to take personal responsibility for their actions); see also Aronson, *supra* note 49, at 148-49 (discussing the need for different rules of conduct for family law practitioners and citing the American Academy of Matrimonial Lawyers' *Bounds of Advocacy* standards).

306. All of the professionals involved in these cases have duties of confidentiality to their clients. Changes must be made in ethical standards to allow collaborative work for the welfare of children and families.

307. See, e.g., Ellmann, *supra* note 26:

[T]he ethic of care appears to authorize a significantly greater degree of intervention in client decisions than do the existing codes of ethics. Admittedly, the Code and the Rules do not offer a clear statement of the proper constraints on the manner and intensity with which lawyers should render this advice. Instead, they contain tantalizing hints: that the lawyer may press her point rather than merely stating it, that under some circumstances she may temporarily withhold relevant information to forestall what she deems an unwise reaction on her client's part, and that the lawyer-client relationship can become more a joint venture than a principal-agent relationship. Perhaps these add up to a suggestion that lawyers are authorized to design their counseling so as to make distinct inroads into client autonomy, even in the framework of the existing rules of ethics.

Id. at 2709-10 (footnotes omitted). Ellmann concludes that the above described behavior may be permitted within the existing codes and rules, but is inconsistent with the "ethos of autonomy that is so prominent in the Model Code" and the rules. He acknowledges that the standard for practice left open to such discretion would be subject to "unjustifiable breaches of human liberty," and that the ethic of care should not replace the right of client self-determination, but merely guide it. *Id.* at 2710-11. Ellmann's conclusion leaves the situation ambiguous and undefined, providing no clear standard for attorneys working in best interests cases. Without a complete "revisioning" of these cases and the process for resolving them, it is difficult to break away from values which are vital to the adversarial process. I also believe Ellmann assumes a counseling aptitude and skill on

ABA Standards for a completely new set of ethics for this group of professionals.

a. Zealous Advocacy and Confidentiality

Zealous advocacy must take on a very new meaning for attorneys, not merely a modified version which calls for protection against its extremes.³⁰⁸ In this context, it would mean guarding fairness in the process, ensuring that the client is heard, and working to make sure the client receives necessary services for appropriate strengthening of family connections.

Confidentiality rules for all the professionals would give way to the needs of the family. This process is about relationships, responsibilities and connections. There is no constitutional right to a confidential relationship with any of these professionals. A process based upon the best interests of the child must be more successful in reaching that result than a process which is based on competition and adversarialness. Lawyers must become part of the solution rather than continue to be identified as a major part of the problem.³⁰⁹

b. Practice in This Field by All Professionals Is Limited to Those Who Are Specially Trained and Certified

Matters dealing with the best interests of children would be the work of a special "profession" which includes judges, lawyers, social workers, mental health providers, physicians, and others. A special license or certificate should be required to enter this field. Family and juvenile court judges would need to be appointed on the merit of their interest, training and experience in these areas and their commitment to ongoing training, since knowledge in the field is in flux.

the part of attorneys which is neither inherent, nor part of lawyer training. Exercising such control over clients may be damaging in the long run to client welfare and seems to be manipulative behavior in the guise of "caring."

308. See *id.* at 2724. Ellmann would have the rules state that there are exceptions to complete client loyalty and require ethical consultation in difficult cases. *Id.* This does not go far enough; the paradigm for the lawyer's role must be changed. See Zacharias, *supra* note 39, at 373-74 ("Empowering [lawyers] to exercise and express moral judgments might bring lawyers and clients closer to recognizing that zealous legal representation does not necessarily mean pulling out all the stops in every case.") (citing Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1046 (1982) ("the traditional system encourages the lawyer to pursue his client's supposed interests to the limit . . . without taking responsibility for the results.")).

309. "The image of the co-conspiratorial lawyer helps explain why society considers the profession unsavory. . . . Clients and observers of the legal profession naturally come to look upon lawyers as 'dissemblers, distorters who subordinate truth to winning, and as technicians who answer to but one command, that of their client.'" Zacharias, *supra* note 39, at 375 (citing Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEGAL PROF. 5, 19 (1980)).

3. CHANGES IN SUBSTANTIVE LAW

The purpose of this article is to suggest a major change in the process used for determining the best interests of children. The transformation called for will require a substantial shift in attitudes and behaviors, particularly among attorneys. Some changes in substantive law will be required to accommodate this proposal. Other changes, specifically directed at the assumptions we use in determining what is in the best interests of children, are not considered here.

a. Child Protection

The transformation would require a change in procedure and might require some modification of the federal and state laws to provide more flexibility in meeting time limits to avoid the all or nothing dilemma against which the clock currently runs. Especially if family centers can be established, allowing parents and children to remain in meaningful relationship, although living separately, more flexibility would be appropriate in making long-term choices for children.³¹⁰ I am not suggesting that we should return to the pre-permanency planning days of foster care "drift," but rather that each of our decisions should be made with the child's need for permanency, stability, and connection to family in mind, with the child's best interests being our predominant concern. Existing laws which prevent us from protecting those best interests should be changed.³¹¹

b. Family Court

Others have described how changes in substantive law, arrived at through the legislative process or indirectly through alternative dispute resolution,³¹² have resulted in injustices to women and children. The

310. Martin Guggenheim has expressed concern that the current federal mandate for permanency planning requires termination of parental rights in situations where children might benefit from ongoing relationships with their parents. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995); see also Federle, *supra* note 150, at 1564-65 (asserting the need to focus efforts on ways to support the shared interests of children and parents).

311. See, for example, *Court Orders Girl, 2 1/2, Back to Her Mother*, SAN DIEGO UNION-TRIBUNE, Sept. 9, 1996, at A-3, in which the superior court held that the:

[Law] does not . . . allow for any consideration of the best interests of the child but simply directs return of the child to the birth parent.

While we recognize, and deeply regret, the havoc that will be wreaked upon the life of a 2½-year-old child as a result of this decision, the directive of [the law] must be followed.

Id. (citing Judge J. Anthony Kline, of the Contra Costa County Superior Court in *Adoption of Haley A.*, 56 Cal. Rptr. 2d 505, 519-20 (Cal. Ct. App. 1996)).

312. See, e.g., Fineman, *supra* note 21.

best intentions often wreak such havoc when generalizations, stereotypes, categorizations, and legal presumptions must be applied to individual family situations. The proposed process calls for far greater attention to individual family needs. The question remains whether the collective wisdom of the trained professionals, working in conjunction with the family, can be relied upon to achieve the best interests of children. It may be that some presumptions about appropriate custody arrangements are still required as guidelines,³¹³ yet the inability of any guidelines to address the individual needs of each family spells danger in the hands of the untrained, the rushed, and the overburdened of any system. Furthermore, policies devised with the best intentions often have unintended consequences.³¹⁴

c. Combine Courts So That All Family Matters Are Consolidated in a Court of Expertise

The idea of true "family courts" with combined jurisdiction for all best interests cases has been explored and is in practice in some

313. See, e.g., Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223 (1994). The authors report on two studies comparing mediated agreements with negotiated settlements and judicially-assisted cases, one from New York and the other from Georgia. The well-being outcomes for women and children in Georgia seemed to indicate that state support guidelines protected women whose custody arrangements broke down, so that the dispute resolution method used did not affect them. In addition, the authors felt "it . . . significant that the vast majority of mediators in Georgia are lawyers, whereas in New York (and elsewhere) they are most often mental health professionals or members of the clergy." *Id.* at 245. This might indicate that safeguards in statutory law, known to the professionals who will assist the family in resolving its dispute, can be helpful. See also Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1160-62 (1988) (stating that private ordering may not be appropriate in support and custody matters and that some constraints on the negotiation process are necessary). Some recommendations for change may be so abstract that they do not provide guidance in concrete decision-making. Perhaps suggestions regarding an ethic of care, a child-centered focus, or the passage below lack such guidance:

From a politics-of-meaning perspective, I would want our substantive body of family law to support a moral vision of commitment, trust, responsibility, and nurturing, while at the same time providing for the autonomy and justice needs of those involved in separating from committed relationships. This means both economic justice and a justice of dignity. For this to be realized, we must have a political community committed to these goals and able to translate them into a legislative agenda.

Schorr, *supra* note 9, at 37. These concepts provide little to direct decision-makers who do not embody the values expressed above. I concur with Schorr who suggests that "we need judges who are capable of understanding the full depth of the competing claims they are faced with, and thus, we need human beings in the judicial role who are capable of experiencing, both affectively and cognitively, the impact of their decision on others." *Id.*

314. See Solove, *supra* note 38, at 799 ("[A]n unintended impact of the no-fault [divorce] system may be a perceived shift in the policy of the states regarding the desirability of the maintenance of intact families.").

states.³¹⁵ The current, fragmented, "patchwork"³¹⁶ system is unable to be a full-service provider and is forced to categorize and compartmentalize pervasive family problems.³¹⁷ This apparently illogical situation is due in part to the law's need for categorizing rights and duties. It also reflects the complicated federal structure for reimbursing states and counties for services to families who have abused or neglected, or are at risk for abusing or neglecting, their children. Changing to a unified family court would not achieve the desired end without changing the reimbursement structure to allow services to be provided for other family needs.³¹⁸

A unified court, focused on the needs of families and children, could also be expected to create an atmosphere more friendly to families and conducive to problem solving.³¹⁹ Perhaps they need to be primarily places for people to hold meetings³²⁰ and to provide some commonly needed services, such as parent education. This would require a dramatic change of function and form.

315. Though a need clearly exists for more funding and space, the Family Court of Delaware has gained jurisdiction "over all cases involving children and relating to family life." To meet statutory qualifications, a judge of the Family Court must demonstrate "an interest in and understanding of family and child problems." Morales, *supra* note 79, at 14 (citation omitted).

Oregon has "[e]nlarged the jurisdiction of family court to include all relationship disputes involving children and emotional dynamics that resemble and include those in a marriage." OREGON STATUS REPORT, *supra* note 78, at 9. This does not go as far as needed to bring all best interests cases into the same court. The Task Force acknowledged that these proceedings should be coordinated. *Id.*

316. Solove, *supra* note 38, at 804.

317. See Woodhouse, *supra* note 66. Woodhouse states that:

The statutory and court systems which are implicated in state intervention in the family are extremely complex. They are marked by overlapping rules of local, state and federal law and involve many different kinds of courts that attempt to address everything from domestic relations custody issues, to adoption, to emergency protection from abuse orders. One family may be involved in simultaneous cases before a domestic relations court, a dependency court, a special court dealing with domestic violence, and a criminal court, all arising out of a single incident. In addition, each forum is applying its own specialized branch of law to the specific aspect of the family's problem that is properly before it. Due to shortages of funds for computerization and coordination of local court systems, these various judges may not even know that they are entering overlapping or inconsistent orders in the case.

Id. at 407 (citations omitted).

318. While recent welfare reform measures may give more flexibility to states and local governments regarding provision of services, funding will continue to be inadequate to accomplish this result.

319. See Judge Lindsay G. Arthur, *Tomorrow's Choices*, 47 JUV. & FAM. CT. J. 39 (1996) (arguing that a single judicial team should handle the problems of a family).

320. Family Group Meetings are held in an informal, neutral and comfortable setting where refreshments can be served to provide the family with adequate time to do the necessary work. Discussion with James Nice, Family Unity Project (Oct. 1996).

VII. CONCLUSION

The current adversary system, built upon a paradigm emphasizing competition, rights, and the individual, must be supplanted by a new paradigm which reflects an attitude of care and shared responsibility toward families and children. More than ten years ago, Myers proposed a change in the criminal prosecution of child abuse cases voicing the same concerns expressed in this article, and a hope that change is possible.

The time is right to offer alternatives to the current response to abuse, alternatives which hold greater promise of bringing to fruition the goal of protecting children. It is said that "nothing endures but change," [citing Heraclitus] and with the welfare of countless children at stake, the inadequacies of the legal approach to abuse provide compelling incentives to suggest changes which will enhance the ability to prevent the "nightmare" of child abuse.³²¹

This change has not occurred, but, hopefully, the call for change is more palatable to those responsible for protecting the best interests of children outside of the criminal justice system.

One result of taking the adversarialness out of the problem solving mechanisms used in best interests cases may be an equalizing of socio-economic classes. Those who traditionally have had little voice in the systems would be on par with those who have benefitted from legal representation. All parties would be heard in the group process. All would be assisted by advocates. All advocates would be appropriately trained in the subjects which are relevant to best interests work. The universal application of the system to any family with protection or custody issues could serve to remove the stigma associated with government intervention or receiving services for family problems.

I do not pretend, nor hope to have, the final answers to the present dilemma. It is well known that reformers usually create new problems from their "good ideas."³²² Yet, the current system is so illogical and so damaging to children and families, that I believe we must have a new vision.

321. Myers, *supra* note 8, at 269 (footnote omitted).

322. See Garrison, *supra* note 302, at 1827. ("Each generation of reformers . . . tries anew to effect improvements. Some of these ideas work, but seldom do they work as well as their proponents had hoped or promised. Often the 'solutions' cause new problems, creating the need for new reforms").