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# CHILDREN'S RIGHTS AND LEGAL REPRESENTATION — THE PROPER ROLES OF CHILDREN, PARENTS, AND ATTORNEYS

JONATHAN O. HAFEN\*

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.<sup>1</sup>

## I. INTRODUCTION

The 1992 presidential election and the recent Florida case *In re Gregory K.* have brought the issue of children independently exercising their "rights" to the forefront of family law debate among legal academia and the general public. Hillary Rodham Clinton, wife of President Bill Clinton, has urged in the past that the traditional presumption of a child's incapacity to make legally binding decisions be reversed in certain circumstances in order to allow the child to have greater control over decisions affecting his or her future.<sup>2</sup> *In re Gregory K.*, factually a relatively routine parental rights termination case, gained potentially historic proportions when the child hired his own attorney and affirmatively sought to terminate the parental rights of his natural parents. In that case, *amicus curiae* for Gregory K. encouraged the court to reverse the presumption of a child's legal incapacity in order to allow Gregory K. and other children to sue on their own behalf. *In re Gregory K.*, for purposes of this article, is significant not on its own facts, but

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1. *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979).

2. Hillary Clinton's views are discussed more fully below. See *infra* notes 26-46 and accompanying text.

because of what it portends for attorneys representing children.

In cases where the outcome of a legal proceeding significantly affects a child's life, the child's interests are represented in a variety of fashions.<sup>3</sup> Because children by nature generally lack the capacity to make decisions based on their own long-term best interests, and because state laws reflect that fact,<sup>4</sup> someone else often must make decisions on behalf of a child which will be, in the view of the decisionmaker, in that particular child's best interests. That role has traditionally been the parents' right and obligation.<sup>5</sup> However, where the parents

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3. Although historically such a statement would be disputed, today courts almost universally recognize that a child's interests must be represented in legal proceedings significantly affecting the child's future. Where the interests of the child do not conflict with those of the parents, often the interests of the child are implicitly represented by the parents. Where the parents' interests may conflict with the best interests of the child, courts appoint a guardian ad litem or other individual to speak on behalf of the child. For a discussion on the types of proceedings in which a minor may have the right to counsel, see James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 570-83 (1976); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 76 n.2 (1984). See also N.Y. FAM. CT. LAW § 249 (McKinney 1983) (right to counsel in abuse and delinquency proceedings); OHIO REV. CODE ANN. § 2151.352 (Page 1976) (right to counsel in abuse and delinquency proceedings); *In re Gault*, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency proceedings); Guggenheim, *supra*, at n.170 (citing statutes of 28 states mandating appointment of counsel in child-custody proceedings). Note, however, that not all commentators agree that children themselves should have the right to counsel. Some argue that in many instances it is sufficient that the child's interests are adequately represented. See, e.g., Guggenheim, *supra*, at 91 n.68 (parental privacy and autonomy rights cut against a child's unimpeded right to counsel and should be taken into account when deciding whether to appoint counsel for the child in divorce-custody, abuse and neglect, and termination of parental rights cases).

4. See Michael A. Olivas, *Commentary: 'Breaking the Law' on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 826 (1991) ("most civil and criminal codes presume children are incapable of making legal judgments on their own.").

5. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality opinion) ("[T]here is a presumption, strong but rebuttable, that parents are the appropriate decisionmaker for their infants."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (indicating that the parents' role is to provide custody, care, and nurture for their child); see also JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 7 (1979) (children under age eighteen often incapable of making decisions based on their own best interests; parents most suited to making such decisions on their child's behalf); Lois A. Weithorn, *Children's Capacities for Participation in Treatment Decision-Making*, in *EMERGING ISSUES IN CHILD PSYCHIATRY AND THE*

forfeit that right through abuse, neglect or abandonment of the child, or where a conflict of interest exists between the parents and the child, the role of speaking for the child then traditionally has gone to a guardian ad litem, who may be an attorney.<sup>6</sup> Whether or not the child is a party to the action, or whether a guardian ad litem has been appointed, the court may also choose to appoint an attorney to advocate the child's best interests.<sup>7</sup> Often, courts rely heavily on the advice provided by these attorneys in making decisions which significantly affect the child's future.<sup>8</sup> In addition, today, more than ever before, children of different ages and maturity levels are bypassing these traditional mechanisms of vicarious representation and going straight to an attorney seeking legal representation of what the child perceives to be in his or her own best interests. Thus, the importance of the attorney's role in litigation involving children is readily apparent. Moreover, in each of these situations, the attorney usually possesses significant control over the scope and course of the representation due to the child's legal incapacity and consequent minority status and due to the child's natural inability to control the course of the litigation. The attorney often must decide whether to follow the instructions of a child who may not be mature enough to adequately ascertain his or her own long-term best interests or whether to disregard the wishes of a client, albeit a child. Even where the

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LAW 22 (1985) (parents typically make decisions which are in the best interests of their child); Robyn Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 683 & n.14 (1987) ("The normal presumption is that parents will function as substitute decisionmakers for their minor children.").

6. The guardian ad litem, as a neutral factfinder, then presents his or her views on the best interests of the child to the court. The court, in consultation with the guardian ad litem, then decides what is in the best interests of the child and takes that into consideration in making the decisions relevant to the particular proceeding. See generally Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16 (1976). See also *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (guardian ad litem has the right to direct the litigation involving the child).

7. This most often occurs in situations such as divorce proceedings where custody of the child is in dispute or where the parental rights of the child's parents may be terminated.

8. See Guggenheim, *supra* note 3, at 102 ("Instead of making its own judgments, the factfinder soon comes to rely on the judgment of the attorneys. Instead of independently examining the facts and the law [on what is in the child's 'best interests'], the factfinder asks only what the lawyers think."). This often occurs because the amorphous "best interests" standard, which most states require judges to apply in making such decisions, provides little concrete guidance. See generally Christian R. Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417, 419 (1991).

attorney chooses to disregard the instructions of the child, the attorney must then determine what course to pursue. This is what some have called the "child advocacy dilemma."<sup>9</sup> Attorneys currently attempt to resolve this dilemma in different ways. For some, the goal of the litigation is to achieve what the attorney thinks would be in that particular child's best interests, given that child's culture and background. Other attorneys select as their goal what they believe is in the best interests of children generally. In the second instance, the child may merely serve as a means for the attorney to pursue a "greater cause," allowing the cause to become the client. Currently, ethical guidelines do not expressly prohibit such behavior.

These broad powers possessed by attorneys representing children indicate that there is currently insufficient legislative or judicial guidance defining the proper role of the attorney, the child, and the child's parents where the child, directly or indirectly, participates in litigation which may significantly affect the child's future. Furthermore, the Model Rules of Professional Conduct likewise fail to provide an ethical compass to guide the attorney of a child-client. As legal and public policy-makers discuss possible standards for legal representation of children, they must address two important issues. First, who is in the best position to make the hard decisions children face: the parents, the child, the state, the attorney representing the child, or some combination? Second, assuming that the attorney is the one responsible for acting on behalf of the child, what ethical standards control the conduct of that attorney in light of the sometimes competing interests of the parents, the child and even the attorney?

This article contends that attorneys representing children currently have insufficient guidance or, in some cases, experience to answer these questions themselves. Therefore, the Model Rules of Professional Conduct, as the best vehicle for

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9. See, e.g., Robert H. Mnookin, *The Paradox of Child Advocacy*, in *IN THE BEST INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 43, 50-51 (Robert H. Mnookin ed., 1985) (discussing this dilemma); Martha L. Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1889 (1987) ("The adult who offers the child's view, unmediated, may advance an irrational or misguided position; the adult who supplies a preference other than the child's has no obvious tether and lands in the thicket of general uncertainty over what is good for the child."). Furthermore, this unfettered discretion is generally not reviewable. See Lyon, *supra* note 5, at 689 ("The lack of any check on such arbitrary decisionmaking by children's attorneys injects a degree of arbitrariness into the judicial paradigm. Moreover, decisions made by the attorney, unlike those made by a court, generally are not subject to appellate review.").

defining the attorney-client relationship, should be revised to provide specific directions to attorneys representing children. This article asserts that these modifications should reflect certain well-recognized principles in family and juvenile court law, such as that deserving parents are uniquely qualified, and have the constitutional right, to make decisions on behalf of their minor child, especially where the child is involved in litigation. This parental right must be preserved unless forfeited through certain conflicts of interest or in instances where all parental rights could lawfully be terminated due to abuse, abandonment, or neglect. By establishing standards ensuring participation of deserving parents in the decisionmaking process of the attorney representing the child, the legal profession will preserve an important parental right, protect society's interest in familial stability, and provide for the long-term best interests of the child. Attorneys will likewise benefit from such guidelines because the child advocacy dilemma will be, to some extent, resolved.

Section II of this article analyzes the concept of "children's rights." In section III, the article focuses on problems arising from attorneys representing children. Section IV discusses the insufficient guidance which the Model Rules of Professional Conduct currently provide attorneys representing children and proposes an amendment to the Model Rules to remedy this situation. Section V includes some final comments.

## II. WHO SHOULD BE RESPONSIBLE FOR CHILDREN INVOLVED IN LITIGATION?

Generally, states must refrain from invoking jurisdiction over intra-family disputes.<sup>10</sup> However, certain exceptions apply, such as in cases of parental misconduct, where, for example, the child has been a victim of abuse or neglect.<sup>11</sup> In addition, states are allowed to intervene in instances of family reorganization where custody disputes or foster care issues arise. States also may be required to hear cases in which a child has been charged with delinquency or criminal misconduct. Finally, state involvement may be necessary where a child seeks to exercise a previously unrecognized right of preference. This

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10. See Guggenheim, *supra* note 3, at 109 ("The right of the family to be free from significant state interference is fundamental in American jurisprudence.") (citing cases).

11. Van Duesen, *supra* note 8, at 419 ("In the juvenile court system, not only do courts require a finding that a parent is 'unfit' before intervening, that finding must be by clear and convincing evidence.").

final category includes the scenario in which a child attempts independently of his or her parents to invoke a court's jurisdiction to pursue a "right" unrelated to unlawful conduct by the child's parents. Important legal questions not yet resolved include whether a child's legal incapacity prevents such unilateral actions, and, if so, whether a reversal of the presumption of incapacity would be a wise course to pursue.

#### A. *The Issues Raised By In re Gregory K.*

One now well-known case which some have called a "landmark" decision is *In re Gregory K.* In this case, an eleven year-old boy sought the right to unilaterally terminate the parental rights of his natural parents so that he could be adopted by his foster parents. The court ultimately determined that Gregory had standing to bring suit in his own name and subsequently ruled in Gregory's favor.<sup>12</sup> This case is important because of its potential impact on a child's right to seek state intervention into familial relationships by suing in his or her own name, rather than through parents or a guardian ad litem as is currently required.<sup>13</sup> Although children currently do not widely possess such a right, there is some concern that if they do, children and their attorneys may attempt to use the judicial system as a means to either compel parents to raise their children in a manner which gives greater deference to the child's autonomy or to escape poverty by "shopping" for a more affluent family. Such issues did arise, peripherally, in the *Gregory K.* case. By way of a defense, Rachel K., the boy's natural mother, asserted her belief that the real reason that Gregory was seeking the termination of her parental rights was not because she had abandoned him, but because he would have a more comfortable lifestyle and greater opportunities with his foster family.<sup>14</sup> This assertion touched off a bitter debate over the rights

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12. *In re Gregory K.*, Case No. 92-839-CA-01 (5th Cir. Fla. 1992).

13. In fact, since the *Gregory K.* case was handed down, several other children have tried to bring similar suits, with mixed success. See, e.g., *Another 12-Year-Old Seeks to "Divorce" Parents*, CHI. TRIB., Sept. 29, 1992, § 1, at 10 (discussing the case of a 12-year-old Mississippi boy who now is seeking termination of his natural parents' parental rights); *From Chattel to Full Citizens*, NEWSWEEK, Sept. 21, 1992, at 88 [hereinafter *Chattel to Citizens*] (discussing the case of a 16-year-old who sued her father for \$142 a month support after the father locked her out of the house for failing to take a drug-related psychiatric evaluation).

14. Rachel K. made the following statement to the press:

[H]is brothers go swimming at the public pool and he goes swimming at the country club. . . . Which would you rather do if you were 11 years-old? You'd want the same things if you were a little

of children to unilaterally improve their lives through litigation against their parents. As a result of this debate, several other cases have come to light which present the issue of a child suing over lifestyle choices — without a finding of parental unfitness — in a much clearer way than the *Gregory K* case.<sup>15</sup> An example of such a case is *In re Snyder*.

In *In re Snyder*,<sup>16</sup> a fifteen-year-old child successfully sought to have a court declare her “incorrigible” and remove her from her family following disputes with her parents over her friends, her dating, and her desire to smoke.<sup>17</sup> Remarkable here is the fact that the court also found that the parents had not abused, abandoned or neglected their daughter. From all appearances in the briefs and the opinions, the parents were “fit” to raise their child. In fact, evidence in the record suggested that

[e]mployees of the juvenile court and the Department of Social and Health Services advised [the child] not to return home, encouraged her to file the dependency petitions, and failed to provide counseling for her or urge her to attempt a reconciliation with her parents.<sup>18</sup>

Nevertheless, the Supreme Court of Washington, citing “hostilities” between the parents and the child due to the parents being “strict disciplinarians,”<sup>19</sup> upheld the finding of the trial judge that it would be in the “best interests” of the child to

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kid and had gone from being poor to having Nintendo and a little water bed of your own. I wasn't even able to buy my kids a bike, and in a child's world those are big things.

*Boy Sues to “Divorce” Parents*, N.Y. TIMES, July 8, 1992, at A11 [hereinafter *Boy Sues*].

15. The evidence introduced at trial suggested that Gregory had, in fact, been abandoned by his natural mother. The trial court expressly found that to be the case. For this reason, *In re Gregory K.* will not likely become widely recognized precedent for the proposition that children can sue their parents over lifestyle choices in the absence of a finding of parental unfitness.

16. 532 P.2d 278 (Wash. 1975); see also Comment, *Status Offenses and the Status of Children's Rights: Do Children Have the Legal Right to Be Incorrigible?*, 1976 B.Y.U. L. REV. 659 (discussing implications of *In re Snyder*).

17. 532 P.2d at 279.

18. These allegations were presented by affidavit in the original complaint and quoted by the Court of Appeals when it reviewed and affirmed a lower court dismissal of the parents' claim of tortious interference with family relationships, which the parents filed following the original decision. See Superior Court for King County, Case No. 777930 (1976) (dismissing claim of tortious interference with family relationships); *Snyder v. State*, 577 P.2d 160 (Wash. App. 1976) (affirming dismissal and ruling that “no injustice has been done”).

19. 532 P.2d at 279.



remove her from her home. And it did so, "irrespective of the natural emotions in cases of this nature."<sup>20</sup>

The Supreme Court of Washington also found that in disputes between parents and children that give rise to suits of this kind, "the issue of who is actually responsible for the breakdown of the parent-child relationship is irrelevant."<sup>21</sup> Such a case provides troublesome precedent for courts which may now take up similar issues as an increasing number of children seek to sue in their own name on such matters. It indicates that despite the best efforts of parents to raise their child, their parental rights may be terminated by the child even where there is no finding of parental unfitness.<sup>22</sup>

Another case receiving widespread public attention in the wake of *In re Gregory K.* is *In re A.W.*<sup>23</sup> This case, much more so than *In re Gregory K.*, calls into question the wisdom of allowing children to independently hire and direct their own attorneys.

*In re A.W.* is the case of a thirteen-year-old Chicago girl who had been sexually abused by her stepfather since she was three. Following years of this sexual abuse, the girl's stepfather was convicted of sexually assaulting her. He was released after serving four years of his sentence for that crime. Following her stepfather's release from prison, the girl, currently in foster care because her mother was determined to be an unfit parent, sought permission from the juvenile court to resume overnight, unsupervised visits with her mother and stepfather. The girl's court-appointed guardian ad litem refused to advocate this

20. *Id.* at 281. For some, such emotions may well dictate that in the absence of a finding of abuse, abandonment, neglect, or other evidence of parental unfitness, courts should be loathe to interfere in intra-family disputes over lifestyle issues.

21. *Id.*

22. This despite the fact that state law generally mandates that "[t]he termination of parental rights is an extreme action, justified only upon clear and convincing evidence of [parental] unfitness . . ." *Davis v. Bughdadi*, 458 N.E.2d 177, 181 (Ill. App. 1983); *see also, In re Syck*, 562 N.E.2d 174, 183 (Ill. 1990) ("Precisely because of the devastating effect produced by termination of parental rights, the evidence of a parent's unfitness has to be clear and convincing."); *In re R.L.M., Jr.*, 807 P.2d 161 (Kan. 1991) (same and citing KAN. STAT. ANN. § 38-1583(a), which mandates this standard); *In re Steven T.*, 393 N.W.2d 733, 735 (N.D. 1986) (same); *In re M.B.*, 509 A.2d 1014, 1017 (Vt. 1986) (same); *In re Baby Boy C.*, 581 A.2d 1141, 1177 (D.C. App. 1990) ("A court . . . cannot constitutionally use the 'best interests' standard to terminate the parental rights of a 'fit' natural father . . . and, instead, grant an adoption in favor of strangers simply because they are 'fitter.'").

23. Case No. 86 J 3561 (Cir. Ct. Cook County, Juvenile Division). *See also Chattel to Citizens*, *supra* note 13, at 84 (*In re A.W.* shows that children "may not always know their own best interests.").

position on behalf of the child, arguing instead that visits should be supervised and occur during the day.

After learning of this situation, a local attorney, Barry A. Miller, stepped forward and offered to replace the court-appointed guardian ad litem as the child's legal representative. Mr. Miller stated the following to the press at that time: "This fight is not about the child's right to have her wishes granted; that's up to the judge. [This fight] is about the right to have her voice heard in the legal process. The question is whether a child can be considered adequately represented by a court-appointed attorney who refuses to advocate for what she wants."<sup>24</sup>

In a September 4, 1992 order, the trial court granted the motion for substitution and Mr. Miller became the girl's counsel despite the arguments of the Cook County Public Guardian that such a move would not be in the girl's long-term best interests. Hearings on the substantive matter — whether the child will be permitted to resume the unsupervised, overnight visits with her stepfather — concluded in late March 1993 and a decision is expected in early summer 1993.

Regardless of the outcome of the case, *In re A.W.* compellingly illustrates the incapacity of some children to fully appreciate what is in their own long-term best interests. This case also stands as a stark example of the dangers involved in allowing an attorney to zealously pursue goals dictated by an immature child-client where there is no fit parent to direct the course of the litigation.<sup>25</sup>

### B. *Hillary Rodham Clinton and Children's Rights*

During the recent presidential election, right-wing conservatives spent a great deal of time vehemently arguing that the election of Bill Clinton would lead to a deterioration of the American family due to the influence of his wife, Hillary Rodham Clinton.<sup>26</sup> While it is clear that Hillary Rodham Clin-

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24. Jan Hoffman, *When a Child-Client Disagrees with the Lawyer*, N.Y. TIMES, Aug. 28, 1992, at B6.

25. For a more detailed discussion on this aspect of the case, see *infra* notes 131-35 and accompanying text (discussing the implications of the attorneys' conduct in *In re A.W.*).

26. See, e.g., Walt Bogdanich, *GOP Targets Hillary Clinton's Views on Family, But Some Experts Cite Distortion of Her Position*, WALL ST. J., Aug. 13, 1992, at A14; Ruth Mavens, *Republicans Aim Barbs at Hillary Clinton*, WASH. POST, Aug. 19, 1992, at A21; Ben J. Wattenberg, *The Lady Macbeth of Little Rock: Hillary Clinton's Hard-Left Past and Present*, AM. SPECTATOR, Aug. 1992, at 25.

ton, an important advocate in the "children's rights movement" of the 1970s, does have some influence over President Clinton's policy and appointments to posts within his administration,<sup>27</sup> it is still unclear whether her views on the family have changed since the 1970s,<sup>28</sup> and, if not, whether they will become an important part of the Clinton Administration's agenda.<sup>29</sup> Even so, the importance of her previously expressed views on the family — both in their potential to shape the presidential policy and in their current impact on topical family law issues<sup>30</sup> — compel consideration, especially in light of the current public interest in children's rights due to the *Gregory K.* case. Therefore, this portion of the article focuses on Hillary Rodham Clinton's views on children's rights, including her stand on the legal representation of children.<sup>31</sup>

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27. This is evidenced by the appointment of friends of Hillary Clinton to high-ranking posts throughout the administration. Several of these appointees became known to Ms. Clinton through their mutual association with the Children's Defense Fund, a Washington D.C.-based public interest organization focusing on the needs of children, which Ms. Clinton chaired for several years. See, e.g., *Liberal Activism Signaled*, WASH. TIMES, Dec. 12, 1992, at A1 ("Miss Shalala, who succeeded Hillary Rodham Clinton as Chairman of the Children's Defense Fund, was one of four persons named to top posts yesterday.").

28. Note, however, that in an interview with National Public Radio last year, Ms. Clinton indicated continued dissatisfaction with the presumption of a child's incompetence. *Hillary Clinton's Views Controversial* (NPR radio broadcast, Morning Edition, Aug. 20, 1992) [hereinafter *Views Controversial*] (Ms. Clinton stated: "To assume that every child under a certain age, say 18 or 21, is incompetent is to treat . . . a 17-year-old like a one-year-old, and I don't think that's a very sensible proposal.").

29. However, it is widely speculated that Ms. Clinton will initiate some action on behalf of children. See, e.g., *Baird Flap Overlooks Key Question: Who's Minding the Kids*, CHI. TRIB., Feb. 11, 1993, § 1, at 29 [hereinafter *Baird Flap*] (children's rights important to Ms. Clinton, it remains to be seen what her goals in this area are or how they will be achieved); *T.V.'s Education Plan and Children's Rites: Rhetoric Under Reconstruction?*, WASH. TIMES, Dec. 3, 1992, at G1 ("Children's rights are to Hillary Rodham Clinton what tulip bulbs were to Lady Bird Johnson, a china place setting to Nancy Reagan, illiteracy to Barbara Bush — the private public passion of a public-spirited first lady.").

30. Among recent articles citing Ms. Clinton's early legal writings are Minow, *supra* note 8, at 1868; Maureen Ann Delaney, Comment, *What About Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia*, 41 AM. U. L. REV. 107 (1991); Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988).

31. One limitation here is that Hillary Clinton has not often publicly presented her views on these subjects since her husband became Governor of Arkansas. Thus, it is possible that her views on these issues have changed. Nevertheless, as noted above, her views have become an important part of the debate over children's rights.

Hillary Rodham Clinton was one of the earliest and most articulate voices speaking out for children's liberation. During the early part of her legal career, she wrote several influential articles on children's rights and worked for the Children's Defense Fund.<sup>32</sup> One of the primary goals of that organization, then and now, is to encourage federal assistance for poor and underprivileged children.<sup>33</sup> It appears that many of her earlier legal writings were written with this goal in mind.<sup>34</sup>

In these early writings, Hillary Rodham Clinton advocated taking certain steps to allow children to have more control over important decisions which are made on their behalf.<sup>35</sup> In one of her earliest articles, Ms. Clinton proposed a three-step plan to achieve this goal of "children's liberation." First, she advocated that "the legal status of infancy, or minority, should be abolished and the presumption of incompetency reversed;"<sup>36</sup> next she urged that "all procedural rights guaranteed to adults under the Constitution should be granted to children whenever the state or a third party moves against them, judicially or administratively;"<sup>37</sup> and finally, she asserted that "the presumption of identity of interests between parents and their

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32. From 1986 through 1992, Ms. Clinton served as the chair of that organization. Margaret E. Kriz, *Political Hot Potato*, 24 NAT'L J. 2008 (1992).

33. CHILDREN'S DEFENSE FUND, 1990 ANNUAL REPORT 2 (1991) [hereinafter ANNUAL REPORT].

34. See, e.g., Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 491 (1973) [hereinafter Rodham, *Children Under the Law*]; see also Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 YALE L.J. 1522 (1979) (reviewing GILBERT Y. STEINER, *THE CHILDREN'S CAUSE* (1976)).

35. Hillary Clinton seems fundamentally opposed to relationships of dependency because such dependency leads those in power to act in their own best interests rather than in the best interests of the powerless. For example, Ms. Clinton has likened children's dependency on their parents to the historical dependency which women had on their husbands, as well as to slavery and the Indian reservation system. Rodham, *Children Under the Law*, *supra* note 34, at 493.

36. *Id.* at 507.

37. *Id.* This position finds some support in several contemporaneous Supreme Court decisions. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1966); see also *Wisconsin v. Yoder*, 406 U.S. 205, 244-45 n.3 (1972) (Douglas, J. dissenting) (arguing that children's decisionmaking capacity increases as they approach the age of adulthood and, therefore, such children should have a voice in determining the course of their education). Note, however, that the court has chosen not to expand "children's rights" in the manner advocated by Ms. Clinton. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 511-17 (1983); FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 62-63 (1982).

children should be rejected whenever the child has interests demonstrably independent of those of his parents (as determined by the *consequences* to both of the act in question), and a competent child should be permitted to assert his or her own interests."<sup>38</sup>

Although it is beyond the scope of this article to provide an in-depth critique of these proposals, some observations relevant to this article are in order. Implementing Hillary Clinton's proposals today would mean that many of the legal protections won for children over the years would no longer be in force, because they are justified only under the concept of a child's minority status.<sup>39</sup> Reimposing those laws would be difficult, due to another argument Hillary Rodham Clinton makes — that any age-based laws should be subjected to strict scrutiny, the highest level of judicial review, requiring that a state show both a compelling state interest in the law and that there are no other less restrictive means to achieve the compelling state interest.<sup>40</sup>

Moreover, and most importantly for purposes of this article, Hillary Rodham Clinton asserted that "competent

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38. Rodham, *Children Under the Law*, *supra* note 34, at 507.

39. See, e.g., *Gammons v. Berlat*, 696 P.2d 700, 701 (Ariz. 1985) (construing ARIZ. REV. STAT. ANN. § 13-501 as establishing a rebuttable presumption that children under the age of 14 do not appreciate the wrongfulness of conduct as fully as adults); *Beggs v. Wilson*, 272 A.2d 713, 714 (Del. 1970) (conclusive presumption that children under a certain age are incapable of contributory negligence); *Tamiami Gun Shop v. Klein*, 116 So.2d 421 (Fla. 1959) (enforcing statute prohibiting sale of firearms to minors); *Wilson v. State*, 39 So. 471, 472 (Fla. 1905) (conclusive presumption that female child under ten years of age cannot consent to intercourse or sexual abuse); *People v. Johnson*, 542 N.E.2d 143, 145 (Ill. App. 1989) (child pornography illegal because children cannot lawfully consent to sexual exploitation).

40. Rodham, *Children Under the Law*, *supra* note 34, at 512. This would create a very troubling situation. For example, under Hillary Clinton's proposals, children could consent to sexual intercourse with adults because statutory rape laws, grounded on a child's minority status, would be abolished. Legislative attempts to reimpose such laws above a potentially very young age would be extremely difficult under Hillary Clinton's proposed strict scrutiny standard. While this may seem to be a worst-case scenario, note that two adult males in Florida recently successfully contested their statutory rape charges on the grounds that the girls involved, aged 15 and 16, were mature enough to consent to intercourse; a claim both girls vocally supported. Mike Clary, *Should a Minor Have the Right to Say Yes?*, L.A. TIMES, Nov. 5, 1992, at E1. The judge agreed, ruling that the rights of privacy protecting a mature minor's right to an abortion must necessarily also protect a mature minor's right to consent to the act which may lead to an abortion. *Id.* Addressing the weaknesses of this reasoning is beyond the scope of this article.

children" should be permitted to assert their own interests under certain circumstances.<sup>41</sup> Because there would be a presumption of *capacity* — rather than the current presumption of incapacity — for all children,<sup>42</sup> children would be able to hire and direct attorneys unless this presumption could be overcome. Logically, the existence of such a presumption makes assertion of its opposite more difficult; thus, it would be much more likely under Ms. Clinton's proposal that children would be found competent to act on their own behalf than it is under current law.<sup>43</sup> Moreover, Hillary Rodham Clinton also stated that children should have the right to counsel in all types of proceedings and that the child-client should be able to control the scope and course of the litigation.<sup>44</sup> She goes so far as to suggest that it should be a violation of an attorney's professional responsibility for the attorney to determine the child's best interests on behalf of the child.<sup>45</sup> Therefore, under Ms.

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41. Apparently, Ms. Clinton still maintains this view. See *Views Controversial*, *supra* note 28 (Ms. Clinton asserting that it is "not sensible" to presume that all children are incompetent to assert their rights).

42. Elsewhere, Hillary Clinton argues that the reversal of the presumption of incapacity better prepares children for adulthood because it requires them to take on responsibility at an earlier age. Hillary Rodham, *Children's Rights: A Legal Perspective*, in *CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES* 32 (Patricia A. Vardin & Ilene N. Brody eds., 1979). She apparently believes this to be superior to parental control in which responsibility for decisionmaking is meted out according to a parental determination of the capability of their child to make important decisions. *Id.*

43. Indeed, that is the purpose behind the proposal. The danger is that courts would not want to take the responsibility for deciding on behalf of the child and therefore would be much more likely to allow the child to act on his or her own behalf. Because "legal capacity" is a vague term which would be difficult to prove in court, the effect of reversing the presumption of incapacity would drastically impact cases involving minors. This is so because courts would be hesitant to reverse a presumption where there are no clear grounds to do so. Empirical evidence supports this assertion. In his study of the aftermath of *Bellotti v. Baird*, 443 U.S. 622 (1979), an abortion rights case in which minor girls could petition the court to determine whether they were mature enough to decide to get an abortion themselves or, in the alternative, whether an abortion would be in their best interests, Professor Mnookin learned that every one of the 1300 pregnant minors who sought an abortion through judicial authorization received one. MNOOKIN, *supra* note 9, at 329. This is not to say that all of these judges were necessarily pro-choice as much as it is to say that judges in general are not willing to contest a legislatively imposed presumption that girls should have an avenue to an abortion.

44. Rodham, *Children Under the Law*, *supra* note 34, at 495.

45. *Id.* ("[E]ven the child's own lawyer will likely go beyond the scope of his professional responsibility in determining for himself and for the child where the child's best interests lie.").

Clinton's proposal, it would be up to the child himself or herself to decide what is in his or her own long-term best interests, a difficult task for children generally and for younger children especially.<sup>46</sup>

This article will next explore the definition, history and current status of "children's rights." An analysis of parental rights and obligations then follows. The article then proceeds to discuss the proper role of parents, children and attorneys, where children are involved in litigation.

### C. *The Debate Over Rights — Children's Rights, Parental Rights, and Duties of the State*

#### 1. What Are "Children's Rights?"

##### a. *Introduction*

There is no clear-cut definition of the term "children's rights." Perhaps the best way to define it is by categorizing some of the meanings given the term by various courts and authors. First of all, the term "children's rights" can refer either to legally enforceable rights or it can refer to rights which children ought to have, but may never receive, such as the right to grow up in a peaceful world. The former category can be further broken down into essentially three groups: (1) legal rights of protection, (2) legal rights of choice,<sup>47</sup> and (3) unrecognized "rights" which some advocates argue should be legally enforceable, but currently are not. Within the group of

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46. Hillary Rodham Clinton would, under certain circumstances, also allow children to challenge parental decisions made on their behalf. Rodham, *supra* note 42, at 26. This stance, combined with the *Gregory K.* case discussed above, began the media furor over her views on children's rights. See, e.g., Eleanor Clift, *Hillary Clinton's Not So Hidden Agenda*, NEWSWEEK, Sept. 21, 1992, at 90; Douglas Laycock, *What Hillary Clinton Really Said*, WALL ST. J., Sept. 16, 1992, at A15. However, Hillary Clinton restricted such suits to instances in which the child could be irreparably injured by the parents' decision, such as "decisions about motherhood and abortion, schooling, cosmetic surgery, treatment of venereal disease, or employment, and others where the decision or lack of one will significantly affect the child's future." *Id.* Query whether the inclusion of "schooling" would invalidate existing mandatory education laws and whether "employment" would invalidate existing child labor laws.

47. See Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights'*, 1976 B.Y.U. L. REV. 605, 644; Andrew J. Kleinfeld, *The Balance of Power Among Infants, Their Parents, and The State*, 4 FAMILY L.Q. 320, 321-22 (1970). For an impressive discussion of the historical context of modern children's rights from a revisionist's perspective, see Barbara B. Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

rights of protection are the right to be free from parental abuse and neglect, the right to be free from unwarranted searches and seizures,<sup>48</sup> the right to be free from unreasonable working conditions, the right to be exempt from military service, the right to special treatment when charged with committing a crime,<sup>49</sup> and the right to counsel before institutionalization.<sup>50</sup> Within the much smaller group of rights of choice are the right to terminate a pregnancy<sup>51</sup> and the right to freedom of expression.<sup>52</sup> Some of the rights in each of the first two groups are similar to rights enjoyed by adults but have additional restrictions, while others expressly distinguish between adults and children.<sup>53</sup> A third group of "children's rights" are those

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48. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (recognizing that children possess Fourth Amendment rights, although such rights may differ from those enjoyed by adults). But see *Schall v. Martin*, 467 U.S. 253 (1984) (denying minors a liberty interest against freedom from certain types of detentions).

49. See generally Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163.

50. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 & n.13 (1986).

51. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The minor's right to choose to have an abortion is not absolute. See *H.L. v. Matheson*, 450 U.S. 398 (1981) (states may impose a parental notification requirement on unemancipated minors seeking abortions). Another case involving a minor's right to choose an abortion is *Bellotti v. Baird*, 443 U.S. 622 (1979), which involved a challenge to a Massachusetts law requiring minors seeking an abortion to first obtain parental consent. While supporting the rights of parents to raise their children as they see fit, the Court nevertheless struck down the law and imposed a requirement that while parental notification could be one option, there had to be an alternative. The law eventually passed in response to the Supreme Court's opinion in *Bellotti* provided that where children could not get or would not seek parental consent for an abortion, they could instead go to a judge on their own behalf and seek a judicial determination of competency to decide for themselves whether to get an abortion. If the judge determined that the minor was competent, then she could obtain the abortion without obtaining parental consent. If the child was deemed incompetent by the judge, then the judge would then have to determine whether the abortion was in the best interests of the child.

52. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). Note, however, that since *Tinker*, the Supreme Court has limited a minor's freedom of expression within a school. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). This decision seems to heed Justice Stewart's concurring opinion in *Tinker*, in which he wrote that "[a] State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of the full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker*, 393 U.S. at 515 (Stewart, J. concurring).

53. See *supra* notes 48-49 and accompanying text.



rights which have not yet received widespread express judicial recognition and which mainly relate to lifestyle, such as the right to "a quality education tailored to meet the individual's needs,"<sup>54</sup> or the right to be free from parental restrictions on lifestyles.<sup>55</sup> Rights in this third group are also generally "choice rights," although one could argue that the right to be free from undue parental restrictions is actually a "protection right."

When discussing the difficult concept of "children's rights," it is important to keep in mind that children, by their nature and consequently by statutory and common law, do not have the capacity to make certain fundamental choices about their own lives.<sup>56</sup> For example, minors under a certain age generally cannot validly contract,<sup>57</sup> marry,<sup>58</sup> and, despite a contrary trend, sue or be sued.<sup>59</sup> Instead, the Supreme Court has consistently held that parents are the appropriate decisionmakers for their children in these circumstances.<sup>60</sup> In addition, there are other restrictions imposed by the state on the child regardless of parental preferences, such as age-based restrictions on the right to vote, drive, or purchase alcohol, tobacco or pornographic materials. In these instances, the state is intervening in the autonomy of the child and the parents in order to protect the child. The legal rationale for these restrictions is the minority status of children, which is a reflection of the natural incapacity of children to make certain decisions which would be in their own long-term best interests.

The obvious fundamental reason for the presumption of incapacity (and consequent minority status of children) is that immature children, which all children are at some point, are

54. Minow, *supra* note 9, at 1868.

55. At least one court has implicitly adopted this right, as discussed above. See *In re Snyder*, 532 P.2d 278 (Wash. 1975); see also, Comment, *supra* note 16. However, this case has not received widespread attention by commentators or by federal or state judiciaries.

56. The legal concept of lack of capacity due to infancy relaxes as the child matures.

57. 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 222-48 (3d ed. 1959), cited by Lyon, *supra* note 5, at 683 n.9.

58. See generally Lynn D. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1 (1983-84) (reviewing various state laws on marital age restrictions).

59. For a list of cases and statutes on these restrictions, see Lyon, *supra* note 5, at 682-84.

60. See, e.g., *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 628 n.13 (1986) (plurality opinion) (quoting PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL BEHAVIOR RESEARCH, REPORT 212-14 (1983)) ("[T]here is a presumption, strong but rebuttable, that parents are the appropriate decisionmaker for their infants.").

incapable of exercising reasoned judgment about what is best for them.<sup>61</sup> For this reason, parents ordinarily have the responsibility to make decisions on their child's behalf.<sup>62</sup> In other words, children do not have the capacity to make certain important decisions regarding their own welfare.<sup>63</sup> Where the child cannot make such decisions, the decisionmaking responsibility ordinarily falls to the parents, who may or may not choose to consult with the child in reaching a decision. This right of the parents to act on behalf of their child has long been recognized by the Supreme Court as one of constitutional dimensions.<sup>64</sup> If the parents are disqualified from making these decisions through a judicial or administrative finding of "unfitness," then the decisionmaking role falls to the State in its role of *parens patriae*.<sup>65</sup> In this way, children are prepared for independent decisionmaking when the proper time comes.<sup>66</sup>

Based on the foregoing, some commentators argue that great caution should be exercised in granting rights of choice to children because children, by nature and by legal definition, often do not have the capacity to make choices based on their own long-term best interests.<sup>67</sup> Others contend that the pre-

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61. See Guggenheim, *supra*, note 3, at 85 n.23, 94 n.77 (and sources cited therein); Lyon, *supra* note 5, at 695. ("Children may fail to comprehend crucial concepts, issues, or the possible consequences of their decisions. They may also fantasize or be prone to indecisive or inconsistent behavior.").

62. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (allowing Amish parents to remove their children from compulsory education beyond the eighth grade).

63. As the Supreme Court has concluded, the state has an interest "in protecting a juvenile from his own folly." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (quoting *People ex rel. Wayburn v. Schupf*, 350 N.E.2d 906, 909-10 (1976)).

64. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925).

65. This sentiment is echoed by several Supreme Court opinions. For example, in *Schall*, the Court stated that "[c]hildren, by definition, are not assumed to have capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part *parens patriae*." *Schall*, 467 U.S. at 265.

66. Obviously, there are some restrictions placed on the parents' right to make decisions on behalf of their children. In *Pierce*, for example, the Court held that there is "no question" that the State has the power "to require that all children of proper age attend some school." *Id.* at 538. Other limitations are in the areas of child labor, infant marriage, abortion and contraception, access to necessary medical treatment, and severe physical deprivation. See Lyon, *supra* note 5, at 683-84 (and cases cited therein); Elizabeth J. Sher, Note, *Choosing For Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157 (1983); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

67. See, e.g., John E. Coons, *Intellectual Liberty and the Schools*, 1 NOTRE

sumption of incapacity should be reversed. For example, as discussed more fully above, Hillary Rodham Clinton has argued in the past that children should be presumed to have the capacity to make legally binding choices under certain circumstances.<sup>68</sup> Ms. Clinton has stated her belief that this approach, rather than a parental discretion model, best serves to prepare children for adulthood by giving them substantial responsibility at an early age.<sup>69</sup>

*b. The History of the Children's Rights Movement*

The civil rights movement of the 1950s and 1960s did not regard children as a group in need of increased "civil rights." One reason for this was that a children's protection movement decades earlier successfully sought passage of laws which, for example, protect children from exploitation as laborers,<sup>70</sup> ensure that children will receive an education,<sup>71</sup> and mandate that children accused of committing criminal acts receive special treatment through the juvenile court system.<sup>72</sup> Nevertheless, in the late 1960s, a "kiddie lib" movement began. Two fundamental principles underlying this movement were (1) that any restriction on freedom was inherently repugnant to rights guaranteed all Americans under the Constitution, and (2) that children, especially those belonging to minority groups, were

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DAME J.L. ETHICS & PUB. POL'Y 495, 500-10 (1985); Hafen, *supra* note 47, at 647-48.

68. *Left Wing Now Sounds Right*, CHI. SUN-TIMES, Dec. 3, 1992, at 40 (quoting Hillary Clinton as wanting to abolish "the legal presumption of the incompetence of minors in favor of a presumption of competence").

69. Rodham, *supra* note 42, at 32.

70. See, e.g., *Frazey v. Hoar*, 492 P.2d 1316 (Kan. 1972) (discussing KAN. STAT. ANN. § 38-602, a child labor law protecting children from dangerous working conditions); *Mott v. River Parish Maintenance, Inc.*, 432 So.2d 827 (La. 1983) (discussing LA. REV. STAT. ANN. § 23:161, a child labor law protecting children from dangerous working conditions or activities); *Vincent v. Riggi & Sons, Inc.*, 30 N.Y.S.2d 406 (Ct. App. 1972) (interpreting N.Y. LAB. LAW §§ 30-33, 70-73, child labor laws which the court held were still serving their primary purpose of protecting children from injury).

71. See, e.g., *Ogle v. Ogle*, 156 So.2d 345 (Ala. 1963) (discussing ALA. CODE §§ 297, 301, compulsory education laws requiring public or private education of children aged seven to sixteen); *In re B.B.*, 440 N.W.2d 594 (Iowa 1989) (discussing IOWA CODE §§ 299.1, 299.5, 299.6, compulsory education law requiring public or private education of children aged seven to sixteen).

72. See, e.g., *Ex parte J.D.G.*, 604 So.2d 378, 381 (Ala. 1992) ("The general purpose of the Juvenile Justice Act is to 'facilitate the care, protection and discipline of children . . . '"); *State v. Russell*, 625 S.W.2d 138 (Mo. 1981) (purposes of juvenile court system are protective and rehabilitative).

being unfairly and tragically victimized by the poverty and discrimination inflicted on their parents.

For example, some commentators asserted at the time that classifying children as minors, which formed the basis for the age-based laws protecting children from themselves and others, was itself oppressive. One commentator, who favored "liberating" children from minority status and "freeing" them from age-based restrictions on the right to marry, vote, and contract, made the following argument:

[A]sking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile.

...  
If all this sounds too open and free, we must recognize that in this society . . . we are not likely to err in the direction of too much freedom.<sup>73</sup>

Despite the lack of evidence of harm to the child under the status quo or benefits to the child through granting unlimited rights of choice to children, adherents to this view contended that children should be free from restrictions for freedom's sake and regardless of the consequences to the long-term well-being of the child, the family, and society.<sup>74</sup>

Other commentators, rather than seeking the liberation of children for liberation's sake, instead saw children as the most tragic victims of poverty and discrimination and in need of additional government assistance.<sup>75</sup> This led to activists making children the focal point of campaigns to reform the social climate of the day.<sup>76</sup> These efforts resulted in some needed

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73. RICHARD E. FARSON, *BIRTHRIGHTS* 31, 153 (1974).

74. See, e.g., JOHN C. HOLT, *ESCAPE FROM CHILDHOOD* 18-19 (1974) (contending that children should have the right to vote, be financially independent, choose where to live, and choose where to attend school); GARY MELTON ET AL., *CHILDREN'S CAPACITY TO CONSENT* (1983).

75. See, e.g., Seymour Feshbach & Norma D. Feshbach, *Child Advocacy and Family Privacy*, 34 J. SOC. ISSUES 168 (1978); James Garbarino et al., *Who Owns Children? An Ecological Prospective on Public Policy Affecting Children*, in *LEGAL REFORMS AFFECTING CHILDREN AND YOUTH SERVICES* 60 (Gary Melton ed., 1982).

76. The Children's Defense Fund and The National Center for Youth Law, now two of the largest organizations seeking sufficient and improved government assistance for children, were formed at this time. See NATIONAL CENTER FOR YOUTH LAW, *THE FIRST TWENTY YEARS* (1991); ANNUAL REPORT, *supra* note 33.

changes. Children, especially those from disadvantaged groups, were given additional procedural protections in various settings. For example, the Supreme Court, to some extent, redefined the relationship between the state and the child, imposing new constitutionally required procedural standards on juvenile courts and public schools.<sup>77</sup>

However, unlike the civil rights movement, the Supreme Court never fully embraced the "kiddie lib" aspect of the children's rights movement. Since the late 1960s, when that era of the children's rights movement began, the Supreme Court has accorded different levels of constitutional protection to the different types of children's rights described above. For instance, the Supreme Court has given no constitutional protection to a child's right to exercise unlimited discretion in all situations, unfettered by parental or state involvement in the decisionmaking process; however, the Supreme Court has granted children the right to choose in some limited circumstances, such as state regulation of abortion;<sup>78</sup> and the Supreme Court has given constitutional status to some procedural rights of protection.<sup>79</sup> This hierarchy of constitutional treatment of children's rights acknowledges that limitations on the child's discretion by the parents and the state are required in some circumstances.

The Supreme Court's reluctance to grant full constitutional status to children's choice rights may also be attributed to the premise that while it is inherently unwise and unconstitutional for one adult to have power over another adult due to distinctions based on race, sex, national origin or ethnicity, it is not unwise or unconstitutional for parents and the state to impose some limitations on a child's discretion.<sup>80</sup> Instead, as

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77. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Goss v. Lopez*, 419 U.S. 565 (1975); *In re Gault*, 387 U.S. 1 (1967); see also Olivas, *supra* note 4, at 826 ("By a variety of means, our society accords children extraordinary protection and assistance where complex administrative judgments involve their basic rights.").

78. *Bellotti v. Baird*, 443 U.S. 622 (1979).

79. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (children free from search and seizures by school officials under a lower "reasonableness" standard rather than the higher "probable cause" standard applied to adults); *New York v. Ferber*, 458 U.S. 747 (1982) (protecting children from exploitation by child pornography); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (restricting obscene speech transmitted by public radio in order to protect children); *Goss v. Lopez*, 419 U.S. 565 (1975); *Ginsberg v. New York*, 390 U.S. 629 (1968) (restricting adult access to pornographic literature in order to protect children); *In re Gault*, 387 U.S. 1 (1967) (children's due process rights in juvenile court cases).

80. A clear cut distinction between discrimination against a child due to age and discrimination against a person due to gender or race is that gender

the Supreme Court has recognized, a child's dependency on a parent or parents for sustenance and guidance is critical to the child's preparation for the responsibilities of adulthood.<sup>81</sup> As Professor Coons put it: "If the experience of autonomy is to be available to a child, adult authority must be its instrument, for a child's freedom to choose at all depends upon protections and limits."<sup>82</sup> This relationship of dependency is in the best interests of children, parents, and society as a whole.<sup>83</sup>

*c. The Current Status of Children's Rights*

With this as the backdrop, some commentators are now once again arguing that dependency, in whatever form, is intrinsically wrong under certain circumstances, even in the case of children.<sup>84</sup> They contend that "children's rights," in

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and race are immutable characteristics whereas age is not. In other words, children will grow out of their minority status. *But see* Rodham, *Children Under the Law*, *supra* note 34, at 507-08 (drawing a parallel between the abolition of slavery and the emancipation of women with liberating children from the constraints of the presumption of incapacity); NCRA Brief, *infra* note 106, at 7 (making the same argument using the same citation).

81. *See, e.g., Bellotti*, 443 U.S. at 638-39.

82. Coons, *supra* note 67, at 502. Professor Coons explained the reality of parental restrictions on a child's autonomy this way:

This inescapable limit on children's freedom is not merely an artifact of politics. It is a fact of nature. Even if one held liberty to be the sole concern, there would remain a practical, insuperable and permanent obstacle to liberation. Children are small, weak, and inexperienced; adults are big, strong and initiated. One may liberate children from the law of man, but the law of nature is beyond repeal. There is no way to send an eight-year-old out of the sovereignty of the family and into the world of liberty. For there he will be introduced to a new sovereignty of one kind or another. It may be a regime of want, ignorance, and general oppression; it may be one of delightful gratification. The ringmaster could be Fagin or Mary Poppins. Whatever the reality, it will be created by people: with more power and by the elements. Children — at least small children — will not be liberated; they will be dominated.

*Id.* at 503.

83. *See*, Minow, *supra* note 9, at 1871 (citing commentators supportive of such a proposition); Andrew S. Watson, M.D., *Children, Families, and Courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653 (1980) (freely exercised and nonreviewable parental decisionmaking authority is essential to the healthy development of children); Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1178-79 (1984) ("The principle of minimal state interference with parental guidance serves not only to preserve family autonomy, but also to legitimate state authority.").

84. *See, e.g.,* Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 386 (1991) ("As the child grows older and develops cognitive, experimental and emotional skills, absolute obedience to parental authority is

the form of freedom from constraint, must be more fully recognized.<sup>85</sup> Such commentators believe that the child's right to choose should take precedence over the parents' right to raise the child, regardless of whether the interests of the parents conflict with those of the child.<sup>86</sup> Others believe that children have the "right" to a stable family environment, even though this generally requires submission of the child to parental authority.<sup>87</sup> Clearly, there is a dispute over what properly comes within the parameters of "children's rights."

Currently, there is no clear trend toward increased liberation of children from parental restraint.<sup>88</sup> However, the precedent provided by the *In re Gregory K.* and *In re A.W.* cases, discussed above, and the potential that views similar to Hillary Rodham Clinton's may be promoted by members of the Clinton Administration and others,<sup>89</sup> may change this.

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neither biologically required nor healthy for the child in a liberal democratic society."); Martha Minow, *Part of the Solution, Part of the Problem*, 34 U.C.L.A. L. REV. 981, 998-99 (1987) (reviewing JOEL HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986)) (Minow criticizes as "giving no place to children," Handler's description of a world in which dependency relationships are obsolete and each individual is completely autonomous from the state and others); Alison M. Brumley, Comment, *Parental Control Over a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 338 n.18 (Winter 1991) (child's dependency on parents inconsistent with child's privacy rights, so parents should not be notified when child is suing on own behalf to assert a privacy interest).

For a feminist's view on relationships of dependency within a family setting, see Elizabeth Rappaport, *On the Future of Love: Rousseau and the Radical Feminists*, in *WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION* (Carol C. Gould & Marx W. Wartofsky eds., 1980) (arguing that love between a husband and wife is a destructive dependency relationship for both spouses).

85. See, e.g., MELTON ET AL., *supra* note 74 (arguing that because there is no significant difference between the reasoning capacities of adults and adolescents, adolescents should be granted the same rights as adults).

86. See, e.g., Brumley, *supra* note 84, at 335 (contending that a child deemed mature by the court should be permitted to disregard opposing parental views in pursuing a legal claim in federal court and that even immature children should be allowed to pursue such claims independently following a judicial determination that it would be in the child's best interests).

87. See, e.g., John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633 (1981) (advocating recognition of child's liberty interest in a stable family environment).

88. See Michele D. Sullivan, Note, *From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children*, 65 ST. JOHN'S L. REV. 1139 (1991).

89. Ms. Clinton has made it clear that "children's issues" are high on her priority list. *Baird Flap*, *supra* note 29, at 29. However, it is still unclear

## 2. Parental Rights and Obligations

Although Plato believed differently,<sup>90</sup> experience suggests that society is best served by parents raising their children.<sup>91</sup> As Justice McReynolds wrote in *Pierce v. Society of Sisters*:<sup>92</sup> "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize him and prepare him for additional obligations."<sup>93</sup> Continued adherence to this view preserves the diversity of democracy by ensuring that children's views are shaped not by the state but by parents having different backgrounds and philosophies.<sup>94</sup> Perhaps it is for this reason that public education, in general, is intentionally non-partisan and remains neutral on most controversial issues, leaving it up to parents to teach their children regarding such significant matters as value orientation and personal life philosophy.<sup>95</sup>

The Supreme Court, in *Pierce* and other cases, has made clear that parents enjoy a constitutional right to raise their chil-

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what her specific goals concerning children are or how they will be pursued. *Id.*

90. In his book *The Republic*, which represented an ideal society, Plato depicted his belief that society would be best served if children were taken away from their parents at birth and raised by the community.

91. See generally Coons, *supra* note 67, at 501-10 (and sources cited therein); Paul Schwartz, Note, *Parental Rights and the Habilitation Decision for Mentally Retarded Children*, 94 YALE L.J. 1715, 1715 (1985) (arguing "that habilitation decisions for mentally retarded children in residential care are best made by their parents, and not by public employees, such as mental health workers, as is the current practice").

92. 268 U.S. 510 (1925).

93. *Id.* at 535.

94. Guggenheim, *supra* note 3, at 114 ("[T]he homogenization of values that would result if parental rights were undermined would fall heaviest on those politically defenseless racial, economic, ethnic, and religious groups whose values, beliefs, and childrearing habits are not reflected in American elite culture. Indeed, courts and commentators have often noted the link between family autonomy and social pluralism.") (citations omitted); Leslie J. Harris, *The Utah Child Protection System: Analysis and Proposals for Change*, 1983 UTAH L. REV. 1, 21, 91-92 (diffusing authority over how children are raised promotes social and cultural diversity). Cf. Coons, *supra* note 67, at 510 ("[T]he family (almost without regard to lifestyle) tends to be the right environment for the child's gradual transition from a dependent and dominated infancy to an adolescence marked by an ever increasing practical liberty bestowed by parents. In the run of families the child achieves formal autonomy at eighteen almost without a ripple.").

95. See, e.g., *Board of Educ. v. Barnette*, 319 U.S. 624, 629 (1943) (declaring unconstitutional statute which required children to salute the American flag and recite the pledge of allegiance and subjected parents to fines and jail terms for failing to require their children to comply with the statute).



dren as they see fit so long as their conduct vis-a-vis the child does not fall below a minimal threshold of "unfitness."<sup>96</sup> Some commentators now assert that this right relegates children to property status and is an invidious form of "liberty" in that it grants rights to the parents "to control another human being" while leaving the child "voiceless."<sup>97</sup> These arguments are similar to those raised by feminists concerning repression by a male-dominated power structure. However, the premise is fundamentally different: Whereas adult women, absent mental illness or developmental disorders, have full *capacity* to make decisions affecting their long-term interests, children generally do not have the capacity to make such decisions.

The right of parents to raise their children historically stems from two sources: (1) an inherent right that antedates the state,<sup>98</sup> or (2) a duty conferred by the state. Regardless of the source, this right is protected by the Constitution<sup>99</sup> and is in the best interests of society because parents are the best decisionmakers for their children.<sup>100</sup> This is reflected by the

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96. See also Coons, *supra* note 67, at 510-13 (discussing Supreme Court's protection of parental decisionmaking); Guggenheim, *supra* note 3, at 112-13 ("[O]ur Constitution prohibits the state from exercising broad power to tell parents how to raise their own children.").

97. See, e.g., Woodhouse, *supra* note 47.

98. John Locke wrote that God gave parents the task of raising a child in order to facilitate development of the child's capacity to reason preparatory to the child exercising his or her freedom upon reaching adulthood. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II at § 58 (Peter Laslett ed., 1988) (3d ed. 1698) (discussed in Woodhouse, *supra* note 47, at n.186.). See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (recognizing that the relationship of natural parents and their children is one "having its origins entirely apart from the state").

99. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents possessed a protected First Amendment right to remove their children from public schools after completion of the eighth grade); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have the right under the Fourteenth Amendment to select the schools which their children will attend); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment gives parents the right to allow teachers to instruct their children in a foreign language); see also Gene D. Skarin, *The Role of the Petitioner's Attorney in Family Court Child Protective Proceedings*, in CHILD ABUSE, NEGLECT, AND THE FOSTER CARE SYSTEM 377 (PLI Litig. & Admin. Practice Course Handbook, 1992) ("Fundamental constitutional principles of due process and protected privacy interests prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity.").

100. See *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979); Coons, *supra* note 67, at 505-10; see also Note, *supra* note 83, at 1178 ("A long line of cases has established the [Supreme] Court's view that child-rearing is the role of

fact that, following twenty years of reflection since "children's liberation" promoters first urged the freeing of children from their "powerlessness" by granting them increased autonomy from parental restrictions, courts and legislatures have steadfastly refused to impose significant limits on the parents' right to make decisions on behalf of their children.<sup>101</sup>

Nevertheless, despite the protections consistently granted deserving parents concerning their right to make decisions on behalf of their children, attorneys are currently allowed under the Model Rules of Professional Conduct (Model Rules) to compromise this right where a child is the attorney's client. Under the current Model Rules, an attorney is free to disregard the wishes of the parents of a child-client in favor of the lawyer's own views or the views of the child, thereby threatening violation of the parents' constitutionally protected right to raise their child in the absence of a judicial or administrative finding of parental unfitness. The impetus behind an attorney disregarding parental direction may be the attorney's desire to promote a particular cause. Where the attorney places priority on the interests of the cause rather than the interests of the child-client and his or her parent, an ethical impropriety has occurred, but the attorney is subject to no penalty. Therefore, it is imperative that the Model Rules be amended to reflect the general proposition that, under most circumstances, parents are the appropriate decisionmakers for their children.<sup>102</sup>

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parents, not of impersonal political institutions."); GOLDSTEIN ET AL., *supra* note 5, at 12 ("[T]he state is too crude an instrument to become an adequate substitute for flesh and blood parents.").

101. See Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Institutions*, 48 OHIO ST. L.J. 663, 681 (1987).

102. GOLDSTEIN ET AL., *supra* note 5, at 118-21, 127-29 (*In re Gault* and its progeny stand for the proposition that while a child may have the right to counsel under certain circumstances, fit parents have the right to direct their child's attorney, because the child's right to an attorney is possessed by the family collectively and not the child individually.). But see Stanley Z. Fisher, *Parents' Rights and Juvenile Court Jurisdiction: A Review of Before the Best Interests of the Child*, 1981 AM. B. FOUND. RES. J. 835, 844 (*Gault* does not resolve who is to direct child's attorney).

### III. THE INHERENT DANGER IN TAKING THE DECISIONMAKING POWER FROM DESERVING PARENTS AND GIVING IT TO THE CHILD, THE COURT, OR THE CHILD'S ATTORNEY — WHERE THE CAUSE BECOMES THE CLIENT<sup>103</sup>

Due to the broad discretion which attorneys representing child-clients possess as to the scope and objectives of the litigation, several dangers exist. For instance, certain child advocacy organizations believe that the child should control the litigation seemingly regardless of the child's age or maturity.<sup>104</sup> Such organizations have begun to operate on a local and national scale.<sup>105</sup> Due to some children's inability to afford counsel, children often turn to such organizations seeking legal representation.

One national organization, The National Child's Rights Alliance (NCRA), submitted a brief *amicus curiae* in the *Gregory K.* case.<sup>106</sup> Significantly, NCRA sought recognition of nearly all of the "children's rights" that Hillary Rodham Clinton articulated in her early legal writings.<sup>107</sup> Thus, NCRA asserted that children should have the *unlimited* right to sue in their own

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103. This phrase comes from Robert Mnookin's book, *IN THE BEST INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY*, *supra* note 9, at 516. In this book, Professor Mnookin and several other noted family law scholars study five cases dealing with child advocacy groups bringing cases largely on behalf of children. Several of these cases were filed in pursuit of expanded "children's rights." In summarizing the conclusions reached through the studies, Professor Mnookin commented that:

In each of our studies, although the litigation began because of the immediate needs of particular individuals, the litigation soon took on a life of its own. The 'cause' — as defined by the advocacy groups — became the client. Moreover, where the court appointed separate counsel to represent a class of children, the advocates' positions not surprisingly reflected their own views about what was best for children.

*Id.*

104. This is not to criticize all public interest law firms and organizations which focus on representing children. Many of these groups have made great contributions to the welfare of children, especially poor and underprivileged children.

105. See *infra* text accompanying notes 106-35.

106. Brief for the National Child's Rights Alliance, *In re Gregory K.*, Case No. 92-839-CA-01 (5th Cir. Fla. 1992) [hereinafter NCRA Brief]. Obviously, NCRA, as *amicus curiae*, had no attorney-client relationship with Gregory K. However, the overstatements made by the group to the court in their brief and to the media illustrate the temptation attorneys face to promote the cause over the client where ethical standards allow the attorney to direct the scope and course of the litigation.

107. See *supra* notes 26-36 and accompanying text.

name for termination of parental rights.<sup>108</sup> As preconditions to achieving such a right on behalf of Gregory K. and other children, NCRA also sought recognition of "(1) the standing and capacity of a minor to take such action, (2) the 'family rights' of children independent of the biological parent's right to maintain a relationship with his/her child, and (3) the right of children to representation by counsel to assert and protect their fundamental rights."<sup>109</sup> The brief then attacked the minority status of children, likening it to slavery and the disenfranchisement of women.<sup>110</sup> NCRA further argued that any laws containing classifications based on age should be subjected to strict scrutiny.<sup>111</sup>

Because NCRA sought recognition of these rights in the setting of an actual case, it provides an interesting illustration of the potential conflicts which could arise where the best interests of an NCRA child-client would oppose the NCRA's stated goals.<sup>112</sup> For example, NCRA's national coordinator recently told the New York Times that she believes that children should "have the right to be heard in court just as soon as they can talk . . . . We have had experience with children as young as 3 years old saying, 'I don't want to live here anymore. . . .' We feel that all children should have the right to know what their civil rights are and have access to the people who can help them assert those rights."<sup>113</sup> Such rhetoric implies that this organization fails to recognize the importance of the role of parents in a child's decisionmaking process, especially where the child's rights may be affected by litigation in which the child is involved.

Another organization offering children the opportunity to personally direct the course of litigation is the Children's Legal

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108. NCRA Brief, *supra* note 106, at 4.

109. *Id.* NCRA argued that the presumption of incapacity constitutes "legal demeaning of children which should be swept into the ash can of history." *Id.* at 17.

110. *Id.* at 7 (citing Henry H. Foster, Jr. & Doras Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972)).

111. Compare *id.* at 10 with Rodham, *Children Under the Law*, *supra* note 34, at 512.

112. Ironically, NCRA's brief argued that appointment of a guardian ad litem was insufficient to protect a child's rights because the guardian ad litem "is only bound to do what [he or she] thinks is in the minor's best interests, and cannot be counted on to pursue the minor's goal and assert the minor's rights." NCRA Brief, *supra* note 106, at 11. However, under the Model Rules of Professional Conduct, this is probably what an attorney hired by the child should do as well.

113. *Boy Sues*, *supra* note 14, at A11.

Clinic, which opened its doors in Chicago on September 1, 1992. The stated mission of the Clinic is "to make sure that children have a voice of their own."<sup>114</sup> This organization has refused to accept available public funds "so it can focus on the rights of youngsters without being bound by federal rules requiring families to be reunited."<sup>115</sup> One of the Clinic's board members, Chicago-Kent Law Professor Ralph Brill "thinks that the legal system pays too much attention to adults. All we are trying to do is get some rights for the kids themselves." This approach has been publicly supported by several attorneys in the Chicago area. For example, Diane Redleaf, attorney for the Legal Assistance Foundation of Chicago's Children's Rights Project, welcomed the "[C]linic's support in 'doing what kids want.'"<sup>116</sup>

However, other children's organizations in Chicago contend that the Clinic's "mission to empower children at all costs can be irresponsible."<sup>117</sup> One Clinic critic is Cook County Public Guardian Patrick Murphy, whose office has represented over 14,000 children in various proceedings. While Mr. Murphy welcomes additional advocates willing to represent children, he points out that allowing a child to have the exclusive right to direct an attorney may be unwise: "My 10-year-old son would eat ice cream all night and watch R-rated movies, but I say 'no,' and that is my job as an adult. My job as a lawyer is not to cave in to every goofy whim of a client, particularly a child."<sup>118</sup> Professor Guggenheim expresses a similar view on the general issue of absolute representation of a child's wishes:

Infants, for example, lack even the linguistic capacity to instruct counsel. Slightly older children, on the other hand, are capable of directing an attorney; nevertheless, to allow a child of age five to instruct counsel would be problematic. As attorneys experienced in this field are

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114. *Legal Clinic Tries to Do Justice to Rights of Kids*, CHI. SUN-TIMES, NOV. 23, 1992, at 16 [hereinafter *Clinic Tries to Do Justice*] (quoting the executive director of the Children's Legal Clinic).

115. *Id.*

116. *Id.* The Legal Assistance Foundation provided attorneys to the girl in *In re A.W.*, discussed above. These attorneys agreed to advocate on the girl's behalf her desire to resume unsupervised, overnight visits with the child's stepfather, who had previously been convicted of sexually assaulting the child and subsequently served four years in prison for that crime.

117. *Id.* The article also cited a spokesman for the Illinois Department of Children and Family Services, who asserted that "[t]he best interest of the child is not always what the child wants," *id.*, a sentiment echoed by many courts and commentators.

118. *Id.*

aware, many young children equivocate when asked about their preferences or views on a matter; thus, having an attorney take his guidance from the child may result in practice in the attorney taking whatever position he himself thinks best. More fundamentally, very young children lack the capacity to make considered and intelligent choices. While the attorney need not and should not ignore the child's wishes in the litigation, most readers would agree that the attorney ought not be bound by those wishes.<sup>119</sup>

Because the Model Rules fail to give guidance on the proper course which attorneys should follow in determining whether the child-client is capable of being treated like an adult client, it is completely up to the attorney to decide whether to follow the child's wishes.<sup>120</sup> As Professor Guggenheim puts it: "Lawyers are accustomed to doing their client's bidding. The lawyer who represents the young child, however, finds himself in a new, and rather intoxicating, situation. Now it is he, and not the nominal client, who has the power to control the course of the litigation."<sup>121</sup> This is especially significant in light of the fact that studies have shown that judges often rely heavily on the child's counsel in making determinations concerning the child's future as well as the futures of other members of the child's family.<sup>122</sup> At times this may pit the wishes of the parents against the wishes of the child's attorney, a conflict which should fall in favor of the parents under the established right of parents to raise their children as they see fit, unless the parents

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119. Guggenheim, *supra* note 3, at 93-94.

120. This assumes that the parents have been disqualified as the otherwise proper decisionmaker for the minor. See GOLDSTEIN ET AL., *supra* note 5, at 118-29 (where counsel is appointed for a child in delinquency proceedings, it the parents and not the child who should control the attorney).

121. Guggenheim, *supra* note 3, at 79.

122. See, e.g., Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 YALE L.J. 1126, 1179-80 (1978) (study involved attorneys representing children in divorce cases). Also significant is that in custody proceedings, each parent has an attorney advocating custody for his or her client. Where the child also has an attorney, the views of that attorney may tip the balance in favor of one party or the other in close cases. See Guggenheim, *supra* note 3, at 103-06 ("[F]or every [attorney] who advocates a particular result, one can easily find a different [attorney] who would urge the opposite outcome. In the end, it will be the child's attorney, and not the judge, who decides the case.").

have forfeited their parental rights through abuse, neglect or abandonment of the child.<sup>123</sup>

An example of an attorney possibly disregarding the wishes of her child-clients is found in *Smith v. Organization of Foster Families for Equality and Reform* (OFFER).<sup>124</sup> In OFFER, foster parents and a foster parents organization sought declaratory and injunctive relief against New York State and New York City officials, claiming that the procedures used to remove foster children from foster homes violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. During the course of the proceedings before the district court, the judge appointed a lawyer to represent both the seven named foster children and the much larger class of foster children who were also parties to the litigation. In reviewing the actions of the attorney representing the children in OFFER, Professors Wald and Chambers noted that the attorney failed to ascertain the specific needs and wishes of her plaintiff class.<sup>125</sup> Instead, the attorney based her actions on her own experience with the New York foster care program and substantially aligned herself with defendants, a position in direct conflict with those of the named plaintiffs she ostensibly represented.<sup>126</sup> The attorney for the children also declined an invitation to divide the children into two separate classes, even though such an action could have arguably better protected her client's interests.<sup>127</sup>

Such conduct suggests that where an attorney represents a "cause," such as child-welfare reform, there is a danger that the children whose cases are used as a vehicle to move the reform

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123. For example, if attorneys with a specific organization often represent children who have been abused, and the goal of the organization is to remove children from abusive situations rather than attempt to reunite the family, then the lawyer with that organization may believe the allegations of abuse by a child even where those allegations are untrue. "If this occurs on a regular basis, the outcome in child protective proceedings will be systematically skewed toward removal." *Id.* at 106.

124. 431 U.S. 816 (1977) [hereinafter OFFER].

125. David L. Chambers & Michael S. Wald, *Smith v. OFFER: The Story*, in *IN THE INTERESTS OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY*, *supra* note 9, at 75, 93.

126. *Id.* at 88-93.

127. *Id.* at 94. Though class actions are largely beyond the scope of this article, OFFER provides an appropriate illustration of the very real temptations luring counsel for a class to promote a cause over the specific needs of the class members. Test-case litigation brought on a class action basis allows the attorney free-rein since the attorney's duty runs to the class as a whole and not just to the named plaintiffs. *Cf.* Aryeh Neier, Book Review, 96 HARV. L. REV. 1167, 1170 (1983) ("The efforts of the public interest advocate all too often obscure those of the client . . .").

forward will have their individual best interests knowingly or unknowingly sacrificed by the attorney for the sake of the cause.<sup>128</sup> Professor Mnookin has accurately described the attorney-client relationship itself as conducive to sacrificing the best interests of the particular client for the sake of a general cause:

The problem of ensuring that advocates work towards the best interests of the client is inherent in any system which uses counsel to represent clients. Where one party is given the authority to put forward another's interests, there is always the danger that the agent will not be faithful to the interests of his client. The agent may have misperceived something to be in the client's best interest when it actually is not. Finally, wherever power is delegated, there is always the potential and incentive for the agent to put his own interests ahead of those of his client.<sup>129</sup>

Professor Mnookin notes that, while these problems are inherent in all attorney-client relationships, the problems are exacerbated where the client is a child.<sup>130</sup>

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128. One of the plaintiff's attorneys in *OFFER*, commenting on two of her co-counsel in the case, made the following statement which reveals the dilemma children's rights advocates face when representing children: "You've got two people, you know, who are for children's rights and they love children, and the fact is that they are really doing what the hell each of them wants. And there's no restraint on what they do. The kids are manipulable. And I struggle with this a lot, simply in trying to have some sort of a respectable position for myself to live with." Chambers & Wald, *supra* note 125, at 94-95 (interview with Louise Gans); see also Robert L. Rabin, *Lawyers for Social Change: Perspective on Public Interest Law*, 28 STAN. L. REV. 207, 234 (1976) ("[W]hen a public interest law firm identifies a critical issue, it rarely has any trouble finding a client who is willing to pursue the matter."); Guggenheim, *supra* note 3, at 154-55 ("When lawyers are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child wants or needs.").

129. Mnookin, *supra* note 9, at 54. As another commentator noted, this danger is particularly extreme where an attorney represents groups of clients: "[T]here is an inevitable danger that the lawyer who sets out to help disadvantaged people as members of groups may succeed in oppressing them (or some of them) as individuals." Stephan Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 U. VA. L. REV. 1103, 1104 (1992) (commenting on the failure of the Model Rules of Professional Conduct to regulate the representation of groups).

130. Mnookin, *supra* note 9, at 54.



The case of *In re A.W.*, discussed above, provides a compelling example of this fact. In that case, attorneys for the Legal Assistance Foundation of Chicago, a public-interest group which publicly advocates the right of children to have attorneys who will advocate only what child-clients wants,<sup>131</sup> volunteered to represent a thirteen-year-old girl on a motion for substitution of counsel. The girl wished to have an attorney who would argue to the juvenile court on her behalf that she should be permitted to resume unsupervised, overnight visits with her stepfather, a man who was convicted of long-term sexual abuse of the child and served four years in prison for that crime. After the attorneys for the Legal Assistance Foundation of Chicago were granted the motion for substitution,<sup>132</sup> they then proceeded to argue the case according to the expressed wishes of their child-client.

The Assistant Public Guardian assigned to argue against the visits, Miriam Solo, found the case particularly disturbing. She indicated that the more evidence she heard as the hearings proceeded, the more convinced she became that "it would be very dangerous for the girl to return to her stepfather's home for unsupervised visits."<sup>133</sup> Moreover, Ms. Solo was troubled and alarmed when the girl's attorneys sought to suppress evidence which strongly indicated that the visits should not occur.<sup>134</sup> The attorneys did so despite the fact that much of the evidence which they sought to suppress was critical for the court to have in the record in order to make an informed decision serving the long-term best interests of the child.<sup>135</sup>

*In re A.W.* seems to be a case in which the attorneys for the child may have put their cause — granting children increased autonomy by giving children the right to an attorney who will follow their instructions and forcefully advocate for the outcome desired by the child — ahead of the needs of this particular child-client, in this case, protection from sexual abuse.

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131. See e.g., Hoffman, *supra* note 25; Clinic Tries to Do Justice, *supra* note 114.

132. This matter is now on appeal before the Illinois Appellate Court for the First Judicial District. A decision is expected in May 1993.

133. Telephone interview with Miriam Solo, Assistant Public Guardian (Mar. 23, 1993).

134. *Id.*

135. *Id.*

#### IV. REPRESENTING CHILDREN AND THE MODEL RULES OF PROFESSIONAL CONDUCT — IT IS TIME FOR A CHANGE

##### A. *Background*

##### 1. Representing the Child

One of the most difficult tasks an attorney can undertake is to represent a minor. As has been previously discussed, such representation is difficult for many reasons, among them are: the uncertainty over the proper role of the attorney in legal proceedings involving minors, potential ethical conflicts which occur when an attorney represents a minor, and questions over who has the right to control the course of the proceeding. These issues have traditionally arisen where the child is suing on his or her own behalf and where the attorney has been hired by the parents or appointed by the state. However, because children today are increasingly given the right to their own counsel in various types of proceedings, and because children might now begin to sue on their own behalf with greater frequency, more attorneys will face these problems than ever before. Thus, it is important for attorneys representing children to recognize the myriad problems which may confront them.

Surprisingly, there is a dearth of guidance available to attorneys representing children. Goldstein, Freud and Solnit have remarked that "legislators, judges, and commentators (including ourselves) have failed to clarify how the role of the lawyer for the child-client may differ from his role in relation to adult clients."<sup>136</sup> Likewise, Professor Guggenheim has noted his surprise at the lack of guidance the Supreme Court and other federal and state courts have offered on the proper role of attorneys representing children of any age.<sup>137</sup> Statutes, even those expressly authorizing a child's right to counsel in certain proceedings, also fail to specify the proper role and obligations of an attorney representing a child.<sup>138</sup> Moreover, as discussed below,<sup>139</sup> the Model Rules of Professional Conduct, one of the

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136. GOLDSTEIN ET AL., *supra* note 5, at 116-17 (footnote omitted).

137. Guggenheim, *supra* note 3, at 95-97 (discussing examples of cases in which courts simply told the attorneys to act in the best interest of the child but failed to provide any guidance whatsoever on how this important task was to be accomplished).

138. *See id.* at 96-97 (statutory guidance to attorneys representing children is "uninstructive").

139. *See infra* notes 140-54 and accompanying text.

standards by which attorneys must measure their conduct,<sup>140</sup> also fail to give any real guidance on how the ethical and practical obligations of an attorney differ when the attorney is representing a child rather than an adult. Without any guidance from any of these sources, the attorney is left alone to determine how his or her role and obligations differ when the client is a child.<sup>141</sup> This poses dangers for the child-client where the child's attorney uses this freedom to pursue a course other than one in the best interest of that particular child.<sup>142</sup>

## 2. The Model Rules of Professional Conduct

The Model Rules of Professional Conduct (Model Rules) are designed to provide ethical guidelines to attorneys.<sup>143</sup> The Model Rules' treatment of the situation in which children are clients is deficient, however, because the Model Rules fail to take into account the variety of circumstances under which an attorney may be called upon, or may volunteer, to represent a child. The Model Rules also do not delineate the proper role of the child, the child's parents or the attorney, where the client is the child. Instead, the Model Rules simply counsel that an attorney should treat a minor client as any other client "as far as reasonably possible."<sup>144</sup>

### a. *The Preamble to the Model Rules of Professional Conduct*

The preamble of the Model Rules gives advice to the lawyer on his or her role and responsibilities as a legal professional. However, this language is problematic when applied to the representation of children. For example, the first clause in the preamble states that "[a] lawyer is a representative of *clients*."<sup>145</sup> However, if an attorney has been appointed by the

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140. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1992) [hereinafter MODEL RULES] ("many of a lawyer's professional duties are prescribed in the Model Rules").

141. Perhaps for this reason, the American Bar Association recently convened a panel of experts on the representation of children to discuss the proper role of attorneys representing children in a variety of contexts. Hoffman, *supra* note 25, at B6. The panel eventually agreed that standards for children's representatives should, and will, be drafted. *Id.*

142. These dangers are discussed more fully *supra* part III.

143. MODEL RULES, *supra* note 140, Rule 1.14(a).

144. The ABA adopted the Model Rules of Professional Conduct in 1983. This body of rules is designed to replace the ABA Code of Professional Responsibility. A majority of states have now adopted the Model Rules, some altering the text of the rules in certain areas. The Model Rules are still under consideration in some states.

145. MODEL RULES, *supra* note 140, pmbl. (emphasis added).

court to represent the "best interests" of a very young child, then does the primary duty of the attorney run to the court or the child's parents, in seeming contradiction of the Model Rules, or does it run to the child?<sup>146</sup> Moreover, if the attorney's primary duty is to the child-client, then is that attorney restricted from advocating a "cause" which may run contrary to the best interests of that *particular* child despite the fact that the attorney believes that the "cause" he or she is promoting, if adopted, would better the welfare of most children generally? The lawyer in this position could justify his or her position by pointing to language in the preamble which states that "a lawyer should seek improvement of the law" as support for such conduct.<sup>147</sup> Clearly, in that attorney's mind, adoption of his or her "cause" would be an improvement in the law even if that view is not shared by a majority of the legal profession.<sup>148</sup>

Further complicating matters is the preamble's explanation of the various functions which an attorney should perform in representing a client. Consider the following language:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, the lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealing with others.<sup>149</sup>

Where the client is a child lacking legal capacity to make binding decisions, the meaning of these functions certainly changes. For example, where the child is very young, it makes no sense to require the attorney to attempt to provide the child-client with an informed understanding of the child's legal rights and obligations. Instead, the lawyer should present this information to the child's parents if they are not disqualified or their interests are not in conflict with the child's, or to the guardian ad litem where the parents are not available or have lost their

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146. See Lyon, *supra* note 5, at 693 ("Model Rule 1.14 is flawed because it does not articulate a standard for determining when the child should not be treated like other clients or how the case should be directed when the child is not treated like a normal client.").

147. *Id.*

148. Moreover, the Comment to Rule 1.3 states that "[a] lawyer has professional discretion in determining the means by which a matter should be pursued." MODEL RULES, *supra* note 140, Rule 1.3 cmt.

149. *Id.*

right to act on the child's behalf. If there is no guardian ad litem, then the attorney may view her or his role as a de facto guardian ad litem and inform the court of the options available to the child. This is the way it should be. However, under the current Model Rules, the attorney could justifiably conclude that he or she has discretion to determine what the position of the child should be and then "zealously advocate" that position. No ethical check or balance on the exercise of that discretion now exists.

Where the child is older, the attorney must then determine to what extent the child has the right to control the litigation. There is no clear guidance in the Model Rules concerning who should control the litigation in this instance. Should it be the parents unless they are unfit? What if the parents have a dispute with the child over lifestyle choices and the child takes them to court over it? What should the role of the judge be in determining the competence of the child to direct the litigation? These questions remain open to speculation under the current Model Rules.

*b. Model Rule 1.2 Scope of the Representation*

Model Rule 1.2 suggests that an attorney should abide by the wishes of the client concerning the proper objectives of the representation.<sup>150</sup> Because elsewhere the Rules state that the

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150. The rule provides:

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the

attorney should, to the extent possible, treat the minor-client as any other client,<sup>151</sup> this suggests that the child should be able to control the objectives of the litigation "to the extent possible." The most reasonable interpretation of the interplay between these two rules is that the attorney should act according to the wishes of the child to the extent that the attorney believes that the child is competent to direct the attorney. If the child is not competent to direct the attorney, then, to that extent, the attorney cannot treat the child like any other client.

This is problematic because it requires the attorney to make a judgment call on "competence." This is a threshold question with no criteria expressed in the Model Rules. This creates the temptation for an attorney who represents a specific cause to more easily decide that the child is not competent to direct the attorney, freeing the attorney to take a desired approach to the proceeding that may promote a general cause without protecting the needs and rights of that specific child-client. Likewise, this also creates an incentive for an attorney who believes in child autonomy to allow the child to direct the attorney. This may be inappropriate, and even dangerous, in cases such as *In re A.W.*, discussed above, due to limitations on children's competence to make immediate decisions that best serve their long-term rather than short-term interests.<sup>152</sup> Moreover, the constitutional right of fit parents to make decisions on behalf of their minor children would thereby be circumvented.

### c. *Model Rule 1.14 Client Under a Disability*

The section of the Model Rules which most clearly applies to the legal representation of children is Rule 1.14 "Client Under a Disability." This rule provides as follows:

- (a) When a client's ability to make adequately considered decisions in connection with the representation

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lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

*Id.* Rule 1.2.

151. *Id.* Rule 1.14.

152. These same concerns also relate to Rule 1.3, which requires that the lawyer keep the client reasonably informed so that the client has "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Here, as in Rule 1.2, the attorney must make a threshold determination of the ability of the child-client to direct the attorney, and this determination affects the extent of the lawyer's ethical obligations to the child-client.

is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot reasonably act in the client's best interest.<sup>153</sup>

The Comment to this section indicates that despite the child's legal incapacity, the child should be consulted where feasible.<sup>154</sup> The Comment also acknowledges the intermediate degrees of competence which exist among minors. The Comment refers only to the custody proceeding, but in so doing, suggests that children as young as five should have the opportunity to express a custody preference to the person or entity making the custody determination.

Another important aspect of the Comment to Rule 1.14 is its guidance on the appointment of a legal guardian. The Comment provides that where a legal representative has been appointed for the minor-client, the attorney should look to that legal representative for guidance on how to proceed. The Comment goes on to state that where a legal representative has not been appointed, but the attorney believes that it would be in the best interests of the client to have such a representative appointed, the attorney should seek that appointment. Despite the detail with which the Comment treats the appointment of a legal guardian, the Comment completely overlooks the parental role in a child's decisionmaking process.

A troubling entry in the Comment to Rule 1.14 is that where the attorney represents a minor or a person suffering from a disability, and the disclosure of that disability would adversely affect the client's interest, the attorney is in an "unavoidably difficult" situation regarding whether the attorney should disclose the disability. This is problematic because often the attorney is acting not as an advocate but as investigator or factfinder whose role is to provide the judge with additional information relevant to the decision at hand. If the attorney conveys the wishes of the child-client but does not disclose the fact that the attorney believes that the child is

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153. *Id.* Rule 1.14.

154. The commentary states that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." *Id.* Rule 1.14 cmt.

completely incapable of offering a reasonable opinion, then the attorney has fulfilled the dictates of the Model Rules but has failed to fulfill his or her proper role as an investigator. And if the attorney were to disclose the inability of the child-client to offer a reasonable opinion, then the client would be breaching Model Rule 1.14. This and other shortcomings in the Model Rules suggest that an amendment to the Model Rules is needed.

*B. Proposal — Amendment of the Model Rules of Professional Conduct to Provide Guidelines to Attorneys Representing Children*

As the discussion above illustrates, generally it is unwise to allow either the attorney of a child-client or the child himself or herself to control the scope and course of litigation where parents have not forfeited their right to make decisions on behalf of their minor children. In order to provide guidelines for attorneys representing minors which protect deserving parents' rights to raise their children, the ABA should adopt an amendment to the Model Rules. A more detailed practice guide, which is likely to come from the ABA committee that is currently considering standards for attorneys representing children, should provide more specific guidance to attorneys representing children in a variety of situations and should, of course, be made widely available. Also desirable would be requiring some type of training for attorneys who have no experience representing children but wish to do so. Such programs would necessarily need to be implemented and run by the various state bar organizations.

An amendment to the Model Rules would be the least expensive, most effective means of providing attorneys a standard by which to measure their conduct. This is so because nearly all states require attorneys to pass the Multistate Professional Responsibility Exam, which tests lawyers' knowledge of the Model Rules. Therefore, lawyers entering practice would quickly become familiar with the amendment. Other attorneys would likely learn about the amendment through continuing legal education courses or by word of mouth.

One possible amendment which would minimize the dangers of unrestricted representation of child-clients described above would be the following revision of Model Rule 1.14:<sup>155</sup>

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155. For a related proposal, see Lyon, *supra* note 5, at 694-95. Although the direction of the two proposed amendments is substantially different, some of the language is the same.



(c) If the client is a minor represented by an attorney, the parent or parents have a rebuttable right to direct the course of the representation. If the interests of the parent or parents conflict with those of the child, or the parent or parents have been found "unfit" by an authorized agency or court, or the parent or parents are otherwise unable to direct the course of the representation, then this presumption is overcome.

(1) If this presumption is overcome, then the child's guardian ad litem shall direct the course of the representation.

(2) If there is no guardian ad litem, the lawyer shall seek a judicial determination of whether the child is competent to direct the attorney. If the court determines that the child is sufficiently mature to direct the attorney, the attorney shall maintain a normal attorney-client relationship with the child.

(i) In making this competency determination, the court may use rebuttable presumptions concerning typical ages at which minors possess the requisite maturity to make competent decisions on various issues as reflected in current statutes.

(ii) If the court determines that the minor lacks sufficient capacity to direct the attorney, the court shall appoint a neutral guardian ad litem to direct the course of representation.

Adoption of this language would ensure that parental rights in participating in important decisions over a child's future are protected where the parents have not forfeited their rights in this regard. Where parents have forfeited their rights, such as in *In re A.W.*, attorneys would have a specific course to pursue ensuring that immature children would not be permitted to independently direct their attorney at the expense of the child's own long-term best interests. This amendment would also ensure that the attorney would have less discretion to unilaterally control the course of the litigation. Restricting the attorney's discretion in this manner would protect children from potentially unscrupulous counsel tempted to misuse the judicial process.

## V. CONCLUSION

Attorneys representing children are faced with many difficult issues, such as who should control the course of the litigation and whether the child's wishes should be taken into account where the child is not the one directing the litigation. These decisions have ethical overtones and should be addressed by the Model Rules of Professional Conduct. However, the Model Rules do not yet adequately address such issues. Because of the increasing frequency with which attorneys may now be confronted with such difficult decisions, it is in the best interests of the legal profession and society for guidelines to be promulgated. In addition, courts and legislatures will soon have to address the extent to which minors can bring suit in their own name and the proper subject matter for such suits. For the reasons stated in this article, when considering adoption of a "children's right" to independently bring suit, courts and legislatures should keep in mind the valid reasons behind the presumption of children's legal incapacity and the importance of parental participation in children's decision-making where there has been no finding of parental unfitness and there is no conflict of interest. If they are able to do so, the likelihood of children successfully bringing suit against their parents in the absence of a finding of parental unfitness or a conflict of interest between the parents and the child would be diminished. Moreover, under such a philosophy, children will continue to enjoy the protections and supervision they need to fully and naturally blossom into adulthood.

