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## A CHILD-CENTERED RESPONSE TO THE ELKINS FAMILY LAW TASK FORCE

Hon. Amy M. Pellman,<sup>\*</sup> Robert N. Jacobs,<sup>\*\*</sup> and Dara K. Reiner<sup>\*\*\*</sup>

In *Elkins v. Superior Court*, 163 P.3d 160 (Cal. 2007), California's Supreme Court asked the Judicial Council to form a task force to make recommendations to increase "access to justice" in family court, because it was concerned about rules, policies, and procedures that put self-represented litigants at an unfair disadvantage in parentage and dissolution cases.

Neither the task force's report in 2010 nor the legislation that the report inspired the same year addresses children's due process rights, even though children ordinarily have no access to justice. This Article shows that due process sometimes requires the trial court to appoint counsel for children to obtain the information the court needs to address children's interests.

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This Article also explains why trial courts should not construe the new Elkins laws to impose new and unique restrictions on children’s lawyers, and proposes new legislation and court rules to clarify children’s due process rights and minors’ counsel’s ethical duties when custody is at issue in family court.

#### INTRODUCTION

The *Elkins Family Law Task Force: Final Report and Recommendations (Elkins Report)*<sup>1</sup> is a package of proposals designed to balance the scales in family court<sup>2</sup> on behalf of self-represented litigants.<sup>3</sup> The Elkins Family Law Task Force (the Task Force)<sup>4</sup> presented the *Elkins Report* to the Judicial Council of California on April 23, 2010, after holding hearings and reviewing suggestions for almost two years.<sup>5</sup>

Regrettably, the Task Force seems to have forgotten something important: like the conscientious parents who arranged for their children to attend summer camp, loaded

<sup>1</sup> ADMIN. OFFICE OF THE COURTS: CTR. FOR FAMILIES, CHILDREN, & THE COURTS, ELKINS FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS (Apr. 2010) [hereinafter ELKINS FINAL REPORT], available at <http://www.courts.ca.gov/documents/elkins-finalreport.pdf>; see also ELKINS FAMILY LAW IMPLEMENTATION TASK FORCE, REPORT TO THE JUDICIAL COUNCIL (Apr. 23, 2010) [hereinafter ELKINS JUDICIAL COUNCIL REPORT], available at <http://www.courts.ca.gov/documents/elkins-jcreport.pdf>; ADMIN. OFFICE OF THE COURTS: CTR. FOR FAMILIES, CHILDREN & THE COURTS, ELKINS FAMILY LAW TASK FORCE FINAL REPORT: EXECUTIVE SUMMARY [hereinafter ELKINS EXECUTIVE SUMMARY], available at <http://www.courts.ca.gov/documents/elkins-executive.pdf>.

<sup>2</sup> “‘Family court’ refers to the activities of one or more superior court judicial officers who handle litigation arising under the Family Code. It is not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties.” *In re Chantal S.*, 913 P.2d 1075, 1078 (Cal. 1996); see also CAL. FAM. CODE § 2010 (West 2010) (outlining family court qua family court jurisdiction); WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW ¶ 3:3.10 (2010) (“In practice, the superior court exercising jurisdiction under the Family Code is known as the ‘family court’ (or ‘family law court’). But there is no separate ‘family court’ per se.”).

<sup>3</sup> See *infra* notes 17–18 and accompanying text.

<sup>4</sup> See ELKINS EXECUTIVE SUMMARY, *supra* note 1, at 3. Associate Justice Laurie D. Zelon of the Court of Appeal, Second Appellate District (Los Angeles), chaired the Task Force, which consisted of thirty-eight members, including the following:

[A]ppellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help center attorneys, court executives, family court managers, family court child custody mediators, court administrators, and legislative staff. Members had extensive experience in all aspects of family law and represent courts and diverse cultural and economic communities from throughout the state.

*Id.*

<sup>5</sup> See *id.* In the *Elkins Judicial Council Report*, the Task Force urged “the Judicial Council . . . [to] [d]irect the Administrative Director of the Courts to develop a plan that includes key milestones for implementing the recommendations.” ELKINS JUDICIAL COUNCIL REPORT, *supra* note 1, at 1.

the car with the children's gear, filled the gas tank, checked the tires, and left home only to notice ten miles down the road that the backseat was suspiciously quiet, the Task Force somehow seems to have forgotten the kids.

Because children have so little access to justice, so little sophistication, and so much at stake when custody is at issue in family court,<sup>6</sup> they belong at the center of any discussion of family court reform. Yet, not one of the *Elkins Report's* 5 broad categories of recommendations, 21 main recommendations, and 117 specific recommendations would increase children's access to justice or help ensure due process for children in child custody proceedings.<sup>7</sup>

California's Legislature ("the Legislature") adopted two bills in 2010—AB 939<sup>8</sup> and AB 1050<sup>9</sup>—in response to some of the Task Force's recommendations. The sections of these bills that apply directly to children do not address children's due process rights.<sup>10</sup> Instead, they make it much easier for parents to call children as witnesses and to cross-examine them.<sup>11</sup> Rather than increase children's access to justice, these sections put more children where most children never want to be: squarely in the crosshairs of their parents' divorce.<sup>12</sup>

This Article offers a child-centered response to the *Elkins Report* and the legislation it inspired. Part I explains that California law does not adequately protect the interests of children involved in custody-and-visitation proceedings because the law does not provide workable standards to trigger the appointment of counsel to represent them.

Part II argues that United States Supreme Court and California Supreme Court precedents require trial courts to decide on a case-by-case basis whether to appoint independent counsel to represent children when custody is at issue, consider all relevant factors, and create a record sufficient to support appellate review.<sup>13</sup>

Part III defines child-centered representation, and sets forth the reasons why this type of representation best secures substantive justice for children in child custody cases. We identify substantive justice as a parenting plan that serves the child's best

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<sup>6</sup> See Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 870–72 (2007).

<sup>7</sup> See ELKINS EXECUTIVE SUMMARY, *supra* note 1, at 3 ("Our task force's recommendations fall under five broad categories. . . . Included within these categories are 21 main recommendations that cover different aspects of family court. Within the 21 main recommendations are 117 specific recommendations."); see also *infra* Part V for a discussion of the Task Force's specific recommendations for minor's counsel.

<sup>8</sup> Assemb. B. 939, 2010 Leg. Reg. Sess. (Cal. 2010).

<sup>9</sup> Assemb. B. 1050, 2010 Leg. Reg. Sess. (Cal. 2010).

<sup>10</sup> Assemb. B. 939 §§ 1(c), (d), (e), 3; Assemb. B. 1050 § 1(a)–(i).

<sup>11</sup> See Assemb. B. 939 § 15; Assemb. B. 1050 § 1(b)–(i).

<sup>12</sup> See *infra* notes 155–59 and accompanying text.

<sup>13</sup> The existing appointment statute and rule of court shed little or no light on two crucial questions: (1) precisely when shall the court exercise its discretion to appoint counsel for children?, and (2) precisely what is appointed counsel's role in these cases? See *infra* notes 30–31 and accompanying text.

interest.<sup>14</sup> Since trial courts have very limited means to obtain information about the parents and the children who appear before them in marital actions and parentage proceedings, they frequently must rely on children's lawyers to gather the facts that bear on the child's best interest and to recommend a parenting plan based on objective criteria that are set forth in state law.

Part IV offers anecdotal evidence—the only evidence available—that appointing counsel tends to improve outcomes for children. This is especially important when the children have special needs, the parents have serious parenting deficiencies, the conflict between the parents is intense, the family's home environment is toxic, or both parents are so consumed with “winning” that they have lost sight of their children's best interest. A well-conceived parenting plan can mean the difference between a stable and an unstable childhood. When a child has special needs, or a parent has serious deficiencies, a well-conceived parenting plan can even mean the difference between life and death.

Part V summarizes the Legislature's response to the *Elkins Report* and urges trial courts not to construe that response to place new or unique restrictions on children's lawyers. Trial courts should interpret the new legislation in a manner that is consistent with an attorney's ethical duties to act like a lawyer, not just an investigator or a judicial factotum; to exercise independent judgment on behalf of the client; and to file all appropriate pleadings and request appropriate relief on the client's behalf.<sup>15</sup>

Part VI offers a roadmap toward justice for children in family court by proposing new legislation and court rules designed to clarify children's due process rights and minors' counsel's ethical duties when custody is at issue. This Part also urges the Legislature to require trial courts to hold a hearing to decide whether to appoint counsel for the child whenever custody is at issue in family court, and to repeal the existing requirement to appoint guardians ad litem for some children involved in custody litigation. This Part also encourages the Judicial Council to establish rules to define child-centered representation, to resolve any confusion that may exist about children's pleadings, and to maximize the benefit of those pleadings to trial courts.

#### I. CALIFORNIA'S APPOINTMENT STATUTE

In *Elkins v. Superior Court*,<sup>16</sup> the California Supreme Court struck down a local court rule that put self-represented litigants at an unfair disadvantage in family court.<sup>17</sup>

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<sup>14</sup> The Legislature has made it clear that it does not expect trial courts to carve up custodial time as if it were an element of the parents' community property. Instead, the governing statutes require trial courts to develop a parenting plan that serves the children's best interest. *See infra* notes 89–90.

<sup>15</sup> *See infra* notes 176–99 and accompanying text.

<sup>16</sup> 163 P.3d 160 (Cal. 2007).

<sup>17</sup> *Id.* at 177–78; *see* ELKINS FINAL REPORT, *supra* note 1. As the report explains, a local family court rule and a trial scheduling order required:

[P]arties [to] present their cases and establish the admissibility of all the exhibits they sought to introduce at trial by declaration. Mr. Elkins's

In a footnote, the court asked the Judicial Council to appoint a task force to come up with “proposals that will increase access to justice, ensure due process, and provide for more effective and consistent rules, policies, and procedures” in family court.<sup>18</sup>

Since the parties in *Elkins* were parents,<sup>19</sup> the Task Force did not expressly focus on increasing access to justice or ensuring due process for children.<sup>20</sup> Yet no one in family court has less “access to justice” than children, because they cannot represent themselves as a matter of law,<sup>21</sup> and rarely are in a financial position to hire an attorney.<sup>22</sup> Recognizing this reality, state statutes and court rules create a presumption in favor of appointing counsel to represent children in dependency, delinquency, and other types of child custody proceedings.<sup>23</sup>

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pretrial declaration failed to establish the evidentiary foundation for all but 2 of his 36 exhibits, and the court excluded [the 34 remaining exhibits]. Subsequently, the court divided the marital property substantially in the manner requested by Mr. Elkins’s former spouse . . . . In August 2007, the California Supreme Court found that the local rule conflicted with existing statutory laws and held that marital dissolution trials should proceed under the same general rules of procedure that govern other civil trials.

*Id.* at 9 (quotation marks and citations omitted).

<sup>18</sup> *Elkins*, 163 P.3d at 178 n.20.

We recommend to the Judicial Council that it establish a task force . . . to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for litigants, many of whom are self-represented. . . . Special care might be taken to accommodate self-represented litigants. Proposed rules could be written . . . [to] ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court.

*Id.*

<sup>19</sup> *Elkins*, 163 P.3d 160

<sup>20</sup> See ELKINS EXECUTIVE SUMMARY, *supra* note 1, at 1.

<sup>21</sup> See *infra* note 72 (explaining that children generally are not parties to custody actions in family court, and cannot appear *in propria persona* in any event).

<sup>22</sup> It is not clear whether retaining a private lawyer would offer any benefit to a child who could somehow afford to do so. See Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 95, 102–04 (1995).

<sup>23</sup> See CAL. WELF. & INST. CODE § 317(c) (West 2011) (requiring juvenile courts to appoint counsel for the child when custody is at issue in dependency proceedings unless the court finds on the record that “the child would not benefit” from such appointment and states reasons for the finding); WELF. & INST. § 633; CAL. R. CT. 5.534(h)(2)(A) (requiring the court to appoint counsel for the child when custody is at issue in delinquency proceedings “unless the child knowingly and intelligently waives the right to counsel”); see also WELF. & INST. § 727.31 (requiring the court to appoint counsel for all children “placed in out-of-home care pursuant to Section 727.2 or 727.3 and for whom the juvenile court orders a hearing to consider permanently terminating parental rights to free the minor for adoption.”). Sections 727.2 and 727.3 govern children “in foster care who ha[ve] been declared [ ] ward[s] of the [delinquency] court . . . .” WELF. & INST. §§ 727.2–727.3; *In re Richard E.*, 579 P.2d 495, 498 (Cal. 1978)

By contrast, California Family Code section 3150(a), which governs the appointment of counsel for children in marital<sup>24</sup> and parentage<sup>25</sup> proceedings, contains no presumption or mandatory language in favor of appointment, and does not require trial courts to make formal “findings” supporting decisions whether to appoint counsel. It simply authorizes judges to appoint counsel for children when it would be in their best interest: “If the court determines that it would be *in the best interest of the minor child*, the court *may* appoint private counsel to represent the interests of the child in a custody or visitation proceeding.”<sup>26</sup>

Perhaps because the statute offers so little direction, judicial officers appear to exercise their appointment power idiosyncratically, resulting in “policies and procedures” that vary from fiscal year to fiscal year,<sup>27</sup> county to county,<sup>28</sup> courtroom to courtroom, and case to case. Some trial courts never appoint counsel for children under California Family Code section 3150(a), regardless of the facts alleged in the pleadings, while

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(holding that California Family Code section 7861 creates a *mandatory*, nondiscretionary duty to at least consider the appointment of counsel for children in actions for the purpose of having a minor child declared free from the custody and control of either or both parents); *cf.* CAL. PROB. CODE § 1470(a) (West 2011) (stating that the court may appoint counsel for a child named in a probate guardianship petition).

<sup>24</sup> See CAL. FAM. CODE §§ 2200, 2210, 2310 (West 2004) (describing three types of marital actions: dissolution, legal separation, and nullity, respectively).

<sup>25</sup> See FAM. §§ 7600–7730 (stating that parentage proceedings under the Uniform Parentage Act determine whom the law will recognize as a child’s legal parents); *see also* K.M. v. E.G., 117 P.3d 673, 678 (Cal. 2005).

<sup>26</sup> FAM. § 3150(a) (emphasis added).

<sup>27</sup> Public records show, for example, that San Francisco’s monthly spending on counsel appointed pursuant to Family Code, § 3150(a) increased from \$14,901.25 in FY 2008 to \$28,006.00 in FY 2009, to \$32,613 in FY 2010, before dropping to \$9,225.83 in the first half of FY 2011. Letter from Ann E. Donlan, Commc’ns Dir., Superior Court of Cal., Cnty. of San Francisco, to Robert N. Jacobs, Attorney at Law, (Mar. 21, 2011) (on file with author).

<sup>28</sup> Public records show dramatic differences in spending from county to county on counsel appointed pursuant to California Family Code section 3150(a), even allowing for population differences. Los Angeles County reports that in FY 2010, it received “claims for payment . . . totaling \$5,687,979.26 . . . [for] minor’s counsel [in] 2,259 cases.” Letter from Frederick R. Bennett, Court Counsel, to Robert N. Jacobs, Attorney at Law (Mar. 25, 2011) (on file with author). By contrast, Ventura County has no record of any such expenditures during the three most recent calendar years. Letter from Michael D. Planet, Exec. Officer, to Robert N. Jacobs, Attorney at Law (Feb. 10, 2011) (on file with author). Sometime after the court of appeal held in *Cunningham v. Superior Court*, 222 Cal. Rptr. 854 (Ct. App. 1986), that it could not conscript lawyers to represent children pro bono in parentage cases, Ventura County’s Superior Court seems to have decided as a matter of policy not to appoint counsel for children in custody cases. Ventura County’s record of expenditures is available from Michael Planet, Chief Executive Officer, Superior Court of California, County of Ventura, Hall of Justice, P.O. Box 6489, Ventura, California 93006-6489. Los Angeles County’s records are available from Administrative Records Request c/o Central Civil Operations Administration, Rm. 109, Stanley Mosk Courthouse, 111 N. Hill St., Los Angeles, CA 90012.

others appoint minor's counsel on a regular basis. Still others have appointment practices that show no discernible pattern.<sup>29</sup>

Rule 5.240 of the California Rules of Court attempts, but fails, to offer guidance by listing the following factors for trial courts to "take into account" when deciding whether to appoint counsel for a child:

- (1) The issues of child custody and visitation are highly contested or protracted;
- (2) The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
- (3) Counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
- (4) The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;
- (5) It appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- (6) Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
- (7) The best interest of the child appears to require independent representation; and
- (8) If there are two or more children, any child would require separate counsel to avoid a conflict of interest.<sup>30</sup>

This rule sheds very little light on the question of appointment because it offers no concrete means to assess whether these criteria exist in a given case. Short of holding a hearing, how might a trial court determine whether "the child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel," or "counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented," or "one or both parents are incapable of providing a stable, safe, and secure environment?"<sup>31</sup>

California Family Code section 3150, moreover, gives trial courts discretion to refuse to appoint counsel in all cases, even when they find that all of the factors listed in Rule 5.240 are present, and appointed counsel would unquestionably be in the

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<sup>29</sup> The counties deny that they keep statistics on the quantity of minors counsel appointments from district to district, or courtroom to courtroom. Only anecdotal information is available. *See infra* note 145 and accompanying text.

<sup>30</sup> CAL. R. CT. 5.240(a)(1)–(8).

<sup>31</sup> CAL. R. CT. 5.240(a). As a purely logical matter, nearly every case before a family court for trial should meet at least one of the criteria.



child's best interest.<sup>32</sup> This limitless discretion produces glaring inconsistencies in appointment practices, and raises serious questions of due process.

## II. DUE PROCESS

While attending to the due process needs of parents, the *Elkins Report* ignores the due process needs of children when it fails to address the laws governing the appointment of counsel to represent them. State and federal due process cases suggest that notwithstanding the discretionary language of an appointment statute or a court rule, a trial court must decide on a case-by-case basis whether to appoint counsel for children when custody is at issue in family court, consider all relevant factors, and create a record sufficient to support appellate review.<sup>33</sup>

Any discussion of a due process right to counsel in child-custody cases<sup>34</sup> must start with the United States Supreme Court's opinion in *Lassiter v. Department of Social Services*.<sup>35</sup> The case addresses a parent's right to counsel at a termination-of-parental-rights hearing following North Carolina's version of juvenile court<sup>36</sup> dependency

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<sup>32</sup> See FAM. § 3150(a).

<sup>33</sup> See Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 187–93 (2004).

<sup>34</sup> Courts and commentators have debated children's federal due process right to counsel since at least 1967, when the Supreme Court decided *In re Gault*, 387 U.S. 1 (1967), which held that children have a due process right to counsel in delinquency proceedings. See, e.g., JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 65–67 (1973); Anne V. Ardagh, *California Civil Code Section 4606: Separate Representation for Children in Dissolution Custody Proceedings*, 14 U.S.F. L. REV. 571 (1980); Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessarily Broad Standard, The Child's Constitutional Rights, The Role of the Attorney Whose Client is the Child*, 19 FAM. L.Q. 53, 57–65 (1985); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 54 (1992); James Kenneth 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 (1976); Emile R. Kruzick & David H. Zemans, *In the Best Interests of the Child: Mandatory Independent Representation*, 69 DEN. U. L. REV. 605, 606 (1992); David Peterson, Comment, *Judicial Discretion is Insufficient: Minors' Due Process Right to Participate with Counsel when Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 GOLDEN GATE U. L. REV. 513, 539 (1995); Maurice K. C. Wilcox, Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 930–51 (1976); Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L & SOC. CHANGE 177 (1974).

<sup>35</sup> 452 U.S. 18 (1981).

<sup>36</sup> *Id.*; see CAL. WELF. & INST. CODE §§ 245 (West 2008) (stating that a “juvenile court” is a superior court exercising limited jurisdiction arising under the Juvenile Court Law); *People v. Smith*, 1 Cal. Rptr. 3d 901, 919 (Ct. App. 2003) (stating that juvenile courts “are empowered to declare juveniles to be ‘wards of the court’ based either on the absence of proper parents (‘dependency’ jurisdiction) or the juvenile’s own misbehavior (‘delinquency’ jurisdiction)”);

proceedings.<sup>37</sup> The Court refused to find a right to counsel in every such proceeding—but held that “the complexity of the proceeding and the incapacity of the uncounseled [party] could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s right insupportably high.”<sup>38</sup>

The *Lassiter* Court specifically declined to “formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements,”<sup>39</sup> instead leaving the appropriateness of appointment in any individual case “to be answered in the first instance by the trial court, subject, of course, to appellate review.”<sup>40</sup>

The Court held that in a civil case where physical liberty is not at stake, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires trial courts to balance the factors announced in *Mathews v. Eldridge*,<sup>41</sup> “and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where [an] indigent [party], . . . may lose his [or her] personal freedom.”<sup>42</sup>

The *Mathews* analysis involves two steps: trial courts must first decide whether the asserted private interests are encompassed within the Fourteenth Amendment’s protection of life, liberty, or property; if protected interests are implicated; courts must then decide what procedures constitute due process.<sup>43</sup> The second step requires trial courts to assess the private interests at stake, the government’s interests, and the risk of an erroneous decision in the absence of the safeguard at issue—in this case, appointed counsel.<sup>44</sup>

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*see also* CAL. WELF. & INST. CODE § 300 (defining dependency jurisdiction); WELF. & INST. § 601 (defining delinquency jurisdiction).

<sup>37</sup> Custody is at issue at several stages of dependency proceedings, including detention and disposition hearings. At the detention hearing, the court must decide whether to return the child to the custody of the parent or guardian, or vest “temporary . . . custody of the child . . . with the county social services agency pending disposition . . . .” GARY C. SEISER ET AL., CALIFORNIA JUVENILE COURTS PRACTICE & PROCEDURE § 2.43 (2011). At the disposition hearing, the court must decide, among other things, whether to “permit the child to remain at home,” “[o]rder custody to the noncustodial parent,” or place the child with a nonparent caretaker. *Id.* at § 2.123.

<sup>38</sup> *Lassiter*, 452 U.S. at 31.

<sup>39</sup> *Id.* at 32.

<sup>40</sup> *Id.* The Supreme Court re-emphasized the requirement of findings in *Turner v. Rogers* when it reversed and vacated a civil contempt judgment against an indigent parent who was subject to a child support order. The Court held that the contempt judgment violated due process, in part because the trial court failed to make findings in support of its decision not to appoint counsel for the parent. 131 S. Ct. 2507, 2520 (2011); *see also* Saleeby v. State Bar, 702 P.2d 525, 533 (Cal. 1985) (stating that due process requires “a reasonable record upon which review may be based”).

<sup>41</sup> 424 U.S. 319 (1976).

<sup>42</sup> *Lassiter*, 452 U.S. at 27. Chief Justice Burger, who provided the necessary fifth vote for the majority in his concurring opinion, did not expressly endorse the “presumption” described in the Court’s opinion. *Id.* at 34–35 (Burger, J., concurring).

<sup>43</sup> *Caloca v. Cnty. of San Diego*, 85 Cal. Rptr. 2d 660, 665 (Ct. App. 1999).

<sup>44</sup> *Mathews*, 424 U.S. at 335.

California's Due Process Clause<sup>45</sup> provides more expansive protection than its federal counterpart.<sup>46</sup> "Under our state Constitution, [a party] need not establish a property or liberty interest as a prerequisite to invoking due process protection."<sup>47</sup> Instead, "due process means that decisions to deprive individuals of substantial interests should not be made arbitrarily or by unfair procedures."<sup>48</sup>

To determine what process is required under California's constitution, the courts apply a

flexible balancing standard [that] considers (1) the private interest . . . [at stake], (2) the risk of an erroneous deprivation of such interest . . . and the probable value . . . of additional or substitute procedural safeguards, (3) the [dignity] interest in informing individuals of the nature, grounds and consequences of the action[s] and in enabling them to present their side of the story before a responsible government official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>49</sup>

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<sup>45</sup> CAL. CONST. art. I, § 7(a).

<sup>46</sup> See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1989) (A state may "exercise its . . . sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" (citing *Cooper v. California*, 386 U.S. 58, 62 (1967))); *Quail v. Municipal Court*, 217 Cal. Rptr. 361, 364-74 (Ct. App. 1985) (Johnson, J., concurring and dissenting) (analyzing state and federal due process requirements, the California common law of indigents, the inherent power of the judiciary to administer justice, and the injustice of forcing unrepresented litigants to resolve their disputes "through a highly technical process which can only be negotiated by educated and skilled lawyers"); see also Earl Johnson Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implication for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201 (2003); Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2005); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 504-05 (1998) (discussing how Europe and the United States have different views on the constitutional right to civil counsel).

<sup>47</sup> *Smith v. Bd. of Med. Quality Assur.*, 248 Cal. Rptr. 704, 710 (Ct. App. 1988).

<sup>48</sup> *In re Winnetka V.*, 620 P.2d 163, 168 (Cal. 1980) (citations omitted) (ordering rehearing in juvenile proceeding).

<sup>49</sup> *In re Malinda S.*, 795 P.2d 1244, 1252 (Cal. 1990) (citations omitted). In *In re Jay R.*, a court phrased the analysis somewhat differently:

Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings. In making this determination, we must examine the nature and magnitude of the interests involved, the possible consequences appellants face

Under California law, the court does not balance the net weight of “these factors against a ‘presumption’ that appointed counsel is required only if a person’s physical liberty is at stake.”<sup>50</sup>

Children at the center of marital and parentage actions have a right to counsel in appropriate cases under both the state and the federal standard. Like the parents in *Lassiter*,<sup>51</sup> children also have constitutional rights,<sup>52</sup> which include the right to safe, secure and sufficient parenting.<sup>53</sup> These private interests are substantial. In *Salas v. Cortez*,<sup>54</sup> California’s Supreme Court held that the private “interest in maintaining a parent-child relationship [is] a compelling one, ranked among the most basic of

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and the features which distinguish [this proceeding] from other civil proceedings. These factors must then be balanced against the state’s interests. 197 Cal. Rptr. 672, 679 (Ct. App. 1983) (alteration in original) (quotation marks and citation omitted).

<sup>50</sup> *In re Jay R.*, 197 Cal. Rptr. at 679 (“California precedents do not give rise to such a presumption under the California Constitution and, indeed, hold just the opposite.”) (citing *Mills v. Municipal Court*, 515 P.2d 273, 282 (Cal. 1973)).

<sup>51</sup> 452 U.S. 18 (1981).

<sup>52</sup> *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“[T]o the extent [that] parents and families have fundamental liberty interests . . . so, too, do children have these interests, and so, too, must [these] interests be balanced in the equation.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (“[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”) (internal quotation marks and citation omitted); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”); *In re Gault*, 387 U.S. 1 (1967) (recognizing due process right to counsel in juvenile delinquency proceedings).

State courts have a “duty” to develop additional fundamental constitutional rights beyond those recognized under federal law (and those made explicit in the state constitution), if such rights are “within the intention and spirit of our local constitutional language and . . . necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” *Serrano v. Priest*, 557 P.2d 929, 950 n.43 (Cal. 1976) (citation omitted). In determining the scope of constitutional rights, California’s courts look first to state law and “the full panoply of rights [that] Californians have come to expect as their due.” *Id.* at 950 (internal citation omitted). “California recognizes the principle that children are not merely chattels belonging to their parents, but rather have fundamental interests of their own.” *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 514 (Ct. App. 1996) (internal citation omitted). In *In re Roger S.*, the California Supreme Court held that a minor has a right to due process “when a parent . . . initiates [legal] action in the exercise of the parent’s responsibility.” 569 P.2d 1286, 1290 (Cal. 1977).

<sup>53</sup> *See In re Angelia P.*, 623 P.2d 198, 203–04 (Cal. 1981); *In re Carmeleta B.*, 579 P.2d 514, 520 (Cal. 1978); *In re Albert B.*, 263 Cal. Rptr. 694, 702 (Ct. App. 1989); *see also Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (noting that society benefits when the child is “safeguarded from abuses and given opportunities for growth”).

<sup>54</sup> 593 P.2d 226 (Cal. 1979).

civil rights.”<sup>55</sup> On that basis, the court reversed parentage judgments entered against indigent defendants and held that the trial court erred by denying their requests for appointed counsel.<sup>56</sup>

Few (if any) decisions in a child’s life matter more than the custody, visitation, and other “well-being” orders delineated in a parenting plan.<sup>57</sup> When a child has special needs, or when a parent has serious parenting deficiencies, the court’s parenting plan can mean the difference between life and death.<sup>58</sup> Even when both parents are competent and a child has no special needs, a parenting plan can have a profound effect on the child’s happiness, moral development, and academic success.<sup>59</sup>

The Supreme Court has held that the state has a complementary “*parens patriae*” interest in preserving and promoting the welfare of the child” by limiting exposure to

<sup>55</sup> *Id.* at 230 (internal quotation marks omitted); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (“[T]he Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion.”).

<sup>56</sup> *Salas*, 593 P.2d at 234.

<sup>57</sup> *See infra* notes 120–21 and accompanying text for a discussion of parenting plans.

<sup>58</sup> Children with severe psychological issues, children being bullied, children struggling with identity issues—all are more vulnerable if their parents are too busy fighting amongst themselves to fully focus on the needs of their child. *See infra* notes 229–31 and accompanying text.

<sup>59</sup> *See generally* JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (showing that one third of children of divorce had serious psychological problems that persisted into adulthood); Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across the Generations*, 67 J. MARRIAGE & FAM. 191, 191–92 (2005) (stating that grandchildren of divorced grandparents show higher rates of marital discord, divorce, and tension in early parent-child relationships, and lower rates of educational attainment); Marsha Garrison, *Promoting Cooperative Parenting Programs and Prospects*, 9 J.L. & FAM. STUD. 265, 265, 267 (2007) (finding that parental conflict continues to hurt children even after the parents’ final separation); Sharlene Wolchik et al., *Events of Parental Divorce: Stressfulness Ratings by Children, Parents, and Clinicians*, 14 AM. J. COMM. PSYCH., 59, 72–73 (1986) (noting that divorce is almost always hard on children); *see also infra* text accompanying note 64 (discussing *Ford v. Ford*, 371 U.S. 187 (1962)).

A parenting plan that provides joint physical custody, with both parents expected to be more than visiting parents, is significantly associated with higher levels of child satisfaction than a parenting plan under which one parent has sole custody—absent high levels of parental conflict or a history of domestic violence. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCH. 91, 98 (2002); Janet R. Johnston, *High Conflict Divorce*, in 4 THE FUTURE OF THE CHILD 165, 174 (Spring 1994); Amy Koel et al., *Patterns of Relitigation in the Postdivorce Family*, 56 J. MARRIAGE & FAM. 265, 273, tbl. 4 (1994).

Parent-education programs aimed at reducing conflict between parents and improving ties with children have been shown to shield children from conflict, promote strong relationships with parents, and increase child satisfaction. *Overview of Children in the Middle Outcome Studies*, CTR. FOR DIVORCE EDUC., <http://www.divorce-education.com/research>.

potentially harmful adults.<sup>60</sup> This governmental interest is consistent with the private interest in “error-reducing procedures.”<sup>61</sup>

Family courts generally rely on parents to protect children’s interests,<sup>62</sup> even though some parents present a significant risk of child maltreatment,<sup>63</sup> and others are so consumed with “winning” that they lose sight of their children’s best interest.<sup>64</sup> In one

<sup>60</sup> *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

<sup>61</sup> *Id.* at 761.

<sup>62</sup> *See* Elrod, *supra* note 6.

[Parents] have not always done too well. Annually, approximately four and a half million children are reported abused and neglected [in the United States]; over one million children are impacted by divorce; thirty-four percent of children are born out of wedlock; and more than twelve million children (or 17 percent) live below the poverty line.

*Id.* at 871.

“In California, 694,000 (22%) of all children, ages five and younger, live in poverty . . . and nearly . . . 45% live in low-income families.” *California Report Card 2011–12*, 28 CHILDREN NOW (2011), [http://www.childrenow.org/uploads/documents/reportcard\\_2011.pdf](http://www.childrenow.org/uploads/documents/reportcard_2011.pdf). “Although they are eligible, only . . . [two percent] of California’s 332,825 children under age three living in poverty receive educational, health, nutritional and social services offered by Early Head Start.” *Id.* at 73.

<sup>63</sup> *See* Elrod, *supra* note 6, at 871–72; American Bar Association, Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 152 (2003) [hereinafter *ABA Custody Standards*] (reporting that “[o]ften, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing . . . a case for the child’s best interests [ ] places additional perspectives, concerns, and relevant material information before the court so it can make a more informed decision.”).

For these and related reasons, Article 12 of the U.N. Convention on the Rights of the Child requires nations to recognize children’s right “to be heard in any judicial and administrative proceedings affecting the child . . . in a manner consistent with the procedural rules of national law.” United Nations Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

On August 7, 2006, the American Bar Association adopted a Resolution urging “state . . . governments to provide legal counsel as a matter of right at public expense . . . in . . . adversarial proceedings where basic human needs are at stake, such as those involving . . . child custody . . . .” TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 5 n.6 (2006), <http://www.nlada.org/DMS/Documents/1154019065.09/06A112A.pdf> [hereinafter *ABA Report*].

<sup>64</sup> *See* *Ford v. Ford*, 371 U.S. 187, 193 (1962) (“[E]xperience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”).

Nor can the question of custody be left to parents’ lawyers. By virtue of the attorney-client relationship, parents’ lawyers are bound to represent parental interests even if they conflict with the child’s interests. Parents’ lawyers, therefore, cannot stand in for children even if they are inclined to do so. In *In re Dunlap*, the court noted that a parent’s lawyer “who discovers in the

commentator's words, "the emotional nature of divorce proceedings" requires the court to appoint independent counsel to act on behalf of the child.<sup>65</sup> "When biased parents are left with the responsibility of representing their children's interests, the end result is an often uninformed decision by the court."<sup>66</sup>

At worst, parents use their children in the litigation process for many inappropriate reasons, including control, increased child support payments, and emotional blackmail.<sup>67</sup> For example, where an issue of child abuse exists, one parent may trade a concession on a separate issue, like child support, for the other parent's agreement not to raise the issue.<sup>68</sup> Or the perpetrator of child abuse may also be the perpetrator of spousal abuse, causing the abused spouse to be afraid to raise any issue related to domestic violence.<sup>69</sup>

Humboldt County's Family Court apparently recognized the need for an independent voice for children when it instituted a "general practice of appointing a guardian ad litem [for all children involved in marital proceedings]."<sup>70</sup> Although this appointment practice was not challenged on appeal, the California Court of Appeal ordered sua sponte the family court to desist on the ground that children are not parties to marital proceedings.<sup>71</sup>

California Family Code section 7635, makes some children parties to parentage proceedings, and requires family courts to appoint guardians ad litem for them.<sup>72</sup> Trial courts generally ignore this requirement, perhaps because so "[f]ew lay people are

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course of representing a client in a child custody proceeding that the interests of his client and the child are conflicting may not, without his client's consent, notify the court of the conflict nor suggest court appointment of separate counsel for the child." 133 Cal. Rptr. 310, 316 (Ct. App. 1976) (citing Cal. State Bar, Formal Op. No. 1976-37).

<sup>65</sup> John David Meyer, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 BRANDEIS. J. FAM. L. 445, 448 (1998).

<sup>66</sup> *Id.* at 450.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 449-50.

<sup>69</sup> See generally, Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluation of Domestic Violence and Child Abuse in Custody Determinations*, JUDGES J., Fall 1997, at 38.

<sup>70</sup> *In re Marriage of Lloyd*, 64 Cal. Rptr. 2d 37, 39 (Ct. App. 1997) (The opinion does not disclose whether the guardians ad litem were lawyers.).

<sup>71</sup> *Id.*; see *infra* note 72.

<sup>72</sup> Under California Family Code section 7635(a), a "child may, if under the age of [twelve], and shall, if [age twelve] or over, be made a party to a [parentage] action." In general, a "minor can only appear through a guardian ad litem, and that party cannot appear without counsel." *J.W. v. Superior Court*, 22 Cal. Rptr. 2d 527, 533 (Ct. App. 1993). However, under California Family Code section 7635(a), a child's "guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child." FAM. § 7635(a).

By contrast, "the only persons permitted to be parties" to a marital action "are the husband and wife" with exceptions not relevant here. CAL. R. CT. 5.102(a). A trial court may not appoint a guardian ad litem for children in marital actions "[s]ince minors are not parties" to such actions. *Lloyd*, 64 Cal. Rptr. 2d at 41.

equipped to respond to the legal complexity of [custody] proceedings . . . .”<sup>73</sup> The ABA has noted the problem inherent in appointing nonlawyers to represent children:

The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer.<sup>74</sup>

When courts disregard children’s dignitary interests, refuse to explain the nature, grounds, and consequences of the court’s actions, and refuse to appoint anyone to present the child’s perspective, the “[c]hildren at the center of the dispute are often the only ones whose voices and concerns are not heard.”<sup>75</sup> Only by appointing a lawyer for a child can the court gather the information it needs to assess the child’s interest.<sup>76</sup>

Some courts and commentators have identified a countervailing interest against appointment of advocates for children, rooted in conceptions of family privacy and limited interference with family relations.<sup>77</sup> The short answer to this interest is that once parents invoke the court’s jurisdiction to resolve important questions regarding their child’s health, education, or welfare, they cannot deprive the court of the tools it needs

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<sup>73</sup> *In re Emilye A.*, 12 Cal. Rptr. 2d 294, 303 (Ct. App. 1992).

<sup>74</sup> See ABA Report, *supra* note 63, at nn.9–10. Courts have learned from decades of experience under the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA) that untrained or undertrained guardians ad litem provide little more than a fig leaf of due process and a false sense of security. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–06 (2006)). Dissatisfaction with CAPTA guardians ad litem has caused Congress to amend CAPTA several times over the years to ensure higher quality representation and to bar appointment of untrained or poorly trained court-appointed representatives for children. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 609 (2009).

<sup>75</sup> Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody*, JUDGES J., Winter 2008, at 23, 26.

<sup>76</sup> See *infra* note 110 for a list of factors that the *Lassiter* Court and others have suggested that trial courts should consider to assess the risk of an unfair proceeding resulting in a bad outcome.

<sup>77</sup> See Laura Oren, *The State’s Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 713–14 (1990).



to answer those questions with accuracy and justice. It is well settled that the state may intervene in family affairs when necessary to safeguard the child's health, educational development, and emotional well being.<sup>78</sup>

In *Lassiter*, the Court recognized that state budget concerns are another legitimate countervailing interest.<sup>79</sup> The Court held, however, that they were "hardly significant enough to overcome [the] private interests" at stake in that case, and noted that the cost of appointing counsel in termination-of-parental-rights proceedings would be "de minimis" in comparison with the cost of appointing counsel in criminal actions.<sup>80</sup>

Although a full analysis of costs is beyond the scope of this Article, several points are worth noting here: costs could be constrained by choosing the most appropriate systems to deliver services, and by making effective use of all available revenue streams.<sup>81</sup> California Family Code section 3153(b), for example, lifts some of the economic burden off the taxpayers by authorizing trial courts to order parents to pay "all or a portion of the cost of counsel appointed [to represent the children]."<sup>82</sup> For parents, this can be

<sup>78</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>79</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981); see also Chief Justice Ronald M. George, *Access to Justice in Times of Fiscal Crisis*, 40 GOLDEN GATE U. L. REV. 1 (2009).

<sup>80</sup> *Lassiter*, 452 U.S. at 28.

<sup>81</sup> The *Elkins Report* outlines a compelling case for the proposition that "our family courts have attempted to make the most effective use of the resources available to them to meet the increasing needs of California's families." ELKINS FINAL REPORT, *supra* note 1, at 7–8. Some observers would question, however, whether this observation applies to resources spent on minor's counsel, and whether more could be done with existing resources.

Insufficient resources raise their own due process issues. In *Young v. Young*, 164 N.W.2d 585 (Mich. Ct. App. 1968), a Michigan statute appointed the public prosecutor to represent all children involved in family court custody cases at a capitated rate of \$5.00 per case. This led to a situation where "[a]ll too frequently the prosecuting attorney knows little or nothing of the case." His appearance in the matter may often be "perfunctory . . . he files a claim and receives an order for the payment of the \$5 fee which the legislature requires the county to pay." *Id.* at 587. The court questioned whether this constitutes effective assistance. *Id.* at 588.

<sup>82</sup> CAL. FAM. CODE § 3153(b) (2004). The full text of this subsection reads as follows:

Upon its own motion or that of a party, the court shall determine whether both parties together are financially unable to pay all or a portion of the cost of counsel appointed pursuant to this chapter, and the portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

*Id.* San Diego and Tulare Counties, for example, seek reimbursement from parents for fees paid to minor's counsel. Public records show that between FY 2008 and FY 2011, San Diego County spent a total of \$1,301,115.60 for counsel appoint pursuant to California Family Code section 3150, and recovered a total of \$340,753.00 from parents. Letter from Michael M. Roddy, Exec. Officer, Superior Court of Cal., Cnty. of San Diego, to Robert N. Jacobs, Attorney at Law, (May 26, 2011) (on file with author). Public records show that between July 1, 2006 and May 18, 2011, Tulare County spent a total of \$430,729.24, and recouped a total

money well spent. Children's attorneys can refocus expensive, overzealous advocates from the battle between the parents to the best parenting plan for the child.<sup>83</sup>

California's historic Sargent Shriver Civil Counsel Act<sup>84</sup> may provide useful information about costs, outcomes, and innovative collaborations in custody as well as other types of cases. "The Shriver law recognizes a civil right to counsel and establishes funding for a two-year pilot project that will provide poor individuals a lawyer in certain high stakes cases, . . . includ[ing] domestic violence claims, child custody cases, and housing matters. The pilot project is slated to start in 2011 . . . ."<sup>85</sup>

Children's lawyers can also save court resources when they represent the children of "frequent flyers," that is, self-represented parents who bring separate proceedings to resolve each kink in their custody battles, file additional proceedings to change the court's rulings when they believe they failed to explain themselves properly at prior hearings, and initiate yet more proceedings based on their misunderstandings of what happened at earlier hearings.<sup>86</sup>

Children's lawyers frequently mediate disputes between frequent flyers by focusing on the threat that continuing conflict poses to their children's well-being.<sup>87</sup> When court

of \$207,548.03. Letter from Deanna A. Jasso, Ct. Admin. Manager, Superior Court of Cal., Cnty. of Tulare, to Robert N. Jacobs, Attorney at Law, (May 24, 2011) (on file with author).

<sup>83</sup> See *infra* Part IV.

<sup>84</sup> CAL. GOV. CODE § 68651 (original version at ch. 457, § 6, Stat. 2009 (A.B. 590)).

<sup>85</sup> *California Recognizes Civil Right to Counsel and Creates Pilot Program*, BRENNAN CTR. FOR JUSTICE (OCT. 13, 2009), <http://www.brennancenter.org/content/resource/californiaab590/>.

<sup>86</sup> See generally Leah J. Pollema, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107 (2007).

<sup>87</sup> See JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE, 50, 62 (1980) (finding that even when the fight for loyalty is not overt, young children often believe that they are somehow responsible for the conflict); Paul R. Amato, Laura S. Loomis, & Alan Booth, *Parental Divorce, Marital Conflict, and Offspring Well-being During Early Adulthood*, 73 SOC. FORCES 895, 897 (1995); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 963, 963-65 (2000) (stating that conflict-filled relationships between parents undermine both parents' relationships with their children, and are reliably associated with bad outcomes); Charlene A. Wolchik et al., *supra* note 58, at 70 (asserting that children at all stages rate conflict between their parents as one of the greatest stresses that they face following their parents' separation).

Research consistently associates family relationships marked by high levels of conflict with mental health problems in childhood and adulthood. See, e.g., Rena L. Repetti, Shelley E. Taylor & Teresa E. Seeman, *Risky Families: Family Social Environments and the Mental and Physical Health of Offspring*, 128 PSYCHOL. BULL. 330 (2002).

Those who witness intense bitterness between their parents and are caught [in repeated] loyalty binds are at high risk for later emotional disturbance. Parental conflict interrupts many of the critical tasks of psychological development. It changes the nature of the parent-child relationship. It creates anxiety and distress, over stimulates and frightens children, weakens

mediation services are not fruitful, children's lawyers can help parents think through their parenting disputes and help resolve them in a single proceeding. Children's lawyers also help reduce confusion by drafting "orders after hearings," "final judgments," and other documents, and by explaining those documents to the parties.

Since costs can be constrained, and could even be de minimis, and since lawyers for children are indispensable to justice in some child custody cases, both state and federal due process analyses require trial courts to at least consider appointing counsel for children whenever custody is at issue in marital actions and parentage proceedings, and to create a record sufficient to enable judicial review.<sup>88</sup>

### III. CHILD-CENTERED REPRESENTATION

Substantive justice in child-custody cases means a parenting plan that serves the child's best interest.<sup>89</sup> This definition requires courts to consider the parents' backgrounds; any history of abuse by one parent against the child or the other parent; the

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parents' protective capacity, and compromises identity formation. Most of all, it leaves children powerless to do anything about it. One twelve-year-old girl, who became suicidal after living with parental enmity for years, said sadly, 'As long as I'm alive, it will never stop.'

CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH CONFLICT DIVORCE 26 (1994).

<sup>88</sup> *But see In re Marriage of Laursen & Fogarty*, 243 Cal. Rptr. 398, 401–02 (Ct. App. 1988) ("[A] party to a custody proceeding is not eligible to receive appointed counsel. The California Constitution (art. I, § 13) and the federal Constitution (6th Amend.) specifically provide for court-appointed counsel only for criminal matters and for those cases denominated civil, but basically criminal in nature.") (citation omitted).

The court did not cite *Salas* or *Lassiter* in *Laursen*, and specifically noted that the party without counsel in that case was not indigent. *Id.* The court based its holding on *Hunt v. Hackett*, 111 Cal. Rptr. 456, 458 (Ct. App. 1973), in which the court held that an indigent real estate broker did not have a constitutional right to appointed counsel in an action for breach of contract, fraud, negligence, and conspiracy to defraud. *Id.*

*Laursen's* persuasive value is questionable at best, given its failure to cite the apparently contrary rulings by higher courts in *Salas* and *Lassiter*, or to grapple with the important constitutional differences between child-custody cases and tort claims against a real estate broker. *Laursen*, 243 Cal. Rptr. 398. Much more recently, in *Guardianship of H.C.*, 198 Cal. App. 4th 160 (2011), California's Court of Appeal decided, without citing *Laursen*, that trial courts must decide on a case-by-case basis whether to appoint counsel for a parent involved in a custody proceeding. *Id.* at 162.

<sup>89</sup> *See, e.g.*, CAL. FAM. CODE §§ 3011, 3020, 3040 (West 2004); *id.* § 3100 (West Supp. 2011); *In re Marriage of Brown & Yana*, 127 P.3d 28, 32 (Cal. 2006); *Montenegro v. Diaz*, 27 P.3d 289, 293 (Cal. 2001); *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996); *In re Marriage of Battenburg*, 33 Cal. Rptr. 2d 871, 873 (Ct. App. 1994); *see also* FAM. § 2335 (West 2004) (disallowing findings of fault in divorce cases); HOGOBOOM & KING, *supra* note 2, ¶ 7:300. The Family Code allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child. FAM. § 3040(b).

habitual or continual illegal use of controlled substances or alcohol by either parent; the nature and amount of contact with the parents; and the child's general health, safety, and welfare.<sup>90</sup>

This mandate notwithstanding, trial courts have very limited means to discover information about the parents who appear before them.<sup>91</sup> Parents in family court represent the full range of humanity, from exceptionally well-qualified parents who have decided to go their separate ways for reasons that are not the court's concern, to murderers; child-abusers; drug-abusers; dangerous gang members; sociopaths; and persons with severe, uncontrolled psychoses.

Many parents in family court have been convicted of serious felonies that put their children at risk.<sup>92</sup> It is not unusual for the same parents to appear in both the

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<sup>90</sup> *Id.* § 3011. Family Court custody decisions are governed by Chapter 1 (commencing with section 3020) and Chapter 2 (commencing with section 3040) of Part 2 of Division 8 of the Family Code, relating to custody of a minor. *See also id.* § 3006 (“‘Sole legal custody’ means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.”); *id.* § 3003 (“‘Joint legal custody’ means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.”).

<sup>91</sup> The Legislature has amended California Family Code section 3027 and California Welfare & Institutions Code section 328, effective January 1, 2011, to allow trial courts to direct the “local child welfare services agency” to investigate allegations of child abuse and neglect and report their findings to the court. FAM. § 3027 (West Supp. 2011); CAL WELF. & INST. CODE § 328 (West Supp. 2011). While this makes sense in concept, in reality these agencies may already have more responsibilities than they can handle. *See, e.g.,* Garrett Therolt, ‘Crisis’ Found at Child Abuse Agency, L.A. TIMES, Nov. 12, 2010, at A1, A11 (noting that as of November 9, 2010, Los Angeles County’s Department of Children and Family Services (“DCFS”) had “a persistent backlog,” with four in ten open inquiries stretching beyond the state’s two-month deadline, and stating that “[t]he county’s high [child-abuse investigations] backlog appears to be contributing to poor outcomes in the [child-abuse investigations] unit . . . .”); *see also* Garrett Therolt, *Boy Tortured After County Said He was ‘Not at Risk,’* L.A. TIMES, Oct. 29, 2010, at A1, A9 (reporting that more than sixty-five children have died of abuse or neglect since the beginning of 2008 after being referred to DCFS according to county statistics and that a researcher hired by the state found that since 2007, children left by the department in their homes after investigations increasingly have experienced abuse again within a year). A recent national study of cases opened after January 1, 2007 suggested that DCFS’s problems are far from unique. *See* Kristine A. Campbell et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 943, 943 (2010). The study questions whether child welfare services has produced any measurable improvement anywhere in the lives of children. *Id.*

<sup>92</sup> In *In re Brittany S.*, 22 Cal. Rptr. 2d 50 (Ct. App. 1993), the court noted that “go to prison, lose your child” is not an appropriate legal maxim. *Id.* at 51. When a parent has been to prison for an offense related to parenting, however, it is important to know whether the parent has been rehabilitated. California has recognized that a criminal record may create a significant risk of child maltreatment. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 1502(a)

juvenile dependency court, charged with abuse and neglect, and the family court, seeking custody.<sup>93</sup> Unfortunately, many family courts do not have the resources to check parents' criminal records, or review their dependency files.<sup>94</sup>

Trial courts have even fewer mechanisms available to discover information about the children who are the subject of family-court actions.<sup>95</sup> For example, does the child have special medical, psychological, or educational needs?<sup>96</sup> Does the child have evidence that the parents are not likely to present?

California's statute governing children's lawyers' duties to their clients, combining aspects of both a child advocate and a guardian ad litem, frequently offers the best means of discovering information relevant to a child's best interest.<sup>97</sup> It is the lawyer's job under the statute "to gather evidence that bears on the best interests of the child, and present that admissible evidence to the court . . . ."<sup>98</sup> "If the child so desires, the child's counsel shall [also] present the child's wishes to the court."<sup>99</sup>

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(West 2008) (regulating and licensing community care facilities such as residential group homes, foster family agencies, and foster child facilities); *id.* § 1596.605; *id.* § 1596.60 (West Supp. 2011) (maintaining a "trustline" registry of persons who provide child care in an unlicensed home setting); *id.* §§ 1522, 1568.09, 1596.871(a)(1) (West 2008); *id.* §§ 1569.17(a), 1596.605(b)(1), 1596.607(a)(1) (West 2004) (stating that both the licensing standards and the trustline standards require prospective child care providers to pass a criminal record and a child abuse background screening).

<sup>93</sup> The juvenile court has exclusive jurisdiction to issue orders regarding the custody of a dependent child during the pendency of juvenile court proceedings. CAL. WELF. & INST. CODE §§ 302(c), 304, 362 (West 2008). Once the juvenile court terminates its jurisdiction, "the family law division of a superior court may hear any issues regarding custody." GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 2.31, at 2–60 (2008) (citing WELF. & INST. CODE § 304); *In re Sarah M.*, 285 Cal. Rptr. 374 (Ct. App. 1991), *overruled on other grounds by In re Chantal S.*, 913 P.2d 1075 (Cal. 1996). For the reasons stated above, it is not safe to assume that the termination of juvenile court jurisdiction means that the risk of child maltreatment has been eliminated, or even substantially reduced. *See supra* note 91.

<sup>94</sup> *See* Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 460 (2002).

<sup>95</sup> *See* Josanna Berkow, *Court Appointed Attorneys for Children*, 1 J. CENTER FOR CHILD. & CTS. 131, 132–33 (1999); *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 995 (1979); Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1150–53, 1184–85 (1978) [hereinafter *Lawyering for the Child*].

<sup>96</sup> *See infra* note 108.

<sup>97</sup> *See supra* notes 62–71 and accompanying text.

<sup>98</sup> CAL. FAM. CODE § 3151(a) (West Supp. 2011).

<sup>99</sup> *Id.* California Family Code Section 3151(a) defines minor's counsel's responsibilities as follows:

The child's counsel appointed under this chapter is charged with the representation of the child's best interests. The role of the child's counsel is

Trial courts appoint children's attorneys<sup>100</sup> where there are allegations that either parent has serious parenting deficiencies;<sup>101</sup> where the case involves allegations of physical or emotional abuse, neglect, or sexual molestation,<sup>102</sup> substance abuse,<sup>103</sup>

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to gather evidence that bears on the best interests of the child, and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel shall present the child's wishes to the court. The counsel's duties, unless under the circumstances it is inappropriate to exercise the duty, include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain evidence relevant to the custody or visitation hearings.

*Id.*

The requirement that the child's lawyer "present the child's wishes to the court" when "the child so desires" took effect on January 1, 2011. *Id.* Under prior law, it was the child's lawyer's responsibility to "present . . . to the court . . . the child's wishes when counsel deems it appropriate for consideration by the court . . ." *Id.* (West Supp. 2008) (amended 2010).

<sup>100</sup> See CAL. R. CT. 5.242 (setting forth the "[q]ualifications, rights, and responsibilities of counsel appointed to represent a child in family law proceedings[.]"); *id.* at 7.1101(b)(1) (adopting the same standards for appointments to represent minors in guardianships, and adding others).

<sup>101</sup> For empirical studies on the relationship between severe mental illness and child maltreatment, see generally Fred A. Rogosch et al., *Parenting Dysfunction in Child Maltreatment*, in 4 HANDBOOK OF PARENTING 127 (Marc H. Bornstein ed., 1995) (citations omitted). See also Sherryl H. Goodman & H. Elizabeth Brumley, *Schizophrenic and Depressed Mothers: Relational Deficits in Parenting*, 26 DEV. PSYCHOL. 31 (1990); Teresa Jacobsen & Laura J. Miller, *Focus on Women: Mentally Ill Mothers Who Have Killed: Three Cases Addressing the Issue of Future Parenting Capability*, 49 PSYCHIATRIC SERV. 650, 650–52 (1998).

<sup>102</sup> For a brief summary of the literature on physical and emotional abuse of children, see generally Sandra J. Kaplan, David Pelcovitz, & Victor Labruna, *Child and Adolescent Abuse and Neglect Research: A Review of the Past 10 Years. Part I: Physical and Emotional Abuse and Neglect*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1214 (1999). For a review of the literature on child sexual abuse, see generally Theresa M. Schuman, *Allegations of Sexual Abuse*, in COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS (Phillip M. Stahl ed., 1999). For studies of victim distress that results from children's involvement in the legal system, see generally Simona Ghetti, Kristen W. Alexander, & Gail S. Goodman, *Legal Involvement in Child Sexual Abuse Cases: Consequences and Interventions*, 25 INT'L J.L. & PSYCHIATRY 235, 251 (2002), and Irit Hershkowitz, Omer Lanes, & Michael E. Lamb, *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Parents*, 31 CHILD ABUSE & NEGLECT 111, 123 (2007).

<sup>103</sup> Effective January 1, 2006, the legislature amended California Family Code section 3041.5(a) to authorize the trial court to order drug testing under specified circumstances for any person seeking custody or visitation with a child. FAM. § 3041.5(a) (West Supp. 2011).

For a review of the literature on substance abuse and parenting, see generally Linda C. Mayes & Sean D. Truman, *Substance Abuse and Parenting*, in 4 HANDBOOK OF PARENTING 329 (Marc H. Bornstein ed., 2002).

domestic violence,<sup>104</sup> parental alienation<sup>105</sup> or threats of kidnaping,<sup>106</sup> when there is intense conflict between parents,<sup>107</sup> when a child has special needs,<sup>108</sup> including medical conditions, treatment issues, emotional problems, or learning disabilities; where the family's environment is toxic,<sup>109</sup> and when "the parents . . . have had uncommon difficulty in dealing with life . . . ."<sup>110</sup>

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<sup>104</sup> Family Code section 3011(b)(2) requires the court to consider any history of abuse by one parent against the other parent or a child in determining a child's best interest. FAM. § 3011(b)(2) (West 2004). Children who are exposed to domestic violence against a parent can suffer a form of "secondary abuse" because they "are affected by what goes on around them as well as what is directly done to them." *In re Heather A.*, 60 Cal. Rptr. 2d 315, 322 (Ct. App. 1996) (citing *In re Jon N.*, 224 Cal. Rptr. 319, 321 (Ct. App. 1986)).

Even a child who is not present during violent incidents may still be detrimentally affected by the violence because they live with the aftermath of and context surrounding violent incidents. Marjory J. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J. L. & PUB. POL'Y 221, 228–29 (1994).

<sup>105</sup> For current research on children who resist contact with a parent, see the articles collected in Volume 48 of *The Family Court Review*.

<sup>106</sup> Berkow, *supra* note 95, at 133.

<sup>107</sup> Children at all stages rate conflict between their parents as one of the greatest stresses that they face following their parents' separation. Wolchik, *supra* note 59, at 64, 66. For summaries of the empirical research on the effects of parental conflict on children, see generally Repetti et al., *supra* note 87. Sometimes, a picture really is worth 1,000 words. See, e.g., POSTCARDS FROM SPLITSVILLE, <http://www.postcardsfromsplitville.com> (last visited Oct. 10, 2011). To reduce conflict and facilitate communication, Family Code section 3190(a) gives the court jurisdiction to order the parents (or any other party) to participate in outpatient counseling for a period of not more than one year. FAM. § 3190(a); see also *id.* § 3191.

<sup>108</sup> Recent years have seen a significant increase in the population of young children with special needs, including acute, life-threatening medical conditions, chronic developmental disorders, and psychological and behavioral syndromes. These are children for whom ordinary parenting skills are insufficient. Conflict, marital separation, and divorce are often an unfortunate consequence of trying to raise these high-maintenance children. For a discussion of parenting plans for children with special needs, see generally Donald T. Saposnek et al., *Special Needs Children in Family Court Cases*, 43 FAM. CT. REV. 566 (2005).

<sup>109</sup> For a comprehensive review of research on the effects of neighborhood residence and child and adolescent well-being, see Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, in 126 PSYCHOL. BULL. 309 (2000). See also Robert H. Bradley, *Environment and Parenting* 281, in 2 HANDBOOK OF PARENTING: BIOLOGY AND ECOLOGY OF PARENTING (Marc H. Bornstein ed., 2002); John E. Richters & Pedro E. Martinez, *Violent Communities, Family Choices, and Children's Chances: An Algorithm for Improving the Odds*, 5 DEVELOPMENT AND PSYCHOPATHOLOGY, 609–627 (1993); see generally ANNE R. PEBLEY & MARY E. VAIANA, IN OUR BACKYARD: HOW 3 L.A. NEIGHBORHOODS AFFECT KIDS' LIVES (2002).

<sup>110</sup> In *Lassiter*, the court listed several factors that bear on the question of appointment of counsel. 452 U.S. 18, 30 (1981). They include: (1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures;

Children's attorneys remind parents that their interests and their children's interests are generally two sides of the same coin;<sup>111</sup> except perhaps in move-away cases, there is no inherent conflict.<sup>112</sup> As Judge Josanna Berkow has aptly noted, "[m]ost critically, children's attorneys direct the parents' focus back on their children, and away from disputes with each other."<sup>113</sup> The ABA's Custody Standards, therefore, require children's lawyers to "attempt to resolve [custody disputes] in the least adversarial manner possible."<sup>114</sup>

Professor Linda C. Elrod points out that "[a]ppointing counsel for a child to get the child's voice in the proceeding . . . adds . . . perhaps the most important voice and perspective to the placement issue."<sup>115</sup> In California, the governing statutes allow children's attorneys to introduce and examine their own witnesses, present arguments to the court concerning the child's welfare, and further participate in the proceedings to the degree necessary to represent the child.<sup>116</sup>

To ensure that the child's voice continues to be heard as lawyers advocate their clients' interests,<sup>117</sup> there seems to be a true consensus that children's lawyers must

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(5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question. *Id.* at 29.

Likewise, the ABA suggests fifteen factors that trial courts should consider when deciding whether to appoint counsel for a child. *ABA Custody Standards*, *supra* note 63, at 152–53; *see also* HON. JAMES D. GARBOLINO & HON. MARY ANN GRILLI, CALIFORNIA FAMILY LAW BENCH MANUAL § 9.5 (6th ed. 1998) (listing a number of circumstances that may lead bench officers to appoint minor's counsel); Leslie Ellen Shear, *Children's Lawyers in California Family Courts: Balancing Competing Policies and Values Regarding Questions of Ethics*, 34 FAM. & CONCILIATION CTS. REV. 256, 261–63 (1996) (listing still more relevant considerations). These factors are incorporated in Appendix A of this Article.

<sup>111</sup> *See In re Angelia P.*, 623 P. 2d 198, 202 (Cal. 1981) ("In general, children's needs are best met by helping parents achieve their interests.") (quotation marks and citations omitted).

<sup>112</sup> Relocation cases can pit parents' interests against children's interests. In years past, gender politics produced a series of contradictory legal standards and presumptions that rendered children's interests nearly extraneous to the debate. *See, e.g.*, *Marriage of McGinnis*, 9 Cal. Rptr. 2d 182, 186 (Ct. App. 1992) (requiring the primary parent to show that a move is, "essential and expedient" and for an "imperative reason," not just in the child's interest) *overruled by* *Marriage of Burgess*, 913 P.2d 473, 483 (Cal. 1996) (establishing a "presumption" that remaining with the "primary" parent will continue to meet children's interest in move-away cases). More recent cases have recognized that as a matter of common sense, family courts may not rely on presumptions or skewed burdens of proof to reach predetermined outcomes, but must instead weigh the risks and benefits of relocation against the risks and benefits of alternatives to relocation. *See, e.g.*, *In re Marriage of LaMusga*, 88 P.3d 81, 94 (Cal. 2004) ("The weight to be accorded to such factors must be left to the court's sound discretion.").

<sup>113</sup> *See* Berkow, *supra* note 95, at 133.

<sup>114</sup> *See ABA Custody Standards*, *supra* note 63, at 136 (stating that a child's lawyer should "[p]articipate in, and, when appropriate, initiate negotiations and mediation").

<sup>115</sup> *See* Elrod, *supra* note 6, at 889.

<sup>116</sup> *See infra* notes 166–68 and accompanying text.

<sup>117</sup> This is not to understate the value of a court-appointed advisor's expertise. *See Schall v. Martin*, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the



provide what has come to be known as “child-centered representation.”<sup>118</sup> Professor Elrod offers a working definition of what that means:

The key to child-centered representation is to understand the wishes and needs of a particular child in the context of the child’s family and the type of litigation. Child-centered representation means that the lawyer knows as much as possible about the child client, the child’s developmental stage, the child’s family, the child’s activities and interests, and the child’s needs. In all cases, the lawyer will develop a theory of the case based upon the individual child . . . . The lawyer must do a thorough investigation of the facts surrounding the current custody dispute and the role of all participants, including parents, extended family or others. The lawyer must talk with important people in the child’s life to gain perspective on this child’s needs and interests. The lawyer will prepare to present evidence, and examine and cross examine witnesses as in other cases. In other words, the child client deserves the same quality of representation that adult clients receive, taking into consideration the unique circumstances of the child.<sup>119</sup>

As advocates for their clients, children’s lawyers frequently file pleadings that conclude with recommendations (also known as “prayers for relief”), which take the form of a proposed “parenting plan.”<sup>120</sup> “The best parenting plans reassure children that their family is not broken but rearranged.”<sup>121</sup> In addition to addressing the question of custody, parenting plans also address factors bearing on the child’s health, safety, and welfare, and point families toward available services and resources.<sup>122</sup>

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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 as *parens patriae*.”); see also *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (finding that constitutional rights of children could not be equated with those of adults because of their “peculiar vulnerability . . . inability to make critical decisions in an informed, mature manner[,] and the importance of the parental role in child-rearing”).

<sup>118</sup> There continues to be a debate about details. For some of the flavor of this debate, see generally Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1135 (2006) and Annette R. Appell, *Representing Children, Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008).

<sup>119</sup> See Elrod, *supra* note 6, at 915–16.

<sup>120</sup> See CAL. FAM. CODE § 3040(b) (West 2004) (stating that the family court has the “widest discretion to choose a parenting plan that is in the best interest of the child”).

<sup>121</sup> Richard A. Warshak, *Punching the Parenting Time Clock: the Approximation Rule, Social Science, and the Baseball Bat Kids*, 45 FAM. CT. REV. 600, 613 (2007).

<sup>122</sup> See *Montenegro v. Diaz*, 27 P.3d 289, 293 (Cal. 2001) (stating that in crafting a “parenting plan . . . relevant factors include the health, safety and welfare of the child.”); Shear, *supra*

To ensure that children's attorneys do not usurp the role of experts by recommending parenting plans based on their own definitions of a good parent or role model,<sup>123</sup> the ABA has adopted Custody Standards that require children's lawyers to use objective criteria as set forth in the law related to the purposes of the proceedings when advocating a child's interests.<sup>124</sup> Under the ABA's Custody Standards, "determining the child's best interests is a matter of gathering and weighing the evidence, reaching factual conclusions and then applying legal standards" contained in a state's statutes and case law.<sup>125</sup>

To ensure that counsel's recommendations remain child-centered, Jean Koh Peters has proposed seven questions that children's lawyers should ask themselves in every case:

- (1) In making decisions about the representation, am I seeing the case . . . from my client's point of view, rather than from an adult's[?]
- (2) Does the child understand as much as I can explain about what is happening[?]
- (3) If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?
- (4) If I . . . treat my client differently from the way I would treat an adult . . . , in what ways will my client concretely benefit[?]
- (5) Is it possible that I am making decisions . . . for the gratification of the adults . . . , and not that of my client?
- (6) Is it possible that I am making decisions for my own gratification . . . , and not for the child?
- (7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?<sup>126</sup>

#### IV. BETTER OUTCOMES FOR CHILDREN

When children have lawyers, the court benefits as much as the children themselves. In high-conflict divorces, where parents are chronically litigating over custody and

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note 110, at 258 ("Where once child custody litigation boiled down to a choice between two parents, now it entails the development of a detailed parenting plan governing information exchange, decision making, responsibility for day-to-day care, holidays, conduct, transportation, and related issues.").

<sup>123</sup> See Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 313 (1998).

<sup>124</sup> See *ABA Custody Standards*, *supra* note 63, at 150–51.

<sup>125</sup> *Id.*

<sup>126</sup> Jan Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1511 (1996).

visitation, both parents bombard the court with negative representations of the other parent.<sup>127</sup> The court is presented with reams of paper that describe the parents being neglectful at best and abusive at worst. The novel that is written requires a critical eye; the court must often look beyond the mere words to decipher the true meaning.

Take, for example, the mother who argues for less time for the father because he is too busy with his career and will not have time to parent. The father, on the other hand, describes the mother as an overprotective micromanager. Underlying these descriptions is perhaps a handicapped child who needed special care. During the marriage, the mother felt abandoned by father's busy work schedule, and during the divorce tried to project those feelings of abandonment onto the child. The child's attorney brings a different perspective: the perspective of the child. This perspective does not just come from the child, but from the attorney's investigation and collateral interviews, which describe the father-child relationship as strong and bonded, despite the father's busy schedule.

Both the parents' own psychological baggage from their childhoods, as well as the psychological baggage from their marriage, undoubtedly influences their perceptions and the projections they make onto their children's relationship with the other parent.<sup>128</sup> In this way, it is easy for a parent to misperceive a child's behavior *vis-a-vis* his or her own distorted viewpoint. For example, the mother might construe the reason a child cries, or seems depressed after returning from a visit with her father as the result of neglect, bad parenting, or missing the mother too much.

The mother might start grilling the child, who, not wanting to disappoint the parent, finds something that was disagreeable at the father's home. Litigation ensues and the father throws back denials and affirmative grievances, such as alienation and coaching by the mother. Meanwhile, neither parent has presented the child's perspective and the court is left to figure out what is going on. After interviews with the child and other professionals, it is the child's attorney who dissects the behavior for the court by explaining the child's perspective: that the child was simply sad and grieved by the loss of her intact family.

Sometimes, the child's attorney is the only person who can coax information from the child to shed light on an otherwise "he said/she said" conundrum.<sup>129</sup> Take the child who has been visiting her father every other weekend for years and suddenly refuses to go to the visitation. Both parents throw out the usual hardballs, only to find out from the child's attorney that the child has come across an old picture of father and his new family from many years ago when the child was young. The child has always felt a deep sense of abandonment by the father for the time he disappeared from her life and started a new one with his current wife and child. Based on the relationship of trust and

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<sup>127</sup> Berkow, *supra* note 95, at 132–33.

<sup>128</sup> Vivienne Roseby & Janet R. Johnson, *Children of Armageddon, Common Developmental Threats in High-Conflict Divorcing Families*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 296 (1998).

<sup>129</sup> *Lawyering for the Child*, *supra* note 95, at 1126.

confidence the child develops with her attorney, the child feels safe enough to share her discovery with her attorney. What could have turned out to be protracted litigation and hours of custody evaluations ends up with a quick and easy solution.

There is great pressure on a court to make a decision regarding custody and visitation that is in the best interest of the child and is perceived as fair and just. The terms and conditions of custody and visitation awards are often grouped into cookie cutter solutions, such as: week to week, every other weekend and Wednesday night visits, split the holidays and two weeks in the summer.<sup>130</sup> Parents, most often fathers, are constantly pressuring the courts to be “fair” which in their eyes means being completely “equal” in time share, almost down to the minute.<sup>131</sup> Courts feel pressure to make small adjustments to appease the parent especially if the relationship seems good with both parents.<sup>132</sup> But often, the child gets lost in this equation.

Most courts have a background in children’s developmental stages and how they relate to time-share,<sup>133</sup> but many operate with a dearth of information about the

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<sup>130</sup> See Marygold S. Melli, *Guideline Review: Child Support and Time Sharing by Parents*, 33 FAM. L.Q. 219, 223 n.17 (1999) (citing Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L. REV. 619 (1989) (“[T]he amounts of time in a typical divorce decree [are] alternate weekends, one weekday evening, alternate holidays, and two weeks in the summer.”)).

<sup>131</sup> Irwin Garfinkel et al., *Fathers Under Fire: The Revolution in Child Support Enforcement in the USA* 7 (Ctr. for Analysis of Social Exclusion, Case Paper No. 14, 1998), available at <http://sticerd.lse.ac.uk/dps/case/cp/paper14.pdf>.

Perhaps the most frequently expressed concern of fathers is that they are denied access to their children. When child support enforcement was lax, non-resident fathers had the option of trading child support for access to their child. As enforcement has become more rigorous, non-resident fathers have relatively less bargaining power, and therefore they have been lobbying for government to enforce their visitation rights. In response, several demonstration programmes which seek to improve fathers’ access to their children, have been funded in different parts of the country.

*Id.*

<sup>132</sup> Roseby & Johnson, *supra* note 128, at 307.

There is great pressure on the professional and on the court to focus on the custody and visitation schedule as well, debating the benefits of joint versus sole custody, overnight visitations, weekly schedules, and holiday plans, in great detail. Unwittingly, the professional who is seeking to intervene becomes enmeshed in shifting allegiances, moving back and forth between each parent’s seemingly reasonable position and bearing the brunt of their mounting frustration.

*Id.*

<sup>133</sup> Judges are not usually psychologists or social scientists, of course, and different judges may have different information about children’s developmental needs, especially in areas in which there is no consensus. Compare Brief of Judith Wallerstein, PhD as Amici Curiae, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (No. S107355), with Brief of Richard A.

individual child<sup>134</sup>—especially with self-represented litigants—because every child is different. Is the time-share affecting the child’s academic, social or athletic careers? Does the stress of going back and forth to different homes make it more difficult to succeed in school for a child with Attention Deficit Disorder? Is the child missing out on key social functions at school as a result of the custody schedule? Again, without the child’s attorney’s perspective, the court, more often than not,<sup>135</sup> lacks this critical information about the individual child.

Research shows that tinkering with child custody and visitation schedules does not always alleviate the child’s problems.<sup>136</sup> Instead, the solution lies in “focusing on the child’s perspective and experience and helping parents to reframe the problem to be solved in terms of the child’s own concerns and preoccupations.”<sup>137</sup>

It is only from a child’s attorney that a court can really hear a child’s perceptions, preoccupations, and concerns.<sup>138</sup> Parents involved in high conflict divorces often project their own emotions onto their children.<sup>139</sup> The typical examples are the mother who was emotionally neglected by the ex-husband who projects that the father will be emotionally or otherwise neglectful to the child, and the father who feels emasculated by his ex-wife who projects that his ex-wife hates all men and that his son will suffer as a result.<sup>140</sup>

Children adjust, often negatively, to their parents’ behaviors, and develop maladaptive behaviors that again are often misinterpreted by their parents.<sup>141</sup> For example, the toddler who develops a biting habit or the child who self-soothes by masturbation becomes fodder for extended litigation directed at the other parent, without regard to the child’s own concerns and perceptions.<sup>142</sup>

The child’s attorney often can see through the haze of allegations and misinterpretations because he or she alone is investigating and presenting to the court the totality

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Warshak, PhD, *et al.* as Amici Curiae, *LaMusga*, 88 P.3d 81 (No. S107355), and Brief of the Association of Certified Family Law Specialists as Amici Curiae, *LaMusga*, 88 P.3d 81 (No. S107355) (disagreeing on the accuracy of the social scientific analysis in *In re Marriage of Burgess*, 913 P.2d 473 (1996), that most children’s developmental well-being is tied to the continuity of care by a primary parent). Especially under the evidence-based paradigm discussed *infra* at Part V, one can question whether judges should decide cases based on unstated understandings of issues that would be the subject of disputed expert testimony in other settings.

<sup>134</sup> See *supra* note 95 and accompanying text.

<sup>135</sup> See *supra* notes 91, 94 and accompanying text.

<sup>136</sup> Roseby & Johnson, *supra* note 128, at 307 (stating that “[e]mpiric research and clinical experience have found that the answers do not lie in making the ‘right’ custody decision, nor in searching for elusive ‘correct’ visitation formula. In these cases no amount of tinkering with the custody and visitation arrangements will alleviate the child’s problems.”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 296.

<sup>140</sup> *Id.* 296–97.

<sup>141</sup> *Id.* at 299–306.

<sup>142</sup> *Id.* at 303–04.

of the child's circumstances and perceptions.<sup>143</sup> The child's attorney has the responsibility to investigate the collateral sources and then present to the parties and the court the only viewpoint to which money and full 50/50 custody are irrelevant.<sup>144</sup>

Anecdotal evidence, culled unscientifically from five years before the mast in family court, offers many examples of outcomes for the child that would have been vastly different without children's attorneys.<sup>145</sup> Some parents, for example, fail to disclose important information about the other parent because they do not realize its relevance. Without appointing minor's counsel, a trial court in one case awarded sole legal and physical custody of a kindergartner to a father because no one disclosed that the father worshiped a self-proclaimed messiah who urged his followers to murder white devils and bring back body parts—a sliced-off ear or finger or head—as proof of the kill. By the time a new judge appointed minor's counsel, the child was suicidal. The new judge transferred custody to the mother and ordered her to place the child in therapy. The therapist reported that the child's depression was entirely situational and disappeared completely with a change of custody.

Without appointing minor's counsel, another trial court awarded sole legal and physical custody of two boys in elementary school to a father who may have never had a job, allowed the father, who was still without a job, to home-school the boys for about a year, and then permitted the father to move the boys to a new home in another state pending further orders. No one had disclosed that the father believed himself to be a "sovereign being," who had "revoked consent" to be governed by "statutory law."

The father thereupon rejected the court's jurisdiction to require him to allow the children to visit their mother or to return to California for subsequent hearings. Some months later, a new judge appointed minor's counsel, who reported that the children were miserable in their new state, missed their mother, and wanted to return to California. The new judge returned the children to California and transferred custody to the mother.

Some parents simply do not know enough about the other parent to disclose what the other parent is concealing. The father of an eighth-grade girl involved in a custody dispute knew, for example, that his daughter had five older brothers on her mother's side, but did not know very much about them—although he had some suspicions. The court-appointed counsel learned from a confidential source that all five brothers belonged to the same violent street gang. Counsel checked the Los Angeles County Sheriff's Department's Inmate Information Center when the mother would not explain the brothers' whereabouts. It turned out that all five brothers had been arrested on

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<sup>143</sup> CAL. FAM. CODE § 3151(a) (West 2004) ("The counsel's duties . . . include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary . . .").

<sup>144</sup> *Id.*

<sup>145</sup> Anecdotal evidence is the best evidence available. Unlike the juvenile dependency system, for example, the family court system does not attempt to measure whether children benefit from orders entered in custody disputes.

felony warrants in separate incidents within months of counsel's appointment. Each of the four adult brothers was being held on bail of at least \$300,000.00. Rather than take the risk that the girl would follow in her brothers' footsteps, the court transferred physical custody to her father.

Parents sometimes collude to keep crucial information from the court. In one case, court-appointed counsel for two elementary-school-aged children went to a parent's house and learned that the parents also had a teenaged daughter, who weighed almost 400 pounds, was not otherwise disabled, had no relationship with the other parent, was "home schooled," and rarely left home. Minor's counsel was able to shed light on the teen's issues, though she was not involved in the custody dispute. This child was being neglected by both parents and needed them to work together to address her extreme circumstances. The parents agreed to make the teen their first priority, and to try to resolve all future parenting issues through family therapy, rather than litigation.

Some parents just need a way out of the adversary system. Even when they are not rich, parents have been known to spend hundreds of thousands of dollars on attorneys' fees trying to do what is best for their children. They raise the money by selling their homes, borrowing from relatives, and liquidating assets—including college accounts. In one case, the court appointed minor's counsel after the parents had spent most of their family's assets on attorneys' fees. The children's lawyer submitted a brief, which concluded that the greatest threat to the children's well-being was the endless, expensive, stressful conflict between their parents. After reading the brief, both parents agreed to take a co-parenting class to resolve their issues and to submit all future parenting disputes to a parenting coordinator.

Co-parenting classes and parenting coordinators may be necessary in some cases, but in others parents are just looking for a conscientious, honest broker to take an independent, child-centered look at their situation, and tell them what they can reasonably expect under the law as it applies to the proceeding. These parents frequently enter stipulated orders based on minor's counsel's recommendations.

A child's lawyer is often in a position to cut to the heart of matters that may otherwise be difficult to penetrate in an adversarial situation. For instance, children do not want to anger or disappoint their parents. As a result, children will often tell each parent what that parent wants to hear. Take, for example, a move-away case involving parents with joint custody. The father wanted to move to a new state with his new wife in order to be closer to her extended family. The father alleged that his 14-year-old daughter was excited about the move and wanted to go with him; he also represented that the teenager was close to his new wife's family. The mother alleged that her daughter played on a local volleyball team, had maintained the same group of friends since birth, and did not want to move to a new state.

A minor's counsel, who had previously been appointed to explore a different issue, disclosed to the court, with her client's permission, that the minor told her father she wanted to move simply because she did not want to disappoint him. Upon further investigation, it was learned that the minor had met her stepmother's family just once.

The father withdrew his request and worked out an amicable custody arrangement with his ex-wife.

Other parents lack the perspective they need in order to know what is possible. For example, a father of an elementary school girl filed for custody after her teen-aged brother was shot in a drive-by shooting outside their mother's house. The mother blamed the neighborhood and pointed out that she worked full time, both children had good values, and both got good grades. For the mother, the neighborhood represented the whole world because she had grown up there. Minor's counsel printed out a list of vacant rentals in safer neighborhoods with better schools for essentially the same rent that the mother was paying to live in a "war zone." The mother moved, the father dropped his claim for custody, and the parents have co-parented successfully ever since.

Finally, a child's lawyer can be necessary to make court orders work. A mother alleged, for example, that her 3-year-old did not want to go visit her father. The mother alleged that the child cried, screamed and hung onto her while protesting the visits. This convinced the mother that something sinister was occurring, and she desired to end the visits. The father alleged that as soon as the child was in his car that she was fine, and that all their visits went smoothly. Minor's counsel revealed that the child appeared to have trouble with transitions in general. Minor's counsel discussed the situation with both parents and after both parents made a few, small adjustments, the conflict was resolved.

A child's lawyer is often a combination of attorney, counselor, and mediator, and holds a unique position that allows them to speak with the parents without their attorneys when consent has been obtained from the attorneys.<sup>146</sup> A child's lawyer is, first and foremost, a lawyer with a trained sense of relevance that comes from a background in family law and child development.<sup>147</sup> A child's lawyer can gather information from

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<sup>146</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer *has the consent of the other lawyer* or is authorized to do so by law or a court order.") (emphasis added).

<sup>147</sup> The *ABA Custody Standard* regarding training reads, in part, as follows:

Training for lawyers representing children in custody cases should cover:

1. Relevant state and federal laws, agency regulations, court decisions and court rules;
2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;
3. Applicable representation guidelines and standards;
4. The court process and key personnel in child-related litigation, including custody evaluations and mediation;
5. Children's development, needs and abilities at different ages;
6. Communicating with children;
7. Preparing and presenting a child's viewpoints, including child testimony and alternatives to direct testimony;
8. Recognizing, evaluating and understanding evidence of child abuse and neglect;



the child's therapists<sup>148</sup> and assist parents in gaining access to special education services and other resources.<sup>149</sup> Without children's lawyers, the court is often flying blind. With them, the court can frequently produce better outcomes for children.

#### V. THE LEGISLATIVE RESPONSE TO THE ELKINS REPORT

In deference to parents' due process rights, the *Elkins Report* contains twelve "specific recommendations" designed to "provid[e] guidance for children's participation and the appointment of minor's counsel."<sup>150</sup>

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9. Family dynamics and dysfunction, domestic violence and substance abuse;
  10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;
  11. Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;
  12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.

*ABA Custody Standards*, *supra* note 63, at 156–59.

<sup>148</sup> California Family Code section 3151(b)(5), gives a minor's counsel the "right" to "[a]ccess to the child's medical, dental, mental health, and other health care records, school and educational records, and the right to interview school personnel, caretakers, health care providers, mental health professionals, and others who have assessed the child or provided care to the child." CAL. FAM. CODE § 3151(b)(5) (West 2004).

No statute or appellate decision, however, identifies the holder of the psychotherapist-patient privilege when the patient is a child involved in a custody proceeding in family court. Effective January 1, 2001, the legislature amended California Welfare and Institutions Code section 317, subdivision (f), to specify that the child is the holder of the privilege in juvenile dependency court, and to authorize the child's lawyer to invoke the privilege for the child under certain circumstances. CAL. WELF. & INST. CODE § 317(f) (West 2008). In *People v. Superior Court (Humberto S.)*, a trial court refused to recognize the logical force of this rule in a juvenile delinquency case. 51 Cal. Rptr. 356 (Ct. App. 2006). The Supreme Court of California ultimately reversed on other grounds. 182 P.3d 600, 604–05 (Cal. 2008).

<sup>149</sup> The relevant *ABA Custody Standard* reads, in part, as follows:

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status-offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings, or third parties; (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

*ABA Custody Standards*, *supra* note 62, at 137.

<sup>150</sup> See ELKINS FINAL REPORT, *supra* note 1, at 49. While the Task Force's specific recommendations for children's participation and the appointment of minor's counsel are contained

Based on these recommendations, California's Legislature adopted two bills in 2010 ("the Elkins laws") containing provisions that apply directly to children and their lawyers. Neither bill recognizes children's right to counsel in family court proceedings.<sup>151</sup> The first bill, effective January 1, 2011, adds California Family Code section 217, and substantially rewrites California Family Code section 3151.<sup>152</sup> The second bill, effective January 1, 2012, revises California Family Code section 3042.<sup>153</sup>

California Family Code section 217 contains language that will make it much easier for parents to present live testimony from witnesses—including their children<sup>154</sup>—at hearings and trials and to cross-examine them.<sup>155</sup> As witnesses, children will be subject to depositions.<sup>156</sup> In an additional effort to bring children into the custodial dispute, the Legislature amended California Family Code section 3042 to encourage trial courts to obtain input<sup>157</sup> from children "regarding custody or visitation," and

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within the "main recommendation," none of these specific recommendations connect children's participation with the appointment of minor's counsel. *See id.* Children, therefore, may well find themselves participating *in propria persona* in their parents' divorce. *But see supra* note 72.

<sup>151</sup> The Task Force used the term, "due process" at least forty-three times in the Elkins documents, usually without analysis, and never in connection with the due process rights of children. *See sources cited supra* note 1.

<sup>152</sup> Assemb. B. 939 §§ 2, 4–18, 2010 Leg. Reg. Sess. (Cal. 2010).

<sup>153</sup> Assemb. B. 1050, 2010 Leg. Reg. Sess. (Cal. 2010).

<sup>154</sup> *See* CAL. EVID. CODE § 700 (West 1995) ("[E]very person, irrespective of age, is qualified to be a witness . . .").

<sup>155</sup> California Family Code section 217 now reads as follows:

(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

(b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.

(c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.

CAL. FAM. CODE § 217 (West 2011) (added by Assemb. B. 939 § 3).

<sup>156</sup> *See* CAL. CIV. P. CODE §§ 2016.010, 2025.010 (governing discovery and deposition).

<sup>157</sup> Unless the child testifies, it is not clear whether the child's "input" would be admissible in evidence under any existing statutory or decisional exception to the prohibition against hearsay. The *Elkins Report* seems to be addressing this issue when it maintains that "[c]ourts currently have the authority to use evaluators in gathering information and assessing the child's needs." ELKINS FINAL REPORT, *supra* note 1, at 50; *see, e.g.*, CAL. FAM. CODE § 3110

requires trial courts to allow children “14 years of age or older” to testify unless the court finds that doing so would “not [be] in the child’s best interests.”<sup>158</sup>

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(authorizing trial courts to order an investigation of families involved in custody cases). Los Angeles County’s courts can use this authority to order Family Court Services (FCS) to perform a “minor’s interview,” a “solution-focused evaluation” (a half-day evaluation involving the parents, the children, and some collaterals), or a full custody evaluation (including psychological tests). *See, e.g.*, L.A. SUPER. CT. R., Form FAM 026.

The Task Force could also be referring to recommending mediators. *See* FAM. § 3183; *see, e.g.*, VENTURA CNTY. SUPER. CT. R. 9.30–9.35 (recommending counties, like Ventura County, order all parents involved in family court proceedings to appear before a recommending mediator, who interviews the family and makes *recommendations* to the court when he or she cannot mediate an agreement); *see also* CAL. R. CT. 5.210(d)(2)(B).

Trial courts routinely admit investigators’ and mediators’ reports and recommendations without requiring any sort of evidentiary predicate. LexisNexis shows, however, that the Court of Appeal has never taken a serious look at the propriety of these procedures in a published decision. *Cf. In re Marriage of Slayton & Biggums-Slayton*, 103 Cal. Rptr. 2d 545, 550 (Ct. App. 2001) (acknowledging that statute authorized mediator to recommend a parenting plan).

<sup>158</sup> California Family Code section 3042 reads, in part, as follows:

- (a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.
- (b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.
- (c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child’s best interests. In that case, the court shall state its reasons for that finding on the record.
- (d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child’s best interests.
- (e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child’s preferences.
- (f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor’s counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party’s attorney may also indicate to the judge that the child wishes to address the court or judge.
- (g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation.

FAM. § 3042 (West 2011) (amended by Assemb. B. 1050 § 1).

Recently added California Family Code section 217 and amended Family Code section 3042 portend a new era where parents may require more children to testify in custody proceedings, placing more children where most of them never want to be: squarely in the crosshairs of their parents' divorce.<sup>159</sup> Children will be testifying against one or both parents, and then forced to live with the consequences of their testimony, both at home, with the custodial parent, and on visits, with the noncustodial parent.<sup>160</sup>

For an abused child, a depressed six-year-old, a middle-schooler with special needs, or even a high school student taking advanced placement classes, the opportunities to provide "input," and to testify for or against his or her parents, are no substitute for a lawyer who can investigate the case, file a brief that argues the child's interest, present and cross-examine witnesses, offer analysis, and recommend a parenting plan.<sup>161</sup>

The amendment to California Family Code section 3151(b) deletes its reference to "statement[s] of issues and contentions."<sup>162</sup> Former section 3151(b) authorized trial

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<sup>159</sup> The California Supreme Court in *Elkins v. Superior Court* was specifically concerned about family court rules and practices that inhibit access to justice. 163 P.3d 160, 177–78 (Cal. 2007). The Court did not suggest that parents should be able to assign their children a central role in divorce proceedings. Professor Richard Warshak has explained why such a role may be problematic:

A judge may doff the mantle of Solomon and ask the child to choose which parent he wants to live with. On the surface this seems a kindly offer, and surely it is meant in kindness. But it is double-edged. It cuts to the heart of the child's most painful confusions. It confronts him with his already divided loyalty. It demands that he choose between two people who for him should never have parted at all. Whichever he chooses, he is likely to be left with doubt, regret, and guilt toward the other.

Richard Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. RELATIONS 373, 378 (2003) (citing JULIETTE L. DESPERT, CHILDREN OF DIVORCE 196 (1962)).

<sup>160</sup> The court will retain its powers under California Evidence Code section 765 to make the children as comfortable in court as possible and to protect against undue harassment or embarrassment. CAL. EVID. CODE § 765 (West 2011). The court has less power when children leave court after testifying. The court might order the parents not to retaliate against the child for his or her testimony, and not to discuss case issues with the child. Appellate courts have upheld similar orders. *See In re Marriage of Candiotti*, 40 Cal. Rptr. 2d 299, 303 (Ct. App. 1995) (ordering parents not to make disparaging comments about the other parent that are likely to get back to the child); *Schutz v. Schutz*, 581 So.2d 1290, 1292 (Fla. Dist. Ct. App. 1991) (ordering mother to create in the children a loving and caring feeling toward her former husband). The authors have discovered no research on the efficacy of such orders.

<sup>161</sup> *See Haralambie, supra* note 75.

<sup>162</sup> As amended in 2010, California Family Code section 3151(b) now reads as follows:

Counsel shall serve notices and pleadings on all parties, consistent with requirements for parties. Counsel shall not be called as a witness in the proceeding. Counsel may introduce and examine counsel's own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to represent the child adequately.

FAM. § 3151(b) (West 2011) (amended by Assemb. B. 939 § 15).

courts to order children’s lawyers to serve and file a written statement of issues and contentions at least ten days before a family court hearing.<sup>163</sup> A statement of issues and contentions summarizes minor’s counsel’s investigation, offers an analysis of the legal issues, and concludes by recommending a parenting plan.<sup>164</sup> A statement of issues and contentions is “both an offer of proof and a report to the court.”<sup>165</sup> It is the children’s counterpart to the pleadings that the Judicial Council requires parents to file in order to establish or modify custody-and-visitation orders.

Rule 5.242(j)(5) of California’s Rules of Court, however, still requires children’s lawyers to prepare, “at the court’s request, a written statement of issues and contentions setting forth the facts that bear on the best interest of the child.”<sup>166</sup> California Family Code section 3151.5 still requires trial courts to consider the statement.<sup>167</sup> And Family Code section 3151(c), continues to specify minor’s counsel’s “rights,” which still include:

(2) Standing to seek affirmative relief on behalf of the child.

....

(4) The right to take any action that is available to a party to the proceeding, including, but not limited to, the following: filing pleadings, making evidentiary objections, and presenting evidence and being heard in the proceeding, which may include, but shall not be limited to, presenting motions and orders to show cause, and participating in settlement conferences, trials, seeking writs, appeals, and arbitrations.<sup>168</sup>

Especially given children’s new prominence in family court hearings, the changes to California Family Code section 3151(b) should not be construed to eliminate statements of issues and contentions, or to place any new or unique restrictions on children’s lawyers.<sup>169</sup> Read as a whole, section 3151, as amended, suggests that the Legislature’s

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<sup>163</sup> Section 3151(b), prior to amendment, authorized, but did not require, trial courts to order children’s lawyers to serve and file a written “statement[s] of issues and contentions . . . at least 10 days before [a] hearing” in family court “unless the court orders otherwise.” Assemb. B. 2650, 1994 Leg. Reg. Sess. (Cal. 1994) (amended by Assemb. B. 1526, 1998 Leg. Reg. Sess. (Cal. 1998)).

<sup>164</sup> See Berkow, *supra* note 95, at 131.

<sup>165</sup> *Id.*

<sup>166</sup> CAL. R. CT. 5.242(j)(5).

<sup>167</sup> See generally 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 272 (10th ed. 2005 & Supp. 2010) (explaining procedure and practice for counsel for child).

<sup>168</sup> CAL. FAM. CODE § 3151(c) (West 2011); see also *supra* note 99 (defining “minor’s counsel’s responsibilities”).

<sup>169</sup> See S. JUDICIARY COMM., BILL ANALYSIS, Assemb. B. 939, 2009–2010 Leg. Reg. Sess. (Cal. 2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0901-0950/ab\\_939\\_cfa\\_20100628\\_130304\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0901-0950/ab_939_cfa_20100628_130304_sen_comm.html).

purpose was simply to clarify children’s lawyers’ role in custody cases.<sup>170</sup> Rather than place unique restrictions on children’s lawyers, the Legislature’s purpose was to place new emphasis on evidence-based custody decisions.<sup>171</sup>

The Legislature seems to have amended California Family Code, section 3151(b), in response to *Elkins Report* recommendations II(B)(9)(b) and II(B)(10)(a).<sup>172</sup> According

<sup>170</sup> *Id.* (noting the Task Force’s recommendations on “[r]edefining the role of minor’s counsel”).

<sup>171</sup> The Senate Judiciary Committee’s analysis of AB 939 explains that the amendments to California Family Code section 3151 will “require minor’s counsel to present the admissible evidence it gathers that bears on the best interest of the child to the court in the same manner as counsel for a party.” *Id.*

<sup>172</sup> The *Elkins Report* Recommendations II(B)(9)(b) and (10)(a) are as follows:

9. Minor’s counsel’s role

.....

b. Acting within the scope of that role. Judicial officers desiring to have the information necessary for a well-reasoned custody determination might consider appointing minor’s counsel to gather information and investigate the case on behalf of the child. The results of counsel’s investigation or fact gathering should be presented only in the appropriate evidentiary manner so that the parties’ due process rights are adequately protected. Because minor’s counsel is acting as an attorney, minor’s counsel should never be called upon to testify or to stand in the place of a mental health evaluator or to replace the court’s weighing and determination of the facts with his or her own. Any position minor’s counsel will be taking must be presented in writing to the parties prior to any hearing on the matter. Family Code section 3151(b) should be amended to eliminate the requirement that, at the court’s request, counsel must prepare a written statement of issues and contentions.

.....

10. Counsel’s responsibilities in representing the minor child’s interests

a. Providing information. The goal of counsel’s representation should be to provide the court factually correct information through the presentation of reliable, admissible evidence in a proper court proceeding. Because minor’s counsel is acting in the role of an attorney, he or she should not make “recommendations,” file a report, testify, or present anything other than proper pleadings.

ELKINS FINAL REPORT, *supra* note 1, at 53–54. While AB 939’s legislative history does not explicitly cite these recommendations, the Senate Judiciary Committee’s analysis does say that:

Key among [the *Elkins Report*’s] recommendations is that minor’s counsel should never be called on to take the place of a mental health evaluator or to assume the court’s role of weighing and determining the facts of the case. (*Elkins Report*, page 54.) Further, the Task Force recommended that minor’s counsel fact gathering should be presented to the court in the same manner as other admissible evidence so that parties’ due process rights are protected.

to the former recommendation, “[California] Family Code section 3151(b) should be amended to eliminate the requirement that, at the court’s request, counsel must prepare a written statement of issues and contentions.”<sup>173</sup> According to the latter, “minor’s counsel . . . should not make ‘recommendations,’ file a report, testify, or present anything other than proper pleadings.”<sup>174</sup> The latter recommendation adds nothing new to California law.<sup>175</sup>

Without saying so, the Task Force seems to have adopted Standard III(B) of the ABA Custody Standards.<sup>176</sup> Like the Task Force’s recommendations, ABA Custody Standard III(B) also prohibits children’s lawyers from filing a report or making recommendations.<sup>177</sup> But the Task Force’s recommendations fail to incorporate the commentary following ABA Custody Standard III(B), which explains that it remains the essence of a lawyer’s job to “offer traditional evidence-based legal arguments” and “explain . . . what result a client wants [and] proffer[ ] . . . what one hopes to prove.”<sup>178</sup>

ABA Custody Standard II(B) puts Standard III(B) into context by requiring children’s lawyers to maintain a relationship with the child, conduct an investigation, interview witnesses, present evidence, and advocate the child’s interests.<sup>179</sup> The commentary following ABA Custody Standard III(F) seems to elaborate on California Family Code section 3151(c).<sup>180</sup> That commentary reads as follows:

[T]he [child’s] lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court’s consideration of issues important to the child’s interests . . . . [R]elief requested may include, but is not limited to: (1) A mental or physical examination of a party or

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S. JUDICIARY COMM., BILL ANALYSIS, Assemb B. 939, 2009–2010 Leg. Reg. Sess. (Cal. 2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0901-0950/ab\\_939\\_cfa\\_20100628\\_130304\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0901-0950/ab_939_cfa_20100628_130304_sen_comm.html).

<sup>173</sup> ELKINS FINAL REPORT, *supra* note 1, at 54.

<sup>174</sup> *Id.*

<sup>175</sup> *See, e.g.*, CAL. RULES OF PROF’L CONDUCT R. 5-200 (explaining that a lawyer “[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness”); CAL. FAM. CODE § 3151.5 (declaring that minor’s counsel “shall not be called as a witness”).

<sup>176</sup> *See supra* note 63. The ABA unanimously approved the Standards, culminating a ten-year drafting process, to “promote quality control, professionalism, clarity, uniformity and predictability by being universally applicable to all lawyers . . . [and] by detailing what lawyers should do when appointed.” Linda D. Elrod, *Raising the Bar for Lawyers who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115 (2003).

<sup>177</sup> *See ABA Custody Standards, supra* note 63, at 134.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 133.

<sup>180</sup> *See* FAM. § 3151(c).

the child, (2) A parenting, custody, or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.<sup>181</sup>

According to a report that accompanied the Standards, the ABA's purpose in Standard III(B) is not to place any restriction whatsoever on children's lawyers' pleadings.<sup>182</sup> Instead, its purpose is to establish that a child's "lawyer should act like a lawyer," not like an investigator, advisor, guardian ad litem, or judicial factotum.<sup>183</sup> "[A] person who serves essentially as a witness through testimony in court or by making a report on facts not otherwise in evidence, is not serving as an attorney."<sup>184</sup>

Statements by lawyers, in other words, are arguments, not evidence.<sup>185</sup> Under ABA Standard III(B), a pleading would not be a prohibited "report," and a proposed parenting plan would not be a prohibited "recommendation," unless a party attempted to introduce them into evidence.<sup>186</sup>

Some judicial officers and practitioners would nevertheless construe the new Elkins laws to restrict children's lawyers written submissions to "the results of fact-gathering and investigation."<sup>187</sup> If the new laws were construed to prohibit children's lawyers from filing briefs that analyze the evidence and contain recommendations, or engaging in other traditional forms of advocacy, then they would amount to "silencing

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<sup>181</sup> See *ABA Custody Standards*, *supra* note 63, at 137.

<sup>182</sup> *Id.*

<sup>183</sup> See Elrod, *supra* note 176, at 115.

<sup>184</sup> *Id.* at 117 (emphasis omitted).

<sup>185</sup> *Id.* at 118.

<sup>186</sup> The Introduction to the ABA Custody Standards explains that "[w]hile some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child's best interests and/or related information, this is not a lawyer's role under these Standards." *ABA Custody Standards*, *supra* note 63, at 132. Likewise, the National Conference of Commissioners on Uniform State Laws explicitly distinguishes between documents produced by a court-appointed advisor or investigator and documents produced by attorneys. NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAW, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 16 (2006). Under the Uniform Act, an investigator who is not functioning as an attorney may submit a report to the court setting forth "the advisor's recommendations regarding the best interests of the child." *Id.* By contrast, an attorney may not "introduce into evidence a report prepared by the attorney." *Id.* at § 17.

<sup>187</sup> In response to the suggestion from one of the attorney commentators that children's lawyers should be permitted to file briefs and make recommendations, the Task Force responded that family courts would retain "judicial discretion in hearing from a child," and that the Elkins proposals "do not preclude submitting written information reflecting the results of fact-gathering and investigation . . ." ADMIN. OFFICE OF COURTS: CTR. FOR FAMILIES, CHILDREN & THE COURTS, COMMENTS ON ELKINS FAMILY LAW DRAFT RECOMMENDATIONS No. 124, available at <http://www.courts.ca.gov/documents/elkins-commentchart.pdf>.



doctrines,” i.e., “rules, and judicial decisions that allow opponents . . . to restrict the activity of their adversaries’ advocates.”<sup>188</sup>

As silencing mechanisms, the Elkins laws would implicate ethical norms that traditionally guide the attorney-client relationship. A child’s lawyer has an ethical duty to represent “[the] client[’s] [interests] zealously within the bounds of the law.”<sup>189</sup> “[U]nder canons of professional responsibility,” a lawyer is mandated to exercise “independent judgment on behalf of the client”; in order to do so, the “lawyer [must] be free of state control.”<sup>190</sup> The ABA Model Rules of Professional Conduct (Model Rules) forbid lawyers from letting a nonclient who pays them interfere with their professional judgment on the client’s behalf.<sup>191</sup>

If the Task Force’s proposals were meant to assert state control over children’s lawyers by prohibiting them from offering analysis, making evidence-based arguments, and requesting remedies, then the Task Force’s proposals would not just interfere with professional judgment, but make it irrelevant. It is not clear what would remain of the attorney-client relationship when a lawyer could not offer analysis, advocate for relief, or make recommendations on a client’s behalf.<sup>192</sup> A lawyer who agreed not to argue

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<sup>188</sup> David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209, 220 (2003). Luban believes that “silencing doctrines” violate the common-law maxim, *audi alteram partem*:

Audi alteram partem—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial—whenever any individual, however lowly and unfortunate, asserts a legal claim.

*Id.* at 214 (citing *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting)).

<sup>189</sup> MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980); *see also* *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990) (discussing California cases concerning the definition of zealotry); *People v. McKenzie*, 668 P.2d 769, 770–79 (Cal. 1983); *Anderson v. Eaton*, 293 P. 788, 789–90 (Cal. 1930) (discussing client loyalty).

<sup>190</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 321–22 (1981)). Under ABA Custody Standard III(C), children’s lawyers must have “the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the courts, and to participate in the case as fully and freely as lawyer for a party.” *ABA Custody Standards*, *supra* note 63, at 135.

<sup>191</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (“A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering legal services.”); *Id.* 1.8(f)(2) (“A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship . . .”); *see also* CAL. RULES OF PROF’L CONDUCT R. 3-310(F) (“A member shall not accept compensation for representing a client from one other than the client unless . . . [t]here is no interference with the member’s independence of professional judgment or with the client-lawyer relationship . . .”).

<sup>192</sup> *See Santa Clara Cnty. Counsel Attorneys Ass’n v. Woodside*, 869 P.2d 1142, 1151 (Cal. 1994) (stating that although the Legislature may place “a reasonable degree of regulation” on

the evidence, or request relief for his or her client, “figuratively puts his or her bar card on the back shelf and serves as a volunteer in [a] nonlegal capacity.”<sup>193</sup>

Such an interpretation of the Elkins laws would not just be contrary to a lawyer’s ethical obligations, but also might well be unconstitutional. In *Legal Services Corporation v. Velazquez*,<sup>194</sup> the United States Supreme Court struck down regulations designed to reduce the influence of government-funded lawyers by restricting their speech.<sup>195</sup> Whether or not the client has a due process right to appointed counsel, the Court held, “strict scrutiny” is the baseline standard for reviewing restrictions on lawyers’ speech.<sup>196</sup>

*Velazquez* addressed federal regulations prohibiting Legal Services attorneys from challenging welfare regulations.<sup>197</sup> The Elkins laws obviously address different subject matter—but legal advocacy remains quintessentially a First Amendment activity, regardless of the nature of the case.<sup>198</sup> If the Elkins laws were construed to place unique restrictions on children’s lawyers, then they would be grossly under- and overinclusive to serve any purpose other than to drastically reduce children’s role in custody cases.

At bottom, our adversary system of justice is designed to introduce more voices, and more facts, into the decision-making process.<sup>199</sup> It would be inconsistent with our adversarial system of justice to construe the Elkins laws to prohibit children’s lawyers from filing briefs that argue the facts, analyze the law, and request a parenting plan, or to place any new or unique restrictions on children’s lawyers.

## VI. TOWARD CHILD-CENTERED LEGISLATION

Children have important interests in the outcomes of their custody cases and, for the many reasons outlined above, courts cannot always rely on parents to protect those

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attorneys provided they do not defeat or materially impair the attorney-client relationship and the duties of zealousness, confidentiality, and loyalty, the Supreme Court has the plenary and exclusive authority to regulate attorneys).

<sup>193</sup> See Elrod, *supra* note 176, at 117.

<sup>194</sup> 531 U.S. 533 (2001).

<sup>195</sup> *Id.* at 536–37.

<sup>196</sup> *Id.* at 553; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833–34 (1995) (“[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . . It does not follow, however . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (when the government creates a public forum, the government “assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms”).

<sup>197</sup> *Velazquez*, 531 U.S. at 542–43.

<sup>198</sup> See, e.g., *In re Primus*, 436 U.S. 412, 414 (1978); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971); *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 219 (1967); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 2 (1964); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>199</sup> See Luban, *supra* note 188, at 217 (arguing that “[t]he distinctive virtue of the adversary system lies in its ability to elicit more voices and more input than alternative systems”).

interests. Children therefore have a due process right in some marital and parentage proceedings to counsel who may engage in the same kinds of advocacy as parents' lawyers. To protect children's interests, the authors of this Article would recommend that the Legislature and the Judicial Council adopt legislation and court rules along the lines of the models set forth below.

*A. Access to Justice*

The Legislature should adopt legislation to require trial courts to hold a formal *Lassiter*<sup>200</sup> hearing at the parties' first appearance in any proceeding that involves a dispute about the child's best interests.<sup>201</sup> The legislation could read as follows:

**An ACT to Amend Family Code Sections 7635<sup>202</sup> and 3150(a)<sup>203</sup> Relating to the Appointment of Representatives for Children Involved in Marital or Parentage Proceedings.**

The People of the State of California do enact as follows:

**SECTION 1.:** Section 7635 of the Family Code<sup>204</sup> is amended to read as follows:

§ 7635. Parties

(a) The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. The court shall

<sup>200</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

<sup>201</sup> As long ago as 1991, William Wesley Patton argued that parties in juvenile dependency cases are entitled to a *Lassiter* hearing, and suggested the standard of appellate review. See William Wesley Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537 (1991); see also William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195 (1996).

<sup>202</sup> CAL. FAM. CODE § 7635 (West 2004).

<sup>203</sup> FAM. § 3150(a).

<sup>204</sup> California Family Code section 7635 currently reads as follows:

(a) The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If the child is a minor and a party to the action, the child shall be represented by a guardian ad litem appointed by the court. The guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child.

(b) The natural mother, each man presumed to be the father under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard.

(c) The court may align the parties.

(d) In any initial or subsequent proceeding under this chapter where custody of, or visitation with, a minor child is in issue, the court may,

appoint independent counsel to represent the child unless the court finds after considering all relevant factors that the child would not benefit from the appointment of counsel, and states on the record its reasons for that finding. Relevant factors include, but are not limited to, the factors listed in Appendix A.

(b) The natural mother, each presumed parent under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard.

(c) The court may align the parties.

**SECTION 2.:** Section 3150(a) of the Family Code is amended to read as follows:

§ 3150. Appointment of private counsel to represent child in custody or visitation proceeding

(a) At the first hearing in any proceeding that involves a disputed question of custody or visitation, the court shall appoint independent counsel for the child unless the court finds after considering all relevant factors that the child would not benefit from the appointment of counsel, and states on the record its reasons for that finding. Relevant factors include, but are not limited to, the factors listed in Appendix A.

(b) To conform with subpart (a), the Judicial Council shall, no later than January 1, 2012, promulgate new procedures that trial courts shall follow, and shall revise existing court rules as necessary.

(c) This act shall become operative on January 1, 2012.

### *B. Child Centered Representation*

The ABA's Custody Standards require children's lawyers to maintain a relationship with the child, conduct an investigation, interview witnesses, present evidence, and advocate the child's legal interest "based on objective criteria as set forth in the law related to the purposes of the proceedings."<sup>205</sup> To clarify children's lawyers' role

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if it determines it would be in the best interest of the minor child, appoint private counsel to represent the interests of the minor child pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8.

FAM. § 7635. For reasons that are beyond the scope of this article, the Family Code does not recognize children as parties to marital actions. *See* CAL. R. CT. 5.102(a) (West 2004); *see also supra* note 72 (explaining California codes and procedures).

<sup>205</sup> *See ABA Custody Standards, supra* note 63, at 133–37, 150.

in California's family courts, the Judicial Council should incorporate these principles into a new court rule.<sup>206</sup> The new court rule could read as follows:

### **Child-Centered Representation**

A child's lawyer shall develop a theory of the case that takes into consideration the unique characteristics and the perspectives of the individual child, and shall advocate for the child's best interest based on objective criteria as set forth in the law related to the purposes of the proceedings.

A child's lawyer shall therefore meet with the client, learn as much as possible about the client's family, school, neighborhood, needs, activities, interests, and developmental stage, thoroughly investigate the facts surrounding the current custody dispute, and research the controlling legal principles.<sup>207</sup>

The point is to elicit the child's view about the situation and how the child sees the future, and not to force the child to choose between parents. It is the picture of the family from the child's perspective that will inform the judge's decision.

### *C. Statements of Issues and Contentions*

While AB 939 amends California Family Code section 3151(b),<sup>208</sup> to delete its reference to statements of issues and contentions, California Rules of Court, Rule 5.242(j)(5), still requires children's lawyers to prepare, "at the court's request, a written statement of issues and contentions setting forth the facts that bear on the best interest of the child."<sup>209</sup> California Family Code section 3151.5<sup>210</sup> and California Code of Civil Procedure, section 436(a)<sup>211</sup> govern the trial court's consideration of these documents.

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<sup>206</sup> The scope of the Judicial Council's rule-making power is defined by the California Constitution, Article VI, Section 6, which empowers the Judicial Council to "adopt rules for court administration, practice and procedure, not inconsistent with statute . . ." CAL. CONST. art. VI, § 6.

<sup>207</sup> See Elrod, *supra* note 176, at 117–18 (discussing duties of all attorneys who represent children).

<sup>208</sup> FAM. § 3157(b) (West 2011).

<sup>209</sup> CAL. R. CT. 5.242(j)(5) (West 2004).

<sup>210</sup> FAM. § 3151.5 (West 2004).

<sup>211</sup> California Code of Civil Procedure section 436 authorizes the trial court to:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading [and]

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

CAL. CIV. P. CODE § 436 (West 2004).

To make better use of statements of issues and contentions, and to protect against misuse, the Judicial Council should adopt a new court rule that expresses the foregoing principles and incorporates applicable language from California Welfare & Institutions Code section 355, subdivisions (b)–(d), which govern the admission of “social studies” in juvenile court.<sup>212</sup> The new rule could read as follows:

### Statements of Issues and Contentions

Minor’s counsel shall file and serve on the parties or their counsel of record a written statement of issues and contentions before every hearing at which the court can be expected to make a judicial determination regarding custody or visitation unless the court orders otherwise.

A statement of issues and contentions is an offer of proof, not evidence. It shall address such matters as the court directs. At a minimum, a statement of issues and contentions shall contain a statement of the case, identify the evidence reviewed, list the parties’ contentions and all other factual issues that relate to custody and visitation, objectively summarize the evidence material to those contentions and issues, analyze the legal issues raised by the evidence, recommend methods for the presentation of the child’s preferences regarding custody or visitation, and conclude by recommending a parenting plan based on objective criteria as set forth in the law that applies to the proceeding.

The court shall schedule a separate hearing to receive the statement of issues and contentions at least 10 days before any trial or hearing on a motion or OSC regarding custody or visitation. At the hearing to receive the statement, the court shall proceed as follows:

- The court shall inquire whether the parties will stipulate to minor’s counsel’s recommendations, or any of them;
- The court shall inquire whether the parties will stipulate to the admissibility of statements and evidentiary facts alleged in the statement of issues and contentions, or any of them;
- The court shall require the parties and minor’s counsel to identify by name, address, and telephone number all non-expert witnesses, other than the parties, whom they may call as a

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<sup>212</sup> The procedural and hearsay rules contained in California Welfare & Institutions Code section 355(b)–(d) pass constitutional muster. CAL. WELF. & INST. CODE § 355(b)–(d); *see, e.g., In re Cindy L.*, 947 P.2d 1340, 1344–46 (Cal. 1997) (discussing why social study hearsay is admissible); *In re April C.*, 31 Cal. Rptr. 3d 804, 812 (Ct. App. 2005) (holding that evidence admitted “subjected to the judicial test of reliability” meets “the requirement of fundamental fairness in the due process clause of the Fourteenth Amendment”).

witness, and provide a brief summary of the anticipated testimony of the witness;

- The court shall advise self-represented litigants of services available to help them prepare documents, including subpoenas for witnesses and documents;
- The court shall schedule the exchange of information relating to expert witnesses and the examination of expert witnesses; and
- The court shall set protocols for the presentation of the child's preferences regarding custody or visitation.

The information required by this paragraph shall be contained in the minute order for the date of the hearing to receive the statement of issues and contentions.<sup>213</sup>

A statement of issues and contentions may authenticate evidence contained in the statement or attached to the statement. Hearsay evidence contained in or attached to a statement of issues and contentions shall not be admissible in any proceeding unless a party establishes one or more of the following exceptions:

(A) The hearsay evidence would be admissible in any civil or criminal proceeding under a statutory or decisional exception to the prohibition against hearsay, or

(B) The hearsay declarant is available for cross-examination. For purposes of this section, the court may deem a witness available for cross-examination if it determines that the witness is on telephone standby and can be present in court within a reasonable time of a request to examine the witness.

Any party may subpoena as a witness any person listed in the statement of issues and contentions as having provided information to the child's attorney. The court may grant a reasonable continuance not to exceed 10 days upon request by any party if the party requires additional time to subpoena a witness to a trial or hearing on an OSC or motion regarding custody or visitation.

Upon its own motion or the motion of any party, the court may strike out any irrelevant, false, inflammatory, or improper matter inserted in any statement of issues and contentions, or any part of any statement of issues and contentions not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

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<sup>213</sup> The Judicial Council could link these requirements to California Family Code sections 2450 and 2451, which effective January 1, 2012 allow trial courts to order a "family centered case resolution plan" to "expedit[e] the processing of the case, reduc[e] the expense of litigation, and focus . . . on early resolution by settlement." Assemb. B. 352 §§ 10–11 (West 2011).

Upon request of any party, the court may file a statement of issues and contentions under seal at the conclusion of any proceeding.

Children's lawyers deliver oral reports when trial courts do not order written statements.<sup>214</sup> Oral reports, when they are delivered on the date of a trial or a dispositive hearing, do not give parents enough time to respond to the reports' conclusions or recommendations, in violation of very basic procedural due process requirements.<sup>215</sup> Timely-written reports not only help parents prepare for trial, but also remind parents to focus on their children.<sup>216</sup> Issues are clearer, harder to ignore, and easier to understand when they are written on paper that parents can take home and think about.<sup>217</sup>

Written statements of issues and contentions help the court understand the case, and advance understanding from one hearing to the next<sup>218</sup>—something that is especially critical in family court, where custody awards are always subject to change,<sup>219</sup> and modification hearings may take place many years apart, frequently before different bench officers.<sup>220</sup> When substantial periods of time pass, judicial assignments change, and children's lawyers are relieved, written statements of issues and contentions are the court's institutional memory.<sup>221</sup>

Finally, written reports offer some protection against patronage. The *Elkins Report* implies that too many bench officers appoint acquaintances whom they expect to dispatch cases quickly and cheaply, without much in the way of investigation or research, at the cost of sound rulings.<sup>222</sup> Written reports offer a check against patronage by requiring court-appointed children's lawyers to document that they have made a conscientious attempt to help their clients.

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<sup>214</sup> See, e.g., *Sanfilippo v. Sanfilippo*, 637 S.W.2d 77, 78–79 (Mo. Ct. App. 1982).

<sup>215</sup> See *In re Marriage of Bates*, 819 N.E.2d 714, 728 (Ill. 2004) (finding that failure to provide copy of guardian ad litem report to mother in custody proceeding was violation of due process); *Leinenbach v. Leinenbach*, 634 So.2d 252, 253 (Fla. Dist. Ct. App. 1994) (finding that the trial court erred in relying on report of guardian ad litem where father was not afforded opportunity to rebut contents of report).

<sup>216</sup> See Cassandra Brown, Comment, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIM. LAW. 461, 463 (discussing how children are not typically the focus during custody battles).

<sup>217</sup> See Karen E. Elliott, *The Guardian ad Litem in Ohio's Domestic Relations Courts: The Square Peg Fits*, 27 OHIO N.U. L. REV. 267, 277 (2001).

<sup>218</sup> *Id.* at 282 (discussing the importance of keeping a record for appellate review of family cases).

<sup>219</sup> See *Titcomb v. Superior Court*, 29 P.2d 206, 209 (Cal. 1934); *Anthony v. Tarpley*, 187 P. 779, 782 (Cal. Ct. App. 1919).

<sup>220</sup> See, e.g., *Titcomb*, 29 P.2d at 208 (example of a time-line).

<sup>221</sup> See Elliott, *supra* note 217, at 282.

<sup>222</sup> See ELKINS FINAL REPORT, *supra* note 1, at 53 (recognizing a need for “greater transparency and clarity regarding how such appointments are made and how complaints regarding performance of appointed counsel will be addressed”).



## CONCLUSION

When the *Elkins* Court asked the Judicial Council to form a task force to increase “access to justice”<sup>223</sup> and recommend “more . . . consistent [ ] rules, policies, and procedures”<sup>224</sup> in family court, it was concerned about rules, policies, and procedures that disenfranchise self-represented litigants in parentage and dissolution cases.<sup>225</sup>

While the Task Force succeeded in some areas, the *Elkins Report* is missing an important piece: Perhaps because the parties in *Elkins* were parents, the *Elkins Report* contains no recommendations that would help ensure due process for children, even though the children at the center of child-custody proceedings in family court ordinarily have no access to justice.

This child-centered response to the *Elkins Report* is a first step toward filling in the *Elkins Report*’s missing piece. Children’s lawyers, combining aspects of both child advocates and guardians ad litem, frequently offer the best means to discover information relevant to a child’s best interest.<sup>226</sup> Equally important in many cases, children’s lawyers redirect the parents’ focus back on their children, away from disputes with each other.<sup>227</sup>

Some children have special needs. Some parents have serious parenting deficiencies. Some other parents, to borrow a phrase from *Lassiter*, “have had uncommon difficulty in dealing with life.”<sup>228</sup> Anecdotal evidence—the only evidence available—shows convincingly that appointing children’s lawyers in these and other kinds of cases can help trial courts produce better parenting plans,<sup>229</sup> and that a well-conceived parenting plan can mean the difference between a stable and an unstable childhood, or even life and death.<sup>230</sup>

Inspired by the *Elkins Report*, California’s Legislature adopted two bills in 2010 with provisions that apply directly to children and their lawyers.<sup>231</sup> Given the important interests at stake, these bills should be construed to place new emphasis on evidence-based custody decisions; they should not be construed as silencing mechanisms.

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<sup>223</sup> *Elkins v. Superior Court*, 163 P.3d 160, 177 (Cal. 2007).

<sup>224</sup> ELKINS JUDICIAL COUNCIL REPORT, *supra* note 1, at 2.

<sup>225</sup> *Elkins*, 163 P.2d at 177.

<sup>226</sup> John David Meyer, Note, *The “Best Interest of the Child” Requires Independent Representation of Children in Divorce Proceedings*, 36 BRANDEIS J. FAM. L. 445, 447, 450–51 (1997–98) (offering reasons lawyers are needed as child advocates).

<sup>227</sup> *Id.* at 449–50 (discussing why parents do not focus on children during divorce proceedings).

<sup>228</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 29 (1981).

<sup>229</sup> *See supra* Part IV (describing anecdotal evidence).

<sup>230</sup> *See* Theresa A. Peterson, Note, *The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577, 1579, 1591–94 (1999) (describing the statistics of children raised by only one parent).

<sup>231</sup> *See* CAL. FAM. CODE § 3151(b) (West 2011); Sargent Shriver Civil Counsel Act, CAL. GOV. CODE § 68651 (West 2011).

Consistent with their ethical duties,<sup>232</sup> children's lawyers must continue to function as lawyers, not just as investigators or judicial factotums.

California Family Code section 3150, which governs the appointment of lawyers for children in family court, raises serious due process questions because it gives trial courts limitless discretion, resulting in glaring inconsistencies in appointment practices.<sup>233</sup> The Legislature should correct this situation by requiring trial courts to decide on a case-by-case basis whether to appoint independent counsel for children, to consider all relevant factors, and to create a record sufficient to support appellate review. To clarify children's lawyers' responsibilities, the Judicial Council should adopt new rules defining child-centered representation and regulating the use of statements of issues and contentions.

In a system dedicated to children's best interests, deference to parents' due process rights cannot entail subordination of their children's interests. Due process for children will have a price, just as due process for their parents has a price, but the price need not be exorbitant. California's Sargent Shriver Civil Counsel Act<sup>234</sup> should provide useful information about innovative collaborations that stakeholders in family court can use to formulate a more complete response to the Supreme Court's mandate in *Elkins v. Superior Court*.<sup>235</sup>

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<sup>232</sup> See *ABA Custody Standards*, *supra* note 63, at 145.

<sup>233</sup> FAM. § 3150(a) (West 2004); *see supra* Part I (discussing due process issues).

<sup>234</sup> GOV. § 68651; *see also supra* text accompanying note 84.

<sup>235</sup> 163 P.3d 160 (Cal. 2007); *see supra* text accompanying note 84 (explaining why the Act will help).

## APPENDIX A<sup>236</sup>

### Factors Relevant to the Appointment of Counsel for Children

#### Case Issues

- Whether there are serious allegations of domestic violence, child abuse, mental illness, substance abuse, or other concerns that may impair the capacity of the parents in the litigation and/or present particular risks for the children;
- Whether the appointment of counsel can be expected to help the family produce a parenting plan, or reach resolutions of various issues as they arise, without using court time;
- Whether the case involves medical or psychological issues;
- Whether the issues of child custody and visitation are highly contested or protracted;
- Whether the county children's services department, probation department, probate investigator, or domestic relations investigator is available to perform a thorough evaluation;
- Whether there is a reliable source of information upon which to base a custody decision;
- Whether the appointment of counsel is necessary to take the children out of the line of fire, and insulate the child from the litigation process;
- Whether ongoing conflict or a complex custody dispute has created a need for monitoring, case management, parent education, and managed negotiation;
- Whether the appointment of counsel is necessary to help keep a lid on the conflict until a parenting plan can be established;
- Whether the appointment of counsel is necessary to ensure that the parents are complying with court orders;
- Whether the court calendar is congested and the court does not have the resources to provide the detailed attention that the family requires (either on a long-term or an interim basis);
- Whether parents have asked the court to ratify decisions that the court fears may be detrimental to the child but are insufficient to trigger dependency court intervention;
- Whether each parent is employing different mental health professionals for treatment of the child;
- Whether the child and his or her parents come from another culture, and practices and beliefs of that culture have given rise to issues in the litigation.
- Whether the court is considering extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent;

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<sup>236</sup> See *supra* note 110 for sources used in the writing of this Appendix.

- Whether the court is considering relocation that could substantially reduce the child's time with a parent or sibling;
- Whether paternity is disputed;
- Whether the child's interests are not necessarily aligned with the parent's interests, or where the parents cannot agree about the child's interests.

**Parents' Issues**

- The parents' educational background;
- Whether the parents can present at least a rudimentary case involving a dispute over parenting time;
- Whether the parents are able to accurately assess or present information concerning the child's needs and best interests;
- Whether the parents have had uncommon difficulty in dealing with life;
- Whether the parents seem usually distressed, confused, or disoriented;
- Whether the parents believe that the child would benefit from independent counsel;
- Whether a parent uses the litigation process in destructive ways;
- The possibility of criminal self-incrimination;
- Whether it appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- Whether the parents are interpreting events to the child in a conscious or unconscious effort to influence or distort the child's perceptions and attitudes;
- Whether there is a serious imbalance of power between the parents so that one parent is apt to be pressured into concessions that are not in the child's best interests;
- Whether a parent has a criminal history, or has been a party to a proceeding in juvenile delinquency or dependency court.

**Children's Issues**

- The children's relationship with each parent;
- Whether a child is very young, or other circumstances create a need for many day-to-day or incremental decisions to be made;
- Whether the child has special medical, psychological, educational, or other needs that create significant issues in the case or are disputed, exaggerated, or ignored by the parents;
- Where the child is a potential witness, whether questions arise as to whether to permit a child to testify or require a child to testify;
- Whether the child expresses a strong preference that is not shared by either parent, or advocated so strongly by a parent that it is difficult to assess the independence of the child's view;
- Whether the child is employed, requires a guardian ad litem for unrelated litigation or has a separate estate, and management of the child's career or assets is contested;
- Whether the child is being pressured by one or both parents to form an alliance against the other parent;

- Whether gangs or inappropriate friends are an issue;
- Whether a child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
- The child's performance in school, including grades, discipline, and attendance;
- Whether appointing an attorney to represent the child is the best way to learn the child's wishes and positions;
- Whether the child has legal interests at stake that may conflict with the adult interests;
- Whether the child's medical, educational, cultural, psychological, and social needs are being addressed, or the child's life is being disrupted.

**Neighborhood Issues**

- Whether a parent lives in a neighborhood associated with high risk for child maltreatment due to poor schools, inadequate recreational opportunities, poor access to medical services, low levels of educational attainment, or high levels of crime, child abuse, family instability, unemployment, adolescent and non-marital childbearing, or childhood behavioral and emotional problems.

**Other Issues**

- Whether counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented.