CUSTODY: KIDS, COUNSEL AND THE CONSTITUTION

AMY E. HALBROOK*

ABSTRACT

Fifty years ago, the United States Supreme Court in In re Gault *held that children have the constitutional right to traditional counsel in cases where their physical liberty interests are at stake. As a result, children are provided counsel during the adjudication phase of delinquency proceedings in order to ensure protection of their rights.* Gault *did not, however, extend the automatic right to traditional counsel to other contexts in which children most frequently appear in court: family law cases.*

This Article explores whether a child's right to traditional counsel should be extended to children in the private custody context. The article reviews cases that have explicitly expanded children's rights since Gault, *both children's cases expanding their rights in various contexts and adults' cases with implications for children in the family context. In addition, it reviews current inconsistencies in practice, rules and standards related to children's attorneys. It concludes that children's constitutional rights require traditional client-directed advocacy by attorneys in custody matters, and recommends a role of counsel that protects constitutional rights while ensuring consistent and ethical advocacy by children's attorneys.*

* Associate Professor of Law, Director of the Northern Kentucky University Chase Children's Law Center Clinic, Salmon P. Chase College of Law, Northern Kentucky University; J.D. Northwestern University School of Law; B.A. University of California at Berkeley. The author wishes to thank Jennifer Kreder, Jennifer Kinsley, Erin Heidrich, Krista Burton and Nicholas Hunt.

INTRODUCTION

> Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.[1]
>
> [I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests. . . .[2]

Fifty years ago, the United States Supreme Court decided *In re Gault*, the most important case related to the right to counsel for children in the United States.[3] In *Gault*, the Court held that children whose physical liberty interests are at stake in delinquency proceedings have an affirmative right to counsel.[4] As a result, children in the adjudication phase of delinquency proceedings are provided not just counsel, but traditional counsel – lawyers required to act as "client-directed" or "expressed wishes" attorneys.[5] *Gault*, however, separated the delinquency context from other contexts in which children frequently appear in court – in particular child protection and child custody matters[6] – and the Supreme Court has never addressed whether children have the right to traditional counsel in these contexts.

Courts and parents' advocates often express concern about expanding children's right to counsel in the family context, given current limits on children's legal status and the practical challenges related to competing rights within families. Changes in law and practice since *Gault*, however, show movement in that direction. Since *Gault*, children's substantive legal rights[7] and access to counsel have expanded

---

1. *In re* Gault, 387 U.S. 1, 1 (1967).
2. Troxel v. Granville 530 U.S. 57, 86–88 (2000) (Stevens, dissent).
3. *In re* Gault, 387 U.S. at 1.
4. *Id.* at 60 (Black, J., concurring).
5. *Id.* at 36. The right to counsel in these proceedings is not uniform. Across jurisdictions, attorneys are often confused about their roles, even in delinquency proceedings, and are not always appointed at every stage in the proceeding. *See* ABA JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002), http://njdc.info/wp-content/uploads/2013/11/A-Call-for-Justice_An-Assessment-of-Access-to-Counsel-and-Quality-of-Representation-in-Delinquency-Proceedings.pdf; ARIZ. REV. STAT. ANN. § 8-221(A) (2010) (appointing counsel only if the offense can result in detention); *cf.* OR. REV. STAT. ANN. § 419C.200 (2003) (requiring court to appoint counsel to a child in any case where it would be required to appoint counsel to an adult charged with the same offense).
6. *Gault*, 387 U.S. at 49.
7. While nineteen other countries have adopted the United Nations Convention on the Rights of the Child, the United States has not done so; therefore, children's rights have not been articulated within a single framework in the United States. The bases for expanded children's rights in the United States are discussed in Section II, *infra*.

significantly.[8] As discussed in Section I, children are now frequently represented in a variety of legal matters[9] by advocates serving in a variety of roles, based on best interests,[10] the right to be heard,[11] a delineated right to counsel,[12] or some unarticulated reason. The substantive legal basis for and the purpose of the representation is often vague in practice outside the delinquency context[13] and attorneys' roles and ethical duties are often muddled in other matters.[14]

Without the obligation to serve as traditional client-directed counsel as is constitutionally mandated in delinquency matters,[15] children's attorneys in custody, visitation and other private family matters – serving in such roles as guardian ad litem (GAL), best interests attorney, and child representative[16] – are often allowed (and even in some circumstances required)[17] to obstruct their own clients' rights and interests.[18] This Article explores whether the right to traditional "client-directed" or "expressed-wishes"[19] counsel should be extended to children in the custody context. It takes the position

8. *See* Howard A. Davidson, *Children's Rights and American Law: A Response to What's Wrong With Children's Rights*, 20 EMORY INT'L L. REV. 69, 70–72 (2006).

9. *See, e.g.*, *In re* H.R.C., 781 N.W.2d 105, 115 (Mich. App. 2009) (finding the child's attorney in dependency and termination of parental rights case owed duties to child); Michael H. v. April H., 934 N.Y.S.2d 685, 686 (N.Y. Fam. Ct. 2011) (appointing expressed wishes attorney in child custody).

10. *See, e.g.*, 750 ILL. COMP. STAT. 5/506(a)(3) (2016) (duties of child representative in Illinois child custody cases).

11. For an excellent discussion of the importance of child voice in custody proceedings, see generally Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 175 (2010).

12. *See, e.g.*, *In re* Jamie TT, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993) (finding a child constitutionally entitled to counsel in fact-finding dependency hearing).

13. Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L. REV. 299, 305 (1998).

14. Morgan v. Getter, 441 S.W.3d 94, 115–16 (Ky. 2014) (holding that a guardian ad litem needs to be an advocate, representative, and agent of the child, and the guardian ad litem should assume the role of a "best interest" attorney, not an "expressed interest" attorney).

15. *In re* Gault, 387 U.S. 1, 27 (1967).

16. *See, e.g.*, 750 ILL. COMP. STAT. 5/506(a)(3) (2016).

17. *See, e.g.*, ADMIN. OFFICE OF THE CTS., RESPONSIBILITIES OF GUARDIAN AD LITEM, http://courts.ky.gov/courtprograms/Documents/P84ResponsibilitiesofaGALsheet.pdf (August 2014) ("A GAL should advocate the child's best interests, but advise the court when the child disagrees with the attorney's assessment of the case.").

18. *Id.*

19. *See* NAT'L ASS'N OF COUNSEL FOR CHILDREN, ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Standard IV(C) (NACC Revised Version 2011) [hereinafter ABA STANDARDS] ("The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction through the case.").

ultimately that children's constitutional rights require traditional client-directed advocacy in custody matters, meaning that children should be represented by attorneys providing traditional functions, following client directives and advocating for their client's positions in the same manner as any other attorney. Part I describes the history of children's legal rights and status in the United States. Part II describes *In re Gault* and its potential implications for advocacy on behalf of children across contexts. Part III compares the current roles that children's attorneys play nationally across contexts. Part IV describes current inconsistencies in the appointment and role of counsel for children in child custody matters. Part V examines constitutional rationales for providing children traditional counsel in custody matters under the First and Fourteenth Amendments. Part VI argues that children's rights require traditional advocacy in private custody matters. Part VII recommends how states may define the role of counsel for children in custody matters in a manner that acknowledges child status, protects children's constitutional rights, and allows attorneys to follow the traditional rules of professional conduct, thus promoting appropriate and ethical advocacy.

I. BASIS FOR CHILDREN'S RIGHTS AND STATUS IN THE UNITED STATES

The Constitution does not reference children or their relationship to their families.[20] Historically, it was assumed that children did not need legal rights or status based on the idea that children were the property of their parents and parental authority was sufficient to protect children's interests.[21] Still, in the early 1800s, courts began to allow the state to intervene in matters involving children where the parents were unable or unwilling to protect their children's interests under the doctrine of *parens patriae*.[22]

20. Homer H. Clarke Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 1 (1992) ("[T]here is nothing in the Constitution about children, minors or infants, or parents for that matter. So far as I have been able to determine, none of those subjects appears in the records or debates leading to the drafting and ratification of the Constitution."); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 876 (2007) ("The Constitution is silent on rights for children or their families and the United States Supreme Court has been reluctant to enumerate substantive rights for children.").

21. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 606 (1979) (holding that State procedures for admitting a child for treatment to a state mental hospital were not unconstitutional because Georgia's medical fact-finding processes were consistent with constitutional guarantees and that children have due process rights when being committed to mental institutions).

22. *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014). The right held by the court

Seminal U.S. Supreme Court decisions illustrate children's legal status in the early twentieth century, affirming the notion that children's constitutional rights were subsumed in their parents' rights, or, if the parents were unfit, to the state's rights. These early cases pitted the state's interest in protecting children's wellbeing against the rights of parents to raise children and control their upbringing. In *Meyer v. Nebraska*, for example, the Court considered a state statute that prohibited schools from teaching children in a language other than English.[23] The Court noted that a parent's right to "establish a home and bring up children" is a liberty interest protected by the Fourteenth Amendment.[24] In *Pierce v. Society of Sisters*, parents challenged a state statute that required students to attend public schools rather than parochial schools.[25] In overturning the statute as unconstitutional, the Court noted that children "are not mere creature[s] of the state," but its rationale was based on the parents' rights, not the child's: "[W]e think it entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[26] However, in *Prince v. Massachusetts*, the Court upheld the conviction of a guardian who violated child labor laws by forcing a niece under her guardianship to distribute Jehovah's Witness pamphlets.[27] The Court reiterated its former position that "the custody, care, and nurture of the child resides first in the parents," but added that "[a]cting to guard the general interest in youth's wellbeing, the state as *parens patriae* may restrict the parent's control."[28]

Scholars have discussed that early children's rights cases came about in the context of the "child saving"[29] movement and the creation

---

to make a reasonable decision on the part of a person who is unable to make one for himself. Usually, such people suffer from disabilities, rendering it impossible for them to make the right decision.

23. Meyer v. Nebraska, 262 U.S. 390, 397 (1925).

24. *Id.* at 399.

25. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 530–31 (1925).

26. *Id.* at 535–36.

27. Prince v. Massachusetts, 321 U.S. 158, 160, 171 (1944).

28. *Id.* at 166.

29. *See* WILLIAM AYERS, A KIND AND JUST PARENT 25–26 (1997) ("The 'child-saving' societies [of the Protest and Catholic Churches] . . . strove to take children from 'unfit' or destitute homes, places where youngsters were 'neglected' or 'morally corrupted,' and find a foster home (preferably on a farm) or an institution where children could be raised up to be 'moral,'" "'fully participating members of society.' Large numbers of children, particularly immigrant children from Catholic countries like Italy and Ireland, found themselves literally swept off the streets and ensnared in the legal system, either as delinquents or paupers, forced from their families and shipped away 'for their own good.'").

of juvenile courts.[30] The first juvenile court was founded in Chicago in 1899 and almost every state followed over the next twenty years.[31] Juvenile courts had jurisdiction over delinquent and dependent children and were considered "an especially kind tribunal, which would care for children . . . as the *parens patriae*."[32] The courts "operated . . . as largely process-less tribunals, attempting to do what was best."[33] Children were not given the kind of rights that we now think of as necessary to ensure due process – for example, the right to notice, to be heard, or to counsel – because these types of rights were considered disruptive and non-essential by the authorities who operated the courts and "felt they knew what was best for disadvantaged children and could implement it through a judicial process that did not require procedural safeguards for the child."[34]

Without articulated individual rights to assert, children did not have autonomy within delinquency or dependency proceedings in juvenile courts and were subject to the whims and judgment of the court as a substitute "kind and just parent."[35] Courts operated in a generally due-process-free manner for more than half a century until *In re Gault*[36] appeared before the Court fifty years ago. In *Gault,* as detailed below, the Court considered the informal juvenile court process that existed in the first half of the twentieth century.[37] There, a minor was before the court for making prank phone calls.[38] He was determined to be delinquent and sentenced to removal from his home without ever standing trial or receiving advocacy by an attorney.[39] Gault alleged that the juvenile court process violated his constitutional rights.[40] The Court agreed, holding that children are individuals who possess their own

30. *See In re* M.I.S., No. 41000–8–I., 1999 WL 325442 at *7 (Wash. Ct. App. May 24, 1999) ("The philosophy of the child-saving movement and the court's expanding grounds for family intervention were finally codified in 1899 when the first juvenile court was created in Cook County, Illinois. The model was quickly followed in other states.").

31. *Id.*

32. Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 86–88 (2006).

33. *Id.*

34. *Id.*

35. Ayers, *supra* note 29, at 24.

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

37. *See generally id.*

38. *Id.* at 4.

39. *Id.* at 7–8.

40. *Id.* at 9–10.

constitutional rights specifically delineated in the Bill of Rights and protected by the Fourteenth Amendment.[41]

While children's attorneys often argue that children should be afforded the same rights as adults,[42] parents' attorneys frequently note children's different historically-recognized legal status as a reason not to extend adult constitutional rights to children.[43] The Court has held that children's constitutional rights are not automatically equated to adult's rights due to children's developmental status,[44] but since *Gault* the Court has recognized, alluded to, or expanded children's constitutional rights in a variety of cases.

Since *Gault*, the Supreme Court has addressed children's substantive rights based on the First and Fourteenth Amendment numerous times and has made it clear that children have fundamental rights that are entitled to the protection of the law.[45] When addressing children's rights under the First Amendment in *Wisconsin v. Yoder*, the Court reiterated its position from *Gault*: children are considered persons within the meaning of the Bill of Rights.[46] In *Tinker v. Des Moines*, the Court held that children have First Amendment free speech rights that are not surrendered at the schoolhouse door.[47] In

41. *Id*. at 13.

42. *See, e.g.*, Elrod, *supra* note 20.

43. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); *see also* Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988) ("We assume that [children] do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions.").

44. *See, e.g.*, *Thompson*, 487 U.S. at. 825 n.23.

45. In addition to these cases, there are several other areas where children's rights have been articulated or expanded. *See, e.g.*, Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage,* 92 B.U.L. REV. 1817 (2012) (discussing parental consent, judicial bypass and pregnancy as means for minors to marry and highlighting Georgia's procedure for appointing a guardian ad litem pursuant to N.C.S.A. § 51-2.1(b)); Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REF. 239 (1992) (discussing categories of emancipated minors and states that allow for appointment of counsel for the child); Luke Hudock, *Deference to Duplicity: Wisconsin's Recognition of the Mature Minor Doctrine*, 98 MARQ. L. REV. 973 (2014); Doriane Lambelet Coleman & Phillip M. Rosoff, *The Legal Authority of Mature Minors to Consent to General Medical Treatment*, 131 PEDIATRICS 786 (2013); Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About their Home Life?*, 46 SUFFOLK U. L. Rev. 503 (2013) (discussing mature minor doctrine and emancipation); S.C. v. Guardian Ad Litem, 845 So.2d 953, 957 (Fla. Dist. Ct. App. 2003) (finding that a minor child has the right to assert psychotherapist-patient privilege).

46. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (finding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16).

47. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). *But see* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (allowing a principal to censor

addition, the Court has spoken several times to children's First Amendment rights to personal autonomy. In *Belotti v. Baird*,[48] *Carey v. Population Services International*,[49] and *Planned Parenthood v. Danforth*,[50] the Court acknowledged minors' reproductive rights. In *Belotti*, the court held that the state could not infringe upon a minor's right to seek abortion without parental consent without a judicial determination of whether the minor was sufficiently mature to make the decision.[51] Because a fundamental interest was at stake, the minor had a right to be heard.[52]

In addition to the First Amendment, the Court has extended the protections of the Fourteenth Amendment – both due process and equal protection – to children in a variety of cases. The idea that children may assert the right to notice, to be heard, and the other protections typically associated with basic due process has by now been established and followed in various settings outside the delinquency context. For example, in *Parham v. J.R.*, the Court held that children have due process rights when being committed to mental institutions.[53] In *Goss v. Lopez*, the Court held that children have due process rights before being expelled from school.[54] In *Ingham v. Wright*, the Court held that a child has due process rights prior to being subjected to corporal punishment in school.[55] The Court has also allowed Equal Protection challenges brought by minors. For example, in *Stanton v.*

---

school magazine); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986) (allowing school to regulate offensive speech).

48. Bellotti v. Baird, 443 U.S. 622, 647 (1979) (holding that a minor has the right to seek judicial consent for abortion).

49. Carey v. Population Servs. Int'l, 431 U.S. 678, 692 n.14, 694 (1977) (holding that a minor has the right to access contraceptives, and noting that minors are entitled to constitutional protections for speech, equal protection against racial discrimination, due process in civil matters, and the rights of a defendant in delinquency matters).

50. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (finding that a minor has the right to seek elective abortion).

51. *Bellotti*, 443 U.S. at 647.

52. *Id.*

53. *See* Parham v. J.R., 442 U.S. 584, 606 (1979) (holding that the State's procedures for admitting a child for treatment to a state mental hospital were not unconstitutional because Georgia's medical fact finding processes were consistent with constitutional guarantees and that when being committed to mental institutions, children have due process rights).

54. *See* Goss v. Lopez, 419 U.S. 565, 580–81 (1975) (holding that students facing temporary suspension from public school were entitled to protection under the due process clause and that due process required, in connection with suspensions of up to ten days, that such a student be given notice of charges and an opportunity to present his version to authorities, preferably prior to removal from school, but there were instances in which prior notice and hearing were not feasible and the immediately removed student should be given necessary notice of hearing as soon as practicable).

55. Ingham v. Wright, 430 U.S. 651, 674 (1977).

Stanton[56] and *Craig v. Boren,*[57] the Court allowed equal protection challenges brought by minors to age and gender restrictions.[58] In *Plyler v. Doe*, the Supreme Court held that the Equal Protection Clause applied to immigrant schoolchildren who were denied an education.[59]

Despite substantive legal advances and expanded status in many contexts, children's rights within the family context remain less clear. The Supreme Court has not had many opportunities to address children's First and Fourteenth Amendment children's right to family relationships, mostly because cases in the family context are typically brought by parents asserting their own rights or the state asserting rights over a child under the docrtrine of *parens partiae*.[60] Therefore, we are left to review the decisions of lower courts, which have more frequently addressed the issue of children's First Amendment relational rights within the family[61] – whether the constitutional right to the parent-child relationship afforded to parents must also be directly afforded to children – and some have addressed what means are constitutionally necessary to protect children's relational rights.[62] Children's relational rights as constitutionally-protected rights, and as a basis for the child's right to a traditional attorney, is discussed in Section V. In order to expand children's right to traditional counsel in custody cases, the Court would have to entertain a challenge similar to the one in *Gault*, discussed in the next Section.

II. *GAULT* AND ITS POTENTIAL IMPLICATIONS ACROSS CONTEXTS

Gault, the seminal right-to-counsel children's case began over fifty years ago. In June of 1964, minor Gerald Gault was taken into custody on complaint that he had made an "irritatingly offensive, adolescent

56. *See* 421 U.S. 7, 17 (1975) (holding that the difference in sex between children did not warrant a distinction in the Utah statute under which girls attained majority at 18 but boys did not attain majority until they were 21 years of age, and the statute could not, under any test, survive an attack based on equal protection).

57. *See* 429 U.S. 190 (1976) (holding that an Oklahoma Statute that prohibited the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18 constituted a denial of the equal protection of the laws to males aged 18-20).

58. *Id.*

59. *See* Plyer v. Doe 457 U.S. 202, 211–12 (1982). The Supreme Court had previously applied the Equal Protection clause in *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954), which held that racially segregated schools deprived black children of the Fourteenth Amendment's guarantee of equal protection of laws.

60. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 159–60 (1944).

61. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817, 821 (2d Cir. 1977).

62. *See, e.g.*, Doe v. Heck, 327 F.3d 492, 524 (7th Cir. 2003).

and of the sex variety" phone call to his neighbor, Ora Cook.[63] When Gault was finally released to his mother, the superintendent of the Detention Home gave Gault's mother a note stating, "Judge McGhee has set Monday June 15, 1964 at 11:00 A. M. as the date and time for further hearings on Gerald's delinquency."[64] At the hearing, the judge ordered that Gault be confined to the State Industrial School "for the period of his minority, unless sooner discharged by due process of law."[65] Gault's accuser was not present at either hearing because the judge determined it was not necessary for her to be present.[66] Gault's parents petitioned the Arizona Supreme Court for a writ of habeas corpus for Gault's release, but the petition was dismissed.[67] Gault's parents appealed to the United States Supreme Court.[68] The Court held that "absent a valid confession, a determination of delinquency, and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements," and reversed and remanded the case.[69]

Since *Gault*, children in delinquency proceedings have the right to be assisted by traditional client-directed counsel.[70] This right is rooted in the Fourteenth Amendment's due process clause.[71] The protections afforded to children include the right to notice, confrontation, counsel, and to avoid self-incrimination.[72] The Court in *Gault* noted that "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution."[73] Because a liberty interest was at stake – physical removal from the family and placement in an institution – the Court rooted the right to counsel in the due process clause and explicitly rejected the idea that a parent, probation officer or judge could be relied upon to protect a child's interests in a delinquency proceeding.[74] Children were thus acknowledged as rights-

63. *In re* Gault, 387 U.S. 1, 5 (1967).
64. *Id*. at 6.
65. *Id.* at 7.
66. *Id*. at 5.
67. *Id.* at 8.
68. *Id*.
69. *Id*. at 56.
70. *Id.* at 36.
71. *Id*.
72. *Id*.
73. *Id.*
74. *Id*. ("The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child.

based persons under the Constitution: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[75]

III. ROLE OF COUNSEL FOR CHILDREN ACROSS CONTEXTS

Children are involved in a variety of legal proceedings, either as parties or as people with an interest in the outcome of the litigation. Children are represented in these proceedings in a variety of ways by advocates serving in a variety of roles that include traditional attorney and non-traditional advocacy roles. Advocates are typically appointed in cases where parents or guardians cannot be relied on to protect the child's interests, for example: minors seeking emancipation from parents,[76] minors seeking judicial consent to marry,[77] minors seeking judicial consent to seek abortion,[78] minors asserting mature minor right to make medical decisions,[79] psychiatric confinement,[80] and minors participating in probate or other financial matters where the parent may have a competing interest in the property.[81]

These are not, however, the only cases where children appear before the court. Children also appear before the court in matters including delinquency, child protection, paternity, adoption and private custody matters. Because of *Gault*, children in delinquency proceedings now have the right to a traditional attorney during adjudication proceedings and the full extent of the rights and privileges that the attorney-client relationship creates.[82] The right to a traditional attorney

---

Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by the Court.").

75. *Id*. at 13.

76. *See, e.g.*, *In re* Kevin B., No. HHDFA990721554, 2010 WL 1508468 (Conn. Super. Mar. 9, 2010).

77. *See, e.g.*, *In re* King, 10 Pa. D. & C.2d 533 (Pa. Orph. 1958).

78. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 624 (1979).

79. *See, e.g.*, *In re* E.G., 549 N.E.2d 322, 323 (Ill. 1989).

80. Parham v. J.R., 442 U.S. 584, 606 (1979) (requiring that children subject to mental commitment be afforded an independent inquiry by a neutral factfinder, but not requiring the appointment of independent counsel).

81. Williams v. Briggs, 502 P.2d 245, 248 (Or. 1972).

82. *See* Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005). Henning notes:

> Notwithstanding the initial debate, by the early 1980s a consensus seems to have evolved among academic commentators and professional leaders in the juvenile justice community regarding the appropriate role of counsel in delinquency cases. The professional leadership as represented by the OJJDP, the ABA, and the Institute of Judicial Administration (IJA) issues a series of standards to govern the administration of justice for children charged with crimes. These standards uniformly endorsed an

is now "uniformly endorsed" in juvenile justice matters.[83] *Gault* did not, however, extend an affirmative right to a client-directed attorney to other court contexts.[84]

In child protection matters[85] involving allegations of abuse and neglect, children are provided a representative to protect their best interests.[86] The current version of the federal Child Abuse Prevention and Treatment Act[87] requires that children in such proceedings be appointed a trained individual to advocate for the child – an attorney or a court-appointed special advocate – tasked with understanding the child's needs and situation, and making recommendations to the court concerning the child's best interests.[88] States vary considerably in these matters: some provide guardians ad litem, some traditional attorneys, some hybrid roles, and some non-attorney advocates.[89]

Under the Uniform Parentage Act (UPA), a child may bring a paternity action through his or her mother or guardian.[90] In some states, if paternity is contested, the child is appointed a guardian ad litem to

---

> expressed-interest, adversarial model of representation for children at all phases of the delinquency case. . . . Today, even where disagreement persists among scholars over the role of counsel in abuse and neglect and other child-related proceedings, the weight of academic opinion now firmly supports the expressed-interest adversary model of advocacy in delinquency cases.

Id. at 255–56.

83. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (balancing the rights of a parent to the custody and control of her child with the minor's right to obtain an abortion, such that the minor's rights outweighed the parent's: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights").

84. *See In re* Gault, 387 U.S. 1, 13 (1967) ("We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship between the juvenile and the state.").

85. While the child's right to client-directed counsel in dependency, abuse and neglect cases is outside the scope of this article, there are many articles on this subject. *See, e.g.*, LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 606 (2009); Elrod, *supra* note 20; Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663 (2006); Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L. Q. 485, 490 n.36 (2003).

86. *See, e.g.*, 45 C.F.R. 1340.14(g) (1994) (requiring appointment of a guardian ad litem for abused or neglected children in judicial proceedings, pursuant to the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. 5101-5118)).

87. *Id.*

88. *Id.*

89. FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NAT'L REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN (2009), https://www.firststar.org/wp-content/uploads/2015/02/Final_RTC_2nd_Editio n .pdf.

90. MO. ANN. STAT. § 210.826 (2009).

represent the child's best interests.[91] After the child reaches the age of majority, he or she may assert parentage rights through independent counsel.[92]

Likewise, states frequently lay out the age at which a child must consent to an adoption.[93] If the child contests the adoption, he or she may contest the adoption, but courts have the ability to waive the child's consent after a hearing.[94] Counsel or a guardian ad litem is appointed on a discretionary basis in these matters, in particular in contested matters where the suitability of the adoptive placement is questioned or where the child's best interests are otherwise at issue.[95]

However, in private custody matters – cases involving custody disputes within intact families – children (like parents) are not automatically afforded counsel.[96] When counsel is hired or appointed, that counsel may play a variety of roles, as outlined below.[97]

IV. APPOINTMENT AND ROLE OF COUNSEL IN CUSTODY MATTERS

Without a constitutional mandate requiring the appointment of traditional client-directed counsel in custody matters, practices vary widely between jurisdictions. Rather than operating within a children's rights-based framework, custody matters are most often framed within a best-interests-of-the-child scheme. Within that framework, the child's wishes are to be considered when making custody determinations, but are not dispositive.[98] Under the Uniform Marriage and Dissolution Act

91. OKLA. STAT. ANN. tit. 10, § 7700-612 (2006).

92. OHIO REV. CODE ANN. § 3111.05 (1982) (a paternity action may be filed within five years of reaching the age of majority).

93. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-106A (2014) (requiring consent of child 12 and above for adoption).

94. S.J. *ex rel.* M.W. v. W.L., 755 So. 2d 753 (Fla. 4th Dist. App. 2000).

95. *Id*.

96. *In re* Rosier-Lemmon/Rosier Children, No. 2003 CA 00306, 2004 WL 540299, at ¶ 22 (Ohio Ct. App.). ("There is no constitutional right, however, to effective representation by counsel in civil cases between individual parents involving visitation and residential-parent status.").

97. For articles generally addressing standards for child representation in custody matters, see Barbara Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interest Lawyering or No Lawyering at All?*, 53 ARIZ. L. REV. 381 (2011); Melissa L. Breger, *Against the Dissolution of the Child's Voice in Court*, 20 IND. INT'L & COMP. L. REV. 175 (2011); Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. L. 251 (2009); James C. May, *Lawyering for Children in High Conflict Cases*, 33 VT. L. REV. 169 (2008); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998).

98. *In re* Hartley, 886 P.2d. 665 (Colo. 1994).

(UMDA), courts are frequently not required to appoint advocates for children at all, let alone traditional client-directed attorneys.[99] While many children's rights scholars and attorneys take the position that children should have client-directed counsel in custody matters,[100] many legislatures, professional organizations, and parents' attorneys have not moved in that direction. As such, there is inconsistency in practice that affects children's ability to be heard or effectively advance their rights and interests.

A. Best Interests of the Child Framework

Custody and related matters are determined within the best interests of the child framework.[101] The standard has been uniformly adopted in private custody matters via the UMDA, which states:[102]

> § 402. [Best Interest of Child]
> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Pursuant to the UMDA, the parties' and the child's wishes are factors[103] for the court to consider in determining the child's best interests, but are not dispositive.[104] The trial court does not determine parental fitness in private custody matters, but instead balances the best interest factors. Judges are allowed, but not required, to appoint a

99. *See, e.g.*, WASH. REV. CODE ANN. § 26.10.070 (1989) ("The court may appoint an attorney to represent the interests of a minor or dependent child with respect to custody, support, and visitation.").

100. *See supra* note 97 and accompanying text.

101. UNIFORM MARRIAGE & DIVORCE ACT (AM. BAR ASS'N, amended 1973).

102. *Id.* § 402.

103. *See* Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK L. REV. 503 (2013) (discussing the disparities in state laws regarding child's preferences).

104. *In re* Hartley, 886 P.2d. 665 (Colo. 1994).

lawyer for the child based on the application of the factors.[105] Commentators have questioned the appropriateness of the standard, calling it "a formula for unleashing state power, without any meaningful reassurance of advancing children's interests."[106]

The best interest framework is rooted in the presumption that parents act in the best interests of the child, which dates all the way back to *Meyer v. Nebraska* in 1925 and was addressed by the Supreme Court in the private custody/visitation context as recently as *Troxel v. Granville* in 2000. Where parents are deemed to be "fit," they are shielded from state examination by the veil of parental privacy.[107] One problem with the best interests approach is that it presumes that parents will act in the interests of their children, which is not always the case.[108] Some courts have addressed the issue of whether the child's fundamental right to family relations is advanced and protected by the best interests of the child. For example, in *Hiller v. Fausey*, the Pennsylvania Supreme Court upheld the constitutionality of the Pennsylvania Grandparent Visitation Act.[109] In a separate concurrence, Justice Newman advocated for fundamental rights protections to be applied to the child's best interests in making a custody determination:

> I advocate that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right. The interest is expressed in a variety of statutes and proceedings, ranging from complete severance of parental rights on a judge's finding of parental unfitness [in a termination proceeding], to the limitation of parental choices in the areas, for example, of education, health care, and safety. Thus, I believe that the instant matter involves a situation that burdens two fundamental rights – the right of a fit father to make parenting decisions for the child and the right of the child to have its best interests considered . . . If balancing of interests is necessary, the interests of the child must prevail.[110]

This position is fairly unusual. Despite the fact that the child's wishes are to be considered by the court when making a best interests determination, in practice custody proceedings frequently focus on the parents' competing rights and minimize the child's interests. "Courts

105. *Id*.
106. *See* GUGGENHEIM, *supra* note 43.
107. Troxel v. Granville, 530 U.S. 57, 69 (2000).
108. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 269 (1983) (White, J., dissenting) (noting that the presumption is inappropriate where the parent's and the child's interests conflict).
109. Hiller v. Fausey, 904 A.2d 875 (Pa. 2006).
110. *Id*. at 897.

routinely deny children standing in custody cases, even though children's futures are at stake. Judges place maximum emphasis on what is perceived fair and equitable to the parties; other issues, such as the child's wishes or needs for stability, get lost."[111] When cases go to hearing, courts frequently refuse to hear from children as witnesses,[112] relying instead on indirect evidence offered by the parties with their own interests at stake in the matter.[113] This is despite the fact that children's wishes as to custody are considerations under the best interests statute and they often want to be heard.[114] As appointment of counsel is discretionary under the UMDA, children frequently have no ability to assert their wishes as to custody, regardless of the requirement that their wishes be considered in a best interest determination, or their individual constitutional right to the parent-child relationship.

B. Inconsistent Appointment and Conflicting Roles of Children's Lawyers Across Jurisdictions

Parties (usually parents) in custody matters do not have the right to appointed counsel.[115] This is because the state is minimally involved in

111. *See* Elrod, *supra* note 20; *see also* Monroe L. Inker & Charlotte Anne Peretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108, 108 (1971) ("Almost without exception, the right to children, as adjudicated in custody proceedings, is determined by comparing fitness of the contesting parents: the children are treated as secondary parties in these proceedings . . . this approach is opposed to increasing judicial recognition that children have rights which can no longer be ignored.").

112. Leahman v. Broughton, 244 S.W. 403 (Ky. 1922).

113. *See, e.g.*, Hanna v. Hanna, 894 N.E.2d 355 (Ohio Ct. App. 2008) (finding that minor who had been joined as a party defendant did not have status to invoke the continuing jurisdiction of the court once the parents' actions were withdrawn).

114. *See* Patrick Parkinson, Judy Cashmore & Judi Single, *Adolescents' Views on the Fairness of Parenting and Financial Arrangements*, 43 FAM. CT. REV. 429 (2005) (half of adolescents reporting indicated they had no say and believed the arrangement entered into reflected what was fair to parents, not children); *see also In re* Trosset, 925 N.Y.S.2d 328 (Fam. Ct. 2011) (holding that child's attorney had standing to file petition on child's behalf and the child had stake in the outcome sufficient to confer standing upon him to file a petition to modify a visitation and custody order, and, by extension, for the child's attorney to file on his behalf, based on allegations which related directly to the child's desire to live with his father).

115. Private custody matters are different than other types of child-related matters in that the state is not a party. The state action involved is not assuming a *parens patriae* role and taking over custody of the child; the state action involved is assigning custody to one parent over the other based on a judicial determination of the best interests of the child. *See* UNIFORM MARRIAGE & DIVORCE ACT § 403 (AM. BAR ASS'N, amended 1973). In private custody matters, parents do not have the right to appointed counsel the way they would in child protection matters. *Id.* Neither parent has a prima facie right to custody of the child. Monroe L. Inker and Charlotte Anne Peretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108 (1971). Both have the constitutional right to some form of the parent-child relationship so long as neither party's rights have been terminated. *See* Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18 (1981). While the court's intrusion into the parent-child relationship is less than a termination of

custody disputes as applied to parties;[116] the parties are in relatively equal bargaining positions; the parties have ability to represent their own interests or engage their own counsel if necessary; and the parties are able to enter into binding agreements to avoid litigation.[117] Children do not have the automatic right to counsel either, despite the fact that the child's right to family association is arguably implicated.[118] The UMDA allows courts to appoint an "attorney to represent the interests of a child" in a custody or visitation matter, but does not require it.[119] States have adopted a crazy quilt of statutes, rules and court decisions defining the role of the child's attorney in custody matters.[120] While the right to representation in custody matters is now often addressed by statute, what the lawyer is supposed to do is often ill-defined, even today.[121] Courts are not frequently asked to define or explain the role of counsel for children in family matters, and, when courts have done so, they have provided no consensus.[122]

When advocates are appointed for children in custody matters, they generally serve in one of two roles: Guardian Ad Litem (GAL)[123] or

parental rights proceeding, many of the same constitutional issues are implicated, and the trial court's determination of best interests and assignment of custody can impose significant restrictions on parent-child relationships. *Id.* at 20. Still, because the parents are individually asserting rights, and the state's involvement in the matter is considered minimally intrusive as applied to parents. parties are not entitled to appointed counsel in custody matters (although they are frequently represented by private counsel). *See id.*

116. *See supra* note 115 and accompanying text.

117. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 757 n.122 (1988) ("[The] goal is to divert families from continued litigation, to help them resolve the current issues of dispute by agreement, and to assist them in establishing a more successful way of resolving future disagreements.").

118. *See* GUGGENHEIM *supra* note 43, at 246 (noting that commentators argue that children's claims of the right to family association should not be constitutionally protected because they over-empower children and destroy the fabric of the family by promoting side-taking).

119. *See* UNIFORM MARRIAGE & DIVORCE ACT (AM. BAR ASS'N, amended 1973).

120. *Id*. § 402.

121. *Id*.

122. Recently, however, the Kentucky Supreme Court addressed this issue. In *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), the court addressed the issue of the proper role of children's counsel in custody proceedings. In the trial court, the GAL had been allowed to provide a recommendation report to the court, but was not subject to cross examination. *Id.* at 96. The parent's attorney objected, claiming a procedural due process violation. *Id.* at 97. The Kentucky Supreme Court addressed the conflict between procedural due process and the GAL's professional responsibility obligations. *Id.* at 99. The Court indicated that, in Kentucky, the proper role of a children's attorney is a best interests attorney who does not provide reports to the court or make recommendations and is not subject to cross examination. *Id.* at 103.

123. *See Guardian Ad Litem*, BLACK'S LAW DICTIONARY (10th Ed. 2014) (defining Guardian Ad Litem as the party the court deems responsible for an incapacitated, handicapped, or minor in court).

some form of attorney for the child.[124] A GAL is obligated to advance the best interests of the child within the case.[125] In some jurisdictions, the GAL must be an attorney,[126] and in others he or she is not.[127] In some jurisdictions, the GAL must make reports and recommendations to the Court,[128] and in others he or she must not.[129] An attorney for the child must advance the child's interests, sometimes framed as the child's "best interests"[130] and sometimes as the child's expressed wishes.[131] Both types of attorneys must serve in attorney roles, but their roles and obligations to their clients deviate greatly in terms of allocation of authority between attorney and client,[132] the duty of confidentiality,[133] and other professional responsibility concerns.

Most often in custody matters, the child is appointed a GAL who may or may not be an attorney, who is not required to follow the child's

124. *See, e.g.*, IOWA CODE ANN. § 232.89(4) (2002); N.C. GEN. STAT. §§ 7B-601, 7B-1108, and 7B-1200 (2011); Tenn. S. Ct. R. 40A § 1(c)(1) (provisional) (allowing the guardian ad litem to be an attorney or a specially trained non-lawyer such as the Court-Appointed Special Advocates (CASA)); WIS. STAT. ANN. § 767.407 (2008) ("The court shall appoint a guardian ad litem for a minor child in any action affecting the family . . ."); *see also* WASH. REV. CODE ANN. § 26.10.070 (1989) ("The court may appoint an attorney to represent the interests of a minor or dependent child with respect to custody, support, and visitation.").

125. *See* Elrod, *supra* note 20.

126. *See, e.g.*, ALASKA STAT. ANN. § 25.24.310 (West 1998).

127. *See, e.g.*, S.D. CODIFIED LAWS (1990) § 25-4-45.4.

128. *See, e.g.*, MONT. CODE ANN. § 40-4-205; *In re* Marriage of Hammill, 225 Mont. 263 (1987); Jacobsen v. Thomas, 323 Mont. 183 (2004).

129. *See, e.g.*, State *ex rel.* A.D., 6 P.3d 1137 (Utah Ct. App. 2000) (GALs may not be compelled to testify and may not be called as expert witnesses based on fulfilling statutory duties to make best interests recommendations.)

130. *See* Roussel v. State, 274 A.2d 909, 926 (Me. 1971) (The best interest of the child standard has been largely influenced by the common law doctrine of parens patriae, which holds that the state has the right and duty to control the custody of a minor child as it deems appropriate for the child's welfare, once the child has become a subject of the jurisdiction of a court).

131. *See* Ziehm v. Ziehm, 433 A.2d 725, 728 (Me. 1981) (quoting Finlay v. Finlay, 148 N.E. 624, 626 (1925)) ("[The trial judge] acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. He 'interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the [state] as parens patriae.'").

132. *See* ABA STANDARDS, *supra* note 19.

133. *Id.*

direction.[134] About half of states employ GALs,[135] who generally conduct investigations, make recommendations, provide a report to the court, and may be called as a witness.[136] In some jurisdictions, the GAL does not provide a report to the court but instead brings in evidence to advance the child's best interests.[137] This role has also been referred to as a child representative[138] or best interests attorney[139] in other jurisdictions. In some jurisdictions, the court also has the option of appointing a child's attorney – sometimes referred to as counsel or an expressed wishes attorney – in custody matters.[140] This person argues for the child's wishes, similar to the way an attorney would with an adult client.[141]

---

134. *See, e.g.*, K.L.R. v. L.C.R., 854 So.2d 124, 130 (Ala. Civ. App 2003); D.E.S. v. J.S., 603 So.2d 1064 (Ala. Civ. App. 1992) (both stating that GAL appointment in child custody is not required and the child protection statute does not apply); ALASKA STAT. ANN. § 25.24.310 (1998) (GAL, who may be but is not required to be, an attorney, represents the child's best interests); AZ. STAT. RFLP R. 10 (GAL must determine the child's best interests, and if the child's wishes differ from the GAL's best interests determination, must communicate the child's wishes to the court along with the best interest recommendations); 750 ILL. COMP. STAT. ANN. § 5/506 (2015) (GAL provides recommendations in the child's best interests).

135. *See* Holloway v. Arkansas, 435 U.S 475 (1978) (noting that where the government is under a due process obligation to appoint an attorney with no conflict of interest and in a manner that structurally does not impede ability to effectively represent the client).

136. *See, e.g.*, OHIO ST. JUV P. r. 4 (2001); *In re* Clark, 749 N.E.2d 833, 837 (2001).

137. Morgan v. Getter, 441 S.W.3d 94, 115–16 (Ky. 2014).

138. For example, in *Aksamut v. Krahn*, 227 P.3d 475, 480 (Ariz. App. 2010), the court held that the substantive report provided by the best interest attorney (BIA) was improper because it was based on her own investigation. This error was prejudicial because the trial court relied on the BIA's custody opinion to decide the child custody issue. *Id.* at 481. Thus, there are bright line delineations provided in the rule: a child's attorney or BIA may act in a representative capacity and urge the court to reach a particular result based upon the evidence presented. *Id.* However, like any other attorney functioning in a representative capacity, the argument and positions taken by the attorney do not themselves constitute evidence. *Id.*

139. States that have a best interests attorney role include Arizona, Illinois, Maryland, New Mexico, North Carolina, Oregon, and Pennsylvania.

140. *See* N.Y. Fam. Ct. Act. §§ 241, 249 (appointment in DV cases where order of protection is sought). *See In re.* Pamela N. v. Neil N., 941 N.Y.S.2d 751 (3d Dept. 2012); Arlene R. v. Wynette G., 37 A.2d 1044 (4th Dept. 2007); Michael H. v. April H., 394 N.Y.S.2d 685 (Fam. Ct. 2011) (declaring mistrial in family court where child's lawyer advocated an outcome which contradicted the 14-year-old client's wishes). *But see ex rel.* McDermott v. Bale, 943 N.Y.S.2d 708 (4th Dept. 2012) (refusing to grant children in custody cases full-party status and children's lawyers cannot veto parents' settlement and force a trial). The attorney must follow the child's directions where the child is competent to take a position and not at imminent risk of harm, even if the attorney believes the direction is not in the child's best interests. *See* 22 N.Y. C.P.R. 7.2[d][2].

141. *See* Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529 (2002) (describing the evolution of New York's law guardian role). *See also* Michael H. v. April H., 934 N.Y.S.2d 685 (N.Y. Fam. Ct. 2011) (finding that attorney whose closing argument directly contradicted child's wishes in custody case violated statutory duty to zealously advocate for client's wishes).

While children are sometimes appointed counsel in custody matters, it is often not clear what the lawyer is required or even allowed to do.[142] The Model Rules of Professional Conduct, discussed below, provide some basic guidance for lawyers representing clients with diminished capacity,[143] but are not very directive in assisting lawyers representing child clients and their special developmental needs. In order to address these issues, beginning in the mid-1990s,[144] various organized bar and professional organizations began promulgating "standards, principles, recommendations from two national conferences, and even a uniform law on the representation of children."[145] These guidance documents are similar in many accounts, but they are not consistent. Much of their differences have to do with varying positions on the proper role of the child within the litigation, whether the child should have independent rights to assert, and whether they must be asserted through counsel.

C. Non-Constitutional Attempts to Clarify Role of Counsel for Children

The Court in *Gault* declined to speak to the proper role of counsel in family cases. Post-*Gault*, courts, practitioners and commentators scrambled to figure out their positions on the appointment and role of counsel in these other contexts.[146] Of course, without a constitutional mandate, the appointment and role of counsel for children in custody matters varies greatly.

---

142. *See generally* GUGGENHEIM *supra* note 43 (analyzing the most significant debates in the children's rights movement, particularly those that treat children's interests as antagonistic to those of their parents and argues that "children's rights" can serve as a screen for the interests of the adults).

143. *See* MODEL RULES PROF'L CONDUCT r. 1.14 (1983).

144. A 1995 conference titled "Ethical Issues in the Representation of Children" at Fordham Law School was the catalyst for much of the work that followed in attempts to establish clear and ethical roles for children's attorneys. The conference generated a list of recommendations. *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996). The Conference reached an agreement that attorneys should be appointed to represent children in child protection, termination of parental rights, delinquency, status offense and mental health commitment matters, but did not come to an agreement about whether children should be appointed as a matter of course to children in custody, visitation, adoption and other matters.

145. *See* Elrod, *supra* note 20, at 872–73 (listing current guidance).

146. Some scholars believe that children should not be appointed counsel at all in custody matters because doing so elevates the child's position in the litigation improperly. *See* GUGGENHEIM, *supra* note 43. Professor Guggenheim has also argued that children who cannot direct counsel should not have counsel. *See* Martin Guggenheim: *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996).

Advocates for traditional client-directed counsel for children argue that allowing traditional advocacy honors children's autonomy and voice.[147] While children's capacity to fully direct counsel is debated,[148] children's rights advocates argue that almost all children have the ability to communicate their wishes and desires, which should be followed to the greatest extent possible.[149] The Rules of Professional Conduct define the attorney-client relationship as client-directed, even though the client is a child, and therefore require traditional advocacy to the greatest extent possible.[150] While the Model Rules of Professional Conduct account for diminished capacity – and youth and developmental immaturity fall under that umbrella[151] – many courts and commentators remain unconvinced that traditional attorneys practicing under the Rules alone can properly serve clients and the public interest; as such, several sets for professional standards and rules have evolved over time to help define what counts as competent representation of children in custody matters.[152]

Under the rules, attorneys who represent child clients have traditional obligations to them, taking into account Rule 1.14.[153] Although children are considered clients with diminished capacity under that rule, the rules do not allow attorneys to substitute judgment for their clients.[154] Under the rules, they are instead to maintain the traditional lawyer-client relationship "as far as reasonably possible,"[155] and maintain ethical duties. These duties include competence,[156]

147. Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L. J. 93, 97 (2010); Elrod, *supra* note 20.

148. *Compare* AAML STANDARD 2.2 (the attorney should discuss the objectives of the litigation with a client twelve or over), *with* Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L. J. 1240 (2006) (discussing how a child age 7 has the capacity to direct counsel).

149. *See* Federle, *supra* note 147, at 97; Elrod, *supra* note 20; Mark Henegan, *What Does a Child's Right to Be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough*, 42 FAM. L. Q. 117 (2008).

150. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (1983) (requiring lawyers to abide by their clients' decisions concerning the client's objectives).

151. *See id.* r. 1.14(a) ("When a client's ability to make adequately considered decisions in connection with the litigation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.").

152. *See id.*

153. *Id.*

154. *Id.* r. 1.14(b).

155. *Id.*

156. *Id.* r. 1.1.

allocation of authority,[157] diligence and zeal,[158] communication,[159] and avoidance of conflicts.[160] While the comments to Rule 1.14 note that "maintaining the ordinary lawyer-client relationship may not be possible in all respects,"[161] children's opinions are entitled weight in proceedings affecting them.[162] Under the rules, if the lawyer is required to take protective action in order to assist the client, the lawyer's action is determined by "the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."[163]

Without consensus about the proper role of counsel for children in the custody context – or whether the Rules of Professional Conduct alone provide a sufficient framework for children's attorneys – various professional organizations promulgated standards for attorneys representing children. The American Academy of Matrimonial Lawyers took the position, for example, that, in the event that a child was appointed an advocate in a custody matter, that advocate should always be a traditional expressed-wishes attorney.[164] The ABA, on the other hand, took a more measured approach.

The ABA promulgated Standards of Practice for Lawyers Representing Children in Custody Cases ("ABA Standards").[165] The ABA Standards do not take a position on the proper role of counsel for children's lawyers; they simply describe the duties of such lawyers if they are appointed either to advance the child's individual interests ("Child's Attorney") or best interests ("Best Interests Attorney").[166] The Child's Attorney is "a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation that are due an adult

157. *Id*. r. 1.2.
158. *Id*.r. 1.3.
159. *Id.* r. 1.4.
160. *Id*. r. 3.7.
161. *Id.* r. 1.14 cmt. 1.
162. *Id.*
163. *Id.* cmt. 5.
164. American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardian ad Litem in Custody or Visitation Proceedings,* 13 J. AM. ACAD. MATRIM. LAW 1 (1995).
165. ABA Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 131 (2003).
166. ABA STANDARDS, *supra* note 19, at II.B.(1)–(2) ("These Standards do not use the term 'Guardian Ad Litem.' The role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations.").

client."[167] The Best Interests Attorney is "a lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's objectives or directives."[168] Both attorneys are to provide traditional functions including filing motions and participating in hearings and trials.[169]

The roles of the Child's Attorney and the Best Interests Attorney deviate from there. The Child's Attorney is required to advocate for the result sought by the client, so long as the client is capable of adequately directing counsel.[170] The Child's Attorney functions as legal counsel with the same ethical obligations "in all matters"[171] as an adult's attorney.[172] If the child does not express wishes, the Child's Attorney must make a good faith effort to determine the child's wishes and, if the child does not want to express a position regarding a particular issue, the Child's Attorney must determine and advocate for the child's interests.[173]

The Best Interests Attorney advocates for the child's best interests.[174] The Best Interests Attorney is "bound by their states' ethics rules except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks."[175] A Best Interests Attorney is subject to the rules of lawyer-client confidentiality, "except that the lawyer may also use the child's confidences for the purposes of representation without disclosing them."[176] The Best Interests Attorney must conduct a

167. *Id*. II.B.(1) (defining Child's Attorney as a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client).

168. *Id*. II.B.(2) (defining Best Interests Attorney as a lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives).

169. *Id*.

170. *Id*. IV.C. ("The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.").

171. *Id*. IV.A.1. ("Child's Attorneys are bound by their states' ethics rules in all matters.").

172. *Id*. IV.A.1. cmt. ("The child is an individual with views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position and owes traditional duties to the client, subject to rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct.").

173. *Id*.

174. *Id*. V.E. ("The Best Interests Attorney should conduct thorough, continuing, and independent investigations . . . .").

175. *Id*. V.A.

176. *Id*. V.B. cmt. ("The distinction between use and disclosure means, for example, that if a

thorough investigation of the case.[177] The Best Interests Attorney is not required to advocate for the child's wishes but instead advances the child's best interests as determined by the Best Interests Attorney based on the Best Interests factors.

Scholars have argued against the appointment of Best Interests Attorneys because best interests lawyering undermines child autonomy, impinges on the child's right to direct the litigation, and creates ethical conflicts for attorneys.[178] One scholar has argued that best interests lawyers "conclude what is best for their clients based on invisible factors that have more to tell us about the values and beliefs of the lawyers than about what is good for children" and, in doing so, pose a threat to the rule of law.[179]

Without consensus, and with courts adopting varying roles, the Standards may serve to help attorneys define their duties, but they do not solve the problem of proper role. A court decision based on a child's constitutional rights within the custody context would fix the problem of inconsistent practice. While the Rules of Professional Conduct may already support traditional representation, the proper role of counsel remains unsettled.

V. CONSTITUTIONAL BASIS FOR ASSERTING RIGHTS IN PRIVATE CUSTODY MATTERS

Parents' rights to the parent-child relationship cannot be infringed upon by the state absent a "powerful countervailing interest" in the child's well-being.[180] Historically, children's rights were subsumed into their parents' rights and, thus, children did not have the status to assert rights within the family context.[181] Although children's rights have been expanded in the past fifty years,[182] the Supreme Court has continued to

child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child.").

177. *Id*. V.E..

178. *See, e.g.*, Atwood, *supra* note 97, at 382; Elrod, *supra* note 20.

179. Martin Guggenheim*, A Law Guardian By Any Other Name: A Critique of the Report of the Martimonial Commission*, 27 PACE L. REV. 785, 797 (2007) ("The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests.").

180. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)) (highlighting the importance of family relationships and the essential right to "conceive and to raise one's children").

181. Meyer v. Nebraska, 262 U.S. 390 (1923).

182. Parham v. J. R., 442 U.S. 584 (1979).

narrowly tailor children's rights within families.[183] This is due in large part to constitutional challenges having been brought by adult parties and not children, even though the same relationships are implicated.[184] Even where challenges have been brought on behalf of children, the Court has balanced children's safety and best interests, rather than their rights, against their parents' rights.[185]

As such, the Court has acknowledged children's interests in family relationships indirectly, but it has not addressed children's First and Fourteenth Amendment rights in private custody matters head-on.[186] However, children have constitutional interests separate from their parents' in the custody context[187] and, therefore, must have the ability to assert those interests through client-directed counsel.

A. First Amendment Freedom of Association Rights

A long line of cases acknowledge the First Amendment association rights within the family context.[188] Cases brought to the Supreme Court have not been framed as asserting a child's right to a relationship with their parents or family members,[189] although their ability to associate is clearly implicated: "Freedom of association is, by definition, a two-way street involving more than one party; freedom to associate requires associating with someone else."[190]

---

183. *In re* Dependency of MSR, 271 P.3d 234, 245 (Wash. 2012), *as corrected* (May 8, 2012).

184. *Id*.

185. State in Interest of L.D., 92 So. 3d 454, 458 (La. App. 2d Cir. 2012).

186. Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485 (1996).

187. At a minimum, where their interests diverge from their parents' and they are not protected by either party.

188. *See* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship,* 101 J. CRIM. L. & CRIMINOLOGY 77, 108 (2011) (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987)) ("The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."). *See also* Roberts v. United States, 468 U.S. 609, 618 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary . . . ."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (extending constitutional protections to begetting and bearing of children); Prince v. Massachusetts, 321 U.S. 158 (1944) (recognizing fundamental constitutional rights to family relationships); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding that education and child-rearing are protected by the Constitution).

189. *See Rotary Club of Duarte*, 481 U.S. at 537; *Roberts*, 468 U.S. at 609; *Quilloin,* 434 U.S. at 246; *Carey*, 431 U.S. at 678; *Prince*, 321 U.S. 158.

190. Boudin, *supra* note 188, at 107.

Lower courts have assigned due process protections based on children's relational rights. For example, in *Webster v. Ryan*,[191] the New York court addressed the issue of the child's right to assert independent relational rights – specifically the right to assert and maintain an established relationship with foster parents.[192] The court held that the child had an independent right to maintain a relationship with a person whom the child had developed a parent-like relationship, pursuant to the First Amendment freedom of association guarantees from the state and federal constitutions, then protected by the due process clause of the Fourteenth Amendment.[193] Since the child was denied a basis to assert the right of contact with the foster parent, which he could do with other family members, he was denied equal protection.[194]

If the Court acknowledges that children have certain enumerated and unenumerated constitutionally protected rights,[195] then it follows that one such right is the First Amendment freedom of association. The Court has suggested the likely possibility – and several lower courts have indicated directly – that a child's unenumerated rights include the fundamental right to maintain a relationship with a person with whom the child has established a parent-child relationship.[196] These rights are liberty interests that are also protected by the Fourteenth Amendment; children, therefore, are entitled to due process and equal protection of the laws to protect these rights. As such, a child must be provided a process to enforce their rights against the state or a third party. In the custody context, the most frequent (although not the only) party is the parent seeking custody or visitation against the child's wishes. To protect these liberty interests against the interests of the parties in a custody matter, and to ensure that the child is provided due process and equal protection under the law, an attorney must assert these rights on the child's behalf.

B. Fourteenth Amendment Right to Family Integrity

Beyond First Amendment rights, family members have a due process liberty interest in maintaining family integrity that deserves protections.[197] Several Supreme Court cases implicate a child's right to

191. 729 N.Y.S.2d 315 (2001).
192. *Id*. at 331
193. *Id*.
194. *Id*. at 333.
195. *In re Gault*, 387 U.S. 1 (1967).
196. Michael H. v. Gerald D., 491 U.S. 110 (1989).
197. *See, e.g*., Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family*

family integrity, in particular *Moore v. City of Cleveland*,[198] *Smith v. Organization of Foster Families for Equality & Reform*,[199] *Santosky v. Kramer*,[200] *Michael H. v. Gerald D.*,[201] and *Troxel v. Granville*.[202]

In *Moore*, the Court invalidated a zoning ordinance that prohibited extended family members from living in the same residence.[203] In its opinion, the majority held that the ordinance violated due process.[204] And the concurrence noted that "if any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family."[205] This expanded due process protections to extended family members, which were previously only afforded to parents within the parent-child relationship.[206]

Smith v. Organization of Foster Families for Equality & Reform addressed children's rights directly. The Court considered the government's right to remove children from foster placement where they had been living for more than a year.[207] At issue was the balance of foster children's right to stay in foster placements where they had become settled against parent's right to reconciliation.[208] While the Court held that the children's removal did not violate the foster children's or foster families' due process rights, it recognized the "importance of the familial relationship, to the individuals involved."[209] This relationship derives from "the intimacy of daily association."[210]

The Court further explored family integrity in *Santosky v. Kramer*. The case addressed the standard of proof required to demonstrate

---

Integrity Applied to Custody Cases Involving Extended Family Members, 40 COLUM. J. L. & SOC. PROBS. 301-02, 310 (2007).

198. 431 U.S. 494 (1977).
199. 431 U.S. 816, (1977).
200. 455 U.S. 745 (1982).
201. 491 U.S. 110 (1989).
202. 530 U.S. 57 (2001).
203. *Moore*, 431 U.S. at 494.
204. *Id*.
205. *See id.* at 511 (Brennan, J. concurring).
206. *Id*.
207. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977).
208. *Id*.
209. *See id.* (holding that removal procedures under which foster parents were given ten days' advanced notice of removal, were permitted to request a pre-removal conference with the social services department, and were entitled to full adversary administrative hearing, subject to judicial review, following the conference with no stay of removal pending the hearing and judicial review, and under which pre-removal judicial review was provided with respect to children who have been in foster care for 18 months or more afforded sufficient due process protection to any liberty interests involved).
210. *Id*.

parental unfitness in order to remove children from the home. The Court balanced the state's interest "in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings" and the parents' interest in maintaining family integrity.[211] Specifically, *Santosky* expanded the right to family integrity to children.

The Court spoke to children's interests again in *Michael* by examining the constitutionality of a statute that provided an irrebuttable presumption that a child born to a married woman was presumed to be a child of the marriage.[212] The genetic father and the child filed equal protection challenges.[213] The child alleged that she was denied equal protection because the mother and her husband could challenge the presumption, but she could not. [214] The genetic father's petition was denied, and the presumption was upheld, with the court stating:

> The legal issue in the present case is whether the relationship between [the genetic father and the child] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has.[215]

In dismissing the child's equal protection claim, the Court noted, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent in maintaining her filial relationship."[216] But the dissent also discussed the relationship at issue being between Michael H and the child,[217] noting that a parent could only represent a child's interest in a custody matter if the parent's and the child's interests were aligned.[218] Of course, this is not always true.

---

211. *Id.*
212. Michael H. v. Gerald D., 491 U.S 110, 113 (1989).
213. *Id*. at 119.
214. *Id*. at 121.
215. *Id*. at 124.
216. *Id.* at 130. It is important to note that the dissenters in *Michael* and *Lehr* recognized that the parent's rights protected the child's rights only when they did not conflict. *See id.* at 136 (Brennan, J., dissenting); Lehr v. Robinson, 463 U.S. 248, 268 (White, J., dissenting) (1983). The majorities did not consider the children's rights or allow their voice in the outcome. *See Michael,* 491 U.S. at 128; *Lehr*, 463 U.S. at 266 (holding that where the putative father had never established a substantial relationship with his child, the failure to give him notice of pending adoption proceedings, despite the state's actual notice of his whereabouts, did not deny the putative father due process or equal protection since he could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to the putative father registry).
217. *See Michael,* 491 U.S. at 113–15 (citing the dissent's discussion of facts).
218. *Id.*

Most recently, in *Troxel v. Granville*, a private custody case, the Court acknowledged the parent's right to the parent-child relationship,[219] holding that a fit parent is presumed to act in the child's best interests[220] and a state court cannot force a fit parent to allow third-party visitation.[221] In *Troxel*, a mother sought to limit the visitation privileges of paternal grandparents who had sought visitation under a statute that allowed "any person" to petition the court for child visitation if it was in the best interests of the child.[222] The trial court agreed with the grandparents and ordered the mother to allow the grandmother visitation.[223] The Washington Supreme Court overturned the decision, and invalidated the statute.[224] The United States Supreme Court affirmed the Washington State Supreme Court, holding that the statute infringed on the mother's fundamental due process right to make decisions regarding the care and upbringing of her children.[225]

Troxel speaks directly to the issue of the child's rights within the private custody context. In his dissent, Justice Stevens stated:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in the child's best interests. There is at a minimum a third individual, whose interests are implicated in every [custody/visitation] case . . . the child. . . . While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests and so, too, must their interests be balanced in the equation.[226]

While Justice Stevens's dissent in *Troxel* is the most direct, Justice Scalia noted in his dissent that the mother asserted "only, on her own behalf, a substantive due process right to direct the upbringing of her own children, and is not asserting, on behalf of her children, their First Amendment rights of association . . . ."[227] Justice Scalia's comments

219. Troxel v. Granville, 530 U.S. 57, 69 (2001).
220. *Id.*
221. *Id.* at 75.
222. *Id.* at 60–61.
223. *Id.* at 61.
224. *Id.* at 62.
225. *Id.* at 63.
226. *Id.* at 86–88 (Stevens, J., dissenting).
227. *Id.* at 93 n.2 (Scalia, J., dissenting).

imply that children have relational rights that may be asserted, and protections that may be guaranteed by the Fourteenth Amendment.

Taken together, it can be argued that these cases demonstrate the Court's recognition that children have constitutional rights that may be asserted in the family context and a related basis for a child to assert such an interest on his or her own behalf. Several lower courts have found this to be the case.[228] Unlike the Supreme Court, some lower courts have more directly addressed the child's First Amendment right to family integrity. For example, in *Duchesne v. Sugarman*,[229] the Second Circuit addressed the issue of whether a mother was deprived her liberty interest in family integrity[230] without necessary due process of law when her child was placed with third parties.[231] While the case concerned the mother's constitutional rights directly, the Second Circuit spoke of children's rights in the family context.[232] In describing the First Amendment right to family integrity, the court addressed both the parent's and the child's interests, stating:

> [The] right to the preservation of the family integrity encompasses the reciprocal rights of both parents and children. It is the interest in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily associations with the parent.[233]

The Seventh Circuit also addressed the issue of children's First Amendment right to family integrity. In *Doe v. Heck*,[234] the Seventh Circuit addressed the issue of whether child protection case workers violated parents' and the child's right to familial relations when caseworkers interviewed the child at school about abuse allegations without the parents' or the school's consent.[235] Following the reasoning in *Duchesne*,[236] the Seventh Circuit allowed the parents to bring due process claims based on the child's relational rights.[237] The Court held that caseworkers violated not only the parents', but the child's,

228. *See, e.g.*, K.J. *ex rel.* Lowry v. Div. of Youth & Family Servs., 363 F. Supp. 2d 728, 747 (D.N.J. 2005).
229. 566 F.2d 817 (2d Cir. 1977).
230. *Id.* at 824.
231. *Id.*
232. *See id.* at 825.
233. *Id.* (citations omitted).
234. 327 F.3d 492 (7th Cir. 2003).
235. *Id.* at 499.
236. *Id.* at 524.
237. *Id.*

relational rights by threatening removal of the child without reasonable grounds to believe the child was being abused.[238]

C. Fourteenth Amendment Right to Procedural Due Process in Child Protection Matters

Parents are entitled to some semblance of procedural due process when their right to the parent-child relationship is challenged by the state.[239] In child protection proceedings, "[t]he state is the petitioner, the parents are the respondents, and the child's welfare is the subject of the proceeding . . . The purpose of the proceeding is to determine, first, if the child is abused or neglected and, if so, what action should be taken and where the child should be placed."[240]

Counsel is frequently associated with notions of procedural due process. Parents in the abuse, neglect and dependency realm are not provided appointed counsel in every case.[241] The right to counsel in this context is most frequently rooted in the parent's right to procedural due process. The United States Supreme Court in *Matthews v. Eldridge* articulated a three-part balancing test to determine what process is due when the state interferes with individual rights.[242] To determine what process is due, the Court applies a three-part balancing test: (1) the private interests affected; (2) the state's interests, including the fiscal and administrative burdens imposed by the process; and (3) the risk of an erroneous decision if procedural safeguards are not provided, and the likelihood that the safeguards will ameliorate the risk.[243] In *Lassiter v. Department of Social Services,* the Court has applied this test in the dependency context[244] with regard to counsel for parents.

In *Lassiter*, the Court examined a procedure that failed to provide an indigent parent with an attorney in a termination of parental rights

238. *See id.* (citations and question marks omitted) ("The interest being protected is not only that of the parent in the companionship, care, custody and management of his or her children, [but also] of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent.").

239. Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H.L. REV. 97, 107 (2013).

240. *Id.*

241. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (holding that the Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding).

242. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

243. *Id.*

244. *Lassiter*, 452 U.S. at 27–28. The Court also applied this standard when considering the burden of proof necessary to terminate parental rights. *Id.*

hearing.[245] While the Court initially stated that there is a presumption against providing an indigent parent with counsel in a dependency case because indigent people are generally only provided counsel when their physical liberty interests are at stake, the Court acknowledged that a loss of parental rights is a "unique kind of deprivation."[246] When looking at the state's interest, the Court found that appointment of counsel would promote the child's welfare and assist in reaching an accurate decision.[247] While appointing counsel violated the state's pecuniary interest, that interest was a weak one.[248] When addressing the risk of erroneous deprivation, the Court indicated that there were some circumstances where the parent's incapacity and the complexity of the proceedings would make the risk insupportably high.[249] On balance, however, the Court concluded that legal representation for indigent parents in termination of parental rights proceedings is not required in every case.[250]

In spite of the limitations of the Fourteenth Amendment protections addressed in *Lassiter*, most indigent parents are entitled to appointed counsel in termination of parental rights proceedings brought by the state, based on constitutional rights or statute.[251] When an action is brought by an individual rather than the state, indigent parents are not typically appointed counsel.[252]

Even though the Court in *Lassiter* refused to extend the same fundamental protections that would be provided to an adult in the criminal context, and only guaranteed the possibility of counsel for parents upon the balancing test delineated in *Eldridge*, it is important to note that the outcome could be different if the test were applied to children in child protection matters. Justice Blackmun, in his dissent, explained indigent parents' blanket needs and the illogic of requiring

245. *Id.* at 22–23.

246. *Id.* at 27.

247. *Id.*

248. *See id.* ("[T]hough the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here.").

249. *Id.* at 31.

250. *Id.*

251. *See, e.g.*, State *ex rel.* Heller v. Miller, 399 N.E.2d 66, 70 (1980) ("In the absence of sufficient justification by the state, parents must be provided with a transcript and appointed counsel or they will be constitutionally deprived of their right of appeal.").

252. *See, e.g.*, Rosewell v. Hanrahan, 523 N.E.2d 10, 12 (Ill. App. Ct. 1988) (holding respondent not entitled to free counsel in termination of parental rights matter brought by private individual). While one may conclude that *Lassiter* establishes that children—like parents—do not have an automatic due process right to counsel in dependency proceedings, *Lassiter* is distinguishable. For a discussion of this issue, see ABA STANDARDS, *supra* note 19.

an individualized needs assessment.[253] The illogic would be exponential if applied to children, whose blanket needs are at least as great as an indigent parent. In the child protection context, children are especially vulnerable. The allegations relate to abuse, neglect, or dependency.[254] Children are, however, routinely treated not as parties, but as "third party beneficiar[ies] whose interests are subsumed by the parties' positions and protected by the Court." [255] Without the guarantee of due process, the child's views are not considered equal under the law to parents or the state – regardless of the possibility that the child may be removed from the parents' home and placed with strangers.[256] While parents have an interest in proving fitness to the Court, and the state has the obligation to consider the needs of children and child wards as a whole, neither has the individual obligation to advocate for the child's wishes.

Although children are rights-based individuals under the Constitution and the Constitution's protections are "not for adults alone,"[257] the child is in an ineffective position to assert First Amendment protections through the Fourteenth Amendment. While "[f]reedom of association is, by definition, a two-way street"[258] which has been protected by the due process and equal protection clauses, children in dependency cases need more – not less – protection than parents. Children face the risks to physical, emotional, educational and relational stability, which should not be deprived by the state without due process.[259] Applying an *Eldridge* analysis to children could yield a different result on balance. In addition, the last *Eldridge* factor – the risk of an erroneous deprivation – would likely yield a different result. An erroneous decision in a dependency case could mean abuse, neglect, permanently severed relationships, or even death for a child. "Given the weight of the private interest at stake, the social cost of even an

253. *Lassiter*, 452 U.S. at 35 (Blackmun, J. dissenting).

254. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974), which requires states to provide a representative to all children in child protection proceedings. The advocate may be an attorney or a lay advocate, but in either case the representative's role is to make recommendations concerning the best interests of the child.

255. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982) (finding that the interests of the parent and child are presumed aligned until there has been a finding of parental fitness).

256. *See* LaShanda Taylor, *A Lawyer for Every Child: Client-Centered Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 614 (2009).

257. *In re* Gault, 381 U.S. 1, 13 (1967).

258. Boudin, *supra* note 188, at 107.

259. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

occasional error is sizeable."[260] Pursuant to *Santosky*, the Court must also consider the "probably value, if any, of additional procedural safeguards."[261] While an adult may have an understanding of substantive and procedural issues, and court process, children are at great risk of misunderstanding both. The presence of an attorney to advocate for the child could significantly decrease the likelihood of error, thus tipping the *Eldridge* balancing test in favor of appointed counsel for children in child protection cases. This reasoning may be applied to the appointment of counsel for children in private custody matters as well.

Having acknowledged that children may have relational rights to be asserted – at least in family cases where the state is involved – many lower courts have held that children have the right to due process, including the right to effective representation.[262] Many states have adopted statutes that specifically assign counsel to children in family matters to ensure due process, although the statutes sometimes but not always speak to the basis for the assignment.[263]

Another court concluded that children have the right to client-directed counsel in dependency proceedings on procedural due process grounds.[264] In *Kenny A.* ex rel *Winn v. Purdue*, a group of children who had been removed from their homes and placed in foster care alleged that the state had provided them with ineffective counsel in dependency hearings.[265] The District Court for the Northern District of Georgia held that children in dependency hearings have fundamental interests at stake, including "safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and having a relationship with his or her family unit."[266] Having made the conclusion that children have fundamental interests at stake, the court assessed what process was due under the Georgia Constitution.[267] The court held that there were private liberty interests in safety, health and wellbeing and that children had an interest in not being placed in state custody.[268] The court noted that the risk of an erroneous decision was

260. *Santosky*, 455 U.S. at 762.
261. *Id.*
262. *See, e.g.*, *In re* Jamie TT, 599 NYS 2d 892 (N.Y. App. Div. 1993).
263. *See, e.g.*, New Mexico *ex rel* CYFD v. John R., 203 P.3d 167 (N.M. App. 2009) (holding that a New Mexico statute requires counsel for children 14 and up).
264. *See* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).
265. *Id.* at 1355.
266. *Id.* at 1360.
267. *Id.*
268. *Id*. at 1361.

unacceptably high, citing routine errors made by the state and reviewed procedural safeguards that could protect children, including citizen review boards, court-appointed special advocates, and the judge.[269] Having considered these options, the court concluded that only client-directed counsel could adequately protect children in dependency proceedings.[270] Moreover, the court indicated that the state's interest is to ensure the child's best interest is protected, and, therefore, the state's interest is protected when the child is protected by counsel.[271]

VI. CHILDREN'S RIGHTS REQUIRE TRADITIONAL ADVOCACY IN CUSTODY MATTERS

Parents have the fundamental right to family association, including freedom of choice in family matters where health and safety are at stake. The fundamental parent-child relationship is also at stake for the child, yet the child is often left without the ability to assert his or her interests. Children should not be required to rely on parents to protect their constitutional interests in custody matters; instead, children should be provided not just counsel but traditional client-directed counsel. Schemes requiring an attorney for the child to substitute judgment for the child's or pursue a legal outcome against the child's wishes is both unconstitutional and in violation of the attorney's ethical obligations under the Rules of Professional Conduct.

Parents in private custody matters are not assigned counsel. While they may be provided counsel in abuse, neglect and dependency proceedings at the point where the *Eldridge* test balances in their favor,[272] the appointment is not automatic even when the state is involved in the case. Parents are generally presumed competent to assert their rights and interests in private custody matters, including bringing and withdrawing custody actions, participating in hearings and trials, and coming to binding agreements.[273]

While parties to custody matters do not have the automatic right to counsel, children have a stronger basis for the right. Some would argue

269. *Id.*
270. *Id.*
271. *Id.*
272. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981).
273. *See, e.g.*, Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 757 n.122 (1988) ("The goal [of child custody mediation] is to shift the group from its preoccupation with negatives to a rediscovery of positives, from incompetency to themes of competency, and from conflict to cooperation.").

that children's interests are protected by parents' interests and the best interests factors; children's rights, however, frequently conflict with parents' rights in custody and visitation matters.[274] Parents often have personal and legal interests of their own, which they are free to pursue, with client-directed counsel or without counsel. They do not have an obligation to advocate for the child's wishes. Because children do not typically have party status,[275] they are often not heard, despite the fact that their wishes are one of the factors the court is to consider in the best interests context.[276] A child's desires may be manipulated by the parties and may not be in the child's best interests.[277] Without counsel, the parties dominate the process and the child's interests do not get an equal share of consideration; if the constitutional interests in the parent-child relationship are equal, then children's wishes should get equal weight asserted through independent counsel.

The right to be heard "before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."[278] Children are, however, uniquely situated in a worse position than the parents – their liberty interests in familial relationships and sometimes

274. *See* discussion *supra* Part V.C.

275. There is a lack of consistency in whether children are treated as parties. Wisconsin, for example, mandates that the child's best interest be the "party" and that the attorney-guardian ad litem act in the "same manner as an attorney for a party to the action." WISC. STAT. ANN. § 767.407(4) (2008). Ohio and Texas allow the court discretion as to whether to make children parties. *See* Ohio Civ. R. Rule 75(B)(2) ("When it is essential to protect the interests of a child, the court may join the child as a party defendant and appoint a guardian ad litem and legal counsel, if necessary, and tax the costs."); *cf.* Hanna v. Hanna, 894 N.E.2d 355 (Ohio App. 2008) (holding that parents were the only parties who could invoke the court's continuing jurisdiction to modify a custody decree and the minor's party status is contingent upon the parents bringing or maintaining the action). *See also* 39 TEX. JUR. 3D FAMILY LAW § 426 ("The district court may, on its own motion, make the parties' minor children parties to divorce and custody proceedings if it determines, in its discretion, that it is just and proper to do so, and may appoint a guardian ad litem to represent the interests of the children."); Peterson v. Peterson, 502 S.W.2d 178, 180 (Tex. App. 1973) (holding that district court was empowered on its own motion to make children the parties to the divorce action and that it was just and proper to do so).

276. Party status allows for access to justice, notice, the right to be heard and to participate in the proceeding. At a time when the child's liberty interests are at stake – including the possibility of a physical move and restriction on the parent-child relationship – it protects children's rights. And best interests. Without party status, they are not entitled to notice, participation, or voice. Discretionary appointment of counsel creates disparate outcomes – so that some children are treated as parties and some are not. In addition, children may be subject to sanctions of the court without being guaranteed the protection of counsel. *See, e.g.*, Eibschitz-Tsimhoni v. Tsimhoni, No. 329406, 2016 WL 1533598, at *1 (Mich. App. Apr. 14, 2016).

277. *See* Nehra v. Uhlar, 372 N.E.2d 4, 7 (1977).

278. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 121–72 (1951)).

physical liberty is at stake but they often do not have the ability to assert their expressed interests or ability to hire their own lawyers. They are frequently not heard, or not heard adequately, despite the fact that the law says a state cannot wholly infringe on a minor's fundamental rights without an opportunity for the child to present her case to the court.[279]

While children are protected by the same constitutional guarantees as adults against governmental deprivation, the state is allowed to adjust the legal system to account for children's vulnerability and need for "concern, sympathy, and paternal attention." The Best Interests framework – and its provisions for the discretionary appointment of a best interests advocate for children – is an attempt to make this adjustment. It is, however, inadequate. It is based on the inaccurate presumption that parents will protect children's interests. While the best interest standard is minimally invasive as applied to parents, because parents have personal and legal autonomy within the proceedings, it is not the same for children. For children, a best interest determination can have the same effect as a termination of parental rights hearing. When one parent receives primary custody, the child may lose contact and support from the non-custodial parent.[280] If the child is unable to assert his or her rights, the child must rely on the custodial parent to bring a motion to address visitation.[281] If the custodial parent is unwilling to do so, the child is left without recourse; the child is unable to bring the motion unless he or she has counsel.[282] Moreover, if the child is appointed counsel who advocates against what the child wishes, the child is denied due process.

Without safeguards that allow for traditional representation, the child's interests are not likely to be represented and the child is not likely to be heard. Schemes that provide children with an advocate who is not required to follow the client's wishes deny advocacy efforts on the child's behalf. While it would be a constitutional and ethical violation to appoint counsel to parents to argue against their wishes in private custody matters, that is exactly what is permissible with regard to children under many best interests schemes.[283] In addition, child

279. Bellotti v. Baird, 443 U.S. 622 (1979).
280. Lemcke v. Lemcke, 623 N.W.2d 916, 919 (Minn. App. 2001).
281. *See* In re Iris M., 703 A.2d 1279, 1286 (Md. Spec. App. 1998).
282. GUGGENHEIM, *supra* note 43.
283. *See, e,g.*, IOWA CODE § 598.12 (2005) (GAL shall investigate and represent the child's best interests, and inform the court if the child's wishes do not align with the GAL's recommendations).

advocates who provide reports and testify and have no attorney-client privilege with the child, are in a position to deny the child the right to discovery, protective orders, motions, persuasive writing and expressed-wishes participation in hearings and trial. The due process violation is worst in situations where the advocate is allowed to argue against the child's wishes, and the child has no way to express his or her wishes or confront the GAL who has become the child's adversary.[284]

In *Gault*, the Supreme Court made it clear that children are allowed counsel in delinquency cases because their physical liberty interests are at stake, but the Court has also acknowledged that there are special considerations in family cases – particularly where there is the possibility that family relationships will be terminated.[285] While *Gault* is currently applied in the delinquency/criminal context, and has not yet been extended to family contexts, the distinction between the contexts should not survive. Prior to *Gault*, children were not afforded due process in any context; the court assumed a *parens patriae* role in determining the child's and society's needs instead of adjudicating the case. *Gault* recognized the scheme as a mechanism of convenience that violated the child's due process rights.

The requirement of due process is not limited to criminal proceedings. The *Eldridge* balancing test has been applied in the family law context, and some form of hearing is required before an individual is deprived of a liberty or property interest. In custody matters, however, this due process requirement is often only applied to adults and, in contrast, children may be absent or appointed counsel who are not required to assert the child's expressed wishes. This essentially allows an *ex parte* hearing where the child is never heard or where the child's position is controverted by the child's own representative. Courts have found that parents have a due process right to cross examine guardians ad litem who have made recommendations in their custody cases,[286] and the same should be true for the child who is in an even more precarious situation. If the GAL or other representative assigned to represent the child takes a position against the child's

284. In re Christina W., 639 S.E.2d 770, 778 (W. Va. 2006).

285. *See* discussion *supra* Part I.

286. *See* Emily Gleiss, Note, *The Due Process Rights of Parents to Cross-Examine Guardians ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103 (2010) (arguing that the inability of parents under most state laws to cross-examine GALs violates parents' substantive and procedural due process).

expressed wishes, the child has no meaningful way to assert his or her protected rights or wishes.

As discussed above, child representation does not always fit easily within the Model Rules of Professional Responsibility, given a child's potential developmental limitations.[287] Still, the Model Rules account for capacity issues, and give lawyers the ability to seek outside assistance while still maintaining a traditional lawyer-client relationship as "far as reasonably possible."[288] While the Model Rules acknowledge that it may not be possible to maintain the traditional relationship in every respect, they remind practitioners that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[289]

When a child's liberty interests are at stake, the court must consider the child's wishes regarding the outcome of the case because they directly affect the child. The child's ability to express his or her rights, interests, and wishes is lost without the ability to direct counsel and due process is impossible if the attorney can advocate against the child's wishes. Allowing for anything other than traditional advocacy undermines both the child client and the attorney's ethical responsibilities.

VII. RECOMMENDATIONS

It is often convenient for courts to not appoint counsel for children or to appoint counsel not required to keep client confidences or advocate for the child's wishes. These shortcuts come at the child's expense, and the child is the person whose best interests are the focus of custody litigation. To undermine the child's ability to assert his or her interests in the family context, and to disallow the child's voice and direction, undermines the child's constitutional rights as well as the state's interest in promoting the child's best interests. The child is in the best position to articulate his or her interests, not the parents or any third party without an obligation to advance the child's interests in the litigation.

In order for young people to assert their right to fundamental family relationships and freedom of association with their family

287. *See* discussion *supra* Part IV.C.
288. MODEL RULES PROF'L CONDUCT r. 1.14 (1983).
289. *Id.* cmt. 6.

members, states should allow children party status in custody matters in order to assert their rights. This could be done by Civil Rule or Statute. In Ohio, Civil Rule 75 related to divorce, annulment and separation actions allows the court discretion to give children party status "[w]hen it is essential to protect the interests of a child."[290] Commentary to the Rule recognizes that sometimes children are the forgotten parties to the divorce action and allows the specific right to appointment of counsel in order to ensure that the children's interests are represented and protected when necessary.[291] In Texas, the appointment is made based on statute,[292] which allows "[t]he district court [to], on its own motion, make the parties' minor children parties to divorce and child custody proceedings if it determines, in its discretion, that it is just and proper to do so, and may appoint a guardian ad litem to represent the interests of the children."[293]

Courts and practitioners may be uncomfortable with client-directed attorneys for children in some contexts. The ABA standards allow for the appointment of a best interests attorney instead of a traditional attorney as a kind of a compromise in this area. In the event that a best interests attorney is appointed, that attorney should act like any other attorney on the case in terms of duties. The attorney should not advance a position against the client's wishes without the possibility of cross examination.

If a GAL or investigator is appointed, it should be clear that a GAL is serving in a witness role and making a report to the Court; that person's files should be open to investigation and that person should be subject to cross-examination. Preventing the GAL practice of reporting to the court without being subject to cross examination will help ensure that the parents' due process rights, as well as the child's, are not compromised.

In any case where a traditional child's attorney is appointed, that attorney's role should be clearly delineated and the responsibilities clearly articulated. The ABA Standards for Representing Children in Custody Cases include a Model Child Representative Appointment Order and Order for Access to Confidential Information.[294] These may be used as a starting point, but jurisdictions should also articulate

290. OHIO CIV. R. r. 75(B)(2).
291. *Id.*
292. 39 TEX. JUR. 3D FAMILY LAW §426.
293. *Id.*
294. *See* ABA Section of Family Law, *supra* note 165.

exactly what tasks a child's attorney is expected to complete within the litigation.

While child custody proceedings often focus on balancing the parents' competing interests in the child, process should focus on ensuring that the child's wishes and the best interests factors are considered by the court. Allowing for client-directed counsel participating in every aspect of the proceeding, including discovery, motion practice, filing pre-trial memoranda, calling witnesses, and participating in appeals, will allow for more robust consideration of the child's best interests while taking the child's liberty interests into consideration.

Finally, children's attorneys in the custody context should be required to strictly adhere to the Model Rules of Professional Conduct, promoting uniformity of practice, preventing role confusion, and reducing the possibility of substitution of judgment or other ethics violations. Rule 1.14 allows the attorney to take protective action on behalf of a client if the attorney believes it to be necessary, but only when the client's "capacity to make adequately considered decisions" is "diminished."[295] The existing professional responsibility framework already accounts for clients' developmental status in that it acknowledges that "maintaining the ordinary client-lawyer relationship may not be possible in all respects,"[296] allows the lawyer to reveal client confidences in order to seek assistance from third parties.[297] In doing so, it promotes consistency of role and allows for due process.

CONCLUSION

Fifty years ago, the United States Supreme Court in *In re Gault* held that children have the right to traditional client-directed counsel in cases where their physical liberty interests are at stake. As a result, children are provided counsel during the adjudication phase of delinquency proceedings in order to ensure protection of their rights. *Gault* did not, however, extend the automatic right to counsel to other contexts in which children most frequently appear in court: family cases.

The right to traditional counsel afforded to children in *Gault* should be extended to the child custody context. While physical liberty

295. MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
296. *Id.*
297. *Id.*

interests are not typically at stake in custody matters, other serious interests – including the right to familial relationships and freedom of association – are at stake, which require due process protections. When non-traditional child advocates are appointed to custody cases, and allowed to report to the court without having to follow the client's directions and without being subject to cross examination, due process rights – and related fundamental interests – are compromised. Traditional advocacy by attorneys in custody matters protect children's constitutional rights while ensuring ethical advocacy by children's attorneys.