

**FINDING THE BALANCE: ETHICAL CHALLENGES AND BEST PRACTICES  
FOR LAWYERS REPRESENTING PARENTS  
WHEN THE INTERESTS OF CHILDREN ARE AT STAKE**

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**I. INTRODUCTION**

The high rates of separation and divorce, as well as births to unmarried parents, have had the result that every night in the United States, forty percent of our children go to sleep in a household absent one of their biological parents. Over one-half of all children living in the United States before they reach adulthood will live in a home with only one parent. To make matters worse, the transition from marriage to single parenthood is often conflict-ridden and unnecessarily adversarial. Adversarial dispute resolution models often unnecessarily add to this conflict.

These issues are not unique to the United States, indeed, the constellation of “families” and “child-rearing units” has changed throughout the world in recent decades. Some countries have managed this change with greater wisdom and sensitivity than many jurisdictions in the United States; others remain mired in dispute resolution models ill-suited to this new reality.

The evidence is now overwhelming that children do best when they are nurtured and receive emotional and financial support from both parents. Parental conflict is harmful to children, and conflict during and after family breakup is most injurious. Virtually every jurisdiction throughout the world seeks to achieve the “best interests of the child” when managing and resolving divorce, custody or parenting disputes, or other conflict impacting children.

One of the most vexing problems this new landscape presents is the challenges to a lawyer representing a parent in a proceeding designed to determine the “best interests of a child.” The purpose of this paper is to suggest what might be the best practices and guidelines for lawyers walking that delicate ethical tightrope when they represent a parent whose instructions or goals collide with the best interests of a child.

**II. “BEST INTERESTS” STANDARD**

This discussion proposes the proper role of lawyers in jurisdictions where the “best interests of the child” is the prevailing legal standard in proceedings involving child

welfare. The “best interests of the child” is the appropriate standard in such proceedings as articulated in Article 3 of the *United Nations Convention on the Rights of Children*, which provides as follows:

“The best interests of the child to prevail in all legal and administrative decisions; the State is to ensure the establishment of institutional standards for the care and protection of children.”(See Appendix 1, *The United Nations Convention on the Rights of Children*).

The United Nations Convention also provides that children should live with both parents and maintain contact with both parents unless it violates a child’s best interests (Article 9), that both parents should be involved in parenting tasks (Article 18) and that the State is to protect children from abuse and neglect (Article 19).

Obviously, the definition of “best interests of a child” is subject to debate. Clearly, “best interests” translates, at the least, into freedom from physical abuse and the meeting of basic needs including shelter. Thereafter, there are significant cultural and jurisdictional variations on what defines “best interests” including differences over the appropriateness of joint custody, compulsory religious training and, most significantly, the criteria for awarding custody.

In the United States, like elsewhere, the law of “best interests” has responded to changes occurring in the social order long before the passage of current legislation. In the United States, for example, until the early 1800s fathers always received custody: Children and wives were considered chattel. With the advent of the Industrial Revolution in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the nuclear family emerged. Rigid stereotyped sex roles developed. Father’s were often out of the home working. Mother’s were at home taking care of the children. Families had migrated from the farm to the city and away from familial supports. These nuclear families were a relatively new family form - very different than the old extended family. Often the father would travel long distances or be away from home for long periods of time. When these families ended through separation-divorce, or often death, the children stayed with mother if they were of “tender years” and went with father, or were apprentices, if they were adolescents.

The Tender Years Doctrine became a mother preference doctrine because mothers had now become the “primary caretaker.” In 1973, Goldstein, Freud, and Solnit published the influential text *Beyond the Best Interest of the Child*.<sup>2</sup> The authors’ argued that custody should be awarded to the “primary caretaker” and this person should have complete decision-making authority over the activities of the child. The premise of the book was that conflict over the child was more damaging to the child than the separation from one of the parents. Some contend that this philosophy made contests over children more likely. Others believe it led to the increasingly frequent abandonment of children by the non-custodial parent.

Since World War II, dramatic and irreversible changes have occurred in the respective roles of men and women within the family and culture. Families began to share more responsibility for child rearing. Labor saving devices like microwaves, washing machines, and vacuums made housekeeping less time-consuming (in theory at least). Inflation required more mothers to work outside the home to maintain and increase the family's material standard of living. In 1950, less than 20 percent of mothers of children under the age of 18 worked outside the home. Today, the percentage is over 60 percent.<sup>3</sup> These parents came from families where the responsibilities for child rearing had been shared prior to the ending of the marriage. In the 1970s, some families began to share custody calling it "joint custody" or "shared parenting" though legislation was slow to recognize this arrangement.

While the definition of "best interests" remains vexing and, to some extent, controversial, the current view is that "best interests" is situational and should be driven by the needs, interests and parenting capacities of the members of the family unit in question. Presumptions favoring either joint custody, or the father or mother preferences for some reason, too often elevate parental rights over children's interests and needs.

For those attempting to navigate through the maze of legislation on custody and parenting time issues in the United States, it is essential to understand that most family law legislation is enacted at the state level. There are 50 separate states and, thus, 50 separate bodies of family law jurisprudence. A relatively few Federal and interstate statutes exist, such as the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) which establishes the framework to determine who is the appropriate decision maker when the parties of children live in different states, and the Parental Kidnaping Protective Act (PKPA) which provides rules to be applied when a child has been removed from a jurisdiction without parental permission or court order. Regarding child custody or parenting time (visitation), the statutes in the State of Oregon are typical and track the United Nations Convention. Oregon Revised Statute 107.105(1)(b) provides in part:

“ . . . If the parents have been unable to develop a parenting plan or if either of the parents requests the court to develop a detailed parenting plan, the court shall develop the parenting plan in the best interest of the child, ensuring the noncustodial parent sufficient access to the child to provide for appropriate quality parenting time and assuring the safety of the parties, if implicated. The court may deny parenting time to the noncustodial parent under this subsection only if the court finds that parenting time would endanger the health or safety of the child. The court shall recognize contact with both parents and encourage, when practicable, joint responsibility for the welfare of such children and extensive contact between the minor children of the divided

marriage, and the parties. If the court awards parenting time to a noncustodial parent who has committed abuse, the court shall make adequate provision for the safety of the child and the other parent in accordance with the provisions of ORS 107.718(4).<sup>4</sup> (Emphasis supplied.) The Oregon Statute defining best interests is set forth in endnote four.

### **III. UNITED NATIONS CONVENTION ON THE RIGHTS OF CHILDREN AND THE ROLE OF LAWYER FOR CHILD**

Many jurisdictions around the world recognize the right of children to present their wishes in legal proceedings affecting them, separate from the right of their parents to argue what might be in their best interests. The *United Nations Convention on the Rights of Children* (“*Children’s Convention*”) requires that a child’s views be heard and considered in proceedings affecting the child, either directly or indirectly. Article 12 reads:

“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.”

One way of ensuring that a child’s voice is heard in a legal proceeding is to appoint a lawyer for the child. Among other benefits, the independent lawyer prevents parents, biased by their own self-interests, from being the sole advocates for the child’s best interests. This is the solution in some jurisdictions, while others around the world have implemented Article 12 differently.

In Australia all children whose interests are affected in “difficult” cases are appointed an independent lawyer. Further, in cases proceeding to trial, expert reports on the two competing households are mandatory, allowing the child’s voice to be heard through the expert. In England, in cases in which the state is a party, a guardian ad litem is appointed for children, and they are given their own solicitor to represent their interests in court. The Guardian Ad Litem is charged with presenting the child’s best interests to the court, while the solicitor must advocate for the position chosen by the child. Private proceedings in England, such as divorce and custody matters, do not provide the same safeguards; children are appointed counsel only in special circumstances.<sup>5</sup> In Denmark, a child who is 12 years or older has a right to express his

or her views in a custody or visitation proceeding so long as the parents do not reach an agreement themselves.<sup>6</sup> Courts in Japan will listen to a child who is 15 years or older before making a custody decision, and the court has discretion to do so in cases where the child is younger. As in Denmark, however, these safeguards apply only so long as the parents are in disagreement on the issues.

While 140 countries are signatories to the *Children's Convention*, few have gone beyond recognizing the child's right to be heard in judicial proceedings to guaranteeing this right. Many countries require their courts to give children an opportunity to be heard in proceedings affecting them, yet those rules are often not enforced and generally do not apply where the parents come to an agreement on custody and parenting time. Jurisdictions are undoubtedly hampered by financial limitations. The courts do not have funds to hire independent counsel for each child in every proceeding and the parents are often struggling to pay their own lawyers, and cannot afford a lawyer for their children.

However, when it is practical to appoint a lawyer to represent a child in a custody or domestic relations dispute, it is critical that the lawyer and the court be clear about what role the lawyer would play. One of the most articulate expressions of the alternatives is included in the American Bar Association's Standard of Practice for Lawyers Representing Children in Custody Cases.

The American Bar Association's ("ABA")<sup>7</sup> *Standards of Practice for Lawyers Representing Children In Custody Cases* ("Standards")<sup>8</sup>. Prior to the ABA's adoption of the *Standards*, the United States legal community lacked a consistent definition of which role an attorney should play when representing a child-client. Should it be as a guardian ad litem who is an officer of the court, should it be strictly as an advocate for the child's expressed wishes, or as a hybrid of both?<sup>9</sup>

The *Standards* promulgated by the ABA promote "quality control, professionalism, clarity, uniformity and predictability."<sup>10</sup> The *Standards* accomplish this end by being universally applicable to privately-retained or court-appointed attorneys, by providing courts with guidance as to when lawyers should be appointed, and most importantly, by clearly defining the role of an attorney representing a child. The broad overriding theme of the *Standards* is that "a lawyer should act like a lawyer," that is, lawyers are trained to be advocates, not to make decisions on behalf of clients, especially children.<sup>11</sup> Thus, the *Standards* provide two alternative roles that an attorney representing children in custody disputes can play. They are mutually exclusive. The lawyer must choose from these alternatives:

1. "The Child's Attorney," whereby a lawyer represents the child as he/she would any other client. In this capacity, the child is represented as if he were an competent adult client. Full respect is to be given to the child's individual and independent views to ensure that the child's voice is heard.

2. “*The Best Interest Attorney*,” whereby an attorney represents the best interests of the child. The lawyer in this role is no longer considered a guardian ad litem or agent of the court (the concept is abolished by the *Standards*). In this capacity a lawyer is not bound by the client’s wishes. Rather, the attorney must weigh the facts of the case to “objective criteria as set forth in the law related to the purpose of the proceedings.”<sup>12</sup>

The form or type of lawyer appointed or hired should be based upon the function the lawyer is going to serve. Thus, the role of the lawyer will be tailored to the reason for appointment or needs of the child.

Quality of representation is also contemplated by the ABA Standards. A great deal of emphasis is placed on the necessity of both lawyer and judicial training. Accordingly, only attorneys who have agreed to serve in custody cases and who have adequate training or experience should be appointed by the court. The ABA Standards is an excellent template by clarifying the roles lawyers should play when representing children.

#### **IV. ROLE OF ATTORNEY REPRESENTING AN ADULT WHEN INTERESTS OF CHILDREN ARE AT STAKE (E.G., FAMILY LAW CUSTODY LITIGATION)**

##### **A. TENSION BETWEEN “ZEALOUS ADVOCACY” MODEL AND “BEST INTERESTS” MODEL**

For years, the classical model for adversarial decision-making embraced by the United States and many jurisdictions required that the lawyer representing the parent be a “zealous advocate” for the rights and interests of the client. Historically, the lawyer’s role was seen as that of the client’s spokesman. The lawyer’s job was to advocate for the client’s wishes except when to do so would violate the law (for example, by suborning perjury) or violate professional ethics. This pure advocacy model ill-suited family law cases. In a divorce proceeding or a custody proceeding between unmarried parents, the family or child-rearing unit will have a future together long after litigation ends. The litigation is not the end of the family, it merely reconstellates the family. Adversarial proceedings discourage cooperation, reward aggressive posturing and positional bargaining and sabotage the ability of the parents to work together as future child rearing partners. In short, the adversarial model fuels parental conflict, and parental conflict over children is universally seen to be harmful to the children.

In recent years, many consider the better practice to view the child whose interests are affected by the litigation to be a “phantom client,” namely, one whose interests may not be trampled upon by blindly advocating for a parent-client. In short, the culture imposed ethical limitations on the bounds of advocacy. For example, under this model, it would be inappropriate for a lawyer to advocate custody on behalf of a parent whose claim for custody was made in bad faith, perhaps to lever a more favorable property division or support settlement.

B. BROADER PHILOSOPHICAL MODELS OF PRACTICE DESIGNED TO REDUCE ADVERSE IMPACT ON CHILDREN

As mentioned above, the adversarial model of conflict resolution is undergoing transition in the family law context that rejects the notion of “zealous advocacy.” Specifically, lawyers are being encouraged to consider alternatives to uncritically pursuing the instructions of their clients. At least three new models designed to reduce the adverse impact of a contested custody or divorce on children and parents have emerged: collaborative law, restorative justice and therapeutic justice.

Collaborative law:<sup>13</sup> Collaborative law is entirely settlement oriented. Collaborative lawyers and parties agree not to utilize the court system. Parties retain lawyers, however explicit in the lawyer-client relationship is the agreement that if the lawyer cannot negotiate a settlement, that lawyer must withdraw. This places an ethical and financial incentive on the lawyer not to focus on adversarial tactics but instead to focus on the needs of both parties and the children in order to reach an agreement.

In the event that a settlement cannot be achieved, the collaborative lawyers resign and the parties are free to hire different lawyers not bound by the collaborative agreement. Usually this will not significantly increase fees because most of the work done by the initial lawyer is transferable. The collaborative law model forecloses the possibility of trial and the associated expectation of confrontation. It instead creates an atmosphere where the focus is not on “winning” at trial but instead on reaching an agreement beneficial to all parties and their children.

Restorative Justice: The practice of restorative justice has gained considerable popularity in the United States in the realm of criminal law where it is often referred to as victim/offender mediation (“VOM”). It is ironic that this practice coexists with the harsh penalties often associated with the criminal justice system in the United States. The practice involves, as part of a criminal’s treatment, an opportunity for the offender and the victim to meet to discuss the impact and effect that the crime has had on all parties. In the presence of a mediator, victims are able to express directly to the offenders the financial, emotional or physical effects the crime imposed on the victim. The goal of VOM is to impress upon the offenders the impact of their crimes on specific victims and encourage the offender to take responsibility while providing needed support to victims.

In the context of family law, restorative justice is an extension of mediation, where the focus is on the assumption that both spouses contribute to the unresolved conflict, and both need to compromise in order to reach an agreement. Under the direction of a mediator, the “disputants” are encouraged to express their feelings about how a potential settlement would affect all parties and children. Ideally, restorative justice has a beneficial effect on all parties and their children by encouraging

both parents to seek a settlement contemplating the needs and desires of all parties and children, rather than simply pursuing their own short-term goals.

Therapeutic Justice: Therapeutic justice assesses the impact of divorce and custody evaluations on the mental health of the parties. Of primary concern is whether the burden on the mental health of the litigants by conventional legal intervention outweighs any perceived benefit. A court applying therapeutic justice focuses not on deciding the legal issues of the case but rather, solving the long-term mental health challenges to all parties. The fact finder may require the litigants to attend mental health evaluations, education or mediation in order to minimize the negative effect litigation has on all parties. The fact finder applying therapeutic justice has the important initial task of ascertaining the appropriate intervention for the parties. This may range from simple mediation to extensive mental health treatment.

The implications for family law are apparent. The judge presiding over a contested custody case or divorce must make the initial determination of an appropriate course of action, taking into consideration possibilities of abuse and neglect. The court then has the freedom to craft remedies addressing the mental health of the parties. Given the immense emotional impact divorce and custody disputes have on children and parents, attention to their mental health in addition to their legal rights may be immensely beneficial.

Cautions: Whenever there are persistent or high levels of domestic violence where there are significant issues of mental health or competence on the part of one or both parties, or significant levels of chemical abuse, generally the adversarial model is preferable because of the procedural and other safeguards it entails. Essentially, non-adversarial decision-making models presuppose rational actors, that is, parties who are generally capable of accurately perceiving their self-interest and acting upon it. Most jurisdictions utilizing alternative means in dispute resolution such as mediation, private arbitration or any of the models discussed above have developed elaborate safeguards to filter inappropriate cases and assuring that those requiring the control and muscle of the court are directed to the conventional litigation track.

Individual Programs: While it is beyond the scope of this paper, it is worth noting that, even within the context of the adversarial system, many innovative programs have moderated the adverse impact on children of family law proceedings. Programs for mandatory mediation of custody and parenting issues, for example, mandatory parent education classes for all parents navigating through divorce, and the appointment of parent coordinators or special masters to assist high conflict parents manage either during the course of the proceedings or after the divorce have all proven to be beneficial. There are also innovative programs such as *Parents Beyond Conflict*, a program developed by the Oregon Family Institute to assist high conflict couples develop a co-parenting relationship, and also Collaborative Parenting Evaluations, also developed by Oregon Family Institute, which emphasizes strengths of families rather than stigmatizing one or both of the parents and elevating the level of conflict.<sup>14</sup>

C. EMERGING MODELS AND BEST PRACTICES GUIDING ATTORNEY REPRESENTATION OF PARENTS WHEN CHILDREN'S INTERESTS AT STAKE

In cases where it is financially or otherwise impractical to appoint a lawyer or other representative for a child or to expect a child to articulate his or her views to the court without the assistance of an attorney, states can impose restrictions and obligations on the parties and their attorneys such that the court is made aware of a child's views, objections, or interests that might otherwise be missed. Few countries have imposed such obligations on attorneys.

While the United States is no exception, the American Academy of Matrimonial Lawyers (AAML), a private, national organization, has developed a set of aspirational guidelines for family law attorneys with regard to children. These guidelines are the most thoughtful compilation of rules and reflect the best practices for lawyers representing parents where the rights or interests of children are affected by the litigation. The author is grateful to the AAML for its permission to include the following excerpts from their *Bounds of Advocacy*.<sup>15</sup>

**Bounds of Advocacy  
Goals for Family Lawyers**

The lawyer should consider whether the custody claim will be made in good faith. If not, the lawyer should advise the client of the harmful consequences of a meritless custody claim to the client, the child, and the client's spouse. If the client persists in demanding advice to build a spurious custody case or to use a custody claim as a bargaining chip or as a means of inflicting revenge (see 6.2 and Comment), the lawyer should withdraw.

**6. Children**

One of the most troubling issues in family law is determining a lawyer's obligations to children. The lawyer must competently represent the interests of the client, but not at the expense of the children. The parents' fiduciary obligations for the well being of a child provide a basis for the attorney's consideration of the child's best interests consistent with traditional advocacy and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to whom the fiduciary's obligations run.

Statutory and decisional law in most jurisdictions imposes a fiduciary duty on parents to act in their child's best interests. For this analysis to be of benefit to practitioners, however, a clearer mandate must be adopted as part of the ethical code or its official interpretations.

**6.1 An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.**

Comment

Although the substantive law in most jurisdictions concerning custody, abuse and termination of parental rights is premised upon the "best interests of the child," the ethical codes provide little (or contradictory) guidance for an attorney whose client's expressed wishes, interests or conduct are in direct conflict with the well-being of children. This Goal emphasizes that the welfare of each family member is interrelated.

Matrimonial lawyers should counsel parties to examine their wishes in light of the needs and interests of the children and the relationship to other family members. In so doing, the matrimonial lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the family relationship continues.

Parents owe a continuing fiduciary duty toward each other, as well as toward their children, to serve their children's best interests. In many instances, parents should subordinate their own interests to those of their children. Matrimonial lawyers and parents alike should collaboratively seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties and preserve stability for the children.

Children do not benefit from involvement in their parents' divorce. The attorney should warn the client against leaving papers from the attorney out where children can read them and to avoid talking about the case when children can overhear.

If the parents are in conflict and disagree about custody and other parenting issues, the attorney should consider, with the cooperation of the other parent's attorney, sending the parties to a neutral mental health professional who is a family therapist. The goal of this referral is to resolve their disputes through counseling with the help of that mental health professional. The referring agreement should include confidentiality for all contacts with the therapist and exclusion of that therapist as a witness in the divorce case.

The attorney should discourage the client and refuse to participate in multiple psychological evaluations of children for the purpose of finding an expert who will testify in their favor. Repeated psychological evaluations of children are contrary to the children's best interest.

**6.2 An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness.**

Comment

Tactics oriented toward asserting custody rights as leverage toward attaining some other, usually financial, goal are destructive. The matrimonial lawyer should counsel against, and refuse to assist, such conduct. Proper consideration for the welfare of the children requires that they not be used as pawns in the divorce process. Thus, for example, in states where child support is determined partly on the basis of the amount of time a parent spends with the child, the lawyers should negotiate parenting issues based solely on considerations related to the child, then negotiate child support based on financial considerations. If despite the attorney's advice the client persists, the attorney should seek to withdraw.

**6.3 When issues in a representation affect the welfare of a minor child, an attorney should not initiate communication with the child, except in the presence of the child's lawyer or guardian ad litem, with court permission, or as necessary to verify facts in motions and pleadings.**

## Comment

Issues affecting a child's welfare may arise before, during, and after legal proceedings. There is a risk of harm to the child from an attorney's contacts and attempts to involve the child in the proceedings. Advice to or manipulation of the child by a parent's lawyer has no place in the lawyer's efforts on behalf of the parent. Information properly to be obtained from a child regarding the parents and the parents' disputes should be obtained under circumstances that protect the child's best interests.

### **6.4 An attorney should not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child.**

## Comment

Taking sides against either parent in a legal proceeding imposes a large emotional burden on a child. Some children do not want to express a preference in child custody disputes; they want their parents to resolve the issue without calling them. Other children want their views expressed, and their views may be highly relevant to the outcome of the dispute. All participants in a family law proceeding (including attorneys for all parties, any party's therapist, child custody evaluator, and the judge) should strive to permit a child's views and information to be expressed in a manner that least exposes the child to the rigors of the courtroom. The attorney should weigh carefully the risks and benefits to the child of testifying, including consulting with appropriate experts as to the potential for harm.

Where a child's information is material on an issue other than custody, counsel should explore whether the same information can be introduced from another source, rendering the child's testimony cumulative and unnecessary.

### **6.5 An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes necessary to prevent substantial physical or sexual abuse of a child.**

## Comment

Under current RPC 1.6(b)(1), an attorney may reveal information reasonably believed necessary “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” Many states permit the attorney to reveal the intention of the client to commit any crime and the information necessary to prevent it. The rules do not appear to address, however, revelation of conduct that may be severely detrimental to the well being of the child, but is not criminal. Also, while engaged in efforts on the client’s behalf, the matrimonial lawyer may become convinced that the client or a person with whom the client has a relationship has abused one of the children. Under traditional analysis in most jurisdictions, the attorney should refuse to assist the client. The attorney may withdraw if the client will not be adversely affected and the court grants any required permission. Disclosure of risk to a child based on past abuse would not be permitted under this analysis, however.

Notwithstanding the importance of the attorney-client privilege, the obligation of the matrimonial lawyer to consider the welfare of children, coupled with the client’s lack of any legitimate interest in preventing his attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking custody or unsupervised visitation, even without the attorney’s assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child.

As stated in the Comment to the ABA Ethics 2000 Commission’s proposed revision of RPC 1.6(b)(1):

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or

permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the child or children. The entire thrust of the family law system is intended to make the child's well-being the highest priority. The vindictiveness of a parent, the ineffective legal representation of the spouse, or the failure of the court to perceive on its own the need to protect the child's interests do not justify an attorney's failure to act. However, even the appointment of a guardian or lawyer for the child is insufficient if the matrimonial lawyer is aware of physical abuse or similarly extreme parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer adverse treatment by the client.

**6.6 An attorney should not make or assist a client in making an allegation of child abuse unless there is a reasonable basis and evidence to believe it is true.**

Comment

An attorney who is made aware of abuse by a party (or someone closely associated with a party) is permitted, if

not obligated, to provide that information during divorce or custody proceedings (see 6.5). While reporting the existence of child abuse is crucial, however, a claim that a parent has abused a child is ugly and leads to the most unpleasant and harmful litigation in the field of family law. Such claims draw the child into testing or some other form of examination, which itself may be traumatic. The harm to both the accusing and accused parent will almost always be very great.

Desperate or angry spouses sometimes cannot resist the temptation to use such a strong weapon as an abuse charge. Use of such charges to obtain an unfair advantage in the dispute is inexcusable. If a client insists on making such a claim that the lawyer believes unjustified, the lawyer should withdraw from further representation. The lawyer should use all available information and resources — including evaluation by a doctor, therapist, or other health professional — to be sure there is a reasonable basis and substantial supporting evidence for such a charge. Even when the allegation is believed to be justified, it should be made in a manner least harmful to any children and least likely to inflame the dispute.

*Guidelines from other Jurisdictions: the Australian Best Practice Guidelines for Lawyers doing Family Law Work*, prepared by the Australian Government, Family Law Council are also excellent (See Appendix 2). No doubt other jurisdictions have such aspirational guidelines evidencing the strong trend to establish the best interests of children as preeminent in family disputes.

## **V. CONCLUSION**

Families have changed and with them child rearing models have adapted. An international consensus has emerged that the “best interests of the child” is the appropriate legal standard in proceedings affecting the rights and interests of children. This standard cannot be achieved by adherence to the classical adversarial model of dispute resolution. When representing a parent in a proceeding impacting children, guidelines regulating a lawyer’s conduct such as the AAML’s *Bounds of Advocacy* or the *Best Practice Guidelines for Lawyers Doing Family Law Work* should be endorsed by the United Nations and the entire international community. Our children deserve this protection.

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## Endnotes:

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2. Goldstein, G., Freud, A., Solnit, A.J. (1973), *Beyond the Best Interest of the Child*, N.Y.: Free Press.

3. Coontz, Stephanie, (1992) *The way We Never Were: American Families and the Nostalgia Trap*, New York: Basic Books.

4. **107.137 Factors considered in determining custody of child.** (1) In determining custody of a minor child under ORS 107.105 or 107.135, the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court shall consider the following relevant factors:

- (a) The emotional ties between the child and other family members;
- (b) The interest of the parties in and attitude toward the child;
- (c) The desirability of continuing an existing relationship;
- (d) The abuse of one parent by the other;
- (e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and
- (f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.

(2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors. However, if a parent has committed abuse, as defined in ORS 107.705, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse.

(3) In determining custody of a minor child under ORS 107.105 or 107.135, the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.

(4) No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over

the mother for the sole reason that he is the father. [1975 c.722 §2; 1987 c.795 §14; 1997 c.707 §35; 1999 c.762 §2].

5. Children's Rights: A Comparative Perspective, p. 96-97.
6. Minors' Act, s.26; Custody Act, s.29.
7. American Bar Association (ABA), a U.S. organization with membership exceeding 10,000 lawyers.
8. American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 Fam. L. Q. 129 (2003).
9. The only other standard previously in existence, were the *AAML Standards*, which arguably only apply to members of the American Academy of Matrimonial Lawyers.
10. *Custody Standards*, *supra*
11. Elrod, Linda, 37 Fam. L. Q. 105, 115 (2003), *raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*.
12. *Id.* At 121.
13. This practice is mirrored in other jurisdictions but sometimes without the label "collaborative" which carries negative connotations, particularly in Europe.
14. For more information on these innovative programs and other activities of the Oregon Family Institute see their website at [www.oregonfamilyinstitute.org/index.php](http://www.oregonfamilyinstitute.org/index.php).
15. The full text of the American Academy of Matrimonial Lawyers *Bounds of Advocacy* can be found at [www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm](http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm)

## APPENDIX 1

### United Nations Convention on the Rights of Children

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#### **Article 1 *Definition of Child***

Every person under 18, unless national law grants majority at an earlier age.

#### **Article 2 *Freedom from Discrimination***

Rights in the Convention apply to all children without exception; the State is to protect children from any form of discrimination or punishment based on family's status, activities or beliefs.

#### **Article 3 *Best Interests of Child***

The best interests of the child to prevail in all legal and administrative decisions; the State is to ensure the establishment of institutional standards for the care and protection of children.

#### **Article 4 *Implementation of Rights***

The State is to translate the rights of this Convention into actuality.

#### **Article 5 *Respect for Parental Responsibility***

The State is to respect the rights of parents or guardians to provide direction to the child in the exercise of the rights in this Convention.

#### **Article 6 *Survival & Development***

The Child's right to life; the State is to ensure the survival and maximum development of the child.

#### **Article 7 *Name & Nationality***

The right to a name and to acquire a nationality; the right to know and be cared for by parents.

#### **Article 8 *Preservation of Identity***

The right to preserve or re-establish the child's identity (name, nationality and family ties).

#### **Article 9 *Parental Care & Non-Separation***

The right to live with parents unless this is deemed incompatible with the child's best interests; the right to maintain contact with both parents; the State is to provide information when separation results from State action.

**Article 10 Family Reunification**

The right to leave or enter any country for family reunification and to maintain contact with both parents.

**Article 11 Illicit Transfer and Non-Return**

The State is to combat the illicit transfer and non-return of children abroad.

**Article 12 Free Expression of Opinion**

The child's right to express an opinion in matters affecting the child and to have that opinion heard.

**Article 13 Freedom of Information**

The right to seek, receive and impart information through any media.

**Article 14 Freedom of Thought Conscience & Religion**

The right to determine and practice any belief; State is to respect the rights of parents or guardians to provide direction in the exercise of this right.

**Article 15 Freedom of Association**

The right to freedom of association and freedom of peaceful assembly.

**Article 16 Protection of Privacy**

The right to protection from arbitrary or unlawful interference with privacy, family, home, or correspondence, or attacks on honour and reputation.

**Article 17 Media & Information**

The State is to ensure access to information and material from a diversity of national and international sources.

**Article 18 Parental Responsibilities**

The State is to recognize the principle that both parents are responsible for the upbringing of their children and that parents or guardians have primary responsibility; the State is to assist parents or guardians in this responsibility and ensure the provision of child care for eligible working parents.

**Article 19 Abuse & Neglect**

The State is to protect children from all forms of abuse, neglect and exploitation by parents or others, and to undertake preventive and treatment programs in this regard.

**Article 20 Children without Families**

The right to receive special protection and assistance from the State when deprived of family environment and to be provided with alternative care, such as foster placement or Kafala of Islamic Law, adoption or institutional placement.

**Article 21 Adoption**

The State is to regulate the process of adoption (including intercountry adoption), where it is permitted.

**Article 22 Refugee Children**

The State is to ensure protection and assistance to children who are refugees or are seeking refugee status, and to cooperate with competent organizations providing such protection and assistance.

**Article 23 Disabled Children**

The right of disabled children to special care and training designed to help achieve self-reliance and a full and decent life in society.

**Article 24 Health Care**

The right to the highest attainable standard of health and access to medical services; the State to attempt to diminish infant and child mortality, combat disease and malnutrition, ensure health care for expectant mothers, provide access to health education, develop preventive health care and abolish harmful traditional practices.

**Article 25 Periodic Review**

The right of children placed by the State for reasons of care, protection or treatment to have all aspects of that placement reviewed regularly.

**Article 26 Social Security**

The right, where appropriate, to benefit from social security or insurance.

**Article 27 Standard of Living**

The right to an adequate standard of living; the State to assist parents who cannot meet this responsibility and to try to recover maintenance for the child from persons having financial responsibility, both within the State and abroad.

**Article 28 Education**

The right to education; the State to provide free and compulsory primary education, ensure equal access to secondary and higher education and ensure that school discipline does not threaten the child's human dignity.

**Article 29 Aims of Education**

The States Parties' agreement that education be directed at developing the child's personality and talents; to prepare the child for responsible life in a free society, develop respect for the child's parents, basic human rights, the natural environment and the child's own cultural and national values and those of others.

**Article 30 *Children of Minorities***

The right of children of minority communities and indigenous populations to enjoy their own culture, practice their own religion and use their own language.

**Article 31 *Leisure & Recreation***

The right to leisure, play and participation in cultural and artistic activities.

**Article 32 *Child Labour***

The right to be protected from economic exploitation and from engaging in work that constitutes a threat to health, education and development; the State is to set minimum ages for employment and provide sanctions for effective enforcement.

**Article 33 *Narcotics***

The State is to protect children from illegal narcotic and psychotropic drugs and from involvement in their production or distribution.

**Article 34 *Sexual Exploitation***

The State is to protect children from sexual exploitation and abuse, including prostitution and involvement in pornography.

**Article 35 *Sale and Trafficking***

The State is to prevent the abduction, sale and trafficking of children.

**Article 36 *Other Exploitation***

The State is to protect children from all other forms of exploitation.

**Article 37 *Torture, Capital Punishment and Deprivation of Liberty***

The State is to protect children from: torture or other cruel, inhuman or degrading treatment; capital punishment or life imprisonment for offenses committed by persons below the age of 18; and unlawful or arbitrary deprivation of liberty. The right of children deprived of liberty are to be treated with humanity and respect, to be separated from adults, to maintain contact with family members and to have prompt access to legal assistance.

**Article 38 *The Supremacy of Higher Standards***

The State is to respect international humanitarian law, ensure that no child under 15 takes a direct part in hostilities, refrain from recruiting any child under 15 into the armed forces and ensure that all children affected by armed conflict benefit from protection and care.

**Article 39 *Rehabilitative Care***

The State is to promote the physical and psychological recovery and social reintegration of child victims of abuse, neglect, exploitation, torture or armed conflicts in an environment which fosters the health, self-respect and dignity of the child.

**Article 40 *Juvenile Justice***

The right of accused children to be treated with dignity. The State is to ensure that: no child is accused by reason of acts or omissions not prohibited by law at the time committed; every accused child is informed promptly of the charges, presumed innocent until proven guilty in a prompt and fair trial, that the child receives legal assistance and is not compelled to give testimony or confess guilty; that alternatives to institutional care are available.

**Article 41 *Supremacy of Higher Standards***

The standards contained in this Convention not to supercede higher standards contained in national law or other international instruments.

## APPENDIX 2

### CHILDREN

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#### **Best Practices Guidelines for Lawyers Doing Family Law Work**

**prepared by Australian Government Family Law Council**

[<www.lawcouncil.asn.au>](http://www.lawcouncil.asn.au)

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#### **1. Introduction**

**1.1** This section applies to lawyers representing clients in family law cases involving children. Lawyers appointed by the court as Child Representatives should refer to the Family Court's *Guidelines for child representatives* for specific guidance on fulfilling the responsibilities of that role.

**1.2** Some of the matters set out below are legal requirements to be found in the *Family Law Act*, the rules of Court, or Practice Directions of the relevant courts, and their inclusion is for reinforcement in view of their importance.

**1.3** In any case where the separating couple have dependent children, lawyers should exercise particular care even where there is no apparent dispute between the parents of the child or children. If there are child protection issues, whether arising from family violence, child abduction or any other matter, the safety of the children should be treated as paramount.

**1.4** In all children matters it is important for lawyers to bear in mind and to emphasize to clients, throughout the case, the continuing nature of the relationship of parent and child and the benefits that cooperation between the parents brings to the children.

**1.5** When dealing with questions in respect of the upbringing of a child, lawyers always need to remember that the court's paramount consideration is the best interests of the child. Accordingly when acting for parents, or as a child representative, lawyers should be encouraged to advise their clients that the court will be approaching the matter from the viewpoint of what is best for the child and that this can override the wishes of either clients or children or both. Lawyers should therefore encourage their clients to provide cultural-specific information relevant to their client's best interest, for example relating to the maintenance of the child's cultural identity (see Part 1 - Aboriginal and Torres Strait Island Clients).

**1.6** Lawyers should warn clients about the potentially damaging effects of involving their children in disputes concerning their parents and the particular risks of harm to the children where they are encouraged to take sides or become involved in their parents' disputes.

**1.7** Lawyers should make clients aware that negotiations in relation to children are separate from negotiations in relation to other disputes they may have with the other parent on other issues. Clients should be made aware that the courts treat issues concerning money, even if they relate to children, separately and independently from issues concerning children.

**1.8** Lawyers should use their best efforts to dissuade clients from making applications in respect of children when it is apparent that the applications are motivated by intentions other than consideration for the children's welfare. Examples are applications for contact or residence made from spite, from a wish to "teach the other party a lesson" or from a perception that this would improve financial claims. Likewise, lawyers should attempt to dissuade parents from opposing an application for such reasons.