



Copyright (c) 2007 American Bar Association  
Family Law Quarterly

Summer, 2007

*41 Fam. L.Q. 393*

**LENGTH:** 9603 words

SYMPOSIUM ON BANKRUPTCY LAW

WHEN DID LAWYERS FOR CHILDREN STOP READING GOLDSTEIN, FREUD AND SOLNIT? LESSONS FROM THE TWENTIETH CENTURY ON BEST INTERESTS AND THE ROLE OF THE CHILD ADVOCATE

Jane Spinak \*

\* Edward Ross Aranow Clinical Professor of Law, Columbia Law School. My thanks to Lisa Tiersten and Lars Tragardh for inviting me to participate in the symposium discussed in this article and for providing me with insightful comments on an earlier draft, and to Courtney Howard for excellent research assistance.

**TEXT:**

[\*393] Lawyers for children are faced with a difficult dilemma each time they meet a new client. Unlike lawyers for adults, who begin most initial meetings with their clients figuring out the kind of legal problem that the client presents, lawyers for children begin with trying to determine what professional relationship the lawyer and client will have. The answer--which may even vary over the course of the representation--requires the lawyer to consider a multitude of factors, including how many of these factors are for the lawyer to determine on her own and how many are for the client to determine. The factors can be organized into four categories: the type of legal situation the client faces, the state law governing representation for children, the professional codes and standards in effect, and the nature of the client. Diffused through these categories is the complexity of societal values about family life, individual and familial liberty and autonomy, and governmental power and responsibility. Overlaying this complexity is a concept that has now gained international status: the best interest of the child (*BIOC*). A recent symposium, *The Child and the Nation-State: France, Sweden, and the US, 1900-2000*, asked participants to consider [\*394] children's rights and the nation state during the twentieth century, providing an opportunity to reconsider how the concept of *BIOC* has been incorporated into American child advocacy and deeply affected the way in which lawyers for children think about representing children's rights. n1 The last quarter of the twentieth century saw an explosion of child advocacy and, during the same period, a significant investigation into the meaning of *BIOC* in the United States. Lawyers for children were challenged to reconcile the meaning of children's rights with the concept of *BIOC*: was the child an autonomous decision maker able to direct his or her representation or was the child in need of a representative who would "discover" and then advocate for what was best for the child? After almost forty years of lawyering for children in the United States, this question remains unresolved. To help explain why reaching a resolution has been so difficult, I would like to employ a central set of texts about *BIOC*: the trilogy written by Joseph Goldstein, Anna Freud, and Albert Solnit between 1973

and 1986 and republished in one volume as *The Best Interests of the Child* in 1996. n2 These texts had an enormous impact on child welfare policy in the United States, Canada, England and in translation, far beyond. Yet, their influence on resolving the nature of the role of lawyers for children is surprisingly limited. I hope in reexamining these key texts, written during the gestational period of lawyering for children, to unearth some useful lessons for twenty-first century children's lawyers still struggling to define their responsibilities to their young clients.

n1 The Conference was held at Columbia University in New York City on May 26-28, 2006. Participants included academics and policymakers from Sweden, France and the United States, along with representatives of UNICEF and Save the Children, Sweden. An earlier version of this paper was presented by the author.

n2 JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973), *BEFORE THE BEST INTERESTS OF THE CHILD* (1979), and *IN THE BEST INTERESTS OF THE CHILD* (with Sonja Goldstein, 1986). The compendium volume, *THE BEST INTERESTS OF THE CHILD*, will be cited as GOLDSTEIN, ET AL. in the footnotes.

Nearly forty years have passed since the United States Supreme Court determined that children at risk of losing their liberty in delinquency proceedings had a Sixth Amendment right to counsel. The Court's decision highlights the parallels between adult and child criminal proceedings, and recognizes the limitations of a *parens patriae* role for a court when the consequences for a child include a significant period of time in state custody. n3 While the Supreme Court has never held that children subject to state intervention as victims of child maltreatment are similarly entitled to counsel, only seven years after the *Gault* decision, in 1974, the federal government began requiring states to provide children with some form of [\*395] representation of their interests in child protective proceedings as one of the conditions of drawing down federal foster care funding. n4 The type of representation in those proceedings continues to vary tremendously from state to state but includes attorneys, guardians *ad litem* (GAL), volunteer advocates, and hybrid models of these alternatives. n5 Some states, such as New York, had established a system of representation by lawyers for children in delinquency and child protective proceedings prior to *Gault*; others quickly established systems to ensure compliance with federal mandates. Within a very short period of time, children were receiving some form of representation throughout the country. At a much slower pace states also began to permit, and in a few states require, lawyers--rather than other adult advocates--were authorized to represent children, they began to examine the scope and meaning of representing a person who was considered an "infant" under the law, subject to the care and custody of an adult, usually a parent, and often with less than full capacity to direct the lawyer's representation because of age, cognitive, intellectual or emotional development, or other disability.

n3 *In re Gault*, 387 U.S. 1 (1967).

n4 Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247; 42 U.S.C. § 5106 (West 2000)(CAPTA). CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects. CAPTA established, among other child protective policies, requirements for each state to establish a child maltreatment reporting system.

n5 Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421,424 (2000).

Some states supplied a specific definition of the lawyer's role by statute; other states enacted more general language that was subsequently interpreted through case law. Lawyers sought direction in professional ethics codes, newly developing standards of practice for child advocates, and the evolving legal definitions that courts provided. n6 They came face to face repeatedly with the concept of "best interests of the child," either within the definition of their role or as part of the ultimate decision that the court was being asked to make. n7 Given that the divorce rate in the United States was still reaching its peak, and the numbers of children subject to reports of neglect and abuse had skyrocketed

after the passage of Child Abuse Prevention and Treatment Act in 1974 (CAPTA), it is not [\*396] surprising that professionals involved in decisions concerning intervention in the family--social workers, mental health professionals, lawyers and judges--were struggling to understand the standards for making decisions about children and the role that these professionals should play in that decision making. n8

n6 See *ABA Model Rules of Professional Conduct*; IJA-ABA JUVENILE JUSTICE STANDARDS (1973); Federle, *supra* note 5, at 426.

n7 "Regardless of who acts as the child's representative, most states require that that representative (including, in some instances, the child's attorney) act in the child's best interests." Federle, *supra* note 5, at 427.

n8 The divorce rate peaked in the late 1970s. See *The First Measured Century* at <http://www.pbs.org/fmc/book/4family6.htm> (last visited Jan. 7, 2007). From 1974-80 child neglect and abuse reports rose from 60,000 to 1.1 million per year. See DOUGLAS ABRAMS & SARAH RAMSEY, *CHILDREN AND THE LAW*, at 288 (2003).

Before turning to the Goldstein, Freud and Solnit (Goldstein et al.) trilogy, I would like to distinguish what kind of *BIOC* these professionals are facing. n9 Many of the participants in *The Child and the Nation-State* symposium addressed *BIOC* by considering how sweeping social welfare, education and child-care policies affected issues of individual autonomy, family structure, and national demographics. When we discussed these issues, we were not speaking of *BIOC* as a legal definition but as a social aspiration captured most effectively in the culminating event of the so-called "Century of the Child": adoption of the Convention on the Rights of the Child (CRC) by virtually the entire global community at the end of the twentieth century. n10 This compendium of positive and protective rights for children worldwide represents a remarkable recognition by nation states individually, and as part of the international community, of the centrality of the child in all aspects of life. Moreover, Article 3 of the CRC explicitly creates a core decision-making principle for any public or private body affecting children:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

n9 I would like to thank Johanna Schiratzki for highlighting the need for this distinction to me in her commentary on this paper at the symposium.

n10 The United States and Somalia, which lacks a recognized government, are the exceptions. See, Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study*, 6 *NEV. L.J.* 966 (2006).

Even with the qualification of best interests being "a primary consideration" rather than "the primary consideration," the essence of considering what is best for the child is not dislodged. n11 The Convention specifically recognizes that the family should be protected as the fundamental and natural [\*397] environment in which children flourish and that separation of children from their parents against their will should only occur when it is in the child's best interests. n12 While the definition of the concept may remain contested--and subject to cultural and societal norms and beliefs--it is fair to say that the global community has enshrined the idea that decision-makers must consider whether a policy is best for children even in the context of intervening in family life. n13 By contrast, how *BIOC* is interpreted in the framework of a legal proceeding is more limited by statutory definition, precedent, and court interpretation (though equally fraught with personal and societal beliefs). This legal concept of *BIOC* is the one Goldstein et al. sought to define for professionals making determinations in custody and child welfare proceedings about where a child should live.

n11 Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS, 11-13 (Philip Alston ed., 1994). Alston points out that during the CRC drafting process, *BIOC* was a familiar enough term for the drafters who appeared to pay little attention to the domestic wars over the concept.

n12 CRC Preamble and Article 9.

n13 Of course, there are numerous examples of how nations have failed children, despite our international declarations, during the "Century of the Child." See, e.g., Michael Freeman, *The End of the Century of the Child?* 53 CURRENT LEGAL PROBLEMS (2000).

*Beyond the Best Interests of the Child* (1973), the first volume of the Goldstein et al. trilogy, proposed specific legal and psychological guidelines to give meaning, in particular, to the overarching concept of best interests of the child when the child's placement is at issue. n14 The guidelines were remarkably simple: once the state has intervened in the autonomy of the family unit, the child's needs become paramount and decision-making must be shaped by the child's sense of time and need for continuity in relationships. The authors warned decision makers in child protection proceedings that they lacked the ability to make long-term predictions on what is best for the child and, to the contrary, were really only determining the least detrimental alternative for the child. What was best from their perspective--a stable family free from state intervention--had already been lost. n15 Goldstein et al. recommended that the legislature set a time limit for determining whether a child remained with a new caretaker or returned to the original caretaker (usually the biological parent) to highlight their psychological theory of continuity and stability of relationships and to give judges a rule to follow in determining what is best--or least bad--for a child separated from her initial caretaker. n16 In private [\*398] custody matters, Goldstein et al. recommended that once a custodian had been chosen, continuity and stability would only be achieved by restricting any change in custody and giving the custodian full decision-making authority over the child, including whether the child would visit the noncustodial parent. n17 While some of their specific recommendations--especially concerning the power of the custodial parent--were highly controversial, the centrality of continuity and stability for children and the need for content in custodial decisions struck a responsive chord for professionals hungry to give definition to a concept that relied so heavily on personal values and case-by-case decision making. A conversation of sorts began in response to *Beyond's* proposals that sought to give further definition to *BIOC*.

n14 For GOLDSTEIN ET AL., placement of a child is disputed when the state has intervened to remove a child from parents or when parents cannot agree on custody and the court is asked to resolve the custody dispute and determine where the child should live.

n15 See discussion starting at page 399 of BEFORE THE BEST INTERESTS OF THE CHILD, GOLDSTEIN ET AL.'S second book, for a fuller description of their understanding of family autonomy.

n16 GOLDSTEIN ET AL., *supra* note 2 at 20-21; While framed in more affirmative and general terms, the CRC Preamble would soon similarly note, "[the] child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

n17 GOLDSTEIN ET AL., *supra* note 2 at 23-25.

Robert Mnookin's *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* can be seen as a representative example of how this conversation proceeded. Mnookin shares Goldstein et al.'s fundamental concerns about the indeterminacy of *BIOC* as a legal standard in child placement decisions and, like them, proposes a more determinate approach. n18 Mnookin utilizes three assumptions to make the standard more determinate. The first two--deference to family autonomy and continuity and stability in children's relationships--he shares with Goldstein et al. The third, that a legal standard must not contradict deeply held and widely shared social values, he finds missing from the Goldstein et al. analysis. n19 Mnookin warns that the Goldstein et al. creation of a singular set of

psychologically based guidelines for all types of child placement proceedings fails to distinguish between private ordering inherent in most custody proceedings between parents or other caretakers and the presence of enormous state power in child protective proceedings. In the United States, state paternalism has traditionally been limited not only by a strong preference for family autonomy but also by a political consensus that "government may act coercively only when good cause is shown." n20

n18 Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975). Mnookin provides many examples of cases in which the court is clearly relying on personal values about race, sexual intimacy, middle class values, etc., *Id.* at 269-70.

n19 *Id.* at 248, 265.

n20 *Id.* at 267.

Mnookin identifies two points in time that are essential for child-protection decision making: at the point of intervening in the family's life and, if that intervention results in the child being removed from the family, at the point when a decision must be made to reunify the family or [\*399] create an alternative family for the child. When Mnookin is writing in 1976--two years after CAPTA required some form of representation for children in child protective proceedings--he finds that states have failed to define clearly the circumstances to justify initial intervention or to define the appropriate bases for planning for the child once removed. Fearing the power of the state to intervene in family autonomy for reasons more related to racial, cultural, or economic biases, Mnookin would limit child protection intervention to issues of physical health that can be clearly determined to present immediate or substantial risk to the child. Mnookin warns that using the Goldstein et al. psychological parenting theory alone to define *BIOC* in a more determinate way fails to answer fundamental policy questions about the state's obligation to the family when the state removes children from their parents' care and has the power, ultimately, to terminate parental rights and give the child to a new family.

One way to read *Before the Best Interest of the Child*, the second volume of the trilogy published in 1979, is as an answer to Mnookin's concerns. Goldstein et al. offer guidelines for the provision of reunification services for separated families and a specific time frame for when the state should stop attempting reunification and support the creation of another family for a child. n21 More fundamentally, *Before* is a powerful portrayal of family and of the power of the state to destroy family. Highlighting their beliefs about the psychological, historical, and philosophical underpinnings of the family, *Before* categorizes three overlapping elements of families with children: parental autonomy, children's right to have autonomous parents, and privacy. These elements form a core of family integrity that cannot be breached by state authorities except under two conditions. The first is when society, as a whole, has expectations for all children that individual families must obey, such as mandatory education, labor restrictions for minors, or vaccination policies. As the symposium discussed, these types of protective policies for children, became widely accepted in the United States and Western Europe in the twentieth century. The second is when the state intervenes in the parenting decisions of individual families because they fail to meet basic health and safety standards for children. n22 This idea too has become widespread, incorporated into Article 9 of the CRC:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination [\*400] may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

n21 GOLDSTEIN ET AL., at 104-05.

n22 GOLDSTEIN ET AL., at 93-94.

The CRC uses the overarching *BIOC* language in Article 9 to identify when children may be separated from their parents, leaving to nation states the responsibility to define its legal meaning. Goldstein et al., on the other hand, prophetically warn of the difficulty in defining such an indeterminate standard as *BIOC* to intervene in families. Their fear of state overreaching narrows their bases for intervention considerably. Like Mnookin, Goldstein et al. would require a child's physical health to be at risk of impairment or impaired, whether through physical or sexual abuse or by neglect, before the state can intervene to protect the child. Grounds that rely on concepts of emotional neglect, actions of parents that can be interpreted through cultural biases, and conditions that spring predominantly from poverty, do not fall within the state's power to intervene except through the provision of public benefits or voluntarily accepted services. n23 Nor does any notion of child autonomy within the family form a basis for this intervention. Goldstein et al. would certainly reject the Swedish model of making the family more egalitarian, and the child less dependent on parental authority, especially if the state were then to take a more affirmative role in supporting a child's autonomy within the family. n24 Rather, Goldstein et al. would keep the state at bay for all but the clearest provable examples of child maltreatment. Nevertheless, once the intervention occurs and a child's placement is disturbed, Goldstein et al. remain committed to the psychological theory developed in *Beyond*: the child's best interests are served by supporting whatever psychological parent-child relationship ensues, including a new parental relationship if the previous, usually biologically based, psychological parent-child relationship is irrevocably broken. Together *Before* and *Beyond* provide a legal and psychological template--albeit a controversial one--for narrowing the indeterminacy of a best interests analysis.

n23 GOLDSTEIN ET AL., *supra* note 2, at 111-13.

n24 See, e.g., Bengt Sandin, *From Differences to Likeness: The Organization of Welfare and Conceptualization of Childhood in Sweden, Looking for Points of Comparison* (paper presented to symposium on file with the author).

And the conversation about *BIOC* continued. Five years after the publication of *Before*, a conference was held at Rutgers Law School to address the impact of *Beyond* and *Before* on child welfare policy in the United States. As the overview to the Rutgers conference confirms, in a mere ten years, these two volumes changed the way in which law and policymakers thought about child placement decisions and termination of [\*401] parental rights. By invoking the psychological parent theory, statutes and case decisions had incorporated Goldstein et al.'s recommendations, including specific time frames for termination of parental rights and a reliance on psychological parent theory for determining case outcomes. n25 Conference participants voiced grave (and angry) concerns, some presciently foreseen earlier by Mnookin, that the theory was being applied simplistically and parents who lacked any political power--particularly poor parents of color--were losing their children in large numbers. n26 While participants acknowledged that Goldstein et al.'s psychological parent theory did not inevitably lead to termination of parental rights, they overall feared and reported that result. n27 Moreover, Goldstein et al.'s powerful argument to reject the vague concept of best interests as the driving force for intervening in families was not being similarly embraced in practice. The child's need for continuity and stability once removed from parents was not being applied *prior* to removal from parents. n28 Multiple participants warned that decisions to disrupt intact families were being driven by bias against poor, uneducated, culturally and racially different communities. n29 Both Solnit and Goldstein vehemently responded to these concerns. n30 Solnit reaffirmed their psychological parent theory as the basis for not intervening in autonomous families initially as well as for not disturbing new psychological bonds once formed. He did not retreat from the centrality of their argument of the essential nature of this bond, even as other participants questioned the underlying basis of the theory and the [\*402] lack of cultural context in its application. n31 Goldstein responded more holistically to the concerns, recognizing the actual impact the theory was having on children entering foster care. He urged child welfare systems to create effective measures to maintain contact between parents and children in order to support the biological relationship while the child is temporarily in care, to have foster parents raise children in ways that closely mirror the habits of their biological parents, and to develop time frames for decision making that balance the child's needs with a

recognition that state systems work poorly to reach determinations. n32 He reiterated that one of the core purposes of their work is to diminish the indeterminacy of the *BIOC* standard by providing guidelines for decision making to replace the value laden, personal biases of the professionals involved with these families. Finally, he previewed the content of the third volume of the trilogy, an attempt to define more clearly the roles of professionals making decisions about children's placements. n33

n25 Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 485, 488 (1983).

n26 David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 504 (1983); Solnit/Fanshel Discussion 12 *N.Y.U. REV. L. & Soc. CHANGE* at 521 (1983); Everett Waters & Donna Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 *N.Y.U. REV. L. & Soc. CHANGE* 505, 512 (1983); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 *N.Y.U. REV. L. & Soc. PROB.* 539, 541 (1983); Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 549, 551; Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 557 (1983).

n27 Taub, *supra* note 25, at 492; The participants raised many other concerns not addressed in this article, including the sufficiency of the underlying psychological evidence (Davis, *supra* note 26, at 557; Waters & Noyes, *supra* note 26, at 505); the historical underpinnings of family integrity (Gordon at 523); and the variations on family construction (Davis, *id.*; Stack, *supra* note 26, at 539).

n28 Davis, *supra* note 26, at 562.

n29 Fanshel, *supra* note 26, at 504; Davis, *supra* note 26, at 561; Stack, *supra* note 26, at 541.

n30 Solnit participated in the conference, Albert Solnit, *Psychological Dimensions in Child Placement Conflicts*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 495 (1983); and Goldstein was interviewed following the conference, *Interview with Joseph Goldstein*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 575 (1983).

n31 Davis, *supra* note 26; Stack, *supra* note 26.

n32 GOLDSTEIN ET. AL., *supra* note 2.

n33 While *Before* had concluded with a chapter on the role of the lawyer for a child, this discussion of role is better incorporated into an analysis of the third volume, *IN THE BEST INTERESTS OF THE CHILD*.

This third book, *In the Best Interests of the Child*, applies Goldstein et al.'s proposed limitations on indeterminacy outlined in the first two books to the way in which professionals actually intervene in families' lives. The warnings that issued from the Rutgers Conference reflected more than concern about the meaning and use of *BIOC* as a standard. They also addressed the burgeoning business of child welfare proceedings and how professionals--judges, lawyers, social workers and psychologists, to name the most obvious examples--used this standard in their actions on behalf of the families or family members they served. If Goldstein et al.'s theories were being applied only to maintain relationships that children build after they have been removed from their biological parent's care, who was doing this, and why? For the purposes of this examination, what were lawyers for children doing? How did they understand and apply their role almost twenty years after *Gault*? What did this third book have to say to them?

By the time *In the Best Interests* was written, children were receiving some form of advocacy in child welfare proceedings across the country. n34 The variation in roles for lawyers, GALs and lay advocates has been documented repeatedly as one of the bases for the failure to create a definitive role for a child advocate. n35 Yet, even faced with

ambiguous legal definitions [\*403] of their role, advocates who are lawyers are governed by professional codes that limit their discretion from the outset. n36 In recent years, practice standards promulgated by preeminent legal and child advocacy organizations have provided lawyers with far more guidance in understanding and implementing their role. n37 And consensus has been growing toward lawyers rejecting a role that does not presume child-directed representation, which significantly limits lawyer discretion when advocating on behalf of their client. n38 Nevertheless, *BIOC* continues to infuse the role of a lawyer for a child. The symbolic power of being able to represent what is best for a child, rather than to represent what is constrained by client wishes and needs in the context of professional and legal boundaries cannot be underestimated. Even strong proponents of child-directed advocacy rationalize *BIOC* as a component of the lawyer's role. n39

n34 See Federle, *supra* note 5.

n35 *Id.*; Emily Buss, "You're My What?" *The Problem of Child's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699 (1996).

n36 See *supra* note 5.

n37 *American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases*, <http://www.abanet.org/child/childrep.html>; National Association of Counsel for Children Standards, <http://www.naccchildlaw.org/training/standards.html>; New York State Bar Association Law Guardian Representation Standards, [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/NYSBA\\_Reports/Guide\\_to\\_Representing\\_Children/Guide\\_](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Guide_to_Representing_Children/Guide_)

n38 *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 *NEV. L.J.* 592 (2006). Both sets of recommendations affirm client-directed representation for child clients.

n39 Jean Koh Peters, *The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1513 (1996).

*In the Best Interest of the Child* helps the lawyer to recognize the reasons for this rationalization and provides guidance for resisting its lure. The book purposefully distinguishes between substantive outcomes in proceedings and procedural practices that are used by professionals to reach those outcomes in order to highlight that right practices by professionals (even on behalf of positions that Goldstein et al. oppose) are essential in proceedings that impact on children and families. n40 These right practices include four essential elements to limit both the indeterminacy of standards applied to child placement decisions and any unnecessary intervention in parent-child relationships: identifying personal values, distinguishing personal and professional knowledge, recognizing the impact of personal knowledge and values on professional decision-making, and acknowledging the limits of each type of professional role. n41 [\*404] Long before child welfare professionals began to hear about concepts of "cultural competence" in their practices, Goldstein et al. were warning them not only to be aware of their personal biases but to understand that those biases have a habit of substituting for professional knowledge when peoples' lives--especially children's--are at the center of the controversy. For lawyers representing children, these right practices should limit the lawyer's almost overwhelming desire to decide what is best for the client by providing clearer boundaries for decision making. An underlying element of these right practices is the presumption that, "Professional persons know that the ultimate goal of the placement process is to provide children with parents who will be free from further state intrusion: free to use or refuse their help, free to accept or reject their interventions." n42 While this presumption is fully consistent with United States constitutional law--which limits the state intervention in family integrity--it is more aspirational than actual. n43 Limiting the impact of personal knowledge and values and distinguishing personal from professional knowledge in order to constrain one's professional role is extremely difficult for the very reasons that Goldstein et al. identify:

Yet the tragic situations that they often confront in child placement cases tend to blur professionals' awareness of their own limitations and the limits of their assignments. Their personal experiences and sympathies sometimes interfere with their professional judgment. And their effort to maintain a purely professional stance carries with it the risk that they may become too distant and lose the empathy that is essential to good work with children and their families. n44

n40 GOLDSTEIN ET AL., *supra* note 2, at 158.

n41 *Id.* at 157-61; GOLDSTEIN ET AL. are equally concerned that each professional keep to his or her appropriate role, even as they come to understand the knowledge of the other disciplines or roles.

n42 *Id.* at 154.

n43 Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 340 (2002).

n44 GOLDSTEIN ET AL., *supra* note 2, at 154.

When *In the Best Interests* was written, Goldstein et al. rejected a model of child advocacy that was substantially child-directed. Concerned that lawyers have insufficient knowledge and experience to understand the complexity of either their child-client's stage of development or the parent-child relationship in order to counsel the child effectively about the representation, Goldstein et al. recommended instead that "the task of counsel for children is to discover and to represent the interests of the specific child who is their client," while immediately acknowledging that there is no consensus on what that really means. n45 They knew, at a minimum, that providing a recommendation or taking a position based on personal values or knowledge beyond their professional expertise was not the right role. And they urged child advocates to partner with experts in other [\*405] fields in order to "discover" the child's true interests. In essence, to learn enough about child development, health, and behavior to know what questions are important to ask. This model of discovering the client's interests is most akin to the model of "substituting judgment" that has been adopted by client-directed lawyers for children who, after determining that their client does not have the capacity to direct his or her representation, take steps to determine what position the client would want taken if the client had the capacity to direct the representation. But for a child-client capable of directing representation on some or all of the issues being litigated, substituting judgment or "discovering the child's interests" risks looking a lot like deciding what is best for the child. For that reason, I think now Goldstein et al. would embrace the child-directed role for lawyers as the only paradigm for which it is possible for the lawyer to engage in the *right* practices they proscribe: distinguishing between personal values and professional knowledge; remaining true to their assigned role as counsel; and resisting taking on the roles of other professionals in the case.

n45 *Id.* at 171.

At the time Goldstein et al. were writing, the question of when a representative for a child should be appointed in child welfare proceedings was not settled. Consistent with their belief in family autonomy, Goldstein et al. believed children should not be represented by separate counsel until after the court determined that they had been maltreated. At the point, that is, when the court formally determined by law that their interests diverged. In the succeeding decades that position did not prevail. Children are generally represented (whether by an attorney or another type of advocate) from the commencement of the court proceedings. As a result, from the very beginning of the case, lawyers are tempted to see their clients in opposition to their parents. This temptation, combined with the concerns Goldstein et al. identified about failing to use right practices, leads me to conclude that today Goldstein et al. would agree that only a client-directed model of representation has the potential to limit the indeterminacy of *BIOC* by limiting the freedom of

the lawyer to decide what is "best." The New York child advocacy experience provides significant support for my belief.

Unlike in many states, New York law does not explicitly require lawyers for children--called *law guardians* in New York--to represent the client's best interests. Yet the underlying substantive law, the case law interpreting the law guardian's role, and the difficulty lawyers have in limiting the scope of their responsibilities all reinforce the totemic power of *BIOC* to shape the lawyer's role. New York statutory law broadly defines the lawyer's role:

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented [\*406] by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel. n46

n46 New York Family Court Act § 241.

Lawyers are barely constrained by this definition. The statute simply recognizes that a lawyer is the right professional to help "protect their interests" and "express their wishes to the court." Nowhere is the lawyer being asked to assume a role that protects the child's best interests. New York has provided children with lawyers in child welfare proceedings for nearly forty years through institutional organizations, assigned counsel systems, and private practice. There is a tradition of regular training, local as well as statewide standards of law guardian practice, and periodic reporting on the role of the law guardian. n47 The New York system has been analyzed repeatedly in academic and practice articles that have consistently portrayed New York lawyers as being (at least theoretically) independent advocates on behalf of their clients. n48 Neither the lack of statutory definitional constraint nor the tradition of independence, however, has resulted in the children's bar fully embracing a system of representation that reflects the right practices that Goldstein et al. outline in *In the Best Interests of the Child*, which foster a noninterventionist family policy for their clients or strive to limit the indeterminacy of a *BIOC* approach. This is because lawyers do not work in a vacuum. The multiple factors that have shaped law guardian practice in New York during the last forty years have, in fact, either rejected or ignored the lessons of Goldstein et al. No factor in that process may have had more influence than the way New York courts interpreted the underlying substantive child welfare law. Goldstein et al. believed that the state should intervene in families when the detriment of not intervening was greater than the detriment of intervening. Fearful, especially, that state foster care systems routinely fail children, Goldstein et al. further recommended that state intervention take place only when specific acts of harm could be established. Until recently, however, New York courts routinely rejected this construction of child protective policies for a more open-ended, indeterminate *BIOC* analysis despite statutory language to the contrary. This rejection had a fundamental impact on the role [\*407] of lawyers for children and the child welfare decisions made by courts.

n47 Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 *FAM. L.Q.* 497 (2000); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 *NEV. L.J.* 805 (2006).

n48 Spinak, *supra* note 47, at 503; Guggenheim, *supra* note 47, at 807.

In October 2004, the New York Court of Appeals issued a landmark decision in *Nicholson v. Scopetta*, clarifying the meaning of two definitions in child welfare law in New York: what places a child at "imminent risk" for removal from parental care prior to any determination of maltreatment and what constitutes less than a "minimum degree of care" to satisfy an allegation of neglect. n49 For the first time since the current child maltreatment statutes were enacted

in 1969, the highest judicial authority of the state interpreted the statutory definitions of these two terms. In doing so, the court finally rejected what had come to be called the "safer course" doctrine of removing a child from parents alleged to have neglected them as being less harmful to the child than leaving the child with the parents until a factual determination of harm could be made (except in clear emergency situations). Instead, pursuant to *Nicholson*, a family court judge now must determine whether the trauma to the child of removal is greater than the risk to the child's health and safety of being allowed to remain at home pending a determination of whether the parent has neglected the child. Only by balancing the harm of removal with the harm of allowing the child to remain at home can the court satisfy the statutory best interests requirement:

The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

n49 *Nicholson v. Scopetta*, 787 N.Y.S.2d 196 (2004).

*BIOC* is given a definition and meaning that limits the court's authority to intervene in the family without recognizing the impact of such intervention on the child's well-being. When the family court then reaches the stage of the proceeding that determines whether the child has been neglected, the state must prove actual harm to the child by the specific actions or omissions of the parent or caretaker. The *Nicholson* court noted both the historical concern of the legislature of unwarranted intervention in family life when the statute was written and the need to guard against finding neglect based solely on undesirable parental conduct. n50 *Nicholson* recognizes the deep bonds between parents and children and the looming destructive power of state intervention that Goldstein et al. earlier identified as key elements in child-welfare placement policies. If *Nicholson* had been decided twenty-five years ago, at about the time of *Before's* publication, [\*408] law guardian practice would have been shaped by this far more cautious approach to family intervention. n51 Instead, it was shaped by the repeated application of the "safer course" doctrine as substantive law.

n50 *Id.* at 201.

n51 At a recent panel discussion held at Cardozo Law School concerning the role of lawyers for children in New York child protective proceedings, Gary Solomon, one of the preeminent lawyers and legal interpreters of the role of the law guardian in New York, stated that lawyers had to be bound by the interpretation in *Nicholson* to see that these standards were met prior to taking the position that their client should be removed from parental care.

Martin Guggenheim recently reflected on the impact of a more broadly defined "safer course" doctrine on law guardian practice. n52 While the *Nicholson* decision addressed the legal standards that now must be applied to reduce unnecessary intervention in families, Guggenheim exposes the reasons why many law guardians embraced the pre-*Nicholson* interventionist approach. He believes lawyers for children are under enormous pressure in child welfare proceedings to follow a "safer course," that contains three elements: a presumption that a conflict between parent and child exists; an assumption that a parent charged in a neglect or abuse proceeding is unfit; and a form of risk aversion that assumes separating a child from a parent is more likely to keep the child safe. n53 He traces this "safer course" presumption to an appellate court ruling from the early 1980s. The appellate court, *In the Matter of Jennifer G.*, removed the child's lawyer before remanding the case back to the family court for rehearing. The lawyer had taken the position during the earlier family court proceeding that it was an appropriate "risk" to permit the child to return home. n54 While the choice of words may have been unfortunate, the lawyer was advocating for a position consistent with the substantive law of the state and with his clients wishes and interests, as he was obliged to do. Guggenheim believes that if the lawyer's office--the most prominent legal office for children in the state--had challenged the lawyer's removal, the

children's bar would have been fortified in rejecting the safer-course approach to their advocacy, an approach that allows lawyers to advocate for what they think is best for their clients. Lawyers for children would have been able to incorporate into their advocacy what Goldstein et al. point out in *Beyond* and *Nicholson* much later acknowledges: that all decisions concerning children's placements contain risk, but decisions circumscribed by the most current professional knowledge are better decisions.

n52 Guggenheim, *supra* note 47.

n53 *Id.* These three elements are, of course, in total contrast to Goldstein *et al.*'s requirement that professionals be shaped by the boundaries of substantive law that limits intervention into family life and presumes family autonomy prior to any finding of unfitness.

n54 *In re Jennifer G.*, 487 N.Y.S.2d 864, 865 (App. Div. 1985).

The impact of the decision in *Jennifer G.* on lawyers for children was [\*409] compounded by two personal values that Guggenheim believes suffuses child advocacy: lawyers like to win and lawyers for children like to be heroes. Prior to *Nicholson*, following the safer-course approach was more likely to secure a winning result. And winning gave lawyers a sense that they were protecting their clients:

In addition, children's lawyers also get to perform a special role in our culture: that of "hero." Charged with a special duty to protect their "clients" from danger, children's lawyers are rewarded professionally and emotionally when they step forward and argue for intervention to prevent possible future harm. We have not designed or conceived of the children's bar as having been erected to prevent state overreaching. Quite the opposite. The children's bar exists to ensure that all children who need state protection receive it. And sometimes the children's lawyer gets to be the protecting hero. n55

n55 Guggenheim, *supra* note 47, at 830.

Goldstein et al. foreshadowed Guggenheim's hero role when they cautioned that child welfare professionals, laden with a "multitude of personal beliefs and ordinary knowledge about what is good and bad for children and about what makes a satisfactory or unsatisfactory parent," will want to rescue children rather than, in the case of the lawyer, represent them. n56

n56 GOLDSTEIN ET AL., *supra* note 2, at 160.

One further aspect of New York appellate case law reinforces Guggenheim's theory. Even recent cases addressing the law guardian role have split in their analysis of whether the law guardian should be representing the client's wishes or best interests. n57 While there has been a greater acceptance of the law guardian's independent advocacy role in the last few years--especially rejecting the practice of law guardians providing the court with *ex parte* reports as if they were court advisors and not advocates for a client--these same courts continue to use best interests language to define the law guardian's role, even though the word "best" never appears in FCA § 241:

[The] law guardian has the statutorily directed responsibility to represent the child's wishes as well as to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, law guardians sometimes face a conflict in such advocacy. n58

n57 In the 2003 commentaries to FCA § 241, Merrill Sobie notes that four recent cases in three appellate

departments reach seemingly contradictory results about the law guardian role. (Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 241.

n58 *Carballeira v. Shumway*, 710 N.Y.S.2d 149, 152 (2000).

As the official commentary for the Family Court Act notes about this case, "The [court], like most, uses the phrase "best interests" instead of the [\*410] statutory word "interests," although the adjective "best" modifies the word "interests," arguably changing the meaning." n59 Arguably indeed. Why do courts persist in misstating the law guardian's responsibilities and why do law guardians persist in letting them? Beyond succumbing to the safer-course strategy and enjoying the hero role, lawyers cling to wanting to do what's "best" for the very reasons that Goldstein et al. wrote in *In the Best Interests*:

We believe that [professionals] would agree that they *ought not* to exceed their authority and *ought not* to go beyond or counter to their special knowledge or training. But we do not take for granted that they always recognize when they go or are asked to go beyond these limits. Sometimes they do not recognize that they are doing what they "know" they ought not to do. This may be because the law gives them vague and ambiguous assignments; because they have a strong desire to help people in trouble; because they feel a need to justify their work; because they desire to avoid the embarrassment of acknowledging that they do not know something; because they do not pause to consider whether they are being asked to exceed their professional qualifications; or because of a combination of these and other less obvious (or perhaps, less understandable) reasons. n60

n59 Sobie, *supra* note 57, referring to the decision in *Carballeira v. Shumway*.

n60 GOLDSTEIN ET AL., *supra* note 2, at 155; emphasis in original.

Knowing the limits of authority and training requires lawyers for children to mistrust themselves. The fallibility of professionals of good will that Goldstein et al. describe is the most important lesson that their last book imparts for all child advocates. When they provide examples of lawyers for children acting appropriately or inappropriately in their role, they are harbingers for the standards of practice that have been developed, especially during the last ten years, and the complementary analysis of the lawyer's role that has been generated. Goldstein et al. would be encouraged, I believe, with the care and seriousness that lawyers for children have recently devoted to scrutinizing their role and to developing standards of practice that purposefully limit their discretion. Moreover, many lawyers for children have embraced a multidisciplinary model of representation that draws on the expertise of their colleagues in social work and psychology, especially to inform their representation with the expertise they lack. That is why I believe Goldstein et al. would prefer--or at least find "least detrimental"--a child-directed model of representation. For the reasons I have described, child-directed advocacy is the only paradigm that embraces Goldstein et al.'s right practices, allows lawyers to remain true to their assigned role, and to resist taking on the roles of other professionals in the case. At the time they were writing, Goldstein et al. also [\*411] believed that a function of the family court was to advise lawyers about the parameters of their role by invoking the statutory limits of child placement regimes. n61 What we have learned from the *Nicholson* and *Jennifer G.* examples, however, is that courts cannot be relied on to provide those limits. Lawyers must establish those limits themselves. The current child-directed model is far more nuanced and limited than the "child wishes" representation they rejected in their books. These client-directed models draw on the rich experience of the past twenty-five years to train lawyers with multidisciplinary knowledge about children and families; to draw on lawyer's ethical codes to understand the limits of their role; to develop methods of representation that are child-centered and child-friendly in order to maximize the child's understanding of the lawyer's role and the proceedings; to learn and appreciate alternative forms of dispute resolution that may diminish the impact of state intervention in the family's life; and to be bound by the substantive law that recognizes the centrality of family integrity. Goldstein et al. called on legislators and courts to ask continuously: "Does the law reflect the current state of knowledge," to minimize the harm

when the state intervenes in the lives of families? I believe they would recognize today that the current state of knowledge about lawyers for children indicates that only child-directed representation is most likely to achieve that result.

n61 *Id.* at 144.

Most nations have failed to nurture and support children so they can grow to be the happy, healthy and productive adults, which was the hope of the *Century of the Child*. That is, they have failed to follow the overarching principle of securing the child's best interests that the Convention establishes as a primary consideration for all nations. This is certainly a profound defeat for any movement of children's rights. Within the profession of child advocacy in the United States, there is an additional and paradoxical failure to understand the limits of a *BIOC* standard as an organizing principle for representing children's rights. Rather, when we look back at forty years of child advocacy in child welfare proceedings, we can see how the indeterminate *BIOC* standard helped to enable lawyers to fashion a system of representation that substituted the lawyer's understanding of what is best for a rigorous client-centered exploration of the child's interests within strict legal boundaries. Goldstein et al. identified the perils of indeterminacy and provided a template for resisting their allure. The time has come for lawyers to reread their books and revive their lessons in the service of twenty-first century client-centered child advocacy.