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WHAT DOES A CHILD'S RIGHT TO BE HEARD IN LEGAL PROCEEDINGS REALLY MEAN? ABA CUSTODY STANDARDS DO NOT GO FAR ENOUGH

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TEXT:

[*117] I. ABA Standards for Custody Representation

In 2003, the American Bar Association Section of Family Law issued *Standards of Practice for Lawyers Representing Children in Custody Cases*.ⁿ¹ The emphasis is on acting for the child as a "client" "independent from the Court and other participants in the litigation."ⁿ² "Establishing and maintaining a relationship with the child" is described as the "foundation" of representation.ⁿ³ The introduction to the *ABA Custody Standards* highlights that: "children's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator and surrogate decision-maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system."ⁿ⁴ The ABA's [*118] answer is to distinguish between two distinct types of lawyers for children. The child's attorney is to act in a traditional lawyer-client relationship, "giving the child a strong voice in the proceedings." The "best interests attorney" is a quite different and separate role that "independently investigates, assesses and advocates the child's best interests." The underlying rationale for the *Standards* is that "nothing in a lawyer's current training qualifies a lawyer to make decisions on behalf of a client, especially a child client."

ⁿ¹ *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 *FAM. L.Q.* 131 (2003) [hereinafter *ABA Custody Standards*].

ⁿ² *Id.* at 134.

n3 *Id.* at 135.

n4 Two excellent articles on how counsel for children can be conceptualised are Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 *FAM. L.Q.* 53 (1993); and Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996).

Notwithstanding these laudable foundations and a desire to provide clarity, a close reading of the commentary sections of the *ABA Custody Standards* shows that contradiction still lurks, and the "strong voice" of the child is in danger of not being heard. The compromises in the *ABA Custody Standards* are based on commonly held assumptions about children. This article questions those assumptions, reasserts the importance of the child's voice, explains what the child's voice means, and provides suggested amendments to the *ABA Custody Standards* to ensure they remain true to their underlying principles.

II. Reasons for Compromises in the ABA Custody Standards

A. The Vulnerability of Children

We perceive that children may be harmed if their voices becomes central to the decision-making process. We do not want to make children responsible for the decision. We fear that may expose them to pressure from their parents and divide their loyalties to their parents. Robert Emery wrote: "Children are burdened by being asked to choose between parents." n5 In a similar vein, Robert Warshak stated--"all but the most radical child advocates understand that children do not always know what is best for them, the more weight given to their wishes, the greater the risk of pressure and manipulation." n6

n5 Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict and Mediation*, 10 *VA. J. SOC. POL'Y & L.* 164-78 (2002).

n6 Richard Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 *FAM. REL.* 373-84 (2003).

The child's attorney is told in the *ABA Custody Standards* to focus on the "needs" and "circumstances" of the individual child. The "child's point of view" is seen as separate from the "child's needs," revealing that needs are determined by the attorney not the child. The attorney for the child is asked to take the child's point of view "into account," but cautiously because the "child's stated views and desires may vary over time [*119] or may be the result of fear, intimidation and manipulation." n7 Lawyers are told they "may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes." n8 There is danger if other professionals are used too readily so that the child's voice becomes diluted. It is crucial where other professionals are brought in that their focus is on the child's voice, not on what they professionally believe is best for the child.

n7 *ABA Custody Standards*, *supra* note 1, at 136.

n8 *Id.* at 135-36.

All clients are vulnerable when they come to see a lawyer. As nonparties to proceedings, children are subject to potential pressures from parents. Moreover, they are less likely to be listened to by their lawyers because of this perceived vulnerability.

Children should not be burdened by having to choose between parents. The child has not created the situation, the adults have. If it became common practice to ask children to choose between parents, that would inevitably lead to pressure and manipulation. Children need to feel sufficiently comfortable with their lawyer to talk about what is important to them. Lawyers acting for children need to be able to work with the child so that their particular view of their world is truly heard and understood. The lawyer for the child is able to put the child's views into context and to

work through the potential consequences of those views with the child. This is different from the lawyer modifying the child's views because the lawyer believes they are transitory or the result of manipulation.

If the lawyer believes, for example, that the child's views are the subject of manipulation by a parent, the lawyer needs to work with the child to see if the child has a different view. The child may or may not have a different view. If the child does not have a different view, then lawyers must work with that view, rather than impose their own view merely because they believe that is what is best for the child. All of us are manipulated to some degree from time to time, sometimes we are quite happy to go along with that manipulation as it coincides with our own feelings at the time.

The changing of views over time is not uncommon for any client in domestic disputes. It is not a reason to undervalue or take views less seriously. It is a reason to work closely with the client over time to ensure that when action is taken, it does reflect what is important to the client at that moment.

If the *ABA Custody Standards* are to be true to their rationale that nothing in a lawyer's training qualifies him or her to make decisions about what is best for child clients, then children's vulnerability to pressure is [*120] not a justification to minimize the child's voice. If anything, children's vulnerability is a warning to be careful that each child's unique voice is heard. A child's wishes are the child's voice; a child's needs are determined by others. The lawyer for the child, as with any other client, should discuss the child's needs with the child to establish congruence between wishes and needs. If the lawyer's view of the child's needs and the child's views of his or her needs differ, and the child will not shift after deliberations with the lawyer, then the lawyer must act on the child's views if the *ABA Custody Standards* are to be true to their rationale.

B. The Child's Competence to Direct the Lawyer

The child's attorney is to act on the child's instructions to the extent the child is "competent" to give them according to the *ABA Custody Standards*.ⁿ⁹ The child's voice is at the mercy of the attorney's assessment of the child's competence--such a subjective assessment is likely to vary considerably between lawyers as there is no objective test for measuring competence. The *Standards* recognise that age is not a determinant of competence--but rather that competence is "contextual, incremental and may be intermittent depending on the circumstances prevailing at the time the position must be determined."ⁿ¹⁰ Competence is measured in terms of the ability to give instructions to a lawyer. The onus should be on the lawyer to understand the client rather than the client having to measure up to a vague standard of competence. Earlier in the code, a "child-centered" approach is emphasised and that "non verbal children can reveal much about their needs and interests through their behaviours."ⁿ¹¹ A signal that all children are competent to have a "voice" on what is important to them.

ⁿ⁹ *Id.* at 143-44.

ⁿ¹⁰ *Id.* at 144.

ⁿ¹¹ *Id.* at 142-143.

The child's voice in the *ABA Custody Standards* is not the child's unique voice from the child's perspective but rather a means to determining what is called "the child's position in the case."ⁿ¹² The child's voice is heard only to the degree the child is able to determine positions with regard to particular issues in the case. The problem is highlighted by Sarat and Felstiner when dealing with adult clients:

Clients often seek to expand the conversational agenda to encompass a broader picture of their lives, experiences, and needs. In so doing, they contest the ideology of separate spheres that lawyers seek to maintain. Lawyers, on the other hand, passively resist such expansion. They close down the aperture; they are interested only in those portions of the client's life that have tactical significance [*121] for the prospective terms of the divorce settlement or the conduct of the case. ⁿ¹³

n12 *Id.* at 144.

n13 AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 144 (1995).

In *Children's Consent to Surgery*, n14 Priscilla Alderson shows how young children, who may be regarded as incompetent because of age or a perceived lack of understanding, do, in fact, have understanding and abilities well beyond those set forth in developmental theories of what children are capable of at particular stages of their lives. These young children do not have academic knowledge; what they do have is experiential knowledge. This is analogous to adult clients who may well not understand the legal issues but do have experiential knowledge of their situations.

n14 PRISCILLA ALDERSON, *CHILDREN'S CONSENT TO SURGERY* (1993).

The ABA guidelines rightly recognise that the lawyer has a "duty not to overbear the will of the client." n15 The focus of the *Standards* on "positions in the case" (a legal view of the world) has the potential to close off the "broader picture" of what may be important to the particular child (the child's view of the child's world). Too strong an emphasis on the issues as determined by the court or the lawyer for the child has the potential to silence the particular child's ability to talk about what is important to him or her.

n15 Warshak, *supra* note 6, at 143.

C. The Child Who Does Not Want to Express a Position on a Particular Issue

Where the child does not express positions on particular issues, the *ABA Custody Standards* give the child's attorney permission to make a "good faith" effort to determine the child's wishes. n16 The good faith effort is to be based on positions the child has already expressed. The *ABA Custody Standards* rightly acknowledge that failure to express a position is different from being unable to. The child may not want to express a position, as the *ABA Custody Standards* acknowledge, because of loyalty conflicts, or the desire not to hurt one of the parties. Most importantly, the *ABA Custody Standards* say that in such a situation the lawyer must clarify with the child whether the lawyer should go ahead with the "good faith" position or remain silent. The lawyer is bound by the child's direction.

n16 *Id.* at 144.

D. The Child Unable to Express Any Views

The example of a child "unable to express any views" given by the [*122] *Standards* is the "preverbal child." n17 The *ABA Custody Standards* say that where a child is unable to express views, the lawyer acting for the child can put forward submissions on the "legal interests" of the child. In New Zealand, for example, the *Care of Children Act 2004* (which came into force on 1 July 2005) places the child's welfare and interests as first and paramount when making decisions about who should have the rights and duties of day-to-day care (the new term for custody) and contact (the new term for visitation). The Act sets out general principles of guidance on what welfare and interests mean; continuity and preservation of family relationships, responsibility for and cooperation regarding the child; the importance of making decisions within a child's sense of time; the principle of preserving the child's culture, language, and religious identity; and the principle of the child's protection.

n17 *Id.*

Inevitably the application of these principles will result in clashes among them. A lawyer acting for a child without the child's perspective cannot be totally neutral in putting forward the child's legal interests as the ABA guidelines

suggest. The lawyer for the child is likely to emphasise some principles over others, based on the lawyer's own views of what is best for the child. This cuts across a major concern of the ABA guidelines that lawyers should not be making decisions for their clients.

One child's attorney may believe that a particular culture and religious identity is important for the child and advocate that position. Another attorney may believe that the child needs protection from too much emphasis on cultural and religious identity. The child is inevitably at the mercy of the values that the child's attorney believes is best. The child's attorney may well base his or her position on expert advice but is really ensuring that the child has a "strong voice" in the proceedings--the underlying justification for the role of the child attorney. The child's attorney is really becoming a "best interests" attorney and going back to the confusion, which the *ABA Custody Standards* honourably have declared to clarify. The *Standards* do acknowledge that in this situation "an" option is to request a best interests attorney. n18 This should be the only option if the lawyer believes the child is "unable to express views."

n18 *Id.* at 145-46.

The question left open by the *ABA Custody Standards* is what to do when a child is "unable to express views." The example given by the *Standards* is of the "preverbal child." But in earlier commentary, the *Standards* acknowledge "even non-verbal children can reveal much about their needs and interests through their behaviors" n19 This leaves [*123] room for inconsistency of practice and potential silencing of the voice of the preverbal child. The *Standards* acknowledge that age is not a determinate of "determining a position in the case." Preverbal children would not be able to "determine a position" in the case but they certainly can express views. It is a myth that very young children do not have a voice. As Pugh and Selleck put it:

Listening to very young children does not necessarily mean taking all their utterances at face value, but it does mean observing the nuances of how they exhibit stress, or curiosity or anxiety, or pleasure in a manner which is congruent to their maturity. . . . Although most infants do not learn to talk until their second year, their "voices" are there to hear from birth. n20

n19 *Id.* at 142-43.

n20 G. Pugh & D. Selleck, *Listening to and Communicating with Young Children, in THE VOICE OF THE CHILD: A HANDBOOK FOR PROFESSIONALS* (R. Davie et al. eds., 1996).

There is a mindset difference between a lawyer's endeavouring to hear a very young child's voice, which may require expert assistance (which the *Standards* allow for), and a lawyer's basing the case on the lawyer's own views of what is best for the child, whether or not those views are informed by expert opinion. If the child's voice and whether the child can function as a client are the basis of the appointment of a child's attorney, then every effort must be made to listen to each particular child, whether they are preverbal or not.

There is a growing literature that has become known as the "sociology of childhood." n21 This literature is critical of an age and stage-based expectation of what children can do. Anne Smith explains how children communicate from the time they are born:

[F]or example using tiny head movements in time with the movements and sounds other people make when talking to them. Babies watch intently and read other people's moods, imitate others from an early age, and initiate interaction. Babies show that they can form views by responding differently to objects and events showing interest and pleasure in activities and through developing relationships with other people (copying, playing, greeting and sensitively responding). n22

n21 MAKING SENSE! THE CHILD'S CONSTRUCTION OF THE WORLD (Jerome S. Bruner & Helen Weinreich-Haste eds., 1987); CHILDREN OF SOCIAL WORLDS (Martin Richards & Paul Light eds., 1986); JOHN R. MORSS, GROWING CRITICAL (1996); Nicola Taylor, Anne Smith & Pauline Tapp, Children, Family Law and Family Conflict: Subdued Voices, Address before the New Zealand Family Law Conference, Christchurch, New Zealand (Oct. 4-8, 2001), *available at* <http://www.lawasia.asn.au/uploads/images/NZSessionPapers.pdf>; Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6 INT'L J. OF CHILD. RTS. 433-44 (1998) (explaining the significance of work on the sociology of childhood for children's rights).

n22 Anne B. Smith *Interpretation and Supporting Participation Rights: Contributions from Sociological Theory*, 10 INT'L J. OF CHILD. RTS. 73, 83 (2002); ALDERSON, *supra* note 14 (providing a full explanation of how very young children express views).

[*124] The need for the child to "determine positions" is an adult construction written from an adult viewpoint. The underlying rationale for the *Standards* is to give the child a voice. From a child's viewpoint, the burden is on the lawyer to listen, observe, and ascertain what is important for the particular child, rather than the child having to come up to an adult standard of "making determinations."

E. The Child at Risk of Harm

Where the child does express a voice on particular issues, there is still no guarantee in the *ABA Custody Standards* that the child's voice will be given the same degree of advocacy as an adult voice:

If the child's attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate best interests attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. n23

n23 *ABA Custody Standards*, *supra* note 1, at 145.

The exception does emphasize the "substantial" nature of the harm and does say the child's attorney is to continue to act for the child's position. The recommendation for a best interests lawyer is a clear signal to the court that whatever is advocated by the lawyer for the child must be scrutinized through the lenses of another lawyer. In the guise of pursuing a model of pure legal representation, the child's voice is compromised.

The example given in the commentary is of an abused child who wants to remain or return to a home the attorney for the child believes is unsafe. The analysis of what is safe or unsafe is a subjective one where the attorney's values and perceptions of the world determine the outcome. Children can be harmed in houses believed to be safe. If there is clear and unequivocal evidence that the child would be unsafe, then the response is to discuss that with the child. The ABA commentary allows for the lawyer to "attempt to persuade the child to accept a particular position," but not to "overbear the will of the client." n24 If the child insists, notwithstanding discussion with the lawyer, then the lawyer knows two things for sure--the child clearly wants to be with a particular parent, even though that parent may do harm to the child. The lawyer needs to help the child articulate reasons for the decision. It may be to protect a sibling, or that the option of living elsewhere is worse than being harmed. The court can address those reasons, and the child will know he or she has been heard.

n24 *Id.* at 142-43.

[*125] A Booker Prize-winning novel, *The Bone People*, n25 by New Zealand author Keri Hulme analyses the situation of a child wanting to be with a carer who has done some physical harm to the child. The eight-year-old foster child, Sim, wants to live with Joe who physically abuses him from time to time. The reason Sim wants to be with Joe is that Joe is the only person who has loved Sim, notwithstanding Joe's severe physical punishment of Sim when he misbehaves. Sim's voice is clear--while Joe beats him sometimes, Joe does love him like no one else has. Sim's lawyer, following the *ABA Custody Standards*, would recommend a best interests lawyer, who would say to the court "whatever I advocate for Sim will do him substantial harm." It would be better if the lawyer for Sim told the court why Sim wants to remain with Joe. The court then must decide if Sim can be protected while in Joe care's.

n25 KERI HULME, *THE BONE PEOPLE* (1983).

The *ABA Custody Standards* rightly acknowledge that "if there is a substantial danger of serious injury or death, the lawyer *must* take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules." n26 Children who are at risk of "substantial danger" need immediate action to protect them. The appointment of a best interests attorney is not the way to protect the child. The best interests attorney may not know what the risk of substantial harm is if it was told in confidence to the child's attorney. All the best interests attorney will achieve will be to undermine any clear views the child has.

n26 Rule 1.08 Rules of Professional Conduct for Barristers and Solicitors in New Zealand prescribes: "Where the lawyer believes the child or any other person in the family is subject to an anticipated crime involving physical injury it is mandatory for the lawyer, whether acting for the child or adult client, to disclose the information to the police."

The *ABA Custody Standards* are a laudable attempt to hear the particular child's voice. They are the most comprehensive standards internationally on the issue, yet the compromises in them have the potential to create the very confusion they are designed to eliminate.

III. What Does Representing a Child's Voice Mean?

The "best interests" standard, which is universally applied when decisions are made about children, enables courts to individualize decisions for the "particular child." The emphasis on the "particular child" makes it crucial that lawyers appointed to act for children work very closely with the child. Representing a child's voice is not a matter of simply presenting to the court what the child says. The child will not feel heard by a lawyer who takes literally any statements made by the child and then repeats them to the court. As with any client, the lawyer needs to reflect [*126] with the child on the views and the reasons for those views. Lawyers are often reality checks for their clients--the child may not have thought about the consequences of a particular stance for ongoing relationships. The child may ask for something that in the lawyer's experience the judge is unlikely to give. Thus, a compromise may need to be discussed with the child to ensure the child feels heard.

The lawyer needs to deliberate with the child--ask questions that are likely to be important for the particular child and not just questions that may be in dispute in the particular case. The lawyer is trying to work out with the child what is in the child's best interests. This is quite different from a child's forming an independent view of best interests based on the lawyer's worldviews.

The key is establishing sufficient rapport and trust with the child for the child to feel safe to say what he or she is thinking. In that way, if the child feels pressured by a parent, the lawyer will hear that and work with the child to address it in a way that will work for that child.

Sensitive lawyers acting for children provide "scaffolding" n27 to help children form their own views. The voice of

a child from a New Zealand study neatly sums up how a lawyer can work with a child:

[Lawyer] gave me a number of options, sort of like a maths problem, cos there's problems and you get three or four answers and you have to find the right answer. He'll just round up a few possibilities and then I'll choose the best for me, the best possibilities that would suit me. (Craig aged 13 in a custody case). n28

n27 This term is used by Anne Smith in her article *Interpreting and Supporting Participation Rights*, *supra* note 22, at 80.

n28 N.J. Taylor et al., *Children and Young Peoples' Perspectives on Their Legal Representation*, in CHILDREN'S VOICES: RES. POL'Y & PRAC. 110-33 (A.B. Smith et al. eds., 2000).

The issue of competence is not one for the child but for the lawyer appointed to represent the child. The lawyer must be competent in talking with, listening to, and understanding each child. It is not possible to deliberate with very young children, but it is possible to observe and listen to their unique voices in their unique situations.

IV. But Children Are Still Only Children

Children are not adults. They have less experience of the world and they are less powerful in their relationships with others. Most adults have an instinctive desire to protect children. The *ABA Custody Standards*, whilst proclaiming the importance of treating children the same as adult clients, give in to the paternalistic desire to do what is best for the child.

[*127] The desire is reinforced by courts that feel comfortable that lawyers acting for children will help the court determine the difficult decision of what is best for the child. The lawyer for the child has spent time with the child and the child's family. The court often does not see the child, and even when it does, the child is not in the familiar environment of the child's family, but instead is in the unfamiliar environment of the judge's chambers.

The attorney for the child is the court's window into the child's life. In this environment it is almost impossible for the child's attorney not to want to pursue a "best interests" approach from the lawyer's rather than the child's perspective.

We either scrap the whole idea of children's rights and children's voices and call all children's lawyers "best interests" lawyers, or we take up the challenges posed by two United Kingdom legal academics.

As John Eekelaar has said "hearing what children say must therefore lie at the root of any elaboration of children's rights." n29 In order to make this a reality, Eekelaar says, "adults' attitudes and social structures" must be "seriously adjusted towards making it possible for children to express views, and towards addressing them with respect." Michael Freeman says that Article 12 "is significant not only for what it says, but because it recognises the child as a full human being, with integrity and personality, and with the ability to participate fully in society." n30

n29 John Eekelaar, *The Importance of Thinking That Children Have Rights*, in CHILDREN, RIGHTS AND THE LAW 220, 228 (P. Alston et al. eds., 1992).

n30 Michael D.A. Freeman, *Taking Children's Rights More Seriously*, in INTERNATIONAL LIBRARY OF ESSAYS ON CHILDREN'S RIGHTS 175 (M. Freeman ed., 2004) available at <http://law-fam.oxfordjournals.org/cgi/content/abstract/6/1/52>

Carrie Menkel-Meadow says, "[e]ach time we listen to a new way of knowing, we learn more about the limits of our current way of seeing." n31 Listening more to children will change how we see them.

n31 Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 52 (1987).

V. Amending the ABA Custody Standards

The *ABA Custody Standards* set out in excellent detail the role for the attorney of the child: the importance of independence; the initial tasks; meeting with the child; pre, during, and posttrial responsibility; and how to counsel the child. All these are endorsed. The major amendment this article argues for is that the lawyer for the child cannot substitute his or her view for the child's at any point in the process unless the child explicitly endorses this. There should be no differences in the lawyer/client relationship whether the client is an adult or a child. Only then will the strong voice of the child be heard, and only then will there be no ambiguity in the role.

[*128] VI. Application of the Amended ABA Custody Standards to the Alienated Child

The so-called "alienated child" is well recognized in family break-up literature. Richard Warshak n32 says there are three elements for the alienated child--persistent rejection or denigration of a parent, the alienation is not a reasonable response to the alienated parent's behaviour, the behaviour is partially the result of the nonalienated parent's influence.

n32 Richard Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273, 273-301 (2003).

An alienated child's view will be a desire to remain with the nonalienated parent and a desire not to see the alienated parent. It is very tempting when acting for the child in a general best-interests manner to take the position that the child needs to spend time with the alienated parent and that not doing so will cause substantial harm to the child's well-being. Richard Gardner says that the best solution for the child is to change custody. n33 A 1991 ABA study n34 provides evidence that the threat and implementation of environmental modification against the child's wishes lead to positive changes for the child in ninety percent of cases. Janet Johnston and Vivienne Roseby n35 explain that alienated children's development takes place within a web of parental conflict. They say that to forcibly remove children is harmful because it intensifies the problem--"[w]e collude in the process of rendering children unseen and unheard in custody disputes that are fought fraudulently in the name of the child." Carol Bruch puts it equally as powerfully n36--"[a] child's chance for healthy development requires that parents, judges and experts face the realities of the child's situation."

n33 RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (2d ed. 1988).

n34 STANLEY S. CLAWAR & BRYNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* (1991). Courts in New Zealand and the UK have tended to enforce contact. See *L v Q* [2003] N.Z.F.L.R. 440, *C v C* [2003] N.Z.F.L.R. 689; *Re S* [2004] 1 F.I.R. 1279.

n35 JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD* 218 (1997).

n36 Carol S. Bruch, *Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 527-52 (2001).

The reality is that a label such as the "alienated child" lumps a whole group of children together and silences their individual voices. Each so-called "alienated child" is not the same. One child may be manipulated by a parent, but that manipulation is the child's reality. Another child may reflect the circumstances of the broken parental relationship. Yet another may express a reaction to a parent, based on the fact of that parent's abuse of the child. Janet Johnston, who has done a great deal of research on this issue, explains:

[*129] There is no convincing evidence . . . that an alienating parent is primarily responsible for a child's alienation. Nor did we find that family abuse was primarily responsible for the child's rejection of a parent,... the best explanation is a multi-factor systematic view of the phenomena. n37

n37 *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, paper presented at the 4th WORLD CONGRESS ON FAMILY LAW AND CHILDREN'S RIGHTS 20-23 Mar. 2005, Cape Town, South Africa, e-mail: lawrights@capcon.com.au. The paper incorporates material published by Janet R. Johnston and Joan B. Kelly. Janet Johnston says that what helps is early prevention of alienation, a good assessment of the multiple factors that contribute to alienation within the child and family, clear court orders that affirm parental rights and restore an appropriate access plan (one that the child can tolerate); ongoing case management, and family-focused therapy (not just parent-child reunification). What hurts is to do nothing, long delays where the child has no contact with the rejected parent, draconian punishments and threats, "parentectomies" (severing the child's relationship with the aligned parent abruptly), ongoing litigation in the adversarial legal system, and total disregard for the child's ongoing distress or the teenager's need to have some choice in those more difficult cases that are resistant to resolution.

The task for the lawyer for the child is to hear and work with each particular child's reality and to ensure that the court is aware of that reality and the reasons for it. The Quebec Court of Appeal in *F(M) v L(J)* n38 held that the role of the lawyer is to represent the child's views, even where the lawyer believes those views are the result of alienation. The lawyer can advise the child of the consequences of the child's views and what the lawyer believes is best, but cannot simply interpose what the lawyer believes is best into the court process. Any other position would leave the child unheard in the proceedings. A rigorous testing of the other parties' viewpoints and of expert evidence from the child's perspective ensures that the court is then well placed to make the decision of what is best for the particular child.

n38 (2002) 211 D.L.R. (4th) 350.

VII. Conclusion

The *ABA Custody Standards* are a significant attempt to clarify the role of attorneys acting for children. The *ABA Custody Standards* are the most comprehensive internationally. All the *ABA Custody Standards* lack is the courage of their convictions, which would require each attorney to act in a traditional lawyer-client relationship without compromise.