

The Politics of Custody and the Transformation of American Custody Decision Making

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INTRODUCTION

In recent years, much political attention in the United States has focused on the family as an institution in a state of crisis and transition. Advocates of various reforms assert that the stresses of modern life, particularly the high divorce rate, will certainly change the family. The family is viewed as an institution in a transitional stage and, as such, is the subject of ideological struggle within the context of the political system. Of particular interest is the form and substance of the various characterizations of the perceived problems associated with the family. The way we define the issues, to a great extent, dictates the solutions.

The assumptions underlying a variety of suggested reforms in the rules that govern families reveal the tensions in conflicting attitudes concerning the familial institution. Separated out for particular concern have been the children, anointed as the "victims"¹ of the dislocations in the modern family. For example, moral and political concerns over the implications of the no-fault, freely accessible divorce systems adopted by the states have tended to center on the resulting precarious position of the "children of divorce."²

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¹ See Woody, *Preventive Intervention for Children of Divorce*, 59 *SOC. CASEWORK* 537, 541 (1978) ("Divorce is certainly a process over which children have no control; inasmuch as possible, they should not become its victims.").

² See, e.g., Felner & Farber, *Social Policy for Child Custody: A Multidisciplinary Framework*, 50 *AM. J. ORTHOPSYCHIATRY* 341, 345 (1980) ("One must ask if an adversarial process, in which a child's parents are the adversaries and the child is the prize, is best suited to arriving at a placement that truly serves the child's best interests."); Mumma, *Mediating Disputes*, 42 *PUB. WELFARE*, 22, 25 (1984) (stating that "the litigation process is little more than an institutionalized form of emotional abuse to

Characterizing children as innocent victims in need of protection is typical of professional reformers' rhetoric in this age of no-fault divorce. In fact, there seems to be a strong underlying antidivorce aspect to much of this rhetoric and the reforms it supports. In the custody area this aspect is manifested by rules that seek to preserve as much as possible the predivorce power and authority relationships between fathers and their children.³ Even though divorce is now easier to obtain and women's economic position has improved, the state's supervision of the termination process and imposition of substantive standards regulating

children"); Woody, *supra* note 1, at 537 ("For the average family, divorce constitutes a serious crisis situation, and it is likely to be a 'psychological emergency' for the children."). Children were considered the innocent victims of the increasing divorce rate. *Id.* at 541. See *infra* notes 61-62 and accompanying text; see also *infra* Part III.B.

³ This is particularly evident when the recent social science literature in this area is surveyed. One author argues:

The broad generalizations about the personalities and behavioral traits of men and women hold up rather poorly when individual adults are studied. While researchers do report some persistent, sex-linked differences in the psychological responses of men and women in general, they also find that large numbers of individual men display traits stereotypically associated with women. The more specific research examining males and females in their interest in children, attentiveness to them, and capacity to understand and respond to their needs — what might be collectively termed their 'responsiveness' to children — is especially inconclusive. . . .

In the context of custody disputes, the issue of special nurturing traits associated with one sex is posed most purely in cases involving newborns when neither parent has become the primary caretaker for the child and in cases involving preschool children when parents have shared in roughly equal measure the caregiving responsibilities. . . . [W]hen fathers and mothers are observed with their own newborns before either has assumed different caretaking roles, fathers are generally as likely to hold them closely, rock them, talk to them, and look directly at them. New fathers seem as skilled and gentle as mothers with their own children. Observers in the home at later stages, even after differing roles have been assumed, have found that although fathers interact with young children differently than mothers do, with more physical and less patterned, rhythmic play, there still seem to be few differences in the degree of parents' interests in their children or in their capacities to respond to their infants signals.

Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 518-20 (1984) (citations omitted). Chambers also asserts that "[w]omen have no attributes that so especially suit them for childrearing that they merit a preference in custody disputes simply because of their gender." *Id.* at 527 (citation omitted).

Chambers' article is but one example. See also FATHERHOOD AND FAMILY POLICY (M. Lamb and A. Sagi eds. 1984); JOINT CUSTODY AND SHARED PARENTING (J. Folberg ed. 1984).

the postdivorce mother-child unit has greatly increased. While there is no longer serious consideration of the idea that the law should prohibit or make it difficult to divorce, the terms of the dissolution and the structuring of postdivorce relationships are and will continue to be dictated and monitored by the state.⁴

This increased state regulation of the post-divorce family has occurred against the backdrop of significant social and legal developments. These developments have characterized the establishment of, and the response to, the women's movement in the United States. During the 1970s there were successful attempts in most states to make laws "gender neutral."⁵ Such changes were particularly significant in the family law area in which gendered rules had been the norm.⁶ Feminists concerned with law reform considered the push for degendered

⁴ See Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

⁵ For a discussion of the feminist attack on gender-specific legal tests, see Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 821-22.

⁶ By rejecting the dominant ideology that defined a woman's role as that of mother and wife, and by arguing for a more equitable redistribution of parental responsibilities, feminists hoped to break down the barriers that excluded them from the market and to make parenthood more of a joint effort than it had been traditionally. However, the studies indicate that this has not in fact occurred to any great degree. Mothers still perform not only the vast bulk of child care, but also the majority of housework. See Bane, Lein, O'Donnell, Stueve & Wells, *Child-Care Arrangements of Working Parents*, 102 MONTHLY LAB. REV. 50, 52-53 (Oct. 1979). A study by the University of Michigan of male and female executives found that women spend more than twice as much time on household tasks. See *Women Executives "Think Like a Man"*, Capital Times (Madison, Wis.), Apr. 9, 1986, at 9, col. 3. In addition, women in far greater proportions than men seem to plan their careers to accommodate child care responsibilities, illustrating that a combination of mothering and professional career is desirable for them. For a comparison of male and female law students regarding responsibilities for child care, see Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263 (1982). The study reported that women students expect to spend considerably more time than male students in performing child care tasks. *Id.* at 1280, 1289. Moreover, their job considerations will be influenced by the availability of on-site child care, opportunities for part-time employment and the provisions for maternity leave. *Id.*

The effect of women's childbearing responsibilities on their market participation is also analyzed by Fuchs, *Sex Differences in Economic Well-Being*, 232 SCIENCE 459, 459-64 (1986); see also Chambers, *supra* note 3, at 517 ("In America today, as in all other countries of the world, it is women who perform most of the holding, feeding and consoling of young children." (citations omitted)). Yet, despite these studies, in the family law context, gender neutrality remains a popular goal of liberal feminist reform. See Fineman, *supra* note 4, at 824.

rules a symbolic imperative even when they recognized that such reforms might actually result in removing an arguable advantage for women as in the case of maternal preference rules for deciding custody cases.⁷

In addition, the women's movement's push for equality in the family and workplace generated various backlashes. For example, amidst rhetoric that labeled delinquent fathers as "deadbeats," state and federal governments passed economic reforms concerning property divisions at divorce and enacted stringent state and federal provisions for the collection of past due child support. These reforms spurred the formation of fathers' rights groups.⁸ These groups appropriated and successfully employed the feminist rhetoric of equality and gender neutrality⁹ to force reforms in the family law area, such as mandatory joint custody, which were not particularly beneficial to women and children.

Fueling the successes of the fathers' rights groups have been various professionals involved in the divorce process who viewed the traditional rules as imbalanced in favor of women.¹⁰ These professionals used the

⁷ This has in fact been the case. For a discussion of the backlash of the fathers' rights movement on the norm of mother custody, see Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 113-18. For an illustration of the rise and fall of the "tender age" doctrine, see Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1072-74 (1979).

⁸ See N. Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support* (on file with author); see also M. Raschick, *Wisconsin Non-Custodial Parents' Groups* (May 16, 1985) (unpublished manuscript; primary field research on file with the Author). For a discussion of the various ideological strains within the men's movement, see M. Shiffman, *The Men's Movement: An Exploratory Empirical Investigation 3-4* (Aug. 26-30, 1985) (paper prepared for presentation at the 80th Annual Meeting of the American Sociological Association, Washington, D.C.; draft 2.1 on file with author).

⁹ The feminist rhetoric of gender neutrality was particularly susceptible to being employed against women and children by father's rights groups as they attacked the notion of motherhood as distinct from parenthood. See, e.g., Everett, *Shared Parenthood in Divorce: The Parental Covenant and Custody Law*, 2 J.L. & RELIGION 85, 85-89 (1984). The father's rights groups also argued for the child's "right" to access to both parents and the right of the non-custodial father to be equally involved in post-divorce decisions concerning the child. *Id.* at 88-89. Much of the rhetoric of these groups concerns the importance of fathers in the post-divorce family. See, e.g., FATHERHOOD AND FAMILY POLICY, *supra* note 3; Chambers, *supra* note 3, at 534-35.

¹⁰ The helping professions tend to see joint custody as the only "fair" result. See, e.g., Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979). The author makes sweeping conclusions based on four cases:

images of excluded (but worthy and caring) dads to fashion a professional standard of "shared parenting" after divorce.¹¹ This new norm was to be implemented via the mediation skills of these same professionals.¹²

It is interesting to note how much more successfully the equality model has been adopted and implemented in the context of family law as compared to more general laws.¹³ As equality and the concurrent concept of gender neutrality have been incorporated into divorce decision making, the old, tested gendered rules that permitted predictable, inexpensive decisions to be made without protracted litigation have been set aside. One problem confronting the newly, formally degendered family law system is the need to create new gender neutral factors or processes to handle the cases. The need for an authoritative articulation of alternative standards has set the stage for political and ideological battles.

This Article considers two results of this political struggle over the control of custody decision making at divorce: first, the construction and articulation of a perceived need for independent, legal child advocacy at divorce; second, the designation of certain professionals as the source of wisdom in regard to appropriate advocacy for children. Both of these developments reveal ideological changes in society's perception of the mother-child bond that occurred as a by-product of the move to gender-neutral family law.

The institutionalization and professionalization of the concept of child advocacy have operated to justify regulating custody decisions at

There is no doubt that joint custody yields two psychological parents, and that the children do not suffer the profound sense of loss characteristic of so many children of divorce. The children maintained strong attachments to both parents. Perhaps the security of an ongoing relationship with *two* psychological parents helps to provide the means to cope successfully with the uprooting effects of switching households.

Id. at 328 (emphasis in original).

¹¹ This shared parenting discourse entails an uncritical acceptance of the empirical notion that the contributions of women and men to parenting are exchangeable. For an elaborate criticism of both the tendency to view parents as interchangeable and the uncritical use of empirical data by legal policymakers, see Fineman & Opie, *supra* note 7.

¹² See, e.g., Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, 22 FAM. COORDINATOR 63, 64 (1973).

¹³ The change to custody policy envisaged by challenges to legal rules and standards has as its basis idealistic visions about the capacity of law to transform social behavior. See generally Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781; Fineman, *supra* note 5.

divorce in favor of increasing control by men over their children's and thus their ex-wives' lives.¹⁴ Proposals for reforms in this area also reflect competing perceptions of large segments of the legal and nonlegal professional communities about the functioning of families and individuals within families, about the implications of divorce, and about the appropriate role of the legal system in the creation and imposition of social norms.¹⁵

This Article will critically analyze the development of child advocacy. I will first consider the factors that set the stage for the development of the concept of independent child advocacy and how that concept has been put into operation. I will then examine two assumptions underlying the concept of independent child advocacy. The first assumption is that the child should be considered as separate from the parent. The second is that it is possible to independently define children's interests when these interests are conceptually separated and set apart from their parents'. I ultimately conclude that the presentation of independent child advocacy in the divorce process operates to empower

¹⁴ Yet despite the increased potential for control by men under modern divorce regulation, there has not necessarily been a corresponding increase in responsibilities. Many commentators have noted the negative aspects of the rules designed to give fathers more control. For discussions on the negative impacts of joint custody decisions on the lives of women, see Benedek & Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1541-43 (1979) (pointing out the risk of instability inherent in joint custody and stating that "[w]hen the requisite cooperation is not forthcoming, as is often the case following divorce, joint custody can be calamitous"); Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538, 570-71 (1982) (concluding that joint custody is only appropriate when both parents desire it and are willing to cooperate); see also Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

Women and men seem to view the custody issue differently, with women regarding it as more central and therefore less subject to negotiation. See L. WEITZMAN, *THE DIVORCE REVOLUTION* 310-12 (1985) (concluding that "[w]omen . . . draw a line when it comes to custody").

¹⁵ One notion that is articulated within the context of changing custody policy is the view that assumes gender-neutral rules are necessary to promote the symbolic ideal of equality between the sexes. Encouraging men to assume more responsibility for home and child care tasks fosters various instrumental concerns: most globally, the potential for women to increase their market participation, thus decreasing their economic dependence on men; and, within the context of divorce, relief for the "overburdened" custodial mother, as well as an increased financial commitment by fathers to payment of child support obligations, owing to the stronger parent-child emotional bond. See *supra* note 14.

certain professions and greatly to increase the power of fathers in the process, rather than to benefit children.

II. THE POLITICS OF CUSTODY

A. *The Development of Child Advocacy*

The legal profession (at least initially) created the ideal of child advocacy. The profession presented child advocacy as the integration of legal and social science skills.¹⁶ The potent idea of a legal advocate for children in divorce actions can be traced back to a series of articles, which constituted a campaign, by judges in the United States.¹⁷ These judges sought to provide protection for children from the adversary model.¹⁸ In part, the creation of the advocacy role was a result of family court personnel and judges' early recognition that the best interest of the child test¹⁹ was not functioning well in the traditional adversarial court context.²⁰

The creation of something like the child advocate position was an inevitable product of the general unease generated by the widespread acceptance of no-fault divorce and by the breakdown of the best interest of the child test.²¹ The best interest test became unworkable when the old rules of thumb,²² such as a maternal preference, which were used to

¹⁶ See Elkin, *supra* note 12, at 63. Interestingly, this occurred as the social worker's role was limited elsewhere. For example, social workers were experiencing a declining role in delinquency proceedings with the movement away from a therapeutic to a more adversarial model. See Scherrer, *How Social Workers Help Lawyers*, 21 SOC. WORK 279, 279 (1976) (remarking on the tension between social workers and lawyers in the juvenile court context); Weil, *Research on Issues in Collaboration Between Social Workers and Lawyers*, 56 SOC. SERV. REV. 393, 394-95 (1982) (contrasting the trend toward adversarial proceedings in juvenile and dependency courts with a "countertrend . . . in the area of divorce and child custody").

¹⁷ An early proposal was for a "friend of the child" to be assigned. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 107 (1962). Judge Hansen made the issue into a "campaign." See Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1 (1966).

¹⁸ See, e.g., Hansen, *supra* note 17.

¹⁹ The best interest of the child test involves a comparative balancing of the strengths and weaknesses of the parents. Factors such as health, wealth, education, and moral conduct have all been considered. The test is indeterminate and easily manipulated by judges and lawyers. Appellate review is rare since it is very fact specific and the trial judge has wide discretion to conclude which parent will act in the child's best interest.

²⁰ See *supra* note 2 and accompanying text.

²¹ See *supra* note 19.

²² The origin of the term "rule of thumb" was the common law rule that a husband

implement it were attacked as unacceptable standards for custody decision making. The emphasis on gender neutrality, which occurred as a result of feminist agitation during the early 1960s, called into question the desirability of the presumption that children belonged with their mothers unless the mothers were unfit.²³ Gender considerations as a way to make custody decisions began to fade from favor and were even attacked as unconstitutional in some states.²⁴

Earlier, the determination of fault had also provided a way for the traditional legal process to resolve custody issues. Adulterers, wife beaters, and others that the court found at fault lost custody of their children. As gender and fault disappeared from the process it became apparent that the best interest test had worked, in part, because these other references had served to resolve most cases. Increasingly, judges and attorneys who had to employ the best interest of the child test, degendered and free from fault, began to view the test as unworkable.²⁵

could beat his wife without legal sanction if he used a rod no thicker than his thumb. See Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2, 18-21 (M. Roy ed. 1977).

²³ Typical grounds for a finding of unfitness included adultery and intemperance. Under such circumstances, mothers forfeited their ownership interests in their children. See J. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 433-42 (2d ed. 1985). Today, this focus on conduct within the context of custody determinations endures in some jurisdictions, even though there has been a retreat from fault-based divorce. Common statutory and decisional law bases for custody determinations include adultery, cohabitation, and sexual preference. Some states with express statutory grounds require that denial of custody be based on a finding that the behavior in question adversely affects the child. For data supporting the proposition that women are treated more harshly than men in such instances, see Girdner, *Child Custody Determination: Ideological Dimensions of a Social Problem*, in *REDEFINING SOCIAL PROBLEMS* 165, 175-76 (E. Seidman & J. Rappaport eds. 1986).

²⁴ A growing body of literature argues that a presumption of joint custody is a constitutional right. See, e.g., Canacakos, *Joint Custody as a Fundamental Right*, in *JOINT CUSTODY AND SHARED PARENTING* 223 (J. Folberg ed. 1984); Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985).

²⁵ A great deal of literature concerning this crisis exists. See, e.g., Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (discussing some of the dangers of free will and discretion within the indeterminate system). For a history of the interplay of discretion and rules in custody proceedings, see Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965); see also Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 535 (1979). Folberg and Graham state:

Convenient presumptions, first for the father, then for the mother, are no longer available as a short cut to a court in arriving at the most appro-

Thus, the search began for other sources of decision making.

The substantive test has tended to remain the best interest of the child. The best interest test has tremendous symbolic appeal since it rhetorically focuses on the "child." In addition, attacks on the test are easily deflected within the context of the current paradigm that views families as mere collections of individuals whose interests are often in conflict. Attempts to make the test more predictable are met with charges that parents' interests are being substituted for those of children.

Continued adherence to the best interest test has serious consequences. It has necessitated that the court as the legal decision maker in custody cases continually search for alternatives. Judges are uncomfortable with the lack of specificity in the test and increasingly resort to the "helping professions" as assessors of what constitutes the best interest of a child.²⁶ The resort to nonjudicial decision makers as advocates for children in order to apply the best interest standard masks the severe problems with the substantive test. Resort to these decision makers does not solve the problems and, in fact, allows the best interest test to remain functional long after it should have been discarded.

B. The Failures of Legal Institutions

The two legal institutions that have been instrumental in developing the idea of an independent advocacy function for children's interests at divorce are state courts and legislatures. These legal institutions make

appropriate custody determination. When parents disagree about custody, judges are now in the perplexing bind of trying to predict, with limited information and no existing consensus, which of two fit parents would best guide a child toward adulthood.

Id. (citation omitted). Chambers states that:

[The] search for factors present in all or most custody disputes . . . has grown out of an unease with statutes that direct judges to place a child where her interests or welfare will be best served without the guidance of any rule creating a presumption for, or placing a burden of proof on, either party. Such statutes place extraordinary burdens on judges, encourage costly and painful litigation by parents, and probably (though unprovably) lead in many cases to placements for children that do not in fact best serve their needs.

Chambers, *supra* note 3, at 479.

²⁶ See Girdner, *supra* note 23, at 166 ("[Members of the mental health profession] have been critical in defining the custody determination problem and in proposing solutions [—] in the services they offer, in their notions of what is healthy and unhealthy, in their views of what children and parents need, and how families function and change . . .").

legal decisions in different ways and with different constraints, all of which impact on the institutions' respective abilities to address custody issues in a coherent manner. Courts, for example, are traditionally considered inappropriate to formulate major policy directives because they are institutions that resolve disputes between individuals. As a result, the courts define and resolve custody questions in individual cases by focusing on the rights or obligations of the individual members.²⁷ The current best interest of the child test encourages such a focus.

The best interest test necessitates a comparison of parents' qualities and a determination as to which of them would be the preferable custodian. The test is so fact and circumstance specific that it defies any articulation of universal standards.²⁸ No wonder the courts have welcomed the idea of an independent child advocate under the best interest test.²⁹ With gendered decision making no longer permissible and no other societal norm emerging as the replacement for the preference for maternal custody, courts have searched for efficient ways to make individual custody decisions.³⁰ A child advocate, particularly when that advocate is also an attorney, allows the adversary nature of the proceeding

²⁷ For a general description of the development of state supervision of parental duties, see M. GROSSBERG, *GOVERNING THE HEARTH* 289-91 (1985). For a discussion of the ways feminism has influenced judicial determinations in this area, see Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 *FEMINIST STUD.* 235, 239, 246, 254-55 (1983).

²⁸ Traditionally the practice was to award custody to one parent to meet the child's need for a permanent, stable relationship. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37-39 (1973).

²⁹ This solution absolves the judiciary of the burden of making a decision, a responsibility that critics of the judiciary have indicated judges find difficult to fulfill. See Oneglia & Orlin, *A Model For Combined Private Practice: Attorneys and Social Workers in Domestic Relations*, *J. APPLIED SOC. SCI.*, Fall/Winter 1978, at 37, 43-44 ("The judge and the lawyers are not qualified to make a determination as to the best placement for a child considering emotional factors. Judges can evaluate financial and physical circumstances — as can almost any layman."). But see Charnas, *Practice Trends in Divorce Related Child Custody*, 4 *J. DIVORCE*, Summer 1981, at 57, 62 (reporting on a study indicating that "there is no interdisciplinary difference in the ability of judges and mental health professionals to select a custodial psychological parent; both overwhelmingly chose as the custodial parent the one which the evaluation reflected as having a more positive and consistent emotional bond with the children").

³⁰ See, e.g., Chambers, *supra* note 3, at 561 (tentatively recommending a preference for the primary caretaker); Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 *U. CHI. L. REV.* 1 (1987) (comparing and evaluating three alternatives to the best interest of the child standard). For a criticism of the approaches employed in formulating new rules in this area, see Fineman & Opie, *supra* note 7; see also *infra* text accompanying notes 56-73.

to operate because the advocacy practice assigns a designated neutral actor the task of ensuring that the child's interest is not sacrificed to the parents' anger. Child advocacy presents a procedural solution which allows courts to complacently conclude that the child's interest is in fact brought to light and protected.³¹

In contrast to courts, legislatures are capable of performing as broad policy making bodies. However, these bodies are susceptible to political pressures and the creation of simplistic, universally imposed, idealized norms. This susceptibility has been demonstrated throughout the entire spectrum of divorce reform, from marital property rules to the establishment of a preference for joint custody. Legislatures have been particularly responsive in the divorce area to the equality rhetoric of fathers' rights groups.³² Equality as a model for decision making has symbolic as well as political appeal. In the case of child advocacy, many state legislatures now require separate representation for children when custody is contested³³ and a few have proposed that such advocacy be

³¹ For an early proposal of this solution by a judge, see Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964); see also O. STONE, *THE CHILD'S VOICE IN THE COURT OF LAW* 104-05 (1982) (reviewing suggestion that family court judges be accompanied by "behavioural science 'judges'" trained in social sciences); *infra* notes 33-34 and accompanying text.

³² See Everett, *supra* note 9, at 87-89; Fineman & Opie, *supra* note 7, at 113-18.

³³ See, e.g., WIS. STAT. ANN. § 767.045 (West 1988):

In any action affecting the family in which the court has reason for special concern as to the future welfare of a minor child, in which the legal custody or physical placement of the child is contested, or in which paternity is contested under s. 891.39, the court shall appoint an attorney admitted to practice in this state as guardian ad litem to represent the interests of the child as to legal custody, support and periods of physical placement.

The following states provide that the court can appoint an attorney to represent a minor child with respect to his or her custody, support, and visitation: ALASKA STAT. § 25.24.310 (1983); ARIZ. REV. STAT. ANN. § 25-321 (1976); COLO. REV. STAT. § 14-10-116 (1987); MD. FAM. LAW CODE ANN. § 1-202 (1984); MONT. CODE ANN. § 40-4-205 (1987); VT. STAT. ANN. tit. 15, § 594 (1987); WASH. REV. CODE ANN. § 26.09.110 (1989).

For other states that have similar statutes, see CAL. CIV. CODE § 4606 (Deering Supp. 1988) (court may appoint counsel to represent best interest of child in custody dispute); CONN. GEN. STAT. ANN. § 466-54 (1987) (court may appoint counsel for child, and counsel will be heard on all matters pertaining to interests of child, including custody, support, education, and visitation, as long as court feels it is in the child's interests); DEL. CODE ANN. tit. 13, § 721 (1981 & Supp. 1988) (court may appoint attorney to represent child in custody proceedings); D.C. CODE ANN. § 16-918(b) (1981) (court may appoint attorney to represent child in custody dispute); HAW. REV. STAT. § 571-46(8) (1985) (court can appoint guardian ad litem to represent interests of

provided whenever a divorce involves children even if there is *no* contest over custody.³⁴

Complicating the inherent problems with viewing legislatures or courts as rational policy and decision making institutions is the fact that doctrinal family law during the past several decades has rejected the idea that the family has "rights" associated with it as a unit or as an "entity." The thrust of law concerning the family currently reflects an adherence to the notion that the family is nothing more than a collection of individuals, each with specific individuated and potentially conflicting "rights." Therefore, the real unit of modern concern for family law and policy and the legal institutions that implement them is the individual. Laws focus on single issues isolated from other circumstances to "help" specific family members.³⁵ In fact, family law has

child in custody dispute); IOWA CODE ANN. § 598.12 (West Supp. 1988) (court may appoint attorney to represent interests of minor children of the parties); KY. REV. STAT. ANN. § 403.090 (1984) (court may appoint "friend of the court" to supervise and enforce maintenance payments, and who, if requested by a trial judge, can investigate all facts and circumstances relevant to interests of the children); MASS. GEN. LAWS ANN. ch. 215, § 56A (West Supp. 1988) (court may appoint guardian ad litem to investigate facts pertaining to the care, custody, and maintenance of minor children); MINN. STAT. ANN. § 518.165 (West Supp. 1989) (court may appoint guardian ad litem to advise on custody, support, and visitation but must appoint if court has reason to believe that child is victim of domestic child abuse or neglect); MISS. CODE ANN. § 9-5-89 (1972) (court may appoint guardian ad litem only when court considers it necessary to protect child's interests); NEB. REV. STAT. § 42-358 (1984) (court may appoint attorney to represent interests of any minor child of the parties); N.H. REV. STAT. ANN. § 458:17-a (1983) (court may appoint guardian ad litem for children in custody disputes); N.M. STAT. ANN. § 40-4-8 (1986) (court may appoint guardian ad litem on custody disputes); N.Y. FAM. CT. ACT § 241 (McKinney Supp. 1989) (minors should be represented by counsel of their own choosing or by law guardians when they are subjects of family court proceeding); OHIO REV. CODE ANN. § 75(B)(2) (Page 1982) (court may appoint either attorney or guardian ad litem); OR. REV. STAT. § 107.425(3) (1983) (court may appoint counsel for children, but must appoint counsel if the children request it); TEX. FAM. CODE ANN. § 11.10 (Vernon 1986) (court will appoint guardian ad litem for child if termination of parent-child relationship is sought); UTAH CODE ANN. § 30-3-11.2 (1984) (court may appoint counsel to represent child in custody battle); VA. CODE ANN. § 16.1.266(1)(D) (1988) (court will only appoint counsel for children if it feels parents' counsel does not adequately represent interests of children).

³⁴ For example, New Hampshire provides: "In all proceedings for divorce, nullity, or legal separation, the court may appoint a guardian ad litem, to represent the interests of the children of the marriage . . ." N.H. REV. STAT. ANN. § 458:17-a (1983).

³⁵ See, e.g., Fulmer, *A Structural Approach to Unresolved Mourning in Single Parent Family Systems*, 9 J. MARITAL AND FAM. THERAPY 259, 268 (1983):

Virtually all divorcing parents need help in minimizing and managing stress. For this sample, no immunity to stress was afforded by age, sex,

begun to reflect an assumption that the family may be harmful to an individual's (economic, emotional, and physical) health.³⁶

To minimize the evils inherent in divorce the law focuses on and identifies the rights of the individuals. When the individual is a child, we have created a situation that mandates the use of state authority to intervene in a "protective" manner. Children as one set of individuals with separate and potentially conflicting rights and interests from their parents need an "advocate," and the state is the logical supplier of persons to assure that role.

C. *In the Best Interest of the Child*

1. Gender Neutrality and the Custody Debate

The power and persuasiveness of the attack on gendered decision making in the custody area have had more profound impacts than merely making the legislatures' or judges' tasks more difficult. The fetish with gender neutrality has affected the articulation of what substantively constitutes "the best interest of the child" and of what safeguards are considered necessary to achieve it. In fact, it seems that the force of

socioeconomic status or other background factors. Besides the passage of time, only one factor led to a significant decrease in stress — the parental use of valued helping resources in coping with the divorce.

Id.; accord Counts & Sacks, *The Need for Crisis Intervention During Marital Separation*, 30 SOC. WORK 146, 149 (1985) ("Few people caught up in the process of separation are equipped to deal effectively with the considerable and unique stresses [involved] This is especially true of children and adolescents. Thus, intervention is important and should be the rule, not the exception."); see also Herrman, McKenry & Weber, *Attorneys' Perceptions of Their Role in Divorce*, 2 J. DIVORCE, Spring 1979, at 313, 321 (stating that "[i]t may be necessary in some circumstances for one or both lawyers to undertake the temporary role of listener, but the ultimate goal should be to get the client into the hands of a trained therapist") (citation omitted).

³⁶ Mumma has observed:

With half of all first marriages ending in divorce, courtrooms are jammed with hostile parents prepared for battle over the custody or visitation of their mutual children. These parents and children face a destructive adversarial process that will activate a network of court personnel, social workers, and other professionals in a consuming, costly, and stressful human drama that frequently endures for years. For most of these parents the wrangling ends only when one or both litigants become financially or emotionally exhausted and can no longer continue the legal battle. Judges' orders do not seem to settle things, at least for very long. Children suffer and parents blame each other, fueling the conflict and maintaining the tragic cycle.

Mumma, *supra* note 2, at 22.

the gender neutral logic has extended beyond attacking explicitly gendered rules to attacking those that merely operate to produce results that tend to favor one gender over the other.³⁷ For example, rules that focus on the performance of nurturing or caretaking tasks as the basis for preferencing parents have been attacked, not because they are explicitly gender biased, but because in operation they will act to favor women who traditionally perform such tasks.³⁸ Nurturing as a decisional *valve*, even though it is not inherently gendered and is potentially a choice for both men and women, is thus devalued.

This expanded version of neutrality favors fathers. By labeling them gendered, it removes the things women tend to stereotypically do for children, which are grouped under the term "nurture."³⁹ Neutrality in this regard, in the context of an active and operating gendered system of lived social roles, is antimaternal and is hardly gender neutral in its impact.⁴⁰ The search is not only for language but also for *factors* that

³⁷ Most state statutes now specifically provide that both parents are "equal" and forbid consideration of gender in custody cases. See *State Divorce Statutes and Summary Chart Sheet Introduction*, Fam. L. Rep. (BNA) Reference File, at 5 (Mar. 24, 1986) [hereafter *State Divorce Statutes Chart*]. For example, the relevant Wisconsin statute reads: "In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian." WIS. STAT. ANN. § 767.24(5) (West Supp. 1988).

³⁸ See *supra* note 6.

³⁹ It is interesting to note that this devaluing of the nurturing role undermines the rhetoric of the transformative prospects inherent in changing custody policy. That is, while moving away from gender bias, yet simultaneously devaluing nurturing, the likelihood that men will assume more responsibility for child care diminishes considerably. See sources cited *supra* note 14.

Chambers gives a good example of the devaluing of nurturing under the guise of neutrality when he writes:

[I]t is not at all clear, even in the context of a traditional marriage, that the primary caretaker *should* be considered to have 'earned' the child any more than the other parent. The other parent, usually today the father, has typically supported the family by working in the labor force. His earnings paid for the food the mother cooked and the clothes she washed. If the primary caretaker 'deserves' the child because of her contributions as childraiser, then the other parent 'deserves' to keep all stock and other assets held in his name, because they were acquired from his labors.

Chambers, *supra* note 3, at 501 (citations omitted) (emphasis in original).

⁴⁰ To illustrate, even if the ultimate goal is gender neutrality, imposing rules that embody such a view within the context of family law issues is disingenuous since the effect is to the detriment of those who have constructed their lives around "genderized" roles. In this regard, significant emotional as well as economic costs are risked under reformed divorce laws. For example, shifting custody policy means the threat of poten-

are gender neutral. This unfortunate and misguided result can be seen in the position of Judith Areen, an influential family law casebook author, who, in the teacher's manual that accompanies the second edition of her *Cases and Materials on Family Law*, concluded:

On balance, I find the primary caretaker approach . . . objectionable because it does not look first to the needs of the children, and because it is at the same time unnecessarily hostile to men because more gender neutral reforms (*i.e.* economic reforms) could be adopted to offset inequities in bargaining power. . . .

. . . I believe a more appropriate way to offset financial disadvantage is by direct modification of statutes governing child support, alimony and division of property, not by a presumption that is not gender neutral in impact.⁴¹

Professor Areen thus dismisses caretaking, elevates the concern for fathers, and naively minimizes the harmful economic consequences of a divorce system that refuses to acknowledge disadvantages to custodial parents.

In addition, this expanded concept of neutrality operates to set the stage for increased state control over custody decisions. Experts, those from the legal as well as the helping professions, are considered neces-

tial loss of children for many mothers at divorce. To most, this risk is too great to contemplate. As a result, many mothers exchange a bargained-down property settlement to avoid a custody contest because many mothers tend, in contrast to fathers, to consider custody a "non-negotiable" issue.

Furthermore, the choice of a gender-neutral position over one that focuses more specifically on child nurturing, such as the primary caretaker rules, makes no empirical sense. Gendered contributions are *not* equal. There are qualitative differences between the contributions of primary caretakers (typically mothers) and primary earners (typically fathers) to their children's upbringing. The income contributions fathers make for their families cannot be classified as "sacrifices." In the process of generating family income, fathers are simultaneously establishing themselves in their professions, a benefit they retain throughout their careers. Although this undeniably affords advantages to the entire family during marriage, the sharing of the benefit generally diminishes significantly after divorce, as evidenced by data relative to fathers' post-divorce child support payment patterns. See L. WEITZMAN, *supra* note 14, at 262-322. By contrast, mothers' sacrifices in providing daily care to children yield no collateral advantages, except those in terms of the attachment that forms between mother and child. Children consume the services mothers provide to them, with the years spent in child-rearing representing a depletable amount of the mother's nonrenewable resources. Similarly, the time a woman spends away from career development probably disadvantages her throughout her work life. For an extensive discussion of eliminating preference based on Motherhood (or any other genderized notion) in accordance with the goal of gender neutrality, see Fineman, *supra* note 5, at 851-52.

⁴¹ J. AREEN, *CASES AND MATERIALS ON FAMILY LAW: TEACHER'S MANUAL* 122, 124 (2d ed. 1985).

sary to construct and implement new degendered standards and procedures under the best interest test. The rationale for this increased intervention is, of course, the presence of children.⁴² Children are used politically as the imprimatur for the development of processes and rules that conceptually alienate children from their parents and place their futures in the control of state designated experts.⁴³

2. Concern for the Child in Custody Debates

The control over decisions concerning the custody of children has increasingly been viewed as appropriately removed from parents and placed within the public or political sphere. Such state involvement and control may occur at the macro level, as in the wholesale imposition of norms such as a presumption of joint custody,⁴⁴ or at the micro level, as in state control over and confinement of individual custody disputes by mandating the use of mediation⁴⁵ or court-controlled experts.⁴⁶ This shift in the perception concerning the locus of legitimate custody decision making is evident in a variety of transformations in the way that the issue is discussed and understood.

⁴² See *supra* notes 1-2 and accompanying text; see also *infra* note 66 and accompanying text.

⁴³ See *supra* note 2 and accompanying text.

⁴⁴ For a list of those states with a presumption or preference of joint custody, see *State Divorce Statutes Chart*, *supra* note 37, at 5; see also Canacokos, *supra* note 24, at 224-25 (arguing that presumption of joint custody is constitutionally mandated); Robinson, *supra* note 24 (arguing for mandatory joint custody except when a compelling reason for an exclusive award to serve the child's best interest exists); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739 (1983).

⁴⁵ See Mumma, *supra* note 2, at 26-30 (describing a court-associated mediation program developed in Virginia Beach, Virginia); Saposnek, *What is Fair in Child Custody Mediation*, 8 MEDIATION Q. 9, 15 (1985). But see Perlmutter, *Ethical Issues in Family Mediation: A Social Perspective*, 8 MEDIATION Q. 99, 103-04 (1985) (suggesting that a solution to the bargaining power dilemma is to bring lawyers into the mediation process); see also Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1351 (suggesting that when a wide disparity in the status of power of opponents exists, alternative dispute resolution methods may heighten racial and ethnic prejudice); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (arguing for a problem-solving approach to mediation); Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984) (arguing that mediation helps to lessen the problem of dominance).

⁴⁶ For a discussion of the role of mental health professionals in custody determinations, see *supra* note 26 and accompanying text.

Proponents of state involvement in both these forms justify the involvement by referring to an asserted need for independent advocacy for children, compellingly characterized as the innocent victims of divorce.⁴⁷ Increasingly, the mere presence of children at divorce, whether there is conflict over their custody or not, is viewed as *mandating* state involvement and control of the decision making process to ensure that the decisions that are made are in the best interest of the child.

Furthermore, children are viewed as creating the need for state control since they cannot advocate for themselves. In fact, children are viewed as separate, individualized focal points to such an extent that state intervention is mandated. Because of their perceived separateness and vulnerability children now require legal protection against their parents. Thus freed, children, or more accurately, the idealized concept of children, presents not only a problem but an opportunity for intervention by the legal system and the professional actors who cluster around it.⁴⁸ Unencumbered by the barrier created by the presumption that mothers, unless unfit, should care for children or that parents in general protect children's best interests, the perceived need for a child advocate beckons seductively on a policy level. At the same time it both symbolically and practically bestows significant influence and power on child advocates within the system.

Since under the present conceptualization of children's position at divorce their parents cannot be trusted to act in the children's interests, advocacy becomes the state's responsibility. Coincidentally, this concep-

⁴⁷ See *supra* notes 1-9 and accompanying text.

⁴⁸ See Mumma, *supra* note 2, at 24-26:

Our goal is to divert families from continued litigation, to help them resolve the current issues of dispute by agreement, and to assist them in establishing a more successful way of resolving future disagreements. Our brief intervention is designed to create an environment in which parents and children can disengage themselves from conflict and get on with their lives.

.....

... We were [helping] families negotiate their own custody and visitation arrangements, and they were staying out of court. Children who were displaying symptomatic behavior often began to show improvement — sometimes dramatic — when their parents began to cooperate. It became increasingly clear that parental agreement and cooperation had a greater effect on children than the actual custody or visitation arrangement.

.....

... The goal [of child custody mediation] is to shift the group from its preoccupation with negatives to a rediscovery of positives, from incompetency to themes of competency, and from conflict to cooperation.

Id.; see *supra* notes 33-34 and accompanying text.

tualization is the object of fierce competition among groups who publicly assert that they seek the improvement of the position of children within the legal system.⁴⁹ However, the child advocate position is structured in such a way that by definition it is placed beyond criticism. It is understood to be the morally and, therefore, the politically superior position, being the only one that is sanctified as officially advocating for the divorce-victimized child.

Asserting that a professional (or political) position conforms to or is advanced in a manner designed to advance the best interest of the child has become the rhetorical price of entry into the debate over custody policy. One way to describe the politics of custody in the United States in the past several decades is to note that virtually everyone who addresses the issues involved begins by asserting that his or her position is the one which incorporates and represents the interests of children. Such assertions mean little. The best interest of the child rhetoric obscures what is in large part a struggle among professional groups, special interest groups (particularly fathers' rights advocates), and legal actors⁵⁰ over who controls the substantive standards and the process and practice of child custody decision making.

The very fact that so many different groups use the same best interest of the child standard to advocate such different conclusions about what ideal reforms would look like⁵¹ indicates that there are profound problems with the very articulation of the test. What, for example, is the child's interest to be represented? How is it determined? By whom? Using what methods? Those in the mental health professions have successfully made substantial inroads into legal decision making in this area.⁵² These professionals have become accepted as experts in individ-

⁴⁹ This competition among professionals is most evident in the traditional antagonism between social workers and lawyers, as many social workers are uncomfortable with the adversarial nature of legal proceedings. See, e.g., Fogelson, *How Social Workers Perceive Lawyers*, 51 SOC. CASEWORK 95, 99 (1970); Herrman, McKenry & Weber, *supra* note 35, at 315 ("The rational logical emphasis of the legal system does not provide an ideal atmosphere for the resolution of interpersonal conflict and, in fact, may serve as a catalyst to increased hostilities."); Oneglia & Orlin, *supra* note 29.

⁵⁰ For a discussion of the struggle between social workers and lawyers, see *supra* note 49. For a discussion of the father's rights movement, see Fineman & Opie, *supra* note 7, at 116-118; see also *supra* note 9.

⁵¹ See *supra* note 30 and accompanying text.

⁵² See Girdner, *supra* note 23, at 166, 169 (arguing that mental health professionals have had a central role in determining custody decisions: "One assumption underlying the role of mental health professionals in custody determination is that they are able to make objective, reliable assessments and predictions of parental capacities and children's needs in the context of divorce."). For a skeptical consideration of the expert's

ual cases, as well as the sources of social science information⁵³ on which broad legislative standards, such as mandatory joint custody, are proposed. The rhetoric of these professionals is appropriated and successfully utilized by interest groups such as practicing mediators⁵⁴ or fathers' rights advocates.⁵⁵

III. QUESTIONS ABOUT THE CURRENT PARADIGM

There are two critical problems lurking within the idea of a child advocacy that I want to explore. The first problem is with the creation and acceptance of the child as an independent client separable from his or her parent and in need of advocacy services at divorce.⁵⁶ Even were the need for such advocacy clear, however, there is a second problem concerning the process of articulating and defining the child's best interest. The very fact that the client is also a child raises questions about the feasibility of accomplishing this difficult task.

A. *The Creation of the Child-Client*

When one takes a serious historical look at the academic literature that underlies the notion of an advocate for children in divorce cases, one is struck by the fact that neither the arguments for⁵⁷ nor the argu-

role in custody cases, see Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117 (1976).

⁵³ For a critique of the uncritical use of social science data in legal policy making, see Fineman & Opie, *supra* note 7.

⁵⁴ The solution often presented to remedy all sorts of family problems created by the adversary system is mediation. See, e.g., Mumma, *supra* note 2, at 24.

⁵⁵ See, e.g., Priorities for Dads PAC (Sept. 1984) (on file with the author). For an analysis of how fathers' rights groups view mediators as the preferred decision makers in custody disputes, see the primary field research of M. Raschick, *supra* note 8 (stating that one fathers' group advocates mediation to settle child support and custody problems).

In material presented to a Wisconsin Legislative Committee considering changes in that state's custody laws, William Johnson Everett wove the social worker's position into a fathers' rights plea: "[T]he child is not some indivisible 'thing' over which a person is to have 'custody' or not. Custody is for criminal suspects, not children. Similarly, children are not guests to be 'visited' by their parents. Visitation is for funeral homes and hospitals." Everett, *Shared Parenthood in Divorce: Parental Covenant and Custody Law 12* (1983) (unpublished manuscript on file with the Author). For the legislative response to such pleas, see State of Wisconsin Engrossed 1985 Assembly Bill 474, at 3 (on file with the Author), in which "visitation" is abolished in favor of periods of physical placement.

⁵⁶ See *supra* text accompanying notes 44-55.

⁵⁷ See *infra* note 107.

ments against⁵⁸ the institution have changed much over the past several decades. Essentially, the proponents of child advocacy assert that children need representation,⁵⁹ that they are victimized by divorce,⁶⁰ and that the traditional adversary process does not protect them and may even further victimize them.⁶¹ Little conceptual development has occurred beyond this assertion, however. No consensus has developed about the functions that a child advocate should perform or even who should serve as the advocate.⁶² Thus, child advocacy is an ideal that continues to be ill defined. Nonetheless, because of the political context of current family law reform, advocacy is an increasingly powerful ideal even if idiosyncratically implemented in the form of a variety of asserted "child-centered" reforms that are ineffectively criticized or controlled.

1. The Focus of Advocacy

For purposes of this discussion, the significance of the continued use of the best interest test, post maternal-preference and postfault, is found in its theoretical separation of the child from the family. When the maternal preference was viable, the child was conceptually aligned with

⁵⁸ Considerably fewer critics than fans of advocates for children exist. However, one critic has noted:

The present use of guardians or attorneys ad litem often fails to prevent decisions unfair to the persons they represent, and consequently their use debases the quality of the bar. When an attorney is paid for doing nothing, he is perpetrating a fraud on someone. . . . Encouraging new young lawyers to take money under false pretenses by the perpetuation of the present guardian ad litem practice certainly does nothing to advance higher ethical standards in the bar. . . . Lawyers should not be permitted to benefit from a system which jeopardizes the rights of the weakest members of society.

Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH L. REV. 619, 642-43 (1976) (footnote omitted).

⁵⁹ As one commentator has said:

If we are to determine custody of the child in an adversary proceeding, the child must be afforded independent representation. His interests, under such circumstances, can most effectively be protected if he has an advocate who is able to separate the child's interests from the emotional turmoil and financial conflicts of the parents.

Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage*, 50 CONN. B.J. 150, 167 (1976).

⁶⁰ See *supra* note 1.

⁶¹ See *supra* note 49.

⁶² For the disparities that occur in this area on a legislative level, see *supra* notes 33-34.

the mother and, absent compelling evidence,⁶³ courts presumed that she acted in her child's interest.⁶⁴ The designation of the "innocent," not at fault,⁶⁵ spouse could be viewed as functioning in the same way — as an allocation device.⁶⁶ Removing these "easy" indicators meant we had to focus on the child only, as an independent individual, with interests that might differ from both of his or her parents.⁶⁷ It is this development that clearly created the need for an advocate for the child as distinct from those who represent the parents or family.

The child is now viewed as a free floating entity who is the focus of the custody proceeding. Like all assertions of "rights" in the United States with its constitutional tradition, the language used in advancing

⁶³ Such evidence typically concerned adultery and intemperance. *See supra* note 23.

⁶⁴ For an analysis of the tender years doctrine, which was a gloss on the best interest test, see Zainaldin, *supra* note 7. For a discussion of how the rise and fall of the tender years doctrine has entailed both victories and defeats for women, see Olsen, *The Politics of Family Law*, 2 LAW & INEQUALITY 1, 12-18 (1984).

⁶⁵ California was a pioneer in no-fault legislation. *See* J. AREEN, *supra* note 23, at 267-75. No-fault reforms were the product of various forces. *See* L. WEITZMAN, *supra* note 14, at 16-19. The central concept was that divorces were "in reality only symptoms of the ultimate failure of the relationship," and not the result of a single party's fault. *See* THE 1966 REPORT BY THE GOVERNOR'S COMMISSION ON THE FAMILY, *quoted in* J. AREEN, *supra* note 23, at 268 (California State Commission).

⁶⁶ Because custody was granted to the innocent spouse as a general rule, the fault standard itself resolved custody questions.

⁶⁷ The movement to no-fault and the best interest standard made the custody question an area of inquiry separate from the determination of entitlement to divorce. This change was seen as mandating a role for behavioral scientists in custody cases, and some mediation literature has suggested a complete displacement of attorneys: "At the close of mediation, with a legally binding settlement agreement, either party may obtain an uncontested, no-fault divorce at a nominal cost." McKenry, *Mediation Eases the Split*, PRAC. DIG., Dec. 1979, at 8, 9. On the role of behavioral scientists in custody disputes, one commentator has stated:

[A]n analysis of the criteria inherent to the recently enacted [custody] statutes reveal [sic] a strong reliance upon factors that can best be evaluated by behavioral science. Among other factors, assessments must be made of the parent's intelligence, morality, knowledge of child development, personality, child-rearing attitudes, emotional ties with the child, and a host of other factors that are of a social and/or psychological nature.

The behavioral scientist has essentially been given a societal mandate for involvement and must be prepared to function appropriately in child custody determinations.

Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. MARRIAGE & FAM. COUNSELING, Jan. 1977, at 11; *accord* Musetto, *The Role of the Mental Health Professional in Contested Custody: Evaluator of Competence or Facilitator of Change*, J. DIVORCE, Summer 1981, at 69, 72-74 (promoting a more active role for mental health professionals in disputed custody cases).

arguments for child advocacy is symbolically powerful and compelling. This is particularly true because the term "child" is highly sentimentalized in our culture. For example, the first right listed in an early Family Court "Bill of Rights for Children in Divorce Actions" is that the child is "to be treated as an interested and affected person and not as a pawn, possession or chattel of either or both parents."⁶⁸ The justification for child advocacy is set forth in the form of a right attached to the child — "the right to recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare, including the appointment of a guardian ad litem to protect their interests."⁶⁹

Note that this Bill of Rights emphasizes children's need for, and right to, protection from their parents. It states that this protection is to be implemented through a legal advocate. It argues that the right of the child to advocacy is one to which the state must respond and that intervention is not only desirable but inevitable. The entire argument is built upon the unquestioned assertion that children are being used as "pawns,"⁷⁰ or are viewed as "property" by their parents.⁷¹

The acceptance of children as victims,⁷² which is evidenced by the rhetoric surrounding discussions of divorce and which is manifest in the interpretation of the best interest test, is the ideological basis upon which the arguments for increased state involvement have been constructed. A battery of experts who are presumed to act in the best interest of children are added to the process. The result is that both the questions and the solutions concerning any individual child are devel-

⁶⁸ Hansen, *supra* note 17, at 5. See *infra* Part III(B).

⁶⁹ See *Ex Parte Devine*, 398 So. 2d 686 (Ala. 1981); *State Divorce Statutes Chart*, *supra* note 37, at 5-6.

⁷⁰ This theme is strongly presented in the very influential work of Wallerstein & Kelly, *Children and Divorce: A Review*, 24 SOC. WORK 468 (1979). The authors state: Psychologically, an individual's rage against an ex-spouse, often expressed in litigation in which the child is the pawn, can apparently remain undiminished by the passage of time or by distance. The fight for a child may serve profound psychological needs in a parent, including the warding off of severe depression and other forms of pathological disorganization.

Id. at 472.

⁷¹ Historically, children were the property of their fathers, who upon divorce, received custody under the legal doctrine *paternal familius*. See J. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 61, 333 (1870). Such ownership entailed a corresponding duty to support the children, a duty which today is fulfilled through child support payments without the father having actual physical custody of the children. See 1 W. BLACKSTONE, COMMENTARIES *435-438 (rev. ed. 1966).

⁷² See Woody, *supra* note 1.

oped *independently of parental decisions or initiative*. The description and characterization of the problems facing the child, the important judgments that must be made, and the solutions which are suggested, are all in the hands of the professionals. The rationale for this is that the parents, experiencing divorce, can no longer be trusted to act in the child's interest. Child advocacy proponents believe that if a child's future cannot be entrusted to his or her parents, then a child advocate is essential. To these proponents the fact that the parents are enmeshed in an adversarial contest is sufficient to deem them incapable of acting in their child's best interest. Parents are assumed to be concerned only with their own self-serving ends.⁷³

2. The Advocates

A significant component of the modern, degendered, regulatory, and highly interventionist view of divorce is the notion that the state's historic interest in protecting children⁷⁴ establishes a legitimate avenue for the exercise of state control, through judgments at divorce, of parenting behavior. This judgment process depends on designating additional professional personnel for intervention into families.⁷⁵

If judges need to make decisions based on considerations of what is in the best interest of the child, but feel unprepared to do so,⁷⁶ they must look elsewhere for answers. For the most part, they have looked to members of the "helping professions,"⁷⁷ but legal specialists acting in the child's interest have also been employed.⁷⁸ It is not surprising that since the conceptual separation of the child occurs in the context of a divorce proceeding, which is *always* a legal proceeding,⁷⁹ child advocacy

⁷³ Rosenberg, Kleinman & Brantley state:

In addition to the universal and unconscious distortions and misunderstandings of relationships by each individual, in custody evaluations everyone is consciously distorting and misinterpreting. The situation precludes total honesty. Each parent is trying to present him- or herself as the best, the other as the worst, and will often censor or distort information to achieve that goal.

Rosenberg, Kleinman & Brantley, *Custody Evaluations: Helping the Family Reorganize*, 63 SOC. CASEWORK 203, 205 (1982).

⁷⁴ For an historical discussion of the state's interest in protecting children, see Grossberg, *supra* note 27.

⁷⁵ See *supra* note 67 and accompanying text.

⁷⁶ For a discussion of the difficulties of the judiciary in determining the best interest of the child, see *supra* note 26.

⁷⁷ See *supra* note 26; see, e.g., Girdner, *supra* note 23, at 166.

⁷⁸ See *supra* note 34; see also *infra* note 107.

⁷⁹ Some lawyers and mediators, however, fight for legal reforms that will remove

has become increasingly understood as a requirement for legal representation in divorce proceedings. The best interest of the child test, therefore, is a substantive rule that, to be appropriately implemented, has the effect of creating a "client" — the child — for the legal advocate.⁸⁰ At the same time, formalizing the idea of child advocacy allows the best interest test to remain the substantive standard. Thus, the procedural innovation of child advocacy masks the substantive test's inadequacies in a world in which social norms such as maternal custody may not be acceptable politically and, therefore, cannot be determinative legally.

B. Implications of the Paradigm

There are two questions which we should ask. The first is whether it is accurate or helps discussion of the issues to cast children as victims of divorce. The second question to consider is, even if children are victimized by divorce, does this necessitate the establishment of separate, independent legal advocacy? The first question should give rise to additional ones. For example, if it is true that parents during the divorce process are so typically self-absorbed as to use their children as "pawns," isn't it appropriate that child advocates should be required in *all* divorces when there are children? After all, pawns are not only sacrificed in games that end up in court but are equally at risk in negotiated or noncontested cases.

Further, and most important, if it were true that a large number of parents can comfortably be presumed to have the tendency to sacrifice their children's well-being in this way, isn't the real conclusion we should reach be that there are many people who are unfit parents, unable to separate out their own needs and to act in their children's best interest? Could they *ever* be trusted to do so? Can a parent who views his or her children as "property," or treats them as "pawns," be expected to convert and be nonexploitive with the granting of divorce decree and custody award?

The second question about the ability of child advocacy to remedy victimization also raises additional considerations focused on what ideological or political purpose such advocacy actually serves. The typical characterization of the problem places a lot of faith in professionals and

divorce and custody decision making from the legal system. *See, e.g.,* Folberg, *Divorce Mediation: A Workable Alternative*, in A.B.A., *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION*, (H. Davidson, L. Ray & R. Horowitz eds. 1982), *quoted in* KRAUSE, *FAMILY LAW CASES, COMMENTS AND QUESTIONS* 702 (2d ed. 1983).

⁸⁰ *See infra* note 100.

assumes that, at best, parents involved in the vast majority of custody cases become temporarily incapable of acting in both their own and their children's interests.⁸¹ I am not sure we should be satisfied by unadorned assertions of wanton parental self-absorption and blatant sacrifice of children's interests, no matter the degree of professional assurance or force with which they are made.

The net result of the uncritical acceptance of the child as victim construct is state sponsored substitution of informal nonlegal professional decision making for that of parents⁸² or of the courts.⁸³ The significant *input* into the custody decision making process is no longer through parents, but professionals, inaccurately designated as "neutral" or "disinterested" and legitimated by the notion that they alone are capable of acting in the best interest of children.⁸⁴ Furthermore, the *locus* for the decision making is no longer the judge, but these same professionals. I

⁸¹ As one commentator has pointed out:

Parents are normally entrusted by law with providing for the basic human needs of their child. But when the family unit has been broken in a divorce custody dispute, neither parent can be presumed to be the exclusive representative of the child. Neither parent can be relied on to communicate to the court the child's interests that differ from those of one or both parents.

Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1134 (1978).

⁸² Clearly social workers have an enormous amount of power over the decision making processes involved in the divorce as they take control of the task of "restructuring" the family:

Just as the relationship between married spouses is a critical determinant of family interaction, so, too, is the relationship between divorced spouses critical to divorced family reorganization and interaction. . . . The [stressful] process of coparental redefinition requires that divorced spouses separate their spousal and parental roles, terminating the former while redefining the latter. This very difficult and somewhat paradoxical process forms the nucleus of divorced family reorganization and redefinition.

Ahrons, *The Continuing Coparental Relationship Between Divorced Spouses*, 51 AM. J. ORTHOPSYCHIATRY 415, 415 (1981).

⁸³ For a discussion of the centrality of mental health professionals to custody decisions, see Girdner *supra* note 23, at 166. As one commentator has proposed: "[C]onciliation, as well as reconciliation, services should likewise be a mandatory requisite of these proceedings which are fraught with more emotional tension than legal problems. The ultimate goal should be the removal of the adversary concept from the area in which children are involved." Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103, 109-10 (1973).

⁸⁴ See, e.g., Woody, *supra* note 67, at 11.

am far from convinced that this development is necessary to benefit children and have serious doubts as to whether it is even desirable.

C. Construction of the Child-Client's "Best Interest"

Related to the observation that the terms of the substantive legal test for custody have created a climate in which we easily accept the conclusion that there is a necessity for child advocacy is the question of how this child's best interest is to be ascertained. When the child is perceived as separate or independent — a client in need of separate counsel⁸⁵ — there must be some way in which to assess what the content or goal of the representation should be. How does the child's advocate in the divorce proceeding determine what is in the child's best interest and act to advocate that interest?

If the advocate is a member of the helping professions, the assumption is that he or she possesses the skills to make the best interest determination.⁸⁶ Normally, however, these professionals are not advocates within the context of particular cases but are viewed as expert, neutral witnesses. Thus, professional assessments are considered evidence to assist in the determination of best interest, yet an actor is necessary to perform the advocacy role in the adversary context — to represent the child. In most instances this advocate is a lawyer.⁸⁷

The presence of an attorney as the child advocate creates problems that transcend (and complicate) the problems associated with the involvement of mental health professionals who perform custody evaluations. This is particularly true because of role confusion between these

⁸⁵ There is a real belief among professionals associated with custody disputes that representation is the only way to protect the child(ren) of a divorce: "The most important single safeguard which could be utilized to assure the psychological best interest of the child, in a custody action, would be to provide counsel to represent him." Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 66 (1969).

⁸⁶ See, e.g., Girdner, *supra* note 23; see also Hansen, *supra* note 31.

⁸⁷ See Berdon, *supra* note 59 (the child's interests must be separated from the emotionally and financially turbulent interests of the parents); Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 594-95 (1976) (arguing that a separate advocate is needed for the child in order to bring the child's needs to the attention of the court); Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971) (arguing that the best way to achieve the best interest of the child is by granting him/her counsel); Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501 (1963) (discussing the use of "law guardians" in New York in juvenile delinquency and child neglect cases); Podell, *supra* note 83; Note, *supra* note 81.

professions,⁸⁸ coupled with uncertainty as to who and what is represented.

1. The Function of the Legal Advocate

Even if one accepts the idea of a need for independent child advocacy, a critical problem is connected to the perceived need for legal representation or an adversarial "champion."⁸⁹ Once we establish a need, we must consider the problem of the appropriate *function* of the independent child's advocate.⁹⁰ This creates a dilemma because the role of advocate is dependent on the acceptance of and belief in the characterization or creation of the child-client as potential victim of his or her parents. If this is a true characterization then the parents cannot be trusted to provide objective or neutral information about the child and his or her interests. All information from the parents is suspect.⁹¹ Thus, ascertaining the child's interests involves the advocate in constructing the child's best interest — that which is to be represented or advocated in the divorce proceeding. The significant question is how is this interest created independent of parental input?

The modern conceptualization of the child advocacy process has

⁸⁸ In recent years there has been considerable interpenetration of the legal profession and the helping professions. The members of the helping professions are now, in many respects, far more central to custody determinations than lawyers, while the lawyers are moving more towards the growth area of mediation. See *supra* note 54.

⁸⁹ See Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100-09 (1984) (making a distinction between the advocate as Champion and the advocate as Investigator).

⁹⁰ One commentator has pointed out that "an equally crucial issue is posed by the question of the role that the attorney should play — is he a guardian *ad litem* in the traditional sense, or is he an advocate?" Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 169 (1974).

⁹¹ The parents going through a divorce are portrayed as using their child(ren) for purely instrumental reasons in the divorce proceedings:

It is tempting to believe that in a case where two parents are contesting the right to custody of a child, each one is arguing for the child's best interests as he or she perceives them. Unfortunately, the motivations behind the custody demands of the parents are often ambivalent. Mothers may seek custody of children though antipathetic to them, in order to exert influence over their former spouses who seek visitation arrangements. Fathers may seek custody as a bargaining tool to lower the mother's child support and alimony demands, or may fail to seek custody, despite their fitness, because of the realization that mothers obtain custody in most cases. Finally, many parents seek custody as a vindication of their innocence in the break-up rather than to provide the best home for the child.

Genden, *supra* note 87, at 573 (citations omitted).

eliminated parents as sources of the best interest determination. In addition, the desire for gender neutrality has made suspect social and informal empirical observations about mothers and nurturing.⁹² Thus, we are left with three potential sources of the best interest determination. First, and easiest to dispose of quickly, is the suggestion that we look to the child to ascertain what solution should be advocated. The legal advocate could ask the child which parent he or she prefers and then advocate whatever result the child indicates. This is roughly how an attorney would act in representing a competent adult client. However, the children's choice approach is not considered a viable option, at least for children under the age of fourteen or fifteen.⁹³ Many children are unable, or unwilling, to express a preference between competing potential custodial parents. Moreover, some research indicates that it even may be *harmful* for older, competent children to choose between parents at divorce.

The vast majority of legal child advocates do not adhere to such a narrow view of their responsibility. They do not conceptualize the role of the child advocate as being an advocate for the *child*, per se, but an advocate for the *child's best interest*. This is a distinction of considerable importance. Instead of merely representing the child's preference, such an approach demands that the child's legal advocate undertake the task of making an assessment or evaluation of what is in the child's best interest, independent of, though he or she may consider, the child's wishes as to his or her custody.

2. The Advocate and Ascertaining Best Interest

How can the legal advocate make an evaluation of what is in a child's best interest? In practical terms the requirement of independent advocacy means that there are two nonparental contenders for primary

⁹² Much recent academic writing appears to devalue the nurturing ideal or at least to assume that men can nurture children as well as women. See Chambers, *supra* note 3 (listing several studies that support the importance of fathers in post-divorce families); see also FATHERHOOD AND FAMILY POLICY, *supra* note 3. The catalyst for this view seems to have been the psychological parent theory advanced by J. Goldstein, A. Freud, and A. Solnit. See J. GOLDSTEIN, A. FREUD, AND A. SOLNIT, *supra* note 28. Their view, introduced at a time when mothers received custody in the vast majority of cases, was that the psychological parent would retain complete control over the child's upbringing, including decisions about when and whether the child would see the non-custodial parent. *Id.* at 38.

⁹³ See Guggenheim, *supra* note 89, at 121-26 (arguing that appointing attorneys for children too young to have control over them undermines the legitimate interests of the parents in familial privacy and autonomous decision making).

determiners of the best interest of the child at divorce. There is a need not only for the advocacy but also for the construction or creation of that which is urged as in the child's interest. The societal signals which would indicate that in most instances this would lead to a maternal preference are to be excluded by the demands of gender neutrality. Structurally we are then presented with a choice between the two types of professionals who hover around the divorce process — the legal advocate on the one hand and the helping professional on the other.

The legal professional may make the decision, acting first as both an investigator and collector of information and thereafter as an informed expert who has examined the evidence and reached a conclusion as to what is in the best interest of the child. This choice creates the necessity for the legal advocate to investigate, to collect information from both experts and nonexperts about the child and family, and to make a judgment about what should be the appropriate placement.⁹⁴ Thus, the legal advocate acts in this regard as an investigator and as an expert within the legal process. The role of advocate is one with substantive dimension.

Not only has a client been created for the legal advocate,⁹⁵ but the characteristics of that client necessitate that one primary function for the legal advocate is to construct this client's interest in a manner which, to a large extent, is independent of the client's direction.⁹⁶ In this instance, when the legal advocate is making an independent assessment of the quality of evidence accumulated, he or she is no better equipped than a judge to make such an assessment and would seem, for that reason alone, to be unnecessary to the process.⁹⁷

The legal advocate's role may be more limited by the increasing

⁹⁴ In the words of one writer:

Without a separate advocate, the court may not perceive the existence of the special needs of the child. Even if the court does recognize such needs, so long as other parties have separate advocates to represent their interests, *the court will need an advocate to articulate the child's interests and to marshal the supporting facts.*

Genden, *supra* note 87, at 573 (emphasis added). The investigative capacity of the advocate has also been codified. *See, e.g.,* NEB. REV. STAT. § 42-358 (1984) (providing that an attorney appointed to represent a child in a custody dispute "shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children").

⁹⁵ On the creation of the child client, see *supra* note 78 and accompanying text.

⁹⁶ *See* Genden, *supra* note 87.

⁹⁷ However, this is clearly not the rhetoric of those in favor of advocates for children, who believe the advocate is integral to a fair custody determination by the judiciary. *See* Berdon, *supra* note 59, at 167; Watson, *supra* note 85.

value placed on the use of various mental health professionals in the divorce context.⁹⁸ These helping professionals (psychological, psychiatric, or social work) will explicitly serve as the arbiters of the child's best interest. In this process the legal advocate will act as nothing more than the advocate of expert helping professionals' opinions as to what is in the child's best interest. Thus, in effect, the mental health professional becomes the *substituted* client, one who speaks for the constructed child-client and is the vehicle through which the child's best interest is realized.

Increasingly, experts' conclusions in this area have been centered on imposing the ideal of shared parenting after divorce.⁹⁹ In a gender neutral world perceived to require the devaluation of nurturing, these experts have undertaken the task of bringing fathers back into the post-divorce picture.¹⁰⁰ This has resulted in the creation of professional norms which would give custody to the "most generous parent," or the parent most willing to share the child with the other parent.¹⁰¹ A desire

⁹⁸ For a discussion of the interpenetration of the legal and mental health professions in the context of custody disputes, see *supra* note 88.

⁹⁹ See Abarbanel, *supra* note 10, at 321; Greif, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311, 318-19 (1979); Noble, *Custody Contest: How to Divide and Reassemble a Child*, 64 SOC. CASEWORK 406, 411 (1983); Wallerstein & Kelly, *supra* note 70, at 471; *supra* notes 11-12 and accompanying text. Social workers are aware that the operative legal standard in a given jurisdiction constrains the extent to which they can implement their ideal postdivorce family structure of shared parenting. Many jurisdictions still require the selection of a custodial parent when, for example, no statutory authority exists for joint custody. Even in those instances, however, social workers' rhetoric suggests ways to achieve post-divorce shared parenting in fact if not by law.

¹⁰⁰ See Greif, *supra* note 99, at 319 (criticizing visitation rights as not maximizing the contact between the child and both parents). A plethora of literature touts the psychological benefits to fathers and children of joint custody. See, e.g., Abarbanel, *supra* note 10, at 320-29 (finding that the benefits of joint custody outweighed the problems it caused for the families studied); Bowman & Ahrons, *Impact of Legal Custody Status on Fathers' Parenting Postdivorce*, 47 J. MARRIAGE & FAM. 481, 481-88 (1985) (arguing that joint-custody fathers are far more active in parenting after divorce than those without custody).

¹⁰¹ Some states have enacted so-called friendly parent provisions. See, e.g., CAL. CIV. CODE § 4600(b)(1) (West Supp. 1988); COLO. REV. STAT. § 14-10-124(1.5)(f) (Supp. 1988); ME. REV. STAT. ANN. tit. 19, § 752.5H (Supp. 1988); MICH. COMP. LAWS ANN. § 722.23(j) (West Supp. 1987). For a discussion of these statutes, see Schulman & Pitt, *supra* note 14, at 554-56.

Sometimes these generous parent innovations are justified by the custodial parent's perceived need for assistance from the noncustodial parent: "Parents, like children, benefit from two-parent families. The burdens of being a single parent are unfair not only to the child but also to the parents." Pruhs, Paulsen & Tysseling, *Divorce Mediation:*

for sole custody has been labeled "pathological"¹⁰² and is to be discouraged or punished by legal rules that mandate post-divorce cooperation and sharing. The child advocate is part of a larger process whereby professional norms such as these are incorporated and made operative within the context of the legal system. The child advocate ends up representing the professional ideal.

3. Function of the Independent Advocate in Practical Terms

There is an important additional problem with the concept of a legal advocate as a child's *independent* advocate. It is not clear why one needs a legal advocate to interpret and assess expert and other information and reach a conclusion as to the child's best interest. Isn't this what a judge would do? What does an attorney for the child add in this process? In some instances, *perhaps*, some witnesses not called by a parent might be produced, or an expert employed who was not consulted by either parent nor scheduled by court personnel. One wonders how often such a positive contribution by the legal advocate occurs, however, and whether the information placed before the judge in such cases is typically dispositive or merely cumulative.

Furthermore, there are real dangers with accepting the child advocacy model. When the legal advocate represents the helping professional's opinion as to the child's best interest, the presence of an attorney designated as the child's advocate may give added undue weight to professional advice that should be only one factor in fashioning a

The Politics of Integrating Clinicians, 65 SOC. CASEWORK 532, 535 (1984).

At other times, the children's perceived needs seem paramount. "It is clear that the best interests of the child involve much more than the linear relationships between parent and children. . . . One major consideration often may be the custodial parent's ability to allow an arrangement for an appropriate continuing relationship with the noncustodial parent as well as significant others." Rosenberg, Kleinman & Brantley, *supra* note 73, at 207.

¹⁰² See, e.g., Kelly, *Further Observations on Joint Custody*, 16 U.C. DAVIS L. REV. 762, 769 (1983) (recognizing some problems of abuse but emphasizing the problem of "emotionally disturbed women who, due to their own pathology, vigorously fight a father's desire to be involved in the children's lives"). *But see* Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U.L. REV. 485, 527-31 (1981) (suggesting that the stereotype of the manipulative and vindictive mother opposing joint custody is overstated). The therapist is viewed as having a potentially powerful role in correcting pathological behavior. See Abelsohn, *Dealing with the Abdication Dynamic in the Post Divorce Family: A Context for Adolescent Crises*, 22 FAM. PROCESS 359, 365 (1983) (stating that "[t]he therapist delivers this basic message to the mother — you lose, you do not win, if you succeed in keeping your children from their father").

judge's opinion. This may result in the social worker's or psychologist's functionally being the ultimate custody decision maker when the child's attorney uses the helping professional's recommendations to establish what is in the child's best interest.

A primary issue in the current construction of the various roles in custody decision making should be the consideration of whether the legal advocate can be independent of the mental health professional. A powerful combination emerges when social worker and child's attorney agree, for whatever reason. In addition, the judge's role may be compromised. The presence of the child's legal advocate may present an easy out for the judge. It provides the judge with an additional referent — another "neutral" actor who is cast as representing only the child's interest and, for that reason, creates the illusion that his or her conclusions can be safely trusted.¹⁰³ Furthermore, the legal advocate, as the advocate of best interest will inevitably be in the position of merely parroting idealized notions of what is in all children's best interests according to the current theories of mental health professionals.

IV. POLITICAL IMPLICATIONS OF THE ACCEPTANCE OF THE IDEA OF CHILD ADVOCACY

As stated earlier in this Article, the crux of the problem¹⁰⁴ is that the evolving substantive standard¹⁰⁵ is so amorphous, undirected, incomprehensible and indeterminate as to be meaningless without a substantial "extra-judicial implementation team." The only response to a degendered, no-fault divorce system, short of scrapping the best interest of the child test, is to create alternative decision makers, and the referral of all substantive decisions to them. There are problems with this response, no matter which professional is the source of the best interest determination. However, as discussed earlier, the problems for a legal advocate are extreme.¹⁰⁶

The legal advocate functions to give the illusion of neutrality to the decision making process. The illusion allows the system to limp along

¹⁰³ In this way, the role of a child's legal advocate can serve to virtually relieve the judiciary from the burden of being responsible for ascertaining the child's best interest. For a discussion of the judicial ability to determine the best interest of the child, see Oneglia & Orlin, *supra* note 29, at 43-44; Charnas, *supra* note 29, at 62.

¹⁰⁴ The problem also necessitates the development of institutions like the "guardians ad litem" or children's legal advocates.

¹⁰⁵ The evolving substantive standard is the best interest of the child standard as applied in its contemporary gender neutral manner.

¹⁰⁶ See *supra* Part III.C.3.

without serious reassessment of the political and practical roles played by mental health professionals and others who seek to define the best interests of children through processes and standards that enhance the position and power of their own professions. Custody decision making and the rules that govern it involve more than just making individual decisions regarding placement of children. Submerged in the rules and processes are political and ideological conflicts between “mothers” (or nurturing and care taking values) and “fathers” (or independence and financial security values); between the legal profession (or advocacy and adversariness as values) and the helping professions (or treatment and therapy as values); between the moralists (who would burden the divorce system so as to impede or discourage divorce and to punish those who seek to divorce)¹⁰⁷ and the secularists (who would seek to implement rules that ensured individuals did not lose too much if they decided to leave their marriage).¹⁰⁸ The illusion and pretense of objectivity and neutrality, of which the legal advocate is but one part, serve the interests of those empowered by the status quo and the bias in professional opinion making.

¹⁰⁷ Kleinfeld, who sees child advocates as a divorce deterrent, provides an excellent example of this in the present context:

[Children] may have a profound interest in the preservation of the marriage and be substantially and irreparably harmed by the granting of a divorce. Such a right to intervene or status as a necessary party would not imply that divorce could not be granted where there were children, for in every lawsuit some represented parties lose. It would mean that where the grounds for divorce permit or encourage courts to consider the presence of children in deciding, for example, whether sufficiently ‘cruel treatment’ exists to justify a divorce, that children through their counsel would be permitted to articulate their interests. Public policy does not favor divorce, so there can be no general objection to permitting the entrance of a party who may decrease the probability that it will take place.

Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 320, 333 (1970) (footnote omitted).

¹⁰⁸ The secularist reforms are often posited as gender neutral, *e.g.*, equal property division. See Fineman, *supra* note 5, at 832-42 (describing the gender-specific impact of the gender-neutral, equal property division reform in Wisconsin); see also Neely, *supra* note 14, at 180-81 (arguing that the unequal impact of the rule on fathers is justified because women are in an unequal bargaining position and often trade economic advantages because they fear losing custody). In any case, many family law rules have a gender-specific impact; joint custody norms certainly have gender-specific implications.

V. THE IDEAL ROLE FOR THE CHILD'S LEGAL ADVOCATE

In spite of the problems with the idea of child advocacy addressed in this paper, I do think that legal advocates could perform two valuable functions in custody decision making as it occurs today. Both are valuable political functions. First, I envision, in individual cases, that a child advocate could bring legal values, such as due process¹⁰⁹ and a preference for public decision making, back into a process that has become so informal and nonlegal as often to operate according to the whims of politically unaccountable professionals or to be driven by professional fads and biases.¹¹⁰

Second, the potential child advocate could perform a public function by lobbying for the replacement of the best interest of the child test with a more determinative substantive rule — one more susceptible to the protections of traditional legal decision making and more responsive to actual caretaking responsibilities. As the substituted rule, I suggest the primary caretaker rule, which rewards past care and concern for children and minimizes the role and power of the helping professionals in custody decision making.¹¹¹

The primary caretaker rule has been criticized as merely being the old maternal preference in gender neutral terms because it would operate within our current social situation to award custody more often to mothers than to fathers.¹¹² It seems to me that the fact that this is offered as a criticism shows how far we have strayed in the United States from real concern for children to a desire to adhere to simplistic notions of equality between spouses at divorce. The primary caretaker rule is gender neutral on its face, and men can change their behavior if they want to have an opportunity to get custody. The rule values nurturing and caretaking and rewards it. This is appropriate.

In addition, one advantage of the primary caretaker rule is that the evidence on which it relies can be gleaned in open court according to our notions of due process and publicly accountable decision making.¹¹³

¹⁰⁹ For a discussion of the constitutional rights of children to counsel, see Genden, *supra* note 87, at 581-83; Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

¹¹⁰ For an example of the ways professional theoretical fads can determine custody patterns, see *supra* note 92.

¹¹¹ The primary caretaker rule provides that children need day-to-day care and that the parent who has performed this primary care during marriage should get custody. See *Garska v. McCoy*, 278 S.E. 2d 357 (W. Va. 1981) (giving one version of this test).

¹¹² See J. AREEN, *supra* note 41.

¹¹³ See Neely, *supra* note 14. Judge Neely anticipates that the evidentiary hearing on who is the primary parent would only last a few hours and that the witnesses will

It avoids the need for speculative assessments about psychological consequences of attributes and refocuses responsibility for the decision on the parents and, if they can't agree, on the judge who must make the factual finding as to who has cared for the child. Therefore, the rule takes decision making away from the helping professionals.

There have always been voices of doubt raised about the effectiveness of the current system, given its reliance on predictions about the future well-being of children based on scanty evidence of questionable validity.¹¹⁴ The legal advocate could best serve children's interests by not viewing him- or herself as only a part of a best interest team. Rather, the legal advocate should not be aligned with any other professional but should remain skeptical and critical of them all. The helping professional experts would be presumed to be useful *only* to weed out or identify those parents who are *clearly unfit* to care for their children. Providing that the tests and methods of such professionals are reliable, they can tell us who falls below a legally defined bright line. Their opinions as to the superior parent — the one who most resembles their professional ideal and which in current practice would be the best interest recommendation — should be viewed as just an opinion. At most, it would be entitled to no more respect than any other opinion. Optimally, it would be excluded as irrelevant in most custody determinations.

The legal advocate's function would, in those few cases when necessary, ensure that the helping professional's opinion was not overvalued in contrast with information more relevant to the determination of who had acted as the primary caretaker — that supplied by teachers, neighbors and others who have more extensive exposure to the individual child.¹¹⁵ The legal advocate would act as a check on this private, informal decision-making process. In this way professional biases (such as the current ones favoring shared parenting or creating a custody preference for the most generous parent) would be recognized as ideological and be subjected to vigorous and critical probing. This would truly be in the child's best interest.

When an expert testifies, the expert's education and experience

be neighbors, teachers, etc., not experts. *Id.* at 181.

¹¹⁴ For a critical analysis of the use of social science data in custody determinations, see Fineman & Opie, *supra* note 7, at 113-18.

¹¹⁵ One commentator has hypothesized that such a standard would encourage fathers to coparent during marriage. See Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *Women's Rts. L. Rep.* (Rutgers Univ.) 235, 241-43 (1982).

would be explored by the legal advocate. Supervision and a critical assessment of the fact gathering process of the mental health professional would be essential functions for the legal advocate in fulfilling his or her responsibility to the child. The goal would be to expose, and thus examine, the process of reaching a nonlegal professional opinion. What has been lost under current practice are legal procedural values — due process, adherence to clear standards, the right to cross-examination — in addition to the undervaluing of nurturing and caretaking. The current referral to extra-judicial personnel may make us feel more secure because we can believe that some other profession is appropriately taking care of the custody business, but that illusion may not work in the best interest of the children.