Introduction

It is known that approximately 43 percent of marriages in America end in divorce.[1] Even though millions of our children's lives are dramatically affected by the family law child custody system, the shifting character of relationships in the United States is having an equally important impact on children's lives. By 1994 approximately 11 percent of children were born out of wedlock, and 40 percent of American children would live with "their unmarried mother and her boyfriend some time before their 16th birthday. . . ."[2] In 1994 of the 18.6 million children living in single-family homes, two-thirds of those children had one parent as a result of divorce or legal separation.[3] Research has also demonstrated a direct correlation between unwed pregnancy or single-parent families and poverty, poor health, child abuse, and juvenile delinquency.[4] It is therefore not surprising that annually there are more than 2.9 million reports of child abuse in this country and that a significant percentage of those reports result in child dependency actions.[5]

[1] *Family and Fertility, National Institute of Child Health & Human Development*, at 2 (2003), http://www.nichd.nih.gov/publications/pubs/coundbsb/sub4.htm#divorce. Contemporary divorce data are incomplete because the marriage and divorce national database administered by the National Center for Health Statistics was eliminated in 1995 "because of lack of resources." COUNTING COUPLES: IMPROVING MARRIAGE, DIVORCE, REMARRIAGE, AND COHABITATION DATA IN THE FEDERAL STATISTICAL SYSTEM, at 25–26 (The Data Collection Committee of the Federal Interagency Forum on Child and Family Services, December 13, 2001).

[2] *Increased Cohabitation Changing Children's Family Settings*, 13 *Research on Today's Issues*, at 1 (September 2002, Demographic and Behavioral Sciences Branch, Center for Population Research, National Institute of Child Health and Human Development, National Institutes of Health).

[3] Richard Kuhn & John Guidubaldi, Child Custody Policies and Divorce Rates in the United States, Paper presented at the 11th Annual Conference of the Children's Rights Council, at 1 (Washington, D.C. 1997).

[4] *Family and Fertility, supra* note 1, at 9.

[5] John E. Myers, *Definition and Origins of the Backlash Against Child Protection*, in EXCELLENCE IN CHILDREN'S LAW, 21, 32 (National Association of Council for Children, 1994).

Family child custody and child dependency proceedings take up a significant portion of states' judicial calendars. For instance, in California in the 1998–9 fiscal year there were 1,594,807 civil filings.[6] Of those civil filings, there were 155,920 family law cases and 41,890 child dependency proceedings, for a cumulative total of 12.5 percent of all civilly litigated disputes. It is no wonder that, in the more than 1 million child custody and juvenile dependency cases litigated annually in the United States, numerous issues involving legal ethics confound, confuse, and capture the tens of thousands of attorneys litigating these emotionally laden disputes.[7]

Child custody and dependency proceedings are unique legal universes that often involve legal issues that defy the ethical categories articulated by the *American Bar Association Model Rules of Professional Conduct*, state ethical rules, and judicial and executive pronouncements upon best practices and minimum standards of representation. And unlike ordinary civil cases, which are usually permanently resolved in a single judgment, custody and dependency proceedings can continue for years in successive court hearings until the child reaches the age of majority.[8] In these quasi-criminal/quasi-civil systems, notions of zealous advocacy collide with the parties' and court's visions of children's best interests. Attorneys representing abusing parents often find themselves at the cusp of ethical violations of client confidentiality as they struggle with their own conscience in not disclosing their clients' future plans or propensity for reabusing their children. And perhaps to a greater extent than in any other legal area, economic necessity tacitly sanctions conflicts of interests among multiple party representation that would never be tolerated in criminal and/or ordinary civil proceedings. Unconscionably underfunded dependency court systems presumptively permit one attorney to represent multiple siblings unless an actual conflict of interest arises. And in civil custody hearings one or more parents, and usually the children who are the subject of the hearing, do not even have legal representation; if they do, it may be no more than a lay guardian ad litem who frequently, unlike a lawyer, has no duty of confidentiality or loyalty to the client.

But on an even more elemental level, a jurisprudential debate has persisted for almost twenty years regarding whether children in child protection and/or family custody proceedings should be represented by counsel and, if so, what the appropriate model of representation should be. "The questions of when and why counsel should be appointed for children lie at the heart of

[6] COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1989–1990 THROUGH 1998–1999, at 46 (Judicial Council of California, Administrative Office of the Courts, 2000).
[7] *Id.* at 46, 56.
[8] *Child Custody Proceedings Reform: High-Conflict Custody Cases: Reforming the System for Children, Conference Report and Action Plan*, at 1 (American Bar Association Family Law Section, September 8, 2000, http://www.abanet.org/child/wingspread.html).

all dialogue about ethical issues in representing children."[9] In 1984, Martin Guggenheim articulated several reasons why attorneys in child family custody cases are not advisable.[10] Whether the child's attorney adopts the role of fact-finder or zealous advocate, Professor Guggenheim argues that such representation (1) is arbitrary because the child's attorney will merely substitute his or her world view in determining the child's best interest; (2) until the state has proven that the parents neglected or abused their children, the presumption should be that the parents speak for the child's best interest; and (3) taking away parents' decision-making power and placing it in a child's attorney before a finding of abuse may be unconstitutional.[11] He further argues that even if the petition is sustained, counsel serves no real purpose until the child is at least 7 years old and has sufficient capacity to assist the attorney. If the child is not competent to assist in the case, the child's attorney is not only "irrelevant; having counsel is also potentially destructive of our legal process" because the attorney as fact-finder supplants the role of judge as fact-finder.[12] Professor Guggenheim further argues that providing counsel for children in family custody cases needlessly "becomes an invitation to pry into the personal affairs of the separating spouses," thus stripping parents of their right to decide what secrets will be publicly revealed. Professor Guggenheim has recently demonstrated that at the heart of the United States Supreme Court opinions regarding children's rights is a core principle that children's rights, vis-à-vis the government, are best protected by focusing on parental rights, not children's autonomy. "Simply stated, the bulk of laws affecting children and the law in the United States are interwoven with the laws of parental authority. One can fully grasp the complete scope of children's rights under American law only by knowing the rights of their parents."[13] He argues that a best interest of the child standard, rather than a parental rights doctrine, leads to unnecessary state intervention into family lives: "Any alternative to the parental rights doctrine empowers state officials to meddle into family affairs and base their decisions on their own values. . . . A best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise."[14]

John E. B. Myers has gone even further in arguing that parties in child protection cases, including children, meet informally with a judge, without any attorneys, in a form of alternative dispute resolution in which the rules of evidence are suspended, all information disclosed is confidential, and the

[9] Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1618 (1996).
[10] Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation For Children*, 59 N. Y. U. L. REV. 76 (1984).
[11] *Id.* at 127.
[12] *Id.* at 102.
[13] Martin Guggenheim, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 17 (2005).
[14] *Id.* at 38–39.

"judge decides what is needed to help the family and keep the child safe. The judge discusses her ideas with the others, and comes to a resolution."[15] And Emily Buss articulates a child's attorney role as neutral observer who does not express an opinion regarding the child's best interest, but who rather ensures that the process operates fairly and that the other attorneys perform competently.[16]

But even if a state decides to appoint counsel for children in abuse and neglect proceedings and in family law custody cases, at what age does the child have capacity to determine the goals of the litigation and his or her best interest? The problem is that the child psychological developmental literature does not provide "definitive, fixed information upon which to ground simple, age-based rules."[17] Generalizations regarding the minimum age of competency to make legal decisions and to assist counsel in child abuse and family law proceedings vary from age 7 to 15 before a child can make a reasoned choice among legal alternatives.[18] Other developmental psychologists argue that legal policymakers miss the point when they classify children as merely too young to have capacity or as old enough to make decisions because they ignore the "transitional developmental stage" of adolescence and because "children cross over the line to legal adulthood at different ages for different purposes."[19] Even though legislators persist in using categorical age of majority rules for different social activities, such as driving, drinking, and voting, the use of categorical age limits in defining children's competency to assist in their legal proceedings is not helpful because each child's developmental pace is different; age brackets are at once underinclusive and overinclusive when applied to individual children's developmental capacity for decision making.[20] Elizabeth Scott and Thomas Grisso provide the following assessment of the child developmental literature: "[S]cientific authority indicates that, in general, the cognitive capacity for reasoning and understanding of preadolescents and many younger teens differs substantially in some regards

[15] John E. B. Myers, *Session 3: Children's Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POL'Y 267, 285–286 (2004).

[16] Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

[17] *Id.* at 919.

[18] *Id.* at 920; Thomas Grisso, *What We Know about Youth's Capacities as Trial Defendants*, in Thomas Grisso & Robert G. Schwartz, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 162–163 (2000); Guggenheim, at 86 ["accord children seven years of age and older the power to direct their own counsel in delinquency proceedings"].

[19] Elizabeth S. Scott, *The Legal Construction of Adolesence*, 29 HOFSTRA L. REV. 547, 548, 557–558 (2000).

[20] *Id.* at 560. ["In fact, one likely effect of the categorical approach is that minors will sometimes continue to be treated as legal children when they are competent to make decisions or perform adult functions."]

from that of older teens and adults. Tentative authority also supports the conclusion that, by mid-adolescence, youthful capacities for reasoning and understanding approximate those of adults."[21] Therefore, it is clear that the minimal American Bar Association rules for representing child clients provide attorneys with far too little guidance regarding when the child client possesses sufficient capacity to direct the litigation.[22]

Attorneys representing parents and/or children in custody and dependency proceedings are often required to meet standards of representation that are substantially more demanding than those of the average practitioner. For instance, in California, even though the California Supreme Court has held that attorneys, once sworn into office, are presumptively competent to represent any party in any court in the state,[23] dependency attorneys must establish "minimum standards of experience and education" in order to represent a party,[24] including "training and education in the areas of substance abuse and domestic violence . . . [and] child development. . . . "[25] The dissonance between these elevated standards of competence and the unrealistically high caseloads in these expedited proceedings provides attorneys with a nightmare Catch-22 scenario in which the more competently they represent some clients, the less competently they represent others in this zero-sum legal universe. The excessively large attorney caseloads in these proceedings often lead to a statistically deterministic certainty of incompetent representation in a high percentage of cases.[26]

[21] Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160 (1997).

[22] *American Bar Association Rule MR 1.14* provides: (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired . . . because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client; (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes the client adequately act in the client's own interest."

[23] The California Supreme Court in *Smith v. Superior Court*, 440 P. 2d 65, 73 (Cal. 1968) held that "[t]he admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions."

[24] *California Welfare & Institutions Code § 317.5.*

[25] *California Rules of Court, Rule 1438.*

[26] For instance, in 1991, the County of Los Angeles, California paid private dependency attorneys $9,839,971.22; however, by 1998 that cost rose to $16,510,750. PACE SYSTEM APPOINTEE EARNINGS SUMMARY REPORT OF THE LOS ANGELES SUPERIOR COURT MP DISTRICT FOR APPOINTEE TYPES, ALL JUVENILE DEPENDENCY CASES 07/02/97 THROUGH 06/29/98, at 15; January 22, 1990, Dependency Court Legal Services Contract, at 1. And in 1998 in Los Angeles County parents' dependency attorneys had caseloads of between 413 and 658 cases. PACE SYSTEM, *supra*, at 1–15. And each of those dependency cases was compensated at a flat rate of just $380 per case. Amy Bentley, *Ventura Defense Attorneys Fear Dependency Court System Unfair*, L. A. DAILY J., Jan. 7, 1999, at 3.

Judges often fare no better because it is sometimes impossible to remain a "neutral and detached magistrate" when the judicial officer sees that incompetent counsel for one or more parties might result in a disposition that is dangerous for the children before the court. But what defines the ethical cusp between the judge ensuring fairness in the hearing and exceeding those ethical bounds by becoming the equivalent to a zealous advocate for the child? How can and should the judge react to media reports that intimate that a specific case before the court resulted in a travesty of injustice? How does the judge meet the ethical duty to educate the public regarding the legal system without commenting on the confidential proceedings or without prejudicing parties before the courts? And what should be the ethical response of judges to the overburdened child dependency system in which precious court resources pressure judges and attorneys to litigate fundamental rights to child custody and termination of parental rights in approximately ten to twenty minutes per case?[27] How do judges resolve the internal conflict of interest between the "whistle-blower" persona that can ensure a more accurate and accountable legal system and the rise up the judicial ladder, which often requires political deftness and understated service?

And finally, how should counsel representing the Department of Family and Children's Services handle the many ethical conundrums that must be resolved on a daily basis? What are the bounds of advocacy for these government lawyers? What data must be disclosed *sua sponte*, who is the client, and what rules apply when a social worker is civilly sued for malpractice and the Department attempts to avoid liability by claiming that the worker's acts were outside the scope of employment?

These are the many issues upon which this book revolves. To provide guidance to judges, government attorneys, and counsel for both parents and children, the following chapters review several sets of ethical standards, judicial cases, attorney general opinions, and state bar ethics opinions. Although many of these terribly complex ethical maelstroms require answers yet to be written, this text provides the foundation for identifying and analyzing attorneys' ethical duties. Although it might be impossible to practice law for an entire career without violating ethical precepts, a judgment tempered through analysis of existing ethical precedent is likely to benefit both attorneys and clients. It is with this goal that I offer the following analyses of the ethical issues involved in representing parties in child custody and dependency proceedings.

[27] For instance, in Los Angeles County, dependency judges hear "five to ten new cases and as many as 25 reviews a day of cases already under court jurisdiction." William Wesley Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, The Right to Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 301 (1987).

1 Conflicts of Interest

It might seem unusual for a book on legal ethics to begin with the complicated issue of conflicts of interest. However, if an attorney waits until after the initial client interview to determine whether a conflict exists or is likely to develop during representation, the attorney might prejudice the client by having to conflict off the case at some later time. Conflicting off the case will not only lengthen the litigation time-line by requiring another attorney to prepare the case but also will increase the client's emotional trauma inherent in contested litigation. Therefore, before an attorney considers the detailed facts inherent in any case, engages in an intake or initial client interview, and even reviews all the available evidence, counsel should consider actual and potential conflicts of interest. Furthermore, it is essential for counsel to continually assess conflicts questions until the completion of the client's representation.

I. CHILDREN'S ATTORNEYS: POTENTIAL DIVIDED LOYALTIES

Because of the tremendous expense of representing parties in child dependency cases, one money-saving shortcut is to use a system in which a single legal office represents multiple parties.[1] For instance, a government attorney office, such as a county counsel, district attorney, or public defender office, might represent parents, children, and/or the Department of Child and Family Services in different cases. However, because of the possibility of

[1] In recent years Congress and state legislatures have not only limited funds for representing indigents based upon budget concerns but also the types of cases that legal services attorneys can file on behalf of their clients. However, the United States Supreme Court in *Legal Servs. Corp. v. Velazquez, 531* U.S. 533 (2001) limited the legislature's control over the ambit of attorneys' zealous representation by declaring that such restrictions violate separation of powers and/or First Amendment principles. *See* Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L. J. 873 (2002).

conflicts of interest, disclosure of confidential data, and breaches of loyalty, such multiparty representation usually violates the canon of ethics. For instance, in *Illinois State Bar Association Opinion No. 91-17*[2] a public defender's office represented both parents and children in child neglect proceedings. The attorneys shared a common office, secretaries, and investigatory services. The Illinois State Bar held that this shared arrangement involved an obvious ethical violation because parents and children are often, if not usually, in conflict in these cases and confidential material may be shared among different public defenders representing adverse parties. The Illinois State Bar Ethics Committee held that if the public defenders did not share secretaries or investigators and had independent law practices sufficiently shielded from one another, then no conflict would exist.[3] It further held that the shared lawyering context was not only unfair to the parent and child clients but also "to attorneys themselves. Public defenders have no immunity from malpractice actions . . . [and] probably are vulnerable to federal civil rights actions. . . ."[4]

In *Appeal in Yavapai County Juvenile Action No.J-8545*[5] the Arizona Supreme Court held that the trial court erred when it refused to appoint separate counsel for the children, rather than having them represented by parents' or prospective custodians' counsel, because those individuals "would each be pursuing their individual interests at the proceedings and not necessarily the best interest of the children."[6] The Arizona Supreme Court rejected the trial court's logic in refusing to appoint counsel for the children merely because they were currently in custody in another state.

The most frequent type of multiple representation in child dependency cases involves one attorney representing several siblings. Conceptually and economically, such multiple representation seems to be a good policy. A single attorney representative for sibling groups could coordinate all the children's needs, see the total family picture from the perspective of all the children, and save the taxpayers millions of dollars in legal fees as well. However, representation of sibling groups is fraught with numerous actual and probable conflicts.[7]

Consider the following hypothetical:

> An attorney is appointed to represent a sibling group comprising seven children ages 3, 4, 5, 6, 8, 11, and 12 in a child dependency action. The

[2] Illinois State Bar Association Opinion No. 91–17 (January, 1992).
[3] *Id.* at 3–4.
[4] *Id.* at 4.
[5] *Appeal in Yavapai County Juvenile Action No. J-8545*, 680 P. 2d 146 (Arizona 1984).
[6] *Id.* at 148.
[7] A discussion of the conflicts between the child's stated preference and the attorney's opinion regarding the child's best interest is discussed, *infra*, in Chapter 2, Competent and Zealous Representation.

> Department argued that the 8-, 11-, and 12-year-old children should be placed in long-term foster care or guardianship because they were unadoptable; that the 4-, 5-, and 6-year-old children should be placed for adoption; and that the 3-year-old should be placed separately in a placement that could care for the child's special needs.[8]

In the abstract, if the Department's recommendations were accurate and in the children's best interests, and not in opposition to the children's stated preferences, nothing seems to prevent multiple representation in this case. However, during the attorney's initial interviews with the children, he discovered the following information: (1) the 3-year-old was very closely bonded with the 8-, 11-, and 12-year-old children and (2) many of the children in the three placement groups wanted to continue sibling association and visitation even after the termination of parental rights. The court in *Carroll v. Superior Court*[9] determined that there were numerous actual and several probable conflicts of interest inherent in one attorney representing all of the siblings in this case because termination of parental rights and adoption would end the legal relationship among the siblings and make fulfillment of their desire to continue sibling association unlikely. The court noted that zealously arguing for adoption of the 3-year-old child would, in effect, argue against the other children's desires to have continuing postadoption contact with her. The court also noted that some siblings might forgo their right to argue for their best interests in order to assist a permanent placement of a brother or sister that was in that child's best interest but that would result in a severance of sibling association.Because the attorney had interviewed all the children in the case and had established an attorney-client relationship with each child, the only remedy consistent with the requirements of confidentiality and client loyalty was for the attorney to conflict off the representation of all of the siblings: "[T]he attorney must be relieved from representation of any of the minors . . . [and] an attorney may not be appointed to represent multiple minors if it is reasonably likely an actual conflict of interest between or among them may arise."[10]

Conflicts of interest in representing multiple siblings also arise in contexts in which one attorney discovers, through interviews, confidential information that will assist one sibling but will harm the others.For instance, assume that an attorney is appointed in a child dependency action to represent three children, ages 14(sister), 11(brother), and (sister) 6. The petition alleges sexual abuse by the mother's boyfriend of the 14-year-old sister and that the 11-year-old brother once saw the mother's boyfriend lying on top of his

[8] These facts are based upon *Carroll v. Superior Court*, 124 Cal. Rptr. 2d 891 (Cal. App. Ct. 2002).

[9] *Id.* at 894–897.

[10] *Id.* at 897.

14-year-old sister on the couch. Also assume that the 11-year-old brother informs the attorney that he wants his statements to remain confidential. The 14-year-old sister informs that attorney that she wants to be placed outside the home, but wants continuing contact with her siblings. The 11- and 6-year-old children want to remain in the home. The attorney is thus faced with an actual conflict of interest because he now possesses data that can assist the 14-year-old in proving the sexual abuse case and make her removal from the home more likely. However, if the attorney uses that confidential information, the attorney would violate the duty of loyalty and confidentiality to the 11-year-old brother. In addition, because the use of that confidential data may inform the court that the 6-year-old sister may also be at risk of sexual abuse by the mother's boyfriend, the use of that data would frustrate her desire to stay at home with her mother rather than being placed in relative or foster care.

Although providing siblings with separate counsel in custody and dependency proceedings will undoubtedly increase the cost of legal representation, there is a sound reason why some courts have held that "any doubt about the existence of a conflict [in representing an abused child] should be resolved in favor of disqualification."[11] The American Bar Association has described an adult client's reaction to conflicts of interest in legal representation as a feeling of betrayal and a "fear that the lawyer will pursue that client's case less effectively out of deference to the other client. . . ."[12] But the effect on abused children is substantially greater: "The abused child, already betrayed by a trusted adult, has finally taken a substantial emotional risk by having faith in her attorney. She has relied upon the attorney to protect and argue her case. What must she think when yet another trusted adult abandons her? The jurogenic effects of the legal system re-victimize the child."[13]

It is thus critical for attorneys to determine whether actual or potential conflicts of interest are inherent and probable in the representation of multiple sibling groups. To calculate the potential for conflicts of interest, the attorney should consider the following factors. First, the greater the age gap between the siblings, the higher the risk for a conflict of interest. This is because young siblings are much more likely to be adoptable and to have their parental rights severed than are older children. For instance, even if a 2-year-old and a 15-year-old have psychologically bonded, many courts have determined that the older child will be placed in long-term

[11] *In the Matter of H.Children*, 608 N.Y.S. 2d 784, 785 (New York 1994).
[12] Model Rules of Professional Conduct Rule 1.7, comment 6.
[13] William Wesley Patton, *The Interrelationship Between Sibling Custody and Visitation and Conflicts of Interest in the Representation of Multiple Siblings in Dependency Proceedings, 23* CHILD. LEGAL RTS. J. 18, 29 (2003).