

# THE CHILD'S ATTORNEY AND THE ALIENATED CHILD: APPROACHES TO RESOLVING THE ETHICAL DILEMMA OF DIMINISHED CAPACITY\*

Jamie Rosen

---

---

Increasingly lawyers for children follow a model of “client centered” (as opposed to “best interests”) representation in child custody disputes in which the child client defines the objectives of the representation. The client-centered model, while appropriate in most cases to give voice to the child’s preferences in a process that deeply impacts him or her, can create an ethical dilemma for the child’s lawyer in cases where a child is truly alienated from the other parent by the actions of the alienating parent. Alienated children strongly and unreasonably express a preference for objectives of representation that might further damage the alienated parent’s relationship with the child. The alienated child’s objectives may be the result of a campaign of denigration and “brainwashing” by the alienating parent. This Note suggests that when a child is truly alienated from a parent, as diagnosed by a mental health expert, the child may have “diminished capacity” and therefore, the client-directed model of representation is not adequate. This Note proposes that the Child’s Attorney must determine whether the child is of diminished capacity under the Model Rules of Professional Conduct and, if so, must treat the client accordingly under Rule 1.14. Specifically, the attorney may, if all other remedial measures are inadequate, override the child’s wishes and advocate a position that the child would take, but for the brainwashing of the child used to alienate him or her from a parent.

**Keywords:** *Child’s Attorney; Client-Centered Lawyering; Custody; Diminished Capacity; Divorce; Family Court; Parental Alienation; and Visitation.*

---

---

## I. INTRODUCTION

If safe, a child’s interests are best served by a custody and visitation agreement that encourages the development of a relationship with both parents.<sup>1</sup> To protect children, give them a voice in the proceedings and promote their best interests, family courts are increasingly appointing attorneys for children in divorce, custody or parenting disputes.<sup>2</sup> The role of the Child’s Attorney<sup>3</sup> has evolved since its inception, when children, once considered legal objects, became legal clients in the same sense as adults.<sup>4</sup> This trend has led family courts around the country, and the world, to develop standards for these advocates for children in order to help courts determine which advocate is best for each individual situation.<sup>5</sup>

Most state statutes authorize the court to appoint the Child’s Attorney and therefore the court has the authority to define the attorney’s role.<sup>6</sup> Under the *Model Rules of Professional Conduct*, it is a core ethical guideline that the Child’s Attorney follow the client’s decisions about the objectives of the representation.<sup>7</sup> Family courts and policymakers, in an effort to move towards a model where child clients are treated like adult clients, aim to develop standards clearly articulating the role of the Child’s Attorney,<sup>8</sup> ensuring that the child has a voice in the process of decision-making.<sup>9</sup>

Parental alienation, however, challenges that model, forcing each situation to be looked at through a critical lens. For the purpose of this Note, the set of behaviors exhibited by the alienating parent, the targeted parent, and the child is referred to as parental alienation, which is most often seen in the context of custody litigation where a child unreasonably rejects one parent under the influence of the other parent.<sup>10</sup> Parental alienation is an unjustified campaign of denigration against a parent resulting from a combination of a brainwashing parent and the child’s own contribution to the rejection of the target parent.<sup>11</sup> The result of the campaign is that the child generally and unreasonably rejects any

Correspondence: jamiearosen@gmail.com

kind of relationship with the targeted parent, including visitation.<sup>12</sup> The cycle of alienating behavior is not in the child's best interest, which leads many courts to request the appointment of a Child's Attorney.<sup>13</sup>

A child's preference is an important part of the child custody dispute resolution process.<sup>14</sup> It is an important influence on judicial decision-making on a parenting plan.<sup>15</sup> More importantly, for purposes of this Note, the child's preference serves to set the objectives of the Child's Attorney's representation when the Child's Attorney follows a "client-directed" model of representation.

If the child's preference has been unduly influenced by others, especially a parent, and thus is not reflective of his own judgment, that preference raises an ethical dilemma for the lawyer.<sup>16</sup> When the child is alienated, he or she may not be competent to direct the lawyer's advocacy as the client-centered model requires.<sup>17</sup> Specifically, the alienated child may not be capable of making decisions when directing the lawyer as to a desired custody or visitation agreement because the client may be under a disability.<sup>18</sup> A client is considered to have diminished capacity when he or she lacks the capacity to make "adequately considered decisions in connection with a representation."<sup>19</sup> In child custody cases where parental alienation exists, the appointed Child's Attorney must determine whether the child is of diminished capacity under the *Model Rules of Professional Conduct*, and if so, must treat the client accordingly under Rule 1.14.<sup>20</sup> Despite this ethical dilemma, Child Attorneys often rely on the child's preference in custody proceedings where parental alienation exists,<sup>21</sup> leading to continued exposure to parental alienation in many households.<sup>22</sup>

This Note will examine the role of the Child's Attorney in cases of parental alienation and offer possible approaches for the Child's Attorney to work with alienated clients whose interests are at risk due to manipulation by a parent. If the Child's Attorney determines that the child has diminished capacity, the attorney has a variety of options under Rule 1.14, including the option of substituting judgment if all other remedial measures are inadequate.<sup>23</sup> Part II presents an overview of the psychology of parental alienation, including the roles that both the parents and the child play. Part III discusses how parental alienation affects the role of a client-centered attorney. Part IV explores the idea that a child has "diminished capacity" when subject to parental alienation and sets out ways for attorneys to assess and address the problem. Part V addresses critics' concerns about allowing a Child's Attorney to advocate a position contrary to the child's wishes. Finally, Part VI concludes by reinforcing that the attorney for an alienated child may override the child's wishes and advocate a position that the child would take but for the brainwashing of the child by the alienating parent.

## II. UNDERSTANDING PARENTAL ALIENATION

Alienating behavior is common in conflicted divorce cases. All alienating behavior, however, is not parental alienation. Parents involved in high-conflict<sup>24</sup> custody or visitation proceedings sometimes engage in programming or "brainwashing"<sup>25</sup> techniques directed at the child, for the purpose of interfering with the parent/child relationship.<sup>26</sup> Parental alienation is most often identified as an unjustified campaign of denigration against a parent resulting from a combination of programming, or brainwashing, by one parent and the child's own contribution to the attack on the other parent.<sup>27</sup> The critical factor is that the child's attitude and behavior as a result of brainwashing is based on an unreasonable belief that is significantly disproportionate to the child's actual experience.<sup>28</sup>

The work of several prominent psychologists<sup>29</sup> who specialize in divorcing and separating families emphasizes the need to differentiate between a truly alienated child, due to a parent's undue influence, from a non-alienated child who might resist or refuse contact with a parent for justifiable reasons.<sup>30</sup> Many children are falsely labeled as alienated for rejecting a parent based on the child's actual experiences with that parent.<sup>31</sup> All alienating behavior is not parental alienation. Parental alienation specifically refers to the child's behaviors and attitudes in relation to the child's actual experience that are not the result of a reasonable belief.<sup>32</sup> Unreasonable beliefs include extremely negative feelings of anger, hatred, rejection, and/or fear that are significantly disproportionate to the child's actual experience with that parent.<sup>33</sup>

Assuming that parental alienation exists, three parties contribute to the distortion of the child's views and feelings: the Alienating Parent, the Targeted Parent, and the Alienated Child.<sup>34</sup>

### **A. THE ALIENATING PARENT**

The alienating parent's belief that the child has no need for a relationship with the other parent is ingrained into the child's own belief system through the process of alienation.<sup>35</sup> The alienating parent may employ techniques such as badmouthing (portraying the targeted parent as dangerous or abandoning); limiting or interfering with parenting time, mail or phone contact; interfering with information (refusing to communicate); emotional manipulation (withdrawing love or inducing guilt); and fostering an unhealthy alliance with the alienating parent.<sup>36</sup> The alienating parent refuses to listen to positive remarks about the targeted parent and quickly discounts any happy memories or experiences as trivial and unimportant.<sup>37</sup> He or she may portray the target parent as dangerous and exaggerate negative attributes about the other parent, including false or fabricated allegations of sexual, physical, and/or emotional abuse.<sup>38</sup>

### **B. THE TARGETED PARENT**

The alienating parent is not the only contributor to the existence of parental alienation; there are several types of "targeted parents" that play a role in the alienation. Sometimes, the targeted, or rejected, parent is a good parent with no history of physical or emotional abuse of the child.<sup>39</sup> Innocent reactions such as withdrawing in an attempt to give the child space may reinforce allegations of abandonment or poor parenting.<sup>40</sup> On the other hand, the targeted parent may actually have poor parenting abilities, psychological issues, or emotional imbalances, all of which contribute to his or her own victimization.<sup>41</sup> The targeted parent may have a motive such as a hidden desire to abandon the family, intense anger at the alienating parent, past family problems, fragile mental health, or fear of losing a relationship with the child.<sup>42</sup> The allegations against the targeted parent, although possibly based on the truth, are grossly distorted.

### **C. THE ALIENATED CHILD**

Most children involved in a custody or visitation dispute wish for a healthy relationship with both parents as the ultimate outcome.<sup>43</sup> However, there are a small number of children, mostly between the ages of eight and fifteen years old, who resist or refuse to visit or remain in contact with one parent due to parental alienation.<sup>44</sup> The child accepts as true the delusions of falsehood created by the alienating parent, leading to a belief that he or she cannot show or receive love from both parents.<sup>45</sup> The child's behavior consists of a campaign of unfair criticism toward the targeted parent, weak and irrational reasons for their behavior, absence of guilt or remorse, and the presence of borrowed or rehearsed scenarios, among others.<sup>46</sup> An alienated child often denies good experiences with the targeted parent and refuses any possibility of reconciliation.<sup>47</sup>

While Parental Alienation is not listed as a syndrome or a DSM-IV diagnosis,<sup>48</sup> the effects of the alienating and targeted parent's behavior last well into the adulthood of any alienated child, increasing the risk for a multitude of psychological, emotional, and adjustment difficulties.<sup>49</sup> Evidence of these long-term consequences, including an impaired ability to form healthy and lasting relationships with others, self-hatred, guilt, depression, and problems with drug or alcohol abuse,<sup>50</sup> further demonstrates the importance for early identification and legal intervention.

## **III. THE CHILD'S ATTORNEY: ORIENTATION TO REPRESENTATION AND TAKING DIRECTION FROM THE CHILD-CLIENT**

State laws differ greatly when it comes to whether and how the Child's Attorney is guided by the preferences of the client in setting the objectives of the representation and courtroom advocacy.<sup>51</sup>

While people differ on the conflict between Best Interests Attorney and client-directed advocacy, this Note assumes that the lawyer follows the client-directed advocacy model. A client-centered attorney has a duty to represent the client's interests and abide by the client's decisions, ascertain the client's wishes and make them known to the court.<sup>52</sup> On the other hand, a Best Interests Attorney advocates for the best interests of the child.<sup>53</sup>

Many professional organizations have developed similar standards for the use of children's representatives in family court proceedings, including the National Conference of Commissioners on Uniform State Laws<sup>54</sup> and the National Association of Counsel for Children (NACC),<sup>55</sup> but there is still no national guideline defining the role of a child's lawyer.<sup>56</sup> The only uniform standard of practice for lawyers who represent children is the American Bar Association standards, however, these newer ABA Standards, published in 2003, represent a significant change from the previous ABA Standards.<sup>57</sup> This is proof that the law regarding appointment of an advocate for the child is still evolving.

#### A. THE EFFECT OF PARENTAL ALIENATION ON THE CLIENT-DIRECTED MODEL

While children enjoy the same basic rights as all persons and should be treated as adult clients, the alienated child's unique vulnerability<sup>58</sup> calls for the Child's Attorney to follow the rules of ethics for a client with diminished capacity.<sup>59</sup> The client-directed model assumes that the client has the ability to consult with and direct an attorney as to a specific course of action.<sup>60</sup> The Child's Attorney, once appointed, must advocate the child's articulated position by ascertaining the client's wishes and making them known to the court.<sup>61</sup>

However, the ABA Standards also recognize that children are susceptible to intimidation and manipulation and the child's decisions may not reflect the child's actual position.<sup>62</sup> The NACC, the largest child's attorney organization in the United States, defines the role of the attorney for the child as a zealous advocate model unless one of two exceptions exists: the child lacks the capacity to make a reasoned choice among alternatives or the child's stated preference is "considered to be seriously injurious to the child."<sup>63</sup> When a client cannot formulate a position due to age, or for some other reason is "incapable of judgment and meaningful communication,"<sup>64</sup> the client-directed model is not effective.

Despite the fact that alienated children are so brainwashed and therefore incompetent to direct an attorney, lawyers give heavy weight to the child's preference.<sup>65</sup> A Child Attorneys' reliance on the alienated child's position in divorce, custody, or parenting disputes leads to continued exposure to parental alienation in many households.<sup>66</sup> Knowing that the child's preference will be a controlling factor in a court decision provides parents with an additional incentive to manipulate and wrongfully influence their child's position.<sup>67</sup> The Child's Attorney who advocates for a child's preference can be an important force in the child custody courtroom. If a child's lawyer advocates for the father to have custody because the alienated child wants the lawyer to do so, the father in effect has two lawyers in the courtroom—his own and the child's lawyer. The brainwashing of the child extends to the lawyer's representation and creates a serious imbalance in the courtroom. This practice is detrimental to the well-being of alienated children in the family court system and demonstrates the need for the Child's Attorney to treat the alienated child as a client with diminished capacity.

#### B. WHAT IT MEANS TO HAVE "DIMINISHED CAPACITY"

The *Model Rules of Professional Conduct* provide that when a client is not able to make adequately considered decisions as part of the attorney-client relationship, the client is said to have diminished capacity.<sup>68</sup> The attorney of a client with diminished capacity must still zealously advocate for that client, however, the attorney also has a duty to prevent the client from pursuing decisions that are potentially harmful.<sup>69</sup> The standard for diminished capacity applies to clients whose judgment is impaired because of minority or mental disability, for example.<sup>70</sup>

In the case of parental alienation, the Child's Attorney must zealously advocate for that child, however the attorney also has a duty to prevent the child client from pursuing decisions that would not

be made but for the brainwashing techniques employed by the alienating parent.<sup>71</sup> If the attorney believes that the child client lacks the capacity for “knowing, voluntary and considered judgment” or that acting in accordance with the child’s objectives would likely result in a substantial risk or serious danger to the child, the client is considered to have diminished capacity.<sup>72</sup>

Under the influence of an alienating parent, the child may not be cognitively or psychologically able to make a judgment that is in his or her best interests.<sup>73</sup> The *Model Rules of Professional Conduct* state a lawyer should balance such factors as: the client’s capacity to communicate reasoning that led to a decision, the ability to appreciate the consequences of a decision, the fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client.<sup>74</sup> The Child’s Attorney must determine whether the child’s wishes and statements are an authentic reflection of the child’s attachment with each parent or instead, a result of one parent’s efforts to contaminate the child’s feelings toward the other parent as a result of programming or scripting.<sup>75</sup>

#### **IV. ADDRESSING A DIFFICULT DILEMMA: ADVOCATING FOR THE ALIENATED CHILD AS A CLIENT WITH DIMINISHED CAPACITY**

When a client’s ability to make considered judgments on his or her own behalf is diminished, the lawyer should still maintain a normal attorney-client relationship with that client to the extent possible.<sup>76</sup> This Rule is reluctantly<sup>77</sup> applied to persons with diminished capacity, such as the elderly, and is recognized as a solution to representing children due to their age.<sup>78</sup> Specifically, the rule of diminished capacity could apply to an alienated child, exhibited by the child’s impaired ability to make a voluntary and considered judgment after an extensive period of brainwashing.<sup>79</sup> This section explains the steps an attorney should take when representing an alienated child: evaluate whether the child has diminished capacity, counsel the child client and discuss objectives of the representation, and possibly take reasonable protective action.

##### **A. THE ALIENATED CHILD’S CAPACITY TO MAKE DECISIONS**

When a child exhibits behavior that is symptomatic of parental alienation, the child may lack the capacity to instruct an attorney for the purposes of custody or visitation proceedings. In cases of parental alienation, the attorney must be satisfied that the child client is not merely repeating what a parent or other influential adult wants, but rather is expressing his or her own independent judgments.<sup>80</sup> It is important to remember, however, that the determination of diminished capacity is not an “all or nothing” decision; a child may have the capacity to decide some issues but not others.<sup>81</sup> The attorney must determine whether the child is psychologically able to make a judgment and establish that the child exercises his or judgment without undue influence.<sup>82</sup>

No exhaustive list of factors that must be satisfied before the client is determined to have capacity to instruct counsel exists.<sup>83</sup> Almost every state relies on a different list of factors to evaluate whether or not a client has the capacity to instruct an attorney and make decisions. The Child’s Attorney must make this determination at the outset of the representation, assessing some of the following criteria: the child’s developmental stage, the child’s expression of a relevant position, the child’s individual decision-making process, and the child’s ability to understand consequences.<sup>84</sup> The attorney can evaluate the child’s capacity by looking at the child’s age,<sup>85</sup> degree of maturity, intelligence, ability to communicate, and other factors.<sup>86</sup> The attorney should exercise his or her own judgment as to the child’s competence, based on whether a child is frequently changing his or her mind, if the child’s instructions are confusing or inconsistent, or if there is a significant risk of serious harm in the desired plan.<sup>87</sup>

The best way for an attorney to make the determination of whether or not the child client has diminished capacity is to use every tool available to him or her. In order to represent a client competently and diligently, the attorney must interview his or her client, as well as the parents and

other family members, doctors, teachers, therapists, or friends as part of his or her initial investigation.<sup>88</sup> The attorney should also review the child's records that are relevant to the case.<sup>89</sup> When the attorney is not competent to assess the child client's capacity, the attorney should seek the assistance of a qualified mental health professional that works solely for the Child's Attorney.<sup>90</sup> As a team, the attorney should work diligently with the mental health professional to assess whether or not the child is capable of making adequately considered decisions.<sup>91</sup> However, before the attorney begins evaluating the client, the attorney must develop a rapport of trust and respect with the client, which is the backbone of any attorney-client relationship.

## B. BACK TO THE BASICS: ATTORNEY AS COUNSELOR

As counselor and advisor, it is the attorney's job to advise his or her client against pursuing any action that would place the client at risk of substantial harm, whether mental, physical, or emotional.<sup>92</sup> An ethical dilemma arises when the Child's Attorney has determined that the child client has diminished capacity due to mental impairment because of parental manipulation.<sup>93</sup> The process of advising and counseling may not be so simple; the Child's Attorney must maintain the role as counselor and advisor, which may include confronting the client about concerns of parental alienation and having an honest conversation about the consequences of the child client's preferences at a developmentally appropriate level for the child's understanding.<sup>94</sup>

Once the attorney has discussed the benefits and consequences of the client's preference about custody or visitation, the Child's Attorney must assess whether the client is processing that information adequately. A decision that is likely to place the child at risk of harm or serves only to achieve short-term goals is not reasonable, or adequately considered.<sup>95</sup> For example, in *Herbert L. v. Maria L.* the court held that "the children were in imminent danger in the custody of [their mother]" in that she was "perpetuating a custodial arrangement that was overtly hostile" to the father "to the severe emotional detriment of the children."<sup>96</sup> Once the attorney makes a determination that the client has diminished capacity, the attorney then must decide what action to take as an advocate.

## C. TAKING "REASONABLY NECESSARY PROTECTIVE ACTION"

Following a diminished-capacity model in cases of parental alienation helps to avoid a situation where the court relies on a child's preference that has been influenced by others, mainly a parent, and is not reflective of his or her own judgment.<sup>97</sup> The *Model Rules* provide a list of protective measures that an attorney may take when a client has diminished capacity, but does not indicate that this list is exhaustive of all possible options.<sup>98</sup> The attorney may consult with support groups, professional services, or other individuals or entities that have the ability to protect the client.<sup>99</sup> While not an ideal choice, the child's attorney can also request the judicial appointment of a guardian ad litem for the child.<sup>100</sup> Having two advocates represent the child, a Child's Attorney and a guardian ad litem, might be more expensive or traumatic for the client rather than helpful.<sup>101</sup>

The list of potential solutions provided in the *Model Rules* leaves out an extremely important alternative, and controversial course of action: substituting judgment.<sup>102</sup> Leaving this alternative off the list, however, does not preclude it. When a judge appoints a Child's Attorney, this lawyer serves the purpose of providing independent legal services in order to protect a child's best interests and give the child a voice in court.<sup>103</sup> It is the client-directed attorney's job as a counselor to attempt to steer the client away from self-destructive decisions that would place the client at risk of substantial harm.<sup>104</sup> If the Child's Attorney is unsuccessful in persuading the alienated child client to pursue a different outcome, the rules do not prohibit the attorney from overriding the child's wishes<sup>105</sup> and advocating for the position the child would take but for the brainwashing of the child used to alienate him or her from the target parent.<sup>106</sup>

Even the *Model Rules*, among other authorities, recognize that a traditional attorney-client relationship is not adequate when the client has diminished capacity.<sup>107</sup> For example, the Rules of the



Chief Judge, the American Bar Association,<sup>108</sup> and the National Association of Counsel for Children all agree that when the child lacks the capacity for knowing, voluntary and considered judgment, or the child's expressed preference would place the child at risk of substantial harm, the attorney may substitute judgment.<sup>109</sup> The criteria may include a full investigation of the child, examinations of all options, and utilization of medical, mental health, educational, social work, and other experts.<sup>110</sup> The ultimate goal of substituting judgment is for the attorney to determine what position the child would take if he or she had the capacity to direct the representation.<sup>111</sup>

If the attorney chooses to substitute judgment he or she should indicate to the court what the child's original position was, and why the attorney believes the override is justified. In fact, as a matter of law, the Child's Attorney must place the child's stated preferences on the record.<sup>112</sup> The idea is to minimize the impact on the child's "voice" in the court by at least expressing the child's position. In cases of parental alienation, rather than being able to participate in the development of a parenting plan, visitation schedule, or custody agreement, the alienated child is stripped of a genuine voice.<sup>113</sup> "Being heard . . . is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted."<sup>114</sup> The attorney also should explain what he or she is advocating for the child, even if painful and contentious and the child doesn't agree.<sup>115</sup>

## **V. DEALING WITH THE ARGUMENTS AGAINST SUBSTITUTING JUDGMENT**

Advocating against the child's wishes, or substituting judgment, is a practice that many family lawyers and judges frown upon. Legal professionals have several concerns: the child's voice is not being heard; the appointed Child's Attorney does not have the adequate training or information to determine what is in the best interests of the child and advocate that position; or that a court order, which is in direct conflict with the wishes of the parents or the child, may be difficult to enforce. These legitimate interests can be addressed in the following ways.

### **A. ENSURING THE CHILD'S TRUE VOICE IS HEARD**

While it may seem that the child's attorney and the family court system are to blame for taking away a child's voice, in cases of parental alienation, the parental brainwashing of the child is the true culprit.<sup>116</sup> The child's opinion is replaced with the desires and objectives of the parent who exercises the most influence over him or her.<sup>117</sup> Further, as more weight is accorded to a child's stated preferences, the risk of manipulation or pressure by a parent increases.<sup>118</sup> While child clients should feel that their voices are being heard, both by their attorneys and the court, it must also be clear that the alienated child is not responsible for making these ultimate decisions.<sup>119</sup>

The case where a Child's Attorney would substitute judgment is rare; most custody proceedings will not require a Child's Attorney to override an alienated child's desired position in order to protect the child client's best interests. There may be situations where the Child's Attorney determines, either with the assistance of a mental health professional or not, that the client is capable of instructing an attorney and making sound judgments.<sup>120</sup> On the other hand, there may be situations where a Child's Attorney does have a reasonable belief that the alienated child has diminished capacity, but chooses not to take reasonably necessary protective action.<sup>121</sup> This ensures that the child's voice is heard on a particular issue, whether or not that child's opinion is given significant consideration.<sup>122</sup> While acknowledging the value of the child's voice, we must also recognize the downsides of advocating the child's wishes in cases of parental alienation and the fact that the process of substituting judgment is to be used in only the most extreme cases.

### **B. INCREASING THE STANDARD OF EDUCATION FOR CHILD ATTORNEYS**

Those against the practice of substituting judgment argue that a Child's Attorney is not more qualified than a parent when it comes to knowing what is right for the child.<sup>123</sup> In cases of alienation,

however, there are usually two parents, each advocating something different about what is best for the child.<sup>124</sup> And one of them, at least, is trying to cut the other one out of the child's life, actions which are not in the child's best interests.

The Child's Attorney, on the other hand, has the ability to develop a trusting relationship with the child and thus has a legitimate basis for knowing the child's experience and what arrangement would best benefit the child in the future.<sup>125</sup> The representation of child clients requires particular knowledge and skill which most attorneys do not have the opportunity to acquire during their normal training.<sup>126</sup> In order to successfully implement the diminished-capacity model in parental alienation cases it is important that the attorney be educated on subjects such as child development, child psychology, child advocacy, and parental alienation.<sup>127</sup> Attorneys representing children should also receive training in several areas, including: case preparation, investigation and trial skills; understanding the client's environment and recognizing support systems; child developmental concerns as they affect the lawyer/client relationship and child/parent relationship; and reading and examining forensic reports among many others.<sup>128</sup> The attorney must also develop skills for interviewing and advising child clients,<sup>129</sup> identifying high-conflict cases from the start of the proceeding, and distinguishing between a child's reasonable and unreasonable behaviors in response to their actual experiences.<sup>130</sup> Education and training should be comprehensive, mandatory, and ongoing throughout the attorney's career, to ensure that the child client is receiving competent representation.<sup>131</sup> In order to advocate effectively, the attorney representing the alienated child must be able to work diligently and competently with the parties, the court, and mental health professionals.<sup>132</sup>

### C. ENFORCING A COURT ORDER

Those who criticize the practice of substituting judgment believe that if a court order is in direct conflict with the client's wishes (or the parents' wishes), this order may be difficult to enforce.<sup>133</sup> Failure to enforce court orders only reinforces the alienating parent's false sense of power and will only contribute further to the alienation.<sup>134</sup> Critics express concern that the family will be forced to return to court seeking to modify custody, thereby placing additional burdens on the judicial system and having a devastating impact on the family.<sup>135</sup> Court orders are enforceable, however, through a variety of mechanisms, such as criminal sanctions, suspension of alimony or maintenance, tort action for custodial interference, and orders of protection.<sup>136</sup> The judge should notify the litigants of the consequences if the parties do not comply with court orders and should explain the appropriate sanctions.<sup>137</sup> Several court-ordered programs show promise for working with alienated families, though they have not been fully tested and validated.<sup>138</sup> While these enforcement mechanisms can be successful, the Child's Attorney has a duty to make sure that the court does not interfere with the client's rights.<sup>139</sup>

## VI. CONCLUSION

Representing an alienated child presents very significant challenges for a client-centered lawyer. Parental alienation defies the traditional attorney-client relationship, which requires the attorney to advocate for the client's articulated position. The lawyer must consider whether the child is truly alienated, determine whether the child has diminished capacity, and then choose whether or not to take protective action. The attorney may, if all other remedial measures are inadequate, override the child's wishes and advocate a position that the child would take, but for the brainwashing of the child used to alienate him or her from a parent. The longer a high conflict case takes to resolve, the longer a child is exposed to parental alienation, making it even more difficult for the child to start rekindling his or her relationship with the targeted parent.<sup>140</sup> An advocate appointed to represent the child ensures that at least one person in the legal proceeding is focused on the child's needs and interests.<sup>141</sup> Permitting highly trained Child's Attorneys to advocate for alienated children according to the diminished-capacity standard is a way to ensure that the litigating parents do not use this opportunity to further influence and manipulate their child.



## NOTES

\*I would like to express my sincerest appreciation to everyone who has supported me throughout law school and during the note writing process. Professor Schepard, this Note would not have been possible without all of your insight and feedback. To my friends and family, thank you for your continued guidance and support. I would also like to thank Professor Lawrence Jay Braunstein and Hilary Casper, Esq. for their help in researching and editing this note.

1. Marlene Moses & Beth A. Townsend, *Parental Alienation in Child Custody Disputes*, 47 TENN. B.J. 25, 25 (2011)); Robin Ward, *The Legal Representation of Children: A Consultation Paper Prepared by The Quebec Bar Committee*, 13 CAN. J. FAM. L. 49, 51 (1996); See *Zafran v. Zafran*, 814 N.Y.S.2d 669, 672 (App. Div. 2006) (stating that it is generally in the best interest of the child to maintain a relationship with both the custodial and non-custodial parent).

2. See Linda D. Elrod, *Client-Direct Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 905 (2007) (stating that a client-directed attorney should be appointed to represent a child when the parents are contesting custody and their interests are not aligned); William J. Howe & Hugh McIsaac, *International Perspectives: Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of the Children Are at Stake*, 46 FAM. CT. REV. 78, 78 (2008).

3. There are several different terms used to describe actors in the family court and their roles and responsibilities. For the purposes of this Note, a Child's Attorney is a client-centered attorney who has a duty to represent the client's interests and abide by the client's decisions, ascertain the client's wishes and make them known to the court. ABA SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § II (2003). On the other hand, a Best Interests Attorney advocates for the best interests of the child. *Id.* § I. A Guardian ad Litem is a court-appointed professional or lawyer who advocates for the best interests of the child without being bound by the child's expressed preferences. *Id.* § II.

4. Ward, *supra* note 1, at 51.

5. Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 196–99 (2005); Ward, *supra* note 1, at 5.

6. Atwood, *supra* note 5, at 196.

7. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006) (stating that a lawyer shall abide by a client's decisions concerning the objectives of representation).

8. FAMILY LAW STANDARDS OF PRACTICE § I (explaining that the ABA established a uniform standard for performance of lawyers in custody cases since few jurisdictions have clear standards concerning appointed attorneys for children). Standards and rules exist which are not law, but are highly influential. See MODEL RULES OF PROF'L CONDUCT (2006) and NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001).

9. Elrod, *supra* note 2, at 873.

10. Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting it Wrong in Custody Cases*, 24 PACE L. REV. 239, 240 (2003).

11. Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 12 (2010).

12. See *infra*, note 30–31 (Not all alienating behavior is the result of parental alienation. The critical factor is that the child's estrangement from a parent is unreasonable.).

13. FAMILY LAW STANDARDS OF PRACTICE § II.

14. Atwood, *supra* note 5, at 184–85 (stating that children should have a "voice" in proceedings affecting their interests).

15. Nicholas Bala, *Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings*, 43 ALTA. L. REV. 845, 863 (2006) (citing Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373, 375 (2003)).

16. Benjamin Garber & Laura Landerman-Garber, *How Should the Child's Voice be Heard When Parental Rights and Responsibilities are Contested?*, 47 N.H.B.J. 46, 47 (2006).

17. Barbara L. House, *Considering the Child's Preference in Determining Custody: Is It Really in the Child's Best Interest?*, 19 J. JUV. L. 176, 180–81 (1998). MODEL RULES OF PROF'L CONDUCT R. 1.14 (2006). Rule 1.14 is a departure from the traditional rules of ethics. The normal attorney-client relationship is based on the assumption that the client is capable of making decisions. *Id.* This rule requires attorneys to satisfy an extremely high standard in order to take "protective action" for a client with diminished capacity. *Id.* This is not an easy or enjoyable task; lawyers do not necessarily want to take protective action for their clients. It is a very difficult decision to take protective action on behalf of your client, or go so far as to substitute judgment. Making this decision requires a detailed understanding of parental alienation, diminished capacity, child development and child psychology. See discussion *infra* Part V.B.

18. See R. 1.14(a) (reiterating that a client under disability, such as a child subject to alienating behavior, may not be competent to make decisions).

19. *Id.*

20. R. 1.14 (stating that when the attorney reasonably believes that the client has diminished capacity the lawyer may take "reasonably necessary protective action").

21. N.Y. CIVIL PRACTICE, CUSTODY & VISITATION § 13.11[1] (2011).

22. CHILD CUSTODY PRAC. & PROC. § 6:26 (2010).

23. See discussion *infra* Part IV.

24. High conflict cases involve strong hostility between parents, and often a child, or children expressing negative feelings and beliefs towards one of their parents. G. Kim Blank & Tara Ney, *The (De)Construction of Conflict in Divorce Litigation: A Discursive Critique of "Parental Alienation Syndrome" and "The Alienated Child"*, 44 FAM. CT. REV. 135, 135 (2006). Cases of parental alienation are a "subgroup of families involved in more extreme forms of high-conflict separation or divorce." BARBARA JO FIDLER, ET AL., CHILDREN WHO RESIST POSTSEPARATION PARENTAL CONTACT: A DIFFERENTIAL APPROACH FOR LEGAL AND MENTAL HEALTH PROFESSIONALS 4 (2013).

25. See Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 759 (2005) (stating that one of the components to parental alienation is a "vindictive parent who is consciously or unconsciously brainwashing the child"); Fidler & Bala, *supra* note 11, at 12.

26. Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MAT. LAW. 271, 271–72 (1994).

27. Fidler & Bala, *supra* note 11, at 12. The concept of alienation is not a new phenomenon; there has been much disagreement since parental alienation was first identified over what it is and who causes it. Although Richard Gardner's work is controversial and criticized for a lack of sufficient research, it is historically important and led to an expansion of research on alienation. *Id.* at 13; Lawrence Jay Braunstein, "Parental Alienation Syndrome": *Forget the Title; Does the Behavior Exist?*, MATRIMONIAL STRATEGIST 5, 5 (Jan. 2007) available at <http://www.lawrencejaybraunstein.com/articles/Parental%20Alienation%20Mat%20Strat.pdf>.

28. CHILD CUSTODY PRAC. & PROC. § 6:26.

29. See Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273, 280 (2003) (stating that parental alienation, "a child's unreasonable campaign of denigration against, or rejection of, one parent", is different from a child who is reasonably alienated); See Joan B. Kelly & Janet R. Johnston, *Special Issue: Alienated Children in Divorce: The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2001) (distinguishing alienated children from those who resist contact with a parent for a variety of realistic or developmentally appropriate reasons).

30. Compare *In the Matter of J.F. v. L.F.*, 694 N.Y.S.2d 592, 594–95 (App. Div. 1999) (finding that the children's behavior was unreasonable and significantly disproportionate to the children's actual experience with their father) with *In re Marriage of Marshall*, 663 N.E.2d 1113 (Ill. 1996) (finding that the children had reasonable beliefs based on their actual experiences, including alleged physical abuse and a fear of kidnapping).

31. Johnston, *supra* note 25, at 762; Kenneth H. Waldron & David E. Joanis, *Understanding and Collaboratively Treating Parental Alienation Syndrome*, 10 AM. J. FAM. LAW. 121, 121 (1996). A child may favor one parent over another because of temperament, gender, age, familiarity, time spent with that parent, or shared interests. Fidler & Bala, *supra* note 11, at 14. Realistic estrangement from one parent may also result from the trauma of witnessing domestic violence, experiencing physical or sexual abuse, or encountering neglectful parenting. *Id.*

32. Garber & Landerman-Garber, *supra* note 16, at 47; Jo-Anne Stoltz & Tara Ney, *Child Alienation in Divorce: Resistance to Visitation: Rethinking Parental and Child Alienation*, 40 FAM. CT. REV. 220, 222 (2002).

33. CHILD CUSTODY PRAC. & PROC. § 6:26; *In the Matter of J.F. v. L.F.*, 694 N.Y.S.2d 592.

34. Waldron & Joanis, *supra* note 31, at 121–22.

35. CHILD CUSTODY PRAC. & PROC. § 6:26.

36. Fidler & Bala, *supra* note 11, at 19. Judith Wallerstein and Joan Kelly coined the term "unholy alliance" to describe the relationship between the alienating parent and child. FIDLER, ET AL., *supra* note 24, at xi.

37. See Barbara J. Fidler & Catherine H. Petersen, AFCC-AAML Conference, *Advanced Issues in Child Custody: Evaluation, Litigation and Settlement, Understanding and Responding to Parental Alienation* (September 15–17, 2011) (listing typical behaviors of a targeted parent).

38. CHILD CUSTODY PRAC. & PROC. § 6:26.

39. *Id.*

40. Fidler & Bala, *supra* note 11, at 20.

41. Waldron & Joanis, *supra* note 31, at 122. The targeted parent may act selfishly or respond immaturely without realizing how their behaviors contribute to the alienation. Fidler & Bala, *supra* note 11, at 20.

42. Michael R. Walsh & J. Michael Bone, *Parental Alienation Syndrome: An Age-Old Custody Problem*, 71 FLA. B.J. 93, 94 (1997).

43. Johnston, *supra* note 25, at 757.

44. Waldron & Joanis, *supra* note 31, at 123.

45. Fidler & Bala, *supra* note 11, at 15.

46. Walsh & Bone, *supra* note 42, at 93; *In re Marriage of Marshall*, 663 N.E.2d 1113 (Ill. 1996) (The children used identical language in dismissing any positive memories of their father.).

47. Fidler & Bala, *supra* note 11, at 17.

48. Moses & Townsend, *supra* note 1, at 26; Warshak, *supra* note 29, at 290.

49. Fidler & Bala, *supra* note 11, at 20; Glenn F. Cartwright, *Expanding the Parameters of Parental Alienation Syndrome*, 21 AM. J. FAM. THERAPY 205, 212–13 (1993).

50. Waldron & Joanis, *supra* note 31, at 129; *See also* Reena Sommer, Ph.D., *Parental Alienation Syndrome*, available at <http://www.divorcingmistakes.com/articles/PASreview.pdf> (emphasizing the negative impact of parental alienation on the child's self-esteem and perception).

51. Mary E. Hazlewood, *Comment: The New Texas Ad Litem Statute: Is it Really Protecting the Best Interests of Minor Children?*, 35 ST. MARY'S L. J. 1035, 1043–44 (2004).

52. FAMILY LAW STANDARDS OF PRACTICE § II.

53. *Id.* § I.

54. *See generally* National Conference of Commissioners on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (2007), available at [http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf) (The purpose of the Act is to improve the representation of children in custody proceedings by clearly defining the roles and responsibilities of child advocates and providing guidelines to courts in appointing them).

55. *See generally* ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC Revised Version) (1996) (amended 1999) (addressing the specific roles and responsibilities of a lawyer appointed to represent a child).

56. Elrod, *supra* note 2, at 873.

57. *Compare* FAMILY LAW STANDARDS OF PRACTICE § I (stating that a lawyer representing a child can be either a Child's Attorney, who advocates the child's wishes, or a Best Interests Attorney, who advocates for the best interests of the child), *with* ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A–2 cmt. (establishing that a lawyer may accept a dual role as both a Child's Attorney and guardian ad litem).

58. Kelly & Johnston, *supra* note 29, at 261.

59. R. 1.14 cmt. 5.

60. FAMILY LAW STANDARDS OF PRACTICE § IV.

61. *Id.* § II; N.Y. CT. RULES OF THE CHIEF JUDGE § 7.2(d)(1)–(3) (2007).

62. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A–1.

63. William Wesley Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys' Ethical Duties Exacerbate Children's Psychopathology*, 16 WIDENER L. REV. 369, 382 (2010).

64. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B–4(1).

65. N.Y. CIVIL PRACTICE, CUSTODY & VISITATION § 13.11[1].

66. CHILD CUSTODY PRAC. & PROC. § 6:26.

67. House, *supra* note 17, at 181.

68. R. 1.14.

69. R. 1.14(a)–(b). “Advocating uncritically the influenced and manipulated views of children is unhelpful and irresponsible.” FIDLER, ET AL., *supra* note 24, at 167.

70. R. 1.14; Theo S. Liebmann, *Confidentiality, Consultation, and the Child Client*, 75 TEMP. L. REV. 821, 827 (2002). Legal representation of clients with dementia, the loss of the ability to think, reason, and remember, requires the attorney to determine the line between the duty of zealous advocacy and the duty to prevent a client from making a dangerous decision that would not be made but for the dementia. James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 597 (2003).

71. FAMILY LAW STANDARDS OF PRACTICE § IV (stating that the most difficult ethical issue for a lawyer occurs when the lawyer believes the child's expressed position is inappropriate or would result in serious harm to the child).

72. RULES OF THE CHIEF JUDGE § 7.2.

73. Bala, *supra* note 15, at 861.

74. R. 1.14 cmt. 6; *See* Bala, *supra* note 15, at 861 (agreeing that if the child client is constantly changing his or her mind, the child's instructions are confusing or inconsistent, or if there is a considerable risk of harm in the child's plan, the attorney should conclude that the child lacks the legal capacity to instruct counsel).

75. Garber & Landerman-Garber, *supra* note 16, at 47; RULES OF THE CHIEF JUDGE § 7.2 (stating that a child's decision-making and objectives must be independent to be given weight).

76. Liebmann, *supra* note 70, at 827.

77. Traditionally, lawyers follow a client-directed model. R. 1.2. Clients are presumed to be competent unless proven otherwise. R. 1.4. Situations rarely arise where the lawyer must depart from the typical role because the lawyer cannot trust the client's judgment. *Id.* Lawyer's can seek out psychological advice from a mental health professional, (*see* Jonathan W. Gould & David A. Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. AM. ACAD. MATRIMONIAL LAW 303, 305 (2009)), however, Rule 1.14 authorizes a departure from the traditional lawyer-client relationship. R. 1.14(a).

78. R. 1.14(a).

79. Fidler & Bala, *supra* note 11, at 32.

80. Bala, *supra* note 15, at 861.

81. Gary Solomon, *Giving the Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency, and Termination of Parental Rights Proceedings*, 1, 13 (2008), <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf> (highlighting the fact that it is possible for the client, once deemed incapable of meaningful participation in the litigation, to develop into a client capable of active participation).

82. Bala, *supra* note 15, at 861.

83. R. 1.14 cmt. 5.

84. Solomon, *supra* note 81, at 12.

85. By age seven, a child's ability to understand the perspectives of others and exhibit the ability to think rationally. *Id.* However, children as young as five or six years old are entitled to have their opinions heard in legal proceedings regarding their custody. R. 1.14 cmt. 1.

86. *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIMONIAL LAW. 227, 239 (2009).

87. Bala, *supra* note 15, at 861.

88. Samuel J. Ferrara, Presentation for the New York State Bar Association, *The Appointment and Use of Attorney for the Child* (April 14, 2011).

89. *Id.* This includes social services, psychological, drug and alcohol, medical, law enforcement, school, and other records. *Id.*

90. Solomon, *supra* note 81, at 13. The Child's Attorney, if possible, should hire a mental health professional. This professional should not be hired by the parents or court-appointed to avoid the psychologist from transmitting information to a custody evaluator without the client's consent. See Stephanie Conti, Note, *Lawyers and Mental Health Professionals Working Together: Reconciling the Duties of Confidentiality and Mandatory Child Abuse Reporting*, 49 FAM. CT. REV. 388, 390 (2011) (stating that when lawyers and mental health professionals collaborate, the obligation of mandated reporting and the lawyer's obligation of confidentiality come into direct conflict).

91. See R. 1.14 cmt. 1 (explaining that a normal client-attorney relationship is based on the assumption that the client has the capacity to make adequately considered decisions).

92. See Ferrara, *supra* note 88 (citing RULES OF THE CHIEF JUDGE § 7.2) (stating that the attorney must fully explain the options available to the child client and recommend a course of action that would promote the child's best interests).

93. *Representing Children*, *supra* note 86, at 244.

94. *Id.* at 244–45; See R. 1.4(a) (authorizing the attorney to discuss the benefits, burdens, and long-term consequences of pursuing the child's preferences). The attorney may refer to the law as well as other considerations including moral, economic, social, and political factors that may be relevant to the client's situation. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

95. Bala, *supra* note 15, at 861; See discussion *supra* notes 30–31 (discussing what is a "reasonable" decision versus what is an unreasonable decision).

96. *Herbert L. v. Maria L.*, 32 Misc.3d 1217(A), n. 2 (Westchester Cty. Sup. Ct. 2011).

97. Garber & Landerman-Garber, *supra* note 16, at 47 (stating that a mental health professional or attorney interviewing the child must distinguish between a child's valid wishes and a child's statements prompted by a "chameleon-like effort to say what he believes is expected of him" in order to prevent the court from relying on the latter).

98. R. 1.14 cmt. 5.

99. *Id.* The attorney is permitted to reveal confidential information to the extent reasonably necessary to protect the client's interests. Kerry R. Peck, *Ethical Issues in Representing Elderly Clients with Diminished Capacity*, 99 ILL. B.J. 1, 2 (2011), available at <http://www.isba.org/ibj/2011/11/ethicalissuesinrepresentingelderly>; See also Liebmann, *supra* note 70, at 840–41 (stating that a lawyer may disclose information only to the extent necessary for the "future harm exception" including, for example, if the child's stated preferences for custody and/or visitation would place the child at a substantial risk of harm).

100. Patton, *supra* note 63, at 383; R. 1.14(b). Appointing a GAL is not always an ideal choice. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96–404 (1996) (stating that the appointment of a guardian ad litem is a "serious deprivation of the client's rights" and should not be requested if other solutions are available). As an arm of the court, a GAL is an advocate for the child's interests and in no way represents the child or the parents. Leonard P. Edwards & Inger J. Sagatun, *Symposium: Domestic Violence, Child Abuse, and the Law: Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 72 (1995).

101. R. 1.14 cmt. 7.

102. R. 1.14 cmt. 5. It is important to recognize that a Child's Attorney may not just substitute judgment because he or she disagrees with the child's chosen course of action. Ferrara, *supra* note 97. The Child's Attorney is only justified in advocating a position that is contrary to the child's wishes if he or she believes that the child lacks the capacity for making adequately considered judgments or that the child's position would result in substantial risk of harm to the child. RULES OF THE CHIEF JUDGE § 7.2(d)(3).

103. FAMILY LAW STANDARDS OF PRACTICE § II(B).

104. Tamara Steckler & Gary Solomon, *Perspectives: New Era in Representing Children*, N.Y.L.J., October 22, 2008, available at <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/newerainrepresentingchildren.aspx>.

105. Elliot J. Wiener, *The Chief Judge Clarifies the Role of Attorneys for Children*, 40 FAM. L. REV. 1, 2 (2008), available at [http://www.phillipsnizer.com/publications/articles/AttorneysforChildren\\_art.cfm](http://www.phillipsnizer.com/publications/articles/AttorneysforChildren_art.cfm).

106. See Barbara Kaban et al., *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 685 (2006) (stating that when the client lacks the capacity to decide, the Child's Attorney must investigate the child's family, community, and culture in order to advocate a position that the child would make if he or she were capable).

107. R. 1.14.

108. When a client's "ability to communicate, to comprehend and assess information, and to make reasoned decisions is partially or completely diminished, maintaining the ordinary relationship in all respects may be difficult or impossible." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96–404 (1996).

109. Solomon, *supra* note 81, at 31–32.
110. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B–2.
111. Kaban et al., *supra* note 106, at 685.
112. RULES OF THE CHIEF JUDGE § 7.2(d)(3).
113. Bala, *supra* note 15, at 863.
114. Gould & Martindale, *supra* note 77, at 304.
115. This can be difficult since many alienated children become dissatisfied with lawyers who do not advocate a position based on the child’s wishes. FIDLER ET AL., *supra* note 24, at 168.
116. Bala, *supra* note 15, at 863 (citing Warshak, *supra* note 29, at 375 (stating that pathological alignment with one parent and alienation from the other strips the child of a “genuine voice”)); Gould & Martindale, *supra* note 77, at 310 (explaining that the child’s voice begins to reflect “the words, attitudes, and beliefs of the parent who exercises the most influence over him or her”).
117. Bala, *supra* note 15, at 863.
118. *Id.* at 862 (When children are “caught between two warring parents” they are exposed to an increased risk of emotional damage); Gould & Martindale, *supra* note 77, at 309.
119. Fidler & Bala, *supra* note 11, at 32 (stating that to make informed decisions, one must be capable of anticipating and understanding the future consequences of the various options).
120. *Representing Children*, *supra* note 86, at 240 (stating that attorneys must make a case-by-case determination regarding a client’s capacity to set the objectives of the representation).
121. *Id.* (stating that “the lawyer *may* take reasonably necessary protective action” not that the lawyer *must* take protective action) (emphasis added).
122. Gould & Martindale, *supra* note 77, at 304; Edwards & Sagatun, *supra* note 100, at 74 (stressing the importance of empowering the child by reporting to the court the child’s desires).
123. Bala, *supra* note 15, at 850.
124. See Rachel Birnbaum & Nicholas Bala, *The Child’s Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers*, 25 CAN. J. FAM. L. 11, 12–13 (2009) (stating that it is dangerous to assume that parents know what is in their child’s best interests and that therefore the child’s voice is adequately represented by their parents).
125. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B–2 cmt. (stating that an attorney-client relationship is protected by the rules of confidentiality increasing the level of trust between attorney and client).
126. Ward, *supra* note 1, at 121.
127. *Representing Children*, *supra* note 86, at 237.
128. Hon. Sondra Miller, *Appendix A: Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York*, 27 PACE L. REV. 987, 1055–56 (2007). Bar associations and local courts in each jurisdiction must develop courses and materials in order to educate attorneys who wish to be assigned as a Child’s Attorney and for continuing education purposes. *Representing Children*, *supra* note 86, at 237.
129. Bala, *supra* note 15, at 864; ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 772–73 (Vicki Been et al. eds., 2d ed. 2008).
130. Fidler & Petersen, *supra* note 37.
131. Edwards & Sagatun, *supra* note 100, at 77 (stressing that child advocates should be interested in working with children, trained in child development, and prepared to spend a significant portion of their professional career working with children and families).
132. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012). Whether the attorney receives training or not, there may be situations where the lawyer is not competent to handle the assignment to a child with diminished capacity and the attorney should refuse to take an assignment. *See id.*
133. House, *supra* note 17, at 181; *See* Birnbaum & Bala, *supra* note 124, at 13 (adding that when the court does not adequately consider a child’s opinion, older children especially are more likely to “vote with their feet” making any disagreeable court order difficult to enforce).
134. Fidler & Petersen, *supra* note 37.
135. House, *supra* note 17, at 178.
136. Lauren R. v. Ted R., No. 293699–02, slip op. (N.Y. Sup. Ct., May 25, 2010).
137. Donna J. Martinson, *One Case-One Specialized Judge: Why Courts have an Obligation to Manage Alienation and Other High-Conflict Cases*, 48 FAM. CT. REV. 180, 183 (2010).
138. *See* Richard A. Warshak, *Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children*, 48 FAM. CT. REV. 48 (2010) (The program, Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships™, that draws on social science research “to help alienated children and adolescents adjust to court orders that place them with a parent they claim to hate or fear”); *See also*, Matthew J. Sullivan et al., *Overcoming Barriers Family Camp: A Program for high-Conflict Divorce Families Where a Child is Resisting Contact with a Parent*, 48 FAM. CT. REV. 116 (2010) (This program requires families to participate in a five-day family camp experience that includes psycho-education and clinical intervention “to treat separating and divorced families where a child is resisting contact or totally rejecting a parent.”).
139. *See* Miller, *supra* note 128, at 1055–56 (emphasizing that the rules of good lawyering and professional responsibility apply to the Child’s Attorney). An attorney who substitutes judgment should argue against harsh penalties for a child who

refuses to visit a parent, since, after all, the Child's Attorney must advocate for what is in the best interest of the child. See SECTION OF FAMILY LAW STANDARDS OF PRACTICE § I (seeking to keep the best interests of the child at the center of the court's attention). Jail time is certainly not in the child's best interest.

140. Kelly & Johnston, *supra* note 29, at 255.

141. Edwards & Sagatun, *supra* note 100, at 69. The child's parents and their respective attorneys cannot be relied upon to speak for the child since they have to advocate for their own perspectives. *Id.* at 68.

*Jamie Rosen is an associate at the Center for Children, Families and the Law and an associate editor of the Hofstra Law Review at the Maurice A. Deane School of Law at Hofstra University. She graduated cum laude from the University of Maryland, College Park, with a B.A. in psychology and criminology and criminal justice. During her first summer of law school she worked as a judicial intern in Nassau County Family Court in New York where she first learned about the family court system and custody and visitation issues. She also attended the 49th Annual AFCC Conference in Chicago, Illinois where she helped organize a pre-conference institute entitled "Zealous Advocacy and Best Interests: Ethical Dilemmas and Practice of Family Law."*