ETHICAL JUDGMENT AND INTERDISCIPLINARY COLLABORATION IN CUSTODY AND CHILD WELFARE CASES

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I. INTRODUCTION

What is a lawyer’s professional responsibility in child custody and child welfare cases? What do we teach law students, who will soon enter family law practice, about their role?¹

There is a growing consensus that the traditional adversarial litigation model is ill-suited for resolving family disputes, particularly when the custody of children is involved.² Zealous advocacy, as traditionally defined, may injure the interests of all parties to the dispute.³ Too often a lawyer’s attitude...
is: “My job is to zealously represent my client; it is up to the judge to decide what is in the child’s best interest.” Lawyers justify character assassination of the opposing party as zealous client representation. The lawyer’s actions add fuel to the existing dispute between the parties, but shed little light on what would be best for the child. Rather than being protected by the legal process, which is designed to protect the child’s interest, the child is injured by it.

Due to the overload of cases in the child welfare system, as well as the inability of many people to retain counsel in a custody dispute because of financial limitations, the adversary system is not functioning as intended. Although the adversary system presumes that each party has a lawyer

really done the client a service? Courts are beginning to recognize the negative impact that lawyers and the legal process can have in prolonging and intensifying conflicts between divorcing parents. There is no question that ongoing conflicts between parents have a detrimental effect on their children. Therapeutic jurisprudence, which realizes the importance of recognizing the unintended consequences of legal actions and decisions, is relevant in family law cases. See, e.g., Kathryn E. Maxwell, Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients’ Divorces on Their Children, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 161 (Dennis P. Stolle et al. eds., 2000).

4. When I first began practicing family law, I occasionally asked the court to consider appointing an attorney for the child or sending my client, usually a parent or a grandparent, or the child to a family therapist. I would usually make these requests only if I felt quite certain that the results would help my client “win” the case. My primary concern was to avoid any step that could undermine my client’s position.

Today, after twenty years of practicing family law, my first loyalty is still to my client, but I have developed an approach to practice that also considers the welfare of the child and the family as a whole. The input of an experienced family therapist, who can identify the issues underlying the dispute between the parties, is often essential to finding a successful resolution. A court-imposed solution, even if it is favorable to the client, will not work if the opposing party is determined to undermine it.

Sometimes the court will order the parties to enter therapy. In one of our recent cases, we represented a mother with AIDS who wanted to regain custody of her children. The children had been removed from the mother’s care because of her heroin addiction. The mother entered a drug treatment program and was eventually able to regain custody of her two-year-old daughter from foster care. Despite our client’s rehabilitation, the child’s grandmother, who had obtained custody of her four-year-old grandson, was unwilling to return him to his mother or allow her to have unsupervised visits with him. We tried to facilitate a negotiated settlement and suggested family therapy, but the grandmother resisted our suggestions. Initially, the court was unwilling to order therapy. A year of litigation ensued, including a hearing in which our client’s drug treatment counselor and nurse practitioner described her progress. The court awarded our client substantial visitation rights, which was essentially joint custody with the grandmother, and ordered the mother and grandmother to enter family therapy. The court recognized that the feuding between the mother and grandmother would not end with the visitation order and that the feuding was harmful to the children. The parties have recently entered the process, and it remains to be seen whether therapy pursuant to the court order will be successful.
advocating its position, in the typical private child custody dispute, the child is not represented. A different approach is needed.

There is a national move toward requiring mediation in family law cases, which is a step in the right direction. However, mediation as currently practiced has been heavily criticized as favoring the more powerful party, usually the father. Mediation is often carried out by a lawyer who is not equipped to help the parties deal with the underlying issues.

For a new approach to family cases to be successful, it is essential that the lawyer’s role become more constructive than it has been historically. The involvement of a family therapist can be critical in helping the family discuss issues in order to arrive at a fair agreement that considers the needs of the children and the parents. The opportunity exists to substantially shift the approach to child custody cases taken by new law school graduates who enter into family practice. An interdisciplinary, problem-solving approach to


Maryland law requires that in any case involving child custody or visitation, except in cases involving neglect or abuse of a party or a child, the court must make a determination as to whether “mediation of the dispute... is appropriate and would likely be beneficial to the parties or the child.” Md. Code Ann., Fam. Law § 9-205(a), (b)(1)(B) (2001). If the court determines that mediation would be appropriate, the statute provides that the court must order the parties to attempt mediation. Id. § 9-205(b)(3). However, mediation can only be ordered when both parties are represented by counsel. Id. § 9-205(b)(1)(A).


7. There has been some movement toward making the lawyer’s role more constructive. For example, Forrest S. Mosten writes of lawyers defining themselves as “family advocates” who try to engage a prospective client in a discussion as to his or her goals in pursuing custody and what the client believes would be best for the children. See Forrest S. Mosten, Emerging Roles of the Family Lawyer: A Challenge for the Courts, 33 Fam. & Conciliation Cts. Rev. 213, 224 (1995).

8. A California study found that participant satisfaction with mediation was highest when a lawyer and a social worker facilitated the mediation. Bruch, supra note 6, at 118.

9. My desire to propose a different approach to practicing family law has been heightened because of the feelings that my students often express toward the practice of law. In my experience, the majority of students who enter a clinical program in their second or third year of law school have adopted the competitive, zealous advocate approach of the adversary system. In the student’s mind, loyalty to one’s client and zealous advocacy on the client’s behalf are the most important values of this system. To counter the overwhelming images the
family law cases is essential.10 In the cases from the AIDS Litigation and Counseling Clinic of the University of Maryland School of Law (Legal Clinic) detailed below, I describe the steps that we took toward developing a different approach to custody disputes through the exercise of what I call "ethical judgment.”

The ethical judgment approach tempers zealous advocacy for individual clients with the recognition that a resolution in the child’s best interest is the primary legal value to be vindicated in a child custody dispute.11 This approach takes into account that family relationships continue to exist after the litigation ends, and it is in the interest of all the parties to seek a resolution that best resolves all parties’ needs. Adversarial tactics and posturing should be avoided, as they are almost always harmful to the children and the family.12

students receive from the media and during law school, I ask them to read articles that question the dominance of adversarial values. See, e.g., David Luban, The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 83 (David Luban ed., 1983). Thomas Shaffer’s article provides an interesting historical perspective on the question by describing a connection between the robber baron, the growth of corporate America, and the rise of the adversary system. Thomas L. Shaffer, The Unique, Novel and Unsound Adversary Ethic, 41 VAND. L. REV. 697, 703 (1988); see also Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. REV. 5 (1996).


11. The American Academy of Matrimonial Lawyers recognizes that traditional ethical rules, such as the requirement of zealous advocacy, are insufficient and even counter-productive in the context of divorce and custody cases. See AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS (2000) available at http://www.aaml.org. The Academy has published a voluntary code of conduct for family lawyers, which mandates that lawyers should “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children” in child custody cases. Id. at R. 6.1. The lawyer “should be knowledgeable about different ways to resolve marital disputes, including negotiation, mediation, arbitration and litigation.” Id. at R. 1.4. Additionally, a lawyer “should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution.” Id. at R. 1.5.

12. Child advocates sometimes take the zealous advocacy approach. For example, we represented a father who sought custody of his eight-year-old son. The son had been removed from the mother’s care because of neglect due to her drug use. The child was thriving while living with his father, but repeatedly stated his desire to live with his mother. The child’s attorney presented the child’s wishes to the court and then tried to prevent the court from hearing testimony from the child’s therapist. The therapist was prepared to testify about the bond he observed between the father and son, as well as the child’s resistance to the structure his father was trying to implement for his son. Clearly, the therapist’s testimony would conflict with the child’s desire to be reunited with his mother, who was still struggling with her drug addiction. However, the judge needed the information to make an appropriate decision in the child’s best interest.
All parties have a responsibility for the child’s welfare. The ethical judgment approach is consistent with recommendations issued by the American Academy of Matrimonial Lawyers.\(^\text{13}\)

In the ethical judgment approach, the attorney is a problem-solver. The lawyer’s role is to assist the family in seeking creative and workable solutions to the dispute. Problem solving may require the input or assistance of a family therapist because the lawyer alone may be ill-equipped to assist the family in identifying the underlying issues and the best way to address those issues. The lawyer should return to the adversarial model only if the problem-solving model has failed to resolve the dispute. Above all, the lawyer should strive for the goal of minimizing harm to the child and the family.

Part II of this Article describes the ethical judgment approach and how it parallels and differs from William Simon’s notion of ethical discretion in law practice. Part III explores the application of ethical judgment to family law cases. Part IV discusses achieving good substantive outcomes by examining three examples from the Legal Clinic in which the ethical judgment approach was applied to family law cases. Part V addresses whether the ethical judgment approach can be undertaken without a modification of current, relevant ethical rules. Finally, Part VI addresses the potential risks involved in interdisciplinary collaboration.

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I recognize the concerns of Martin Guggenheim, Jean Koh Peters, and others who believe that children’s lawyers have often improperly asserted their own values and beliefs about the child’s interest. See Martin Guggenheim, \textit{A Paradigm for Determining the Role of Counsel for Children}, 64 \textit{Fordham L. Rev.} 1399 (1996); Jean Koh Peters, \textit{The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings}, 64 \textit{Fordham L. Rev.} 1505 (1996). Professor Guggenheim seeks to limit or eliminate the discretionary judgments made by children’s lawyers. Guggenheim, supra, at 1427. He believes that attorneys are unprepared to make judgments as guardians ad litem. \textit{Id.} at 1414. Children’s advocates in child welfare cases have been moving away from the belief that it is appropriate to exercise “discretionary judgment” on behalf of clients. Historically, children’s advocates have advocated their view of what is in the best interest of the child, instead of considering the wishes of the child. While Guggenheim and Peters argue for severely limiting the decisions a child’s attorney can make regarding the child custody case, their argument refers to situations in which the child’s wishes have seldom been zealously advocated. Guggenheim, supra, at 1427; Peters, supra, at 1525-26.

Peters recognizes that there are situations in which the child’s lawyer must exercise judgment on behalf of the child. Peters, supra, at 1516. In these situations, Peters urges advocates to immerse themselves in the literature regarding the various “best interest” theories. \textit{Id.}


\(^{13}\) \textit{See supra} note 11.
II. THE ETHICAL JUDGMENT APPROACH

Reading William H. Simon’s article, Ethical Discretion in Lawyering, was liberating in that the article describes what I, and many other lawyers, often do in practice. I do seek to achieve a just result in each of my cases. I do consider how I must compensate for the dysfunction of the legal system. What is helpful about Simon’s article is that it begins to describe what lawyers often do, but seldom talk about. It provides a starting point for the discussion of what it means to seek justice in the context of a family law case.

Simon argues that lawyers should exercise what he describes as “ethical discretion” based on “a professional duty of reflective judgment.” Lawyers should at least have the option, if not the responsibility, to seek the best possible resolution for all parties in every civil case. Lawyers should have the responsibility to ensure that the procedures in place are functioning as they should, and if they are not, to compensate accordingly. Simon argues that lawyers should be accorded the responsibility to make judgments about what a fair outcome would be and to pursue that end.

One of Simon’s most appealing points, though I fear he may carry it too far, is the notion that it is a lawyer’s responsibility in seeking justice to compensate for a system’s dysfunction or omissions. The difficulty is what

15. Id. at 1096. In the context of the lawyer’s responsibility, the term “ethical discretion” is even more unsatisfactory and simply not descriptive of what the lawyer advocates. Id. at 1096. In the context of the lawyer’s responsibility, the term “ethical discretion” is even more unsatisfactory and simply not descriptive of what the lawyer advocates. Id. at 1096.
17. Id. at 1096.
18. Id. at 1098.
19. Id. at 1083.
20. Id. at 1097.
if, in the course of fixing a systemic omission, you provide assistance to your client’s adversary? Have you breached your duty to the client? Simon fails to adequately address the tension between seeking justice and the lawyer’s ethical obligation to zealously advocate for her client.

Simon makes a critical point when he argues that what are often described as moral concerns extraneous to the lawyer’s role are really competing legal values which deserve equal consideration. For example, in the context of a custody dispute, it is appropriate for all attorneys to consider what resolution would be in the child’s best interest, as finding a result in the child’s best interest is the primary legal value to be vindicated in a custody dispute. At the very least, the parties should do nothing to obstruct this goal.

As Simon points out, ethical discretion is a misleading, awkward term for the judgment he expects. In his book, The Practice of Justice: A Theory of Lawyers’ Ethics, Simon renames ethical discretion “contextual judgment.” However, neither of these terms satisfactorily describes the process I seek to have my students undertake, which I call “ethical judgment.” Ethical judgment parallels many of the aspects of ethical discretion, such as attention to practical outcomes, consciousness of the impact of one’s actions on third parties, compensation for system failures, and recognition of the legal values to be vindicated, but ethical judgment retains a sense of tension with one’s obligation to the client. The client must be fully involved and participate in the decision-making process. In addition, ethical judgment recognizes that lawyers alone may be unable to assist a family in resolving difficult problems or in determining a good resolution to those problems. Therefore, ethical judgment puts heavy emphasis on seeking assistance from other professionals, such as family therapists.

What is most appealing about ethical judgment in family practice? It charges the lawyer with some responsibility and accountability for the outcome of any particular case. The lawyer’s work is not done until the overall problem is resolved, regardless of provisions contained in the retainer agreement. It permits, even demands, consideration of the needs of
unrepresented third parties, usually children. Furthermore, a lawyer who exercises ethical judgment will consider the impact of litigation on the family and will take steps to reduce the severity of the impact. It is not sufficient for the lawyer to present a case without any concern for the practical outcome. Ethical judgment not only requires lawyers to pay attention to practical outcomes, but also to consider their responsibilities in achieving them.

The ethical judgement approach requires a holistic view of family law practice. Application of the approach requires the development of in-depth knowledge of how families operate and what factors impact the welfare of children. It may require the participation of non-legal professionals, such as family therapists, in assessing how to proceed with a particular case. The decision to involve a family therapist involves potential risks, and the client must agree to the decision in advance. To exercise ethical judgment, attorneys must be willing to educate themselves about family dynamics, child welfare concerns, and the needs of the particular family.

III. THE APPLICATION OF ETHICAL JUDGMENT TO FAMILY LAW CASES IN CLINICAL PRACTICE

Ethical judgment mandates that the client be fully involved in every stage of the proceedings. The client is the primary source of information and must remain the primary decision-maker. At the Legal Clinic, we ask the client to consider the child's interests and the impact of possible decisions on the child assist the standby guardian with the petition or in finding new counsel. In my mind, this obligation arises both to the deceased client and to the children who are the main subject of the legal proceeding.

27. Ethical judgment in family litigation is potentially problematic—particularly given an unstable landscape caused by the transition from the old system of publicly ordered relationships to privatization. Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1444. However, there is an emerging consensus that the primary value to be protected in family law cases is the welfare of the child. Jane C. Murphy, Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law, 60 U. Pitt. L. Rev. 1111, 1118 (1999).

28. Involvement of a family therapist can take place in a variety of ways and does not always require active participation of the client and the whole family. The many different activities a family therapist may undertake in this context include the following: consulting with the attorney in assessing issues and determining how to proceed, helping the client develop goals and concerns, addressing barriers to achieving those goals, meeting with all members of the family to identify issues, facilitating communication, helping the family arrive at a resolution, referring the family to additional resources for support and intervention, appearing as an expert witness in court, and critiquing custodial investigations conducted by court employees.
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as well as other members of the family. Possible steps or remedies that serve interests beyond the client’s articulated goal are discussed with the client.

If a lawyer is going to actively seek a good resolution to a family dispute, as opposed to simply pursuing the client’s originally stated goal, the attorney must truly understand the client’s perspective and the family dynamics that contribute to that perspective. Therefore, it is critical that the lawyer develop an open and trusting relationship with the client. It may be difficult to develop such a relationship when the client comes from a very different background than the student-attorney, which is often the case in clinical practice.

Students practicing in the context of a clinical practice must have the opportunity to reflect on what they are experiencing and to educate themselves as they engage the client in a collaborative relationship. The student-attorneys may need assistance in recognizing the judgmental reactions they may experience toward clients who are very different from them. Outside readings can help students see things from a client’s point of view, but discussion and reflection in the context of real cases are critical to students’ understanding of clients.

To practice effectively and ethically, the attorney must understand the client’s experiences and perspective, as well as any possible discrimination that the client may face in the court system. If the client is from a different background than the student-attorney, the student may be required to do extra

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Attorneys must educate themselves regarding the cultural differences in the structure and function of families in order to engage in a successful negotiation for the most appropriate resolution of a child custody dispute. See, e.g., Carol B. Stack, Cultural Perspectives on Child Welfare, 12 N.Y.U. REV. L. & SOC. CHANGE 539 (1983).


32. One useful exercise is to ask students to write about how differences or similarities have impacted a relationship with a client and then discuss, as a class, what each student has written.
work to begin to understand the client. This understanding is a major emphasis of our work in our weekly seminar at the Legal Clinic.

Ethical judgment is intended to describe the judgment a lawyer exercises with the client’s participation and agreement in determining the goals of representation and the means by which those goals may be achieved. These decisions would include, for example, whether and when to initiate litigation and how to conduct discovery. It is not intended to describe the lawyer’s value judgments about the client’s or family members’ lifestyles.

I ask my students who represent parents, “Can we seek a result in this case that will benefit the child as well as our client and heal, rather than injure, this family?” If this question cannot be answered in the affirmative, we might not take the case. However, if there are other goals to pursue, such as challenging a misapplication of the law in a termination of parental rights case, we may still take the case.

If the goal of a family law proceeding is to protect a child or to find a custody solution that is in the child’s best interest, then all of the attorneys involved in the litigation should work toward that goal to the extent that it is consistent with each individual client’s wishes and goals. The lawyers should not permit their zealous advocacy for their clients to overshadow the

33. I pose other questions to the students, such as the following: Where can we obtain information about the needs of this family? Might it be helpful to offer social work assistance to the family? What outside services does our client or other family member need? For example, does the client or family member need individual therapy, family therapy, parenting classes, or respite care?

34. A small number of family lawyers have formalized a non-adversarial approach to family law practice which is known as “collaborative law.” See Tesler, supra note 2, at 215. Lawyers practicing collaborative law enter into agreements up front with their client, the opposing party, and opposing counsel. Id. at 219. Together, they agree that all parties involved will engage in good faith negotiations in trying to reach a fair agreement and that the lawyers involved will not take the dispute to court under any circumstances. Id. By the terms of their agreement, if a settlement cannot be achieved, both lawyers must withdraw and the parties must seek other counsel if they wish to further pursue action in court. Id. In addition, in collaborative law, lawyers can threaten to withdraw if the client insists on proceeding in bad faith. Id. at 220. The collaborative law approach requires the attorney to develop a new group of skills and expertise. The lawyer must alter her approach to the client, opposing counsel, and the negotiation process. Id.

Additionally, collaborative lawyering can be more effective than mediation because of the active problem-solving role that lawyers must undertake during the course of representation. Id. at 221. Each lawyer can privately deal with an upset or unreasonable client so that productive negotiations can resume.

The collaborative law approach to family law practice was pioneered by Stuart Webb, a family law practitioner in Minneapolis. Id. Webb was so unhappy with the traditional adversarial approach and its conflict with his personal ethics that he was about to quit the practice when he realized that there was a different way to do things and set about developing a new approach. Id. at n.32.
child's needs. The attorneys and their clients should have a role in problemsolving in order to arrive at a remedy that serves the needs of the child and the family, as well as the individual parent. The active participation of each party will sometimes include a referral to a family therapist, who can help the parties address issues underlying the custody dispute.

To prepare my students for a problem-solving approach to practice, I have them read Getting to Yes: Negotiating Agreement Without Giving In, in addition to other material on negotiation strategy and tactics. We commence most of our family cases with a problem-solving approach and try to persuade the opposing counsel to respond in kind. However, this does not mean that we fail to take the necessary steps to protect our clients' interests. We carefully consider the impact that our actions are likely to have on the opposing party, who is probably a family member of our client, and weigh the value of a particular step against the likelihood that it will increase hostilities between the parties.

At the University of Maryland School of Law, we are fortunate to have a social work component in our clinical program. A full-time faculty member from the School of Social Work supervises the student social workers, who are available to work with law clinic clients on a wide range of issues. Their assistance has been invaluable in helping us to understand the dynamics at work in our cases, as well as to provide support and assistance to our clients.

An interesting tension can arise from this collaboration with student social workers. Questions arise as to who is the client—whether it is the individual who sought our assistance or the family. From the attorney's standpoint, the client is the individual who first sought our assistance. From the social worker's point of view, the client is often the family. We frequently discuss

35. This restraint is especially important in private custody disputes, in which the child is usually unrepresented by counsel.

36. When I use the term "family therapist," I am referring to a licensed clinical social worker with family therapy training or a licensed marital and family therapist. A family therapist's role is to help the family function as a whole in a manner that best meets the needs of all members of the family. This type of support for the parents generally will benefit the child as well. See Susan L. Brooks, A Family Systems Paradigm for Legal Decision Making Affecting Child Custody, 6 CORNELL J.L. & PUB. POL'Y 1 (1996). The family therapist can help the family overcome communication barriers, identify each of the party's needs, and bring the child's needs and desires to the attention of parents or caretakers.


38. When we believe that a client might benefit from the opportunity to meet with a social worker, we make it clear to the client that this determination is not a requirement of our representation of the client. If the client expresses an interest in proceeding with a social worker, the social worker explains her obligation to report suspected neglect or abuse. The client signs a statement acknowledging that this has been discussed with her.

39. In addition, although the child usually is not defined as our client, the child is often
whose point of view should prevail in our joint work. The final resolution of this issue depends upon the posture and facts of the particular case, the tenor of the family relationships, and the wishes of the person who came to us for help.

Working in collaboration with social work students enables student-attorneys to see the overall impact of their work in family cases. It helps student-attorneys see the value of the less adversarial, problem-solving approach.

Lawyers approaching cases from an adversarial perspective might be hesitant to involve a social worker or family therapist in a family case because of the potential risks to a client. However, in reality, the involvement of social workers is becoming routine in family cases. Either the court orders—or the parties agree to—submission to custody investigations or psychosocial assessments. These investigations and assessments are conducted by individuals whose experience and expertise vary, but their determinations are often heavily relied upon by judges in deciding custody cases. Therefore, it is vitally important for student-attorneys to be educated about the role played by custody investigators and to be prepared to critique the investigators when appropriate. The licensed social worker in our clinical program has been helpful in assessing custody investigation reports to determine whether they were conducted in accordance with professional

40. The determination of which point of view to implement impacts how we draft the retainer agreement with our client, and it impacts our obligation to protect client confidences.

41. The biggest potential ethical conflict we have encountered to date arose because of the legal obligation that social workers and family therapists have to report suspected child neglect or abuse. Attorneys in Maryland do not have an obligation to report suspected child neglect or abuse. However, they may report their suspicions when there is an on-going risk of serious harm to the child. MD. CODE ANN., RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001).

We have dealt with the reporting obligation in our practice by disclosing the social worker's obligation to the client when we made the social work referral. If the client still wishes to proceed, the social work student reviews this obligation with the client, who signs a statement acknowledging this review. I discuss the benefits and possible risks of a social worker referral with the student-attorney prior to her conversation with the client regarding the referral. If we determine that such a referral would pose a serious risk to our client, we do not make the referral, but it is very rare that we make such a determination.

42. In jurisdictions where a referral to the court social worker for a custody investigation is made only with the parties' consent, student-attorneys need to be prepared to counsel the client about the benefits and possible risks of participating in such an investigation.
standards and how much weight they should be given. The social worker provides the students with the tools to make these assessments themselves.

The ethical judgment approach expands the lawyer’s role beyond that of a zealous advocate for an individual client. The lawyer sees the client not just as an individual, but as a part of a family that will continue to function in some way after the litigation is over. The lawyer tries, perhaps with the assistance of a social worker or family therapist, to identify the underlying issues that brought the case to litigation and to assist the parties in arriving at a mutually agreeable solution to the conflict. This is consistent with Simon’s point regarding competing legal values. He argues that what is often described as a law versus morality conflict is actually a conflict between competing legal values. Why is it that being a zealous advocate for a client in a custody dispute is considered more important than the goal of achieving a result that is truly in the child’s best interest? Some balance can, and should, be struck between these competing legal interests.

Advocating procedural fairness is one of the more readily acceptable applications of ethical discretion. The Legal Clinic had the opportunity to put this principle to work in trying to make Maryland’s standby guardianship statute more accessible to the people that it was intended to help. The Maryland legislation authorizing standby guardianship requires both parents to join in the petition. The statute does not address what should be done if one of the parents cannot be located or if the parents cannot agree to the terms in the petition. The traditional view was that petitions under this statute could only be filed if both parents could be located and agreed to the standby guardianship. The staff of the Legal Clinic was concerned that these requirements greatly limited the availability of the standby guardianship for the families most in need of it. Most of our clients are single mothers who often do not have contact with the fathers of their children. The standby guardianship statute was written to respond to the needs of families in which there is only one parent involved in the child’s life. Therefore, it seemed appropriate and in line with the purpose of the statute to read into the statute procedural steps which would allow the custodial parent to initiate a standby guardianship.

43. Simon, supra note 14, at 1114. Simon writes:

“[L]egal option” is objective and integral to the professional role, whereas the “moral” alternative is subjective and peripheral. Even when the rhetoric expresses respect for the “moral” alternative, it implies that the lawyer who adopts it is on her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers and law students to argue for the “moral” alternative. In many such situations, however, both alternatives could readily be portrayed as competing legal values.

Id.


45. See id. § 13-903(a)(2) (providing for filing of standby guardianship petition when parent cannot be located after a reasonable time).
guardianship proceeding, but which would also protect the rights of the absent or non-consenting parent.

In the Legal Clinic's first case presenting this issue, we moved for alternative service on the absent father after demonstrating reasonable efforts to locate him. We persuaded judges in the Baltimore City Circuit Court that the appropriate remedy, if the father objected to the mother's plan, was to schedule a hearing on the merits rather than simply precluding the mother from using the standby guardianship statute. After this remedy had been applied in Baltimore for approximately two years, we persuaded the Rules Committee of the Maryland Court of Appeals to promulgate rules formalizing these procedural steps despite the absence of any explicit authorization for such steps in the statute.46

In the three case examples that follow, we implemented the ethical judgment approach to achieve the goal of a satisfactory result for our client, while at the same time ensuring that the welfare of the child involved was a central consideration.

IV. RESPONSIBILITY FOR A GOOD SUBSTANTIVE OUTCOME: HOW DO THE LAWYERS FOR EACH PARTY ACHIEVE IT?

The zealous advocacy perspective seems to require the advocate to pursue the goals that the client has identified, without substantive regard to the impact on the child who is the subject of the proceeding. The only exception to this might be if there were a concern that the child was in immediate physical danger. In such a case, the zealous advocate would have the option to take steps to protect the child.47 Unfortunately, short of this kind of dramatic concern, there is no expectation that the lawyer for the petitioner for guardianship will ensure that the outcome is appropriate for the child involved, even though it is the child's custody that is the fundamental issue at stake. The system presumes that an adversary will bring out negative factors that might exist with regard to either party and that the judge will be able to make an informed decision in the best interest of the child.

In many areas in which we practice in the Legal Clinic, the prerequisites to the anticipated operation of the adversary system are non-existent. In custody cases, for example, the opposing party is often unrepresented due to a lack of financial resources. The parties involved in child abuse and neglect cases seldom have adequate representation because the advocates are so overwhelmed by the number of cases that they handle. In guardianship proceedings in which a third party seeks custody of a child, there is often no adversary—at least none who is a party to the litigation. Frequently, we see

47. MD. CODE ANN., RULES OF PROF'L CONDUCT R. 1.6 (2001) (discussing confidentiality of information).
that concerns exist about a potential guardian’s qualifications or suitability as a guardian, but there is no adversary party to make the court aware of these concerns.48

Simon’s response, from a choice of case approach to achieving justice, might simply be to reject the case if it has no merit. However, often the child is already residing with the caretaker who is seeking to establish guardianship. In that circumstance, refusing to represent the proposed guardian permits the status quo to continue. In these circumstances, applying the principles of the ethical judgment approach seems to be the only viable option.

A. Case Example #1—Fixing Procedure: Attorney for Every Party?

In this case, we tried to “fix the procedure” to ensure that the child’s welfare would be protected. The child’s interest was protected, but the adversarial posture taken by the child’s appointed counsel undermined our client’s authority with her granddaughter.

The grandmother of a sixteen-year-old girl whose mother had recently died of AIDS contacted the Legal Clinic. The grandmother, Mrs. Aluette, informed us that the child was in a psychiatric hospital and that she needed to be appointed as the child’s legal guardian in order to authorize her granddaughter’s release from the hospital. The grandmother presented the situation as an emergency in need of immediate attention. We agreed to help her file an emergency petition for guardianship, which we filed that same day. However, after we spoke to the grandmother but before we actually filed papers with the circuit court, I received a call from a protective services worker with the Department of Social Services. The protective services worker had been informed by a nurse at the psychiatric hospital that sixteen-year-old Evon did not wish to return to the care of her grandmother who, she alleged, forced her to live in an attic room, did not feed her properly, and was married to a heavy drinker.

Two issues concerned me about the case. Primarily, I did not feel comfortable presenting the grandmother’s petition to the court without some opportunity for the court to know of the child’s complaints against the grandmother. Secondly, the child’s allegations, as presented by the protective services worker, changed my initial determination regarding the merits of the grandmother’s case. I felt that Rule 3.1 of the Maryland Rules of Professional Conduct required a lawyer to abstain from filing a petition for guardianship, especially in an uncontested case, unless the petition had merit or, at least, would do no harm to the child. 49


Several options presented themselves. One option would have been to tell the grandmother that we had decided we could not assist her with the petition. Another option would have been to file the petition and take no further action, based on the assumption that the Department of Social Services had already been alerted to the concerns and that it was their responsibility to see whether the allegations had any substance. However, I was concerned about the welfare of the child and about my reputation with the judge who was about to sign this emergency petition. Therefore, I added a motion requesting that the court appoint an attorney for the child. Otherwise, the child would have gone unrepresented.

I suggested to the court that the Family Law Clinic at the University of Baltimore might have a student available to represent the child. The Family Law Clinic agreed to represent the child. Ironically, the student-attorney who was appointed to represent Evon took a very traditional, adversarial position on behalf of her client. There was no attempt to work through the issues to arrive at a solution that would help heal the relationship of the parties involved, which would have been my preferred approach. Our efforts to set up a meeting to discuss the issues, and perhaps to achieve a negotiated settlement, were resisted by the student-attorney. I believe that a referral to a family therapist, who could have helped the grandmother and granddaughter work out their disagreements, would have been the best outcome, but opposing counsel had no interest in investigating this possibility.

It turned out that the allegations that Evon had made against her grandmother were without foundation and were the result of her desire to live with a friend of her mother's, rather than with her aging, old-fashioned grandmother. The court ultimately held that Evon should remain in the custody of her grandmother, but, over the grandmother's objection, the court also ordered substantial visitation with the mother's friend. This outcome was very upsetting to our client, who fired us and hired another lawyer to appeal the decision.

I think that there was a breach of trust from the moment we filed the motion asking the court to appoint an attorney for the granddaughter. However, I would probably make the same decision again. When we filed our motion, I tried to justify our request to the court for the appointment of counsel for Evon under the traditional principles of the adversary rules. For example, it is permissible under Rule 1.6(b)(1) of the Maryland Rules of Professional Conduct to make a disclosure to the court if it is feared that death or physical harm would come to another party. However, at that time, many

50. The student-attorney’s faculty supervisor indicated to me that she would have taken a different approach, but she was unwilling to impose her practice style on the student.

51. Rule 1.6(b) provides that: “A lawyer may reveal such information to the extent the lawyer reasonably believes is necessary: (1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm . . . .” MD. CODE ANN., RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001).
of my colleagues would have refused to represent the grandmother, or having agreed to represent her, they would have done so zealously and without requesting counsel for the child. In retrospect, I think that it was my concern for the best outcome for the child, rather than real fear about her physical well being, that motivated my motion for the appointment of counsel for the child. My goal was to create a shield for the child, but the child’s counsel turned it into a sword.

The court’s order dictated that the grandmother permit visits between her granddaughter and her mother’s friend according to a specific schedule. From the court’s point of view, this result may have seemed like a compromise because the child wanted to live with her mother’s friend rather than her grandmother. However, the court undermined the grandmother’s authority to decide whether, and when, the child would visit with her mother’s friend. The court’s action was highly unusual in that, generally, only a parent has the right to a visitation order. A parent or other person in loco parentis usually has the full authority to decide with whom the child will visit.

Visitation was justified as being in the child’s best interest. But was it really a good thing to undermine the grandmother’s authority in this way, at a time when she was struggling to establish a relationship with her granddaughter? It would have been preferable to refer the family to a family therapist rather than litigating this issue and having the judge make a decision. The family therapist could have identified the issues and could have helped the grandmother and grandchild communicate with each other about their apparently conflicting needs and desires.

Interestingly, I am sure that the judge in this case did not intend to undermine the grandmother’s authority with her granddaughter. He was simply persuaded that the visits with her mother’s friend would be a good thing for this young woman who had recently lost her mother to AIDS. The judge believed that the grandmother’s concerns about the friend were not well founded, as the friend had been in recovery from drug use for five years.

The impact of this legal decision went beyond the stated issue. This case is a good example of the dynamic identified by therapeutic jurisprudence scholars, who have noted that judges are often unaware of the practical impact of their decisions. Unintended consequences of legal decisions are frequent, often undesirable, and could be mitigated by an interdisciplinary problem-solving approach rather than adversarial litigation.

B. Case Example #2—Fix Procedure—But How? Lawyer for Every Party? Or Encourage Negotiation?

What is an attorney’s obligation when confronted by an unrepresented parent in a custody dispute? Should the attorney try to help the unrepresented parent find counsel, negotiate with the unrepresented party, or proceed to trial against the unrepresented party? Which of these less than desirable choices is most likely to lead to the best possible outcome for the child and the parents? Is that even a question an attorney for one of the parents is permitted to ask? These questions were raised by the Lyons case, in which we ultimately decided to engage in settlement negotiations with the unrepresented mother.

The Maryland Rules of Professional Conduct provide very little guidance in such circumstances. Rule 4.3 provides only that the lawyer should neither state nor imply that she is disinterested in the matter at hand when dealing with an unrepresented party. The comment to Rule 4.3 states that the lawyer should not give advice to the unrepresented party, other than the advice to secure counsel. The rule fails to recognize the reality that, for many poor and even middle class people, obtaining counsel in a custody dispute is impossible.

When Mr. Lyons first contacted the Legal Clinic, he was concerned that the mother of his daughter was not supervising the daughter properly nor getting her to school on time. The mother had had a drug and alcohol problem and recently relapsed. Mr. Lyons moved his daughter to a school near him and took physical custody of her during the week. He asked us to petition the court to modify the existing legal custody order, which stated that the child was to live with her mother during the week and with her father on the weekend, to reflect the new situation. The mother, Ms. Eastman, would not agree to this change. We met with Mr. Lyons and his eight-year-old daughter, who, at this point, was refusing to have overnight visits with her mother. Throughout the litigation, she consistently stated her desire to stay with her father and to go to the school in his neighborhood. We sought and obtained a temporary custody order for our client. The child’s mother was present at the hearing but was unrepresented and was extremely upset by the results of the hearing. The judge referred the parties to the Medical Services Office of the court for an evaluation and recommendation regarding permanent custody.

The permanent custody was scheduled for five months after the temporary custody hearing. The student-attorney representing Mr. Lyons diligently prepared for a full-scale adversarial hearing on the custody issue. A week before the hearing was scheduled, the mother contacted us and spoke with the student-attorney. She asked the student-attorney if the student could help her find a lawyer. The mother indicated that Baltimore Legal Aid could not help her. A private lawyer told the mother that she would need at least five hundred dollars to begin the process. The mother indicated she was working as a housekeeper and could not afford to pay for a lawyer.

54. Id. at cmt.
My student and I both had the sense that the mother’s call to us was really a request to begin a conversation about the case. We explained to the mother that we were representing the father and could not represent her, but that we would be happy to assist her in seeking counsel elsewhere. The mother indicated that she understood and that she wanted to proceed with negotiations without first consulting an attorney. We consulted the Maryland Rules of Professional Conduct, specifically Rule 4.3, for guidance as to how we should proceed. Rule 4.3 provides very little guidance for the lawyer in this type of situation. The rule provides only that the lawyer should not state or imply to the unrepresented party that she is disinterested in the matter at hand, and the lawyer should correct any misunderstanding that may exist.

We decided to talk with our client to see how he felt about trying to arrive at a settlement out of court. Mr. Lyons had no great need to negotiate. The report from Medical Services recommended exactly what he wanted. The report recommended that custody remain with the father during the week and with the mother on weekends, and that the mother complete a drug treatment program. It was very likely that the court would endorse this report and would issue an order accordingly.

We encouraged our client to meet with the mother because we believed that a negotiated agreement outside of court would be more likely to work and perhaps would enable the parties to restore some civility to their interactions. We felt that this would best serve the child, who was upset by the constant squabbling between her parents. Our client was willing, but he was not enthusiastic about meeting with the mother to try to arrive at some agreement.

We provided the mother with a copy of the report from Medical Services. We then acted as informal mediators of a conversation between the parents, presenting the concerns of each parent and being careful to repeatedly remind the mother that we represented Mr. Lyons only and that she could stop the conversation at any point and seek counsel. After about two hours of conversation, both parties agreed to all of the recommendations in the Medical Services report.

Arriving at this agreement was made easier by the fact that the mother had begun work cleaning houses during the week. This would have made it difficult for her to pick her daughter up after school. She saw that her daughter had made a good transition to her new school and that the father was genuinely interested in helping her with her schoolwork. The combination of the mother’s need for child care after school and the recognition that this new arrangement was working well for her daughter gave the mother reasons to agree to the custody modifications as a permanent arrangement.

55. The former Model Code of Professional Responsibility has no direct correlation to the Maryland rule, but DR 7-104(A)(2) of the Model Code provided that a lawyer shall not “[g]ive advice to a person who is not represented by a lawyer other than the advice to secure counsel . . . .” MODEL CODE OF PROF’L RESPONSIBILITY DR 7-104(A)(2) (1979).
The traditional adversarial approach probably would have been to continue to urge the mother to seek counsel. Because the Medical Services report recommended that permanent custody be awarded to the father, the father had little reason to negotiate. He was likely to "win" without negotiating an agreement. Our goal went beyond achieving what our client was seeking when he first came to us. We believed that it was in all of the parties' interests, but especially the child's, to restore the communication that had broken down between the parents. The parents needed to be able to communicate and work things out. We hoped that we could help this process by meeting with the mother in a non-confrontational setting. More litigation would have further harmed the relationship between the parents. The negotiation worked beyond our greatest expectations.

It was impressive that, after our pretrial meeting, the hostility that had existed between the parties seemed to dissipate. They were able to communicate without our facilitation and arrive at a schedule for pick-ups and drop-offs without assistance. They talked about their mutual concerns for their daughter's well-being and the importance of working together, given the challenges that each of them faces in being a good parent.

Despite the favorable outcome of this case, I still have mixed feelings about our decision not to urge the mother to retain independent counsel. Certainly, under traditional adversary principles that would have been the appropriate thing to do. However, if we had gone that route, an opposing lawyer might have worsened the tensions that existed between the parents, and the restoration of meaningful communications between the parents would not have happened. The case was simple in that the only issues involved were custody and visitation. There were no additional issues to be resolved during the time of the dispute, such as child support or property division.

Despite my thinking that the handling of this case is an example of ethical judgment, in some ways it goes against the principles illuminated by Simon—specifically, the notion that a lawyer must always ensure that the procedural structure is well set in place. From Simon's point of view, the appropriate thing to do may have been to assist the mother in obtaining counsel. I have little doubt that the court would have continued the award of custody to our client even if the mother had retained counsel and a full-scale adversarial hearing had taken place. The Medical Services report, which recommended the award of custody to the father, would have carried substantial weight. We had excellent witnesses, including our client's drug treatment counselor and the child's teacher, both of whom were prepared to testify that the father was a good parent and was involved in his daughter's life. In addition, the court would likely have been reluctant to change custody; the child had been doing well in her father's care since she had begun living with him almost a year before the hearing date.

56. Simon, supra note 14, at 1103.
57. See, e.g., Francis J. Catania, Jr., Accounting to Ourselves for Ourselves: An Analysis
One factor that weighed heavily in the outcome was the fact that the child clearly and consistently stated that she wished to stay with her father. If the child had felt differently, or if we had had concerns about the suitability of custodial placement with the father, perhaps we would have tried to assist the mother in obtaining counsel to more effectively advocate her position.

I must confess that our efforts seem, in retrospect, overly manipulative, controlling, and inappropriate from the traditional perspective. However, if one agrees with the premise that the traditional adversary model of resolving disputes is ill-suited to resolving custody disputes, then our actions to reduce the adversary nature of the proceeding were appropriate. The decision was a good one, judging the means by the ends achieved. The parents are now on better terms with each other than when the father first sought our services, and the child is happy.

What still concerns me is the possibility of mixed motives poisoning the well. To what degree was I simply obtaining my client's ends and taking advantage of a power imbalance? What lessons will the student-attorney who represented Mr. Lyons take away from this experience? We discussed the ethical implications of the decisions at each step and again after the fact, but I am still uncomfortable with the underlying questions.

One way that we tried to address the ethical issues in this case was by reiterating to the mother that, if she felt uncomfortable with the process or uncomfortable with the results at any time, we would stop and try to help her find counsel. It could be argued that if the mother had been able to retain counsel, a judge hearing arguments on both sides might have arrived at the same resolution. However, this would not have served the other value present here, namely, encouraging families to communicate and work out solutions for themselves. If this case had continued in an adversarial mode, the likelihood that the parents would have continued to have communication difficulty and strong hostility between them was much greater. The fact that they were able to arrive at an agreement themselves makes the agreement much more likely to succeed.

C. Examples from Child Welfare Cases: Seeking Creative Options Through Negotiated Settlement

When the state is the opposing party, such as in child welfare, neglect, or termination of parental rights cases, the Legal Clinic tends toward the traditional adversarial model. This tendency is tempered with the recognition that the goal of the proceeding is to protect children from abuse or neglect. After analyzing the Child in Need of Assistance (CINA) system in Baltimore and most other urban settings, one realizes that the system is not...
functioning in the way it was intended. Children who are not in need of removal are removed from their homes, and children who should be removed are not. Children languish for years in foster homes. Advocates for children and parents in the CINA system are overwhelmed with cases and have difficulty effectively representing any of their clients. The system is so overloaded that settlement is common and most cases are never heard on the merits by a master or a judge. Caseworkers responsible for the initial investigations of alleged abuse or neglect are also overwhelmed with cases and are inadequately trained. How does a lawyer representing parents in these circumstances begin to "seek justice"? Can a lawyer seek the best possible result for the child without undermining the obligations to the parent or client?

Many of our cases have involved HIV-positive parents whose children were removed for alleged neglect. Abuse was not an issue in those cases. Though our first loyalty is always to the client, we also consider the impact on the child of what we are advocating on behalf of our client, and we try to find a solution that benefits the child as well as the parent.

1. Case Example #3—Negotiated Settlement

Mr. Frederick was referred to us by a public defender who recognized that Mr. Frederick needed more assistance than the public defender could give to the case. Mr. Frederick, who was HIV-positive and symptomatic, was incarcerated and seeking visitation with his seven-year-old son, Jackie. Mr. Frederick had lived with the boy's mother until the child was three but had gradually lost contact with him after that point. The child's biological mother became ill with AIDS when Jackie was around three or four years old. She left Jackie with a friend who cared for him until he set a fire at her home. At that point, the friend turned Jackie over to the Department of Social Services (DSS). DSS persuaded the friend to take the child back, but a year or so later she turned him in again. He ended up in a facility for emotionally disturbed children.

We agreed to represent Mr. Frederick in seeking visitation with Jackie as part of the usual CINA review process. DSS took the position that Jackie did not remember his father and that the father had long since forfeited his rights. However, we were able to persuade a judge that Mr. Frederick was entitled to visitation with his son. The court ultimately ordered that the boy be transported to the Eastern Shore Facility, where Mr. Frederick was incarcerated, for monthly visits. Despite DSS's obligation to provide transportation under the court order, it was the social work faculty and students at the Legal Clinic who provided transportation for the child's monthly visits.

Shortly after our involvement in this case, and while Mr. Frederick was still in prison, DSS placed Jackie in a therapeutic foster home and filed for termination of our client's parental rights. The child's mother died of AIDS around this time. We agreed to represent Mr. Frederick in opposing the
termination of parental rights petition, in addition to continuing our CINA representation.\textsuperscript{58}

We recognized that the likelihood of Mr. Frederick's defeating the petition to terminate his parental rights was slim. Although we originally became involved in the case to vindicate the right of an incarcerated parent who was ill with AIDS to see his son, we remained involved because of a desire to help the father and son maintain the bond that they had just begun to develop with our help. We felt that it was beneficial to the son's well being, as well as the father's, that the connection which we had helped establish be maintained.

From the beginning, it appeared that the child's need and desire to have some connection with a biological family member was an important value that could be vindicated by this case. When we first became involved, a therapist at the facility where the child was living indicated that Jackie was depressed and feeling abandoned. Shortly thereafter the first contact occurred with his father through a letter. The therapist reported that the letter had a good impact on the child's depression and self-esteem to the point that the child had re-engaged in activities and was doing much better. Since we recognized that the father would be unable to care for his child, arguing for ongoing visitation seemed like the best option for our client and his son.

The termination of parental rights statute makes no mention of an option to maintain visitation after termination of parental rights has taken place.\textsuperscript{59} On the other hand, the statute does not preclude such an option. A creative

\textsuperscript{58} Shortly before Mr. Frederick's release from prison, we requested on behalf of our client that the plan for this child be changed from therapeutic foster care to reunification with his father. DSS objected, arguing that this was not in the child's best interest, and refused our request. Our client was released from prison during this time. Mr. Frederick had never really been self-supporting due, in part, to slight mental retardation, but primarily because of drug addiction.

DSS never provided support services to our client as mandated under federal and state law. However, our social work staff went to great lengths to assist Mr. Frederick in getting into a drug treatment program, finding housing, and obtaining social security benefits. Our efforts were to no avail. We approached the termination of parental rights hearing with some trepidation, feeling that, on the one hand, we had a good case against DSS for failing to provide any services to our client, but, on the other hand, knowing that it made no difference because of what we had observed about our client's response to support services. We wanted the court to reprimand DSS and demand the provision of better services to parents in other cases. However, we did not necessarily want the court to order DSS to start the process all over again with our client because we were doubtful that it would succeed, and it would give DSS further grounds to terminate our client's rights. In addition, such an order might give false hope to the son, who would be delayed in seeking more permanent placement and would continue to hope that he and his father might someday be reunited. As it turned out, our client was incarcerated on a violation of probation shortly before the hearing, essentially eliminating the argument that he should be given another chance.

\textsuperscript{59} See MD. CODE ANN., FAM. LAW § 5-313(c) (1999).
approach, which would serve both the child's and father's needs, seemed appropriate in this case. The statutory scheme, however, fails to recognize any possible middle ground. It is all or nothing; either the parent must show within a certain length of time that he is capable of caring for his child on a full-time basis, or the parental rights will be terminated. The statute does not recognize that there are circumstances in which the child would benefit from an ongoing relationship with the parent, even if the parent is unable to provide full time care.

We entered into negotiations with DSS and the child's attorney, arguing that the best solution would be to permit ongoing visitation between the father and son. DSS resisted ongoing visitation and refused to settle the case with this resolution. Although DSS never made clear its basis for refusing to settle, the decision appeared to be based in part on the DSS attorney's view of our client as a criminal who deserved punishment instead of visitation with his son.

The DSS attorney found it impossible to believe that the child could benefit from a relationship with his father, given the father's limitations. However, the social worker who facilitated the visits between our client and his son felt that there were many potential benefits to the child in maintaining the relationship. The child would get the opportunity to see his father for who he was, with all his strengths and weaknesses. He would know that his father loved him, but was unable to provide for him. The child would no longer be able to rely on the fantasy that his father would come and rescue him from his difficult situation. However, the child's sense of total abandonment would be lessened by the knowledge that his father did love him.

The child's attorney agreed with our proposed settlement. The child was clear from the beginning that he wanted to see, and be with, his father. Ultimately, DSS was unwilling to agree to any visitation after the termination of Mr. Frederick's parental rights, and we took the case to trial. DSS presented its case, and our expert witness, the social worker who had worked with both the father and son for the preceding two years, testified as to his belief that the son would benefit from an ongoing relationship with his father.

When our client was on the stand, the judge interrupted him and recommended that we settle the case for visitation, which we had proposed during negotiations. DSS tried to argue that the judge did not have the authority to make this suggestion because it was not explicitly authorized by statute. However, DSS had indicated at one point that it might have the authority to agree to ongoing visitation. The judge pointed out the inconsistency of these positions and pushed the parties to achieve a settlement. Our client debated whether he wanted to accept the settlement. However, the likelihood that he would defeat the petition to terminate his parental rights was slim, so he agreed to accept the termination of his parental

60. Id.
61. Id.
rights in exchange for ongoing visitation. The judge then added four conditions to the visitation: our client must (1) enter drug treatment immediately upon his release from jail, (2) submit to periodic urine screening, (3) attend narcotics anonymous meetings, and (4) attend all of his meetings with his parole officer.

What was the ethical judgment that we exercised in this case? It was our decision to think broadly and consider both the child’s interests and the father’s interests in deciding what course of action to pursue. We tried to determine what was the best outcome for the family and then actively sought to achieve it, despite the lack of statutory authority for the result that we felt would be best. We then sought the advice and assistance of the clinic social worker, who had worked with both the father and son, in deciding what outcome to pursue. 62

How does the ethical judgment approach differ from a more traditional approach? Generally speaking, parents in termination of parental rights cases in Maryland and other states are represented by public defenders whose primary focus is to ensure that the parent’s rights are protected. For example, the public defender may check to see that reasonable efforts were made by DSS to help reunite the family and that these efforts failed, or that there are statutory grounds for termination. Public defenders present the best case for the client and appeal adverse decisions, but they seldom consider alternative resolutions. In many cases, the parent is persuaded that her plight is hopeless and that she should sign a consent to termination. Frequently, there is no discussion about preserving the right to visitation. It is assumed that this “all-or-nothing” approach is in the child’s best interest. 63

In the case of Mr. Frederick, rather than going through the legal exercise of representing a client in a termination of parental rights proceeding that he was almost certain to lose, we sought to achieve a result that would benefit both the father and son, despite the fact that such a resolution was not explicitly authorized by statute.

2. Examples from Standby Guardianship Cases

Many of our cases in the Legal Clinic involve standby guardianships. Students in the Legal Clinic lobbied for standby guardian legislation to give

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62. Termination of parental rights is generally argued to be in the child’s interest because it enables the child to be easily adopted. See Marsha Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV. 423, 424-25 (1983). However, in cases such as this one, in which the child is unlikely to be adopted because he is a nine-year-old African-American boy with serious emotional problems, it is difficult to see the benefit of termination of the parental rights. In addition, permitting ongoing visitation should be an option in appropriate cases.

63. I believe that major reform is warranted in the area of termination of parental rights. We have considered proposing an amendment to the termination of parental rights statute that would authorize ongoing visitation in cases in which it would be in the child’s best interest.
parents facing a terminal illness the ability to plan for their children’s futures. A parent is usually in the best position to make these decisions, and the law should facilitate these decisions. Since the statute was enacted, my students and I have handled at least fifty standby guardianship cases. While I still believe in the importance of respect for parental autonomy in standby guardianship, I have become increasingly concerned about the responsibility that lawyers have to try to ensure a favorable outcome for the children involved in these cases. For example, in a few cases after the death of a parent who had appointed a standby guardian, the standby guardian decided that she could not undertake the responsibility to which she had agreed. This situation raises the question of whether there was something that we, as the attorneys for the parent, should have done to more fully explore the viability of the plan. Should we have interviewed the proposed standby guardian privately to ascertain whether she had any reservations about undertaking this responsibility?

In another example from the Legal Clinic, we represent a client who has ten children under the age of eighteen. This mother would like all ten of the children to go to her sister because she does not want the children to be separated from each other. However, the father of the eldest four children would like to have custody of his children. He has maintained a relationship with them and sees them every summer. Unfortunately, he lives in North Carolina while the mother and the proposed guardian live in Baltimore. Therefore, there would be a substantial separation between the two groups of children. Is it appropriate for us to meet with our client’s sister to ascertain whether she really has the desire and ability to take custody of all ten children upon her sister’s death? We have already discussed this concern with our client who has assured us that her sister is willing to take on this responsibility. However, we know from experience that people often assure dying relatives that they will do whatever is asked of them but are unable to follow through with the promise.

What if the parent desires to appoint a standby guardian who seems unequal to the task? For example, one of our clients wishes to appoint her nineteen-year-old son to be a guardian for his five-year-old and seven-year-old siblings. The son also has a child of his own for whom he has taken very little responsibility. Is it realistic to think that he can become the primary caretaker for his siblings? Again, we have discussed this concern with the client and the client assures us that the nineteen-year-old is an appropriate choice.

The fact that a number of our clients’ standby guardianship plans have failed has caused us to consider asking all clients to meet, at least in one planning session, with a social worker who can explore with the client all of the options and issues relating to each of those options. Is this requirement fair to the clients? In many ways, it seems unduly invasive and potentially in

conflict with the notion of respect for parental autonomy. It also appears that there may be class bias involved because it is hard to imagine a middle class client being subjected to cross-examination about the choice of a guardian when preparing a will with a lawyer.

Our approach to this issue also depends upon how we define our client. Is our client the parent or is our client the parent and the family, including the children? Until now, we have defined the parent as our client, but we often undertake representation of the standby guardian after the death of the parent. What, if any, responsibility do we have to the children who are the intended beneficiaries of this representation?

V. IS THE EXERCISE OF ETHICAL JUDGMENT CONSISTENT WITH A LAWYER’S OBLIGATION TO HER CLIENT UNDER THE EXISTING DISCIPLINARY RULES?

The exercise of ethical judgment is consistent with a lawyer’s obligation to his client under the existing disciplinary rules. However, this is only true if the lawyer is in close communication with the client and the client is involved in, and agreeable to, all decisions that could impact the outcome of the case.

The suggestion that attorneys should take a more active role in encouraging their clients to seek a reasonable resolution and consider the impact of adversarial tactics on the child is consistent with the traditional notion of the lawyer’s role as an advisor. Rule 2.1 of the Maryland Rules of Professional Conduct provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation.” The comment to Rule 2.1 notes that “[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.” However, the comment is clear that the lawyer has an obligation to give candid advice, even if the “advice will be unpalatable to the client.” In addition, the comment notes that it may be appropriate to suggest that the client consult with other professionals. The cite gives “family matters” as an example of an area where problems may exist that are “within the professional competence of psychiatry, clinical

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65. Id. at 67.
66. Id.
67. Shaffer, supra note 9, at 699.
69. Id. at cmt.
70. Id.
71. Id.
psychology or social work . . . "72 In these cases, a referral may be appropriate.73

Effective advocacy in the context of a family dispute may be defined differently from effective advocacy in a civil suit between strangers. When a family is in crisis, the use of adversarial tactics in litigation may further destroy relationships. If the primary subject of the action is a young child who is unrepresented, the attorneys representing the parents should not take any action that would injure the child's interests. This is especially true given that courts are generally reluctant to appoint counsel for a child.74 The adversarial system presumes that all parties will have an attorney. When this presumption is not accurate, some adjustment in tactics and approach is warranted.

One aspect of exercising ethical judgment involves assessing when a problem-solving, non-adversarial approach to a custody dispute will not work. There are some situations in which litigation is essential to vindicate a client's rights, such as in child welfare or termination of parental rights cases. The goal is not peace at any price.75

Equally important to obtaining information about the children and the family, the attorney must be prepared to identify her personal judgmental reactions to the situation. The attorney must be aware of the possible reactions she may have to her client or to other parties due to the economic class, race, religion, sexual orientation, or disability of the individual. It is important to recognize and acknowledge judgmental reactions when they inevitably occur, rather than pretending that they don't exist. For example, in the Lyons case, when I first met our client—a recovering heroin addict in his early fifties who looked to be much older—I had real concerns about representing him in seeking custody of his daughter. He projected the general appearance of a man who had dedicated most of his life to hard drinking. I

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72. Id.
73. Id.
74. Children are usually not represented by counsel in private custody disputes. Wisconsin is the only state that requires the appointment of a representative for the child. Weinstein, supra note 2, at 103. The American Association of Matrimonial Lawyers recommends the appointment of counsel for children in custody disputes in only very limited circumstances. A major issue is how this attorney will be paid.
75. Litigation may be unavoidable in private disputes as well. For example, in the case of North v. North, 648 A.2d 1025 (Md. Ct. Spec. App. 1994), a mother refused to permit overnight visits with her children's gay father, who had been diagnosed with AIDS. Id. at 1027. The mother was unwilling to modify her position, despite the lack of any evidence that overnight visits would pose any harm to the children. Id. at 1028-29. There are also cases, like North, in which the opposing counsel may refuse to take a problem-solving approach, leaving no option but to proceed with full scale litigation.

It has always been part of the lawyer's responsibility to frankly discuss with the client the likely consequences of various courses of action. Most clients, recognizing the detrimental impact of adversarial litigation on their family and their children, are at least willing to consider a problem-solving approach.
recognized my own bias about the suitability of a man raising a pre-adolescent daughter alone. However, as we interviewed the various character witnesses our client had given us, I saw a very different picture of our client. He had successfully completed drug treatment programs and had not had a relapse for at least four or five years. He was very active in his daughter's school, and all of the teachers and aides spoke highly of him. When we saw the clear affection that his daughter had for him, any concerns that we might have had about pursuing custody on behalf of the father were resolved.

The attorney must be open to the viewpoints of all of the advocates involved in the litigation. What does this mean for students applying the ethical judgment approach in the law school clinical context? Student-attorneys must study the relevant child welfare and family systems literature. They must be closely supervised, with every substantive decision subject to discussion with an experienced supervisor. However, to enhance their learning, they must also be given some opportunity to exercise judgment.

VI. WHAT ARE THE POTENTIAL BENEFITS AND RISKS OF INTERDISCIPLINARY COLLABORATION IN FAMILY LITIGATION?

Interestingly, the cases discussed above in which social workers or family therapists were actively involved seemed to achieve the best results in terms of both the ultimate resolution and the family's ability to work together. A social worker who interviewed both Mr. Lyons and the mother of his daughter made the custody recommendation to which both parents agreed.

In Mr. Frederick's case, clinic social work students and their supervisors were involved from the beginning in facilitating the visits between the father and

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76. See generally Noel Zaal, Family Law Teaching in the No Fault Era: A Pedagogic Proposal, 35 J. LEGAL EDUC. 552 (1987) (discussing the importance of interdisciplinary education of law students aspiring to become family lawyers).

The article by Jean Koh Peters contains a synthesis of debates on how to serve a child's best interests, beginning with the arguments made by JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD (1973). Peters, supra note 12, at 1537 n.63. This book was the first in a trilogy in which the authors addressed issues such as the importance of a child's bond with the "psychological parent," the proper grounds for state intervention in the family setting, and the role of professionals in the child-placement process. Id. at 1538-44. The books had a tremendous impact on the child welfare system, but were also heavily criticized. Id. at 1544. See also Matthew B. Johnson, Examining Risks to Children in the Context of Parental Rights Termination Proceedings, 22 N.Y.U. REV. L. & SOC. CHANGE 397 (1996).

77. It is interesting to note that "the most frequently cited favourable user-satisfaction data" regarding mediation services come from "the Denver mediation service, in which a team of one male and one female mediator—one a lawyer and one a mental health professional—worked together." Bruch, supra note 6, at 118.

78. See supra Part IV.B.
son. It was their analysis that helped persuade the court that ongoing visitation with his father would be in the child's interest.

In the case of the grandmother, Mrs. Aluette, there was no social work involvement. A student-attorney interviewed the child and presented her wishes to the court. The court ordered visitation based on the student-attorney's report. Our client objected and filed her appeal. The case continued in an adversarial mode and the relationship between the grandmother and granddaughter continued to deteriorate. The judge made a decision regarding visitation that caused further alienation and litigation between the grandmother and granddaughter.

As described above, our collaboration with social workers or family therapists can take many different forms. There is little risk to the client in our consulting with a social worker or family therapist to get their opinions about a particular situation. However, involving the social worker or family therapist in the situation can pose certain risks. The primary risk is the duty that a social worker has under Maryland law to report incidences of suspected abuse or neglect. In most cases this is not an issue, but we are careful to describe this risk to the client when we make a referral to a social worker or family therapist.

Highlighting the value of a family therapist's assessment is not to say that the lawyer will always defer to the therapist's point of view. There may be, and there often are, conflicting professional judgments. An evaluation based on only one meeting with a party will not always be useful or reliable. However, the lawyer must seek out the opinions of those who are knowledgeable about the family and who have formulated opinions based on that knowledge. The lawyer should consider whether the family would benefit from working through the existing issues with a social worker or family therapist.

The client must be involved in any significant decisions. For example, in each of the three major cases described in this Article, we discussed with the client each step that we were advocating before we took it. In the Lyons case, we would not have agreed to meet with his daughter's mother if our client had objected. In the Frederick case, our client agreed with the goal of preserving his right to visitation with his son. In the Aluette case, the client was not

79. See supra Part IV.C.1.
80. See supra Part IV.A.
81. Although the exercise of ethical judgment was appropriately applied in this case, it was the only one of the three major cases in which our relationship with our client was damaged by its application. What conclusion are we to draw from this case? One conclusion may be that making the process more adversarial is seldom useful, especially in the context of a custody dispute. I think that the damage was done in this case not only by the addition of a new lawyer, but by the adversarial way in which the new lawyer exercised her power. She could have achieved her client's goal of visitation with her mother's friend through a negotiation that enabled the grandmother to save face as well as control.
82. MD. CODE ANN., FAM. LAW § 5-704(a) (1999).
happy about our desire to ask that an attorney be appointed for the child. We proceeded with the motion because of our concern for the child’s welfare, which could be justified under the traditional adversary rules.\footnote{83. See, e.g., Md. Code Ann., Rules of Prof. Conduct R. 1.6(b)(1) (2001).}

Even if the lawyer proceeds in a way that is acceptable under the Rules of Professional Conduct, the alienation of clients by focusing on the welfare of a child who is the subject of a proceeding remains a concern. For example, in the Aluette case, our client, the grandmother, was upset with our decision to request that the court appoint an attorney for the child. Ultimately, when the court ordered visitation with the mother’s friend, our client fired us and sought other counsel to appeal the decision.

The profession will have to address the question of the extent to which a lawyer’s discretion infringes upon clients’ rights. It is clearly not in the interest of society as a whole to support a system in which the client’s right to zealous representation trumps other conceivable interests. As David Luban has eloquently pointed out, the adversary system excuse is an insufficient justification for the abuses that are committed in its name.\footnote{84. See Luban, supra note 9, at 87. Luban writes, “can a person appeal to a social institution in which he or she occupies a role in order to excuse conduct that would be morally culpable were anyone else to do it?” Id.}

The clash between an individual rights-based litigation system and the reality of family life and the needs of children remains a fundamental issue.

V. CONCLUSION

Substantial changes have been made in the way courts handle family law cases. For example, specialized family courts have been created. There is also an emphasis on mediation, and the notion of “therapeutic jurisprudence” is receiving significant attention.\footnote{85. Barbara Babb has written about the application of “therapeutic jurisprudence” in the family court context. Barbara A. Babb, Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court, 71 S. Cal. L. Rev. 469 (1998). Therapeutic jurisprudence suggests that courts and lawyers should be aware of the impact, negative or positive, that law and legal action has on families. Id. at 478. “An archetypic unified family court,” which adopts this form of jurisprudence, “can promote dispute resolution[s] . . . which enable individuals and families to address more effectively their underlying family legal issues and to improve their functioning.” Id.}

In addition to these positive changes, lawyers must be educated so that they redefine their role in family law cases. Otherwise, they will destroy much of the progress that could be, or has been,
made in this area.\textsuperscript{86} In fact, many aspects of the ethical judgment approach have been exercised by experienced lawyers concerned about the negative impact of adversarial litigation on children. Mindless advocacy that is oriented toward the goal of “winning for one’s client” must be eliminated.\textsuperscript{87} The fact that family relationships are likely to continue in some form, regardless of the outcome, dictates a different approach.

Law school provides a wonderful opportunity to take an interdisciplinary approach to educating students about their potential future role as family lawyers. Law students with an interest in family law can be educated by family therapists, as well as by family lawyers, to understand the complexities of assisting a family in crisis in achieving the best possible resolution. Students can be educated about family dynamics and the potentially helpful role of a family therapist in evaluating and resolving family crises. They can learn to work in partnership with social workers who have these skills, and they can be educated about the ethical issues that may arise in the course of this interdisciplinary approach.

Modification of the Rules of Professional Conduct may not be essential to permit practice of this approach, provided that the client is fully informed, consenting, and involved in all decision-making. However, modification of the rules may be necessary to change the existing culture of family practice and to send a message to lawyers that a new approach is desirable.

\begin{itemize}
\item \textsuperscript{86} In some jurisdictions, divorcing parents are now required to take a class on the impact of divorce on children and to learn how to minimize its negative impact. \textit{id.} at 522. Family lawyers should be required to receive a similar education.
\item \textsuperscript{87} In writing this critique of family practice, I acknowledge that many family lawyers, particularly the more experienced ones, or those with multi-disciplinary training, work hard to avoid the dangers of strident advocacy in custody cases. However, I have encountered many others, particularly young lawyers just out of law school, who feel that this narrowly focused goal of “winning” for their clients is their only responsibility. It was this attitude and my sense of law schools’ responsibility for cultivating it that led me to write this Article.
\end{itemize}