Focus

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Appointing Counsel for Children May Not Be Best for Them

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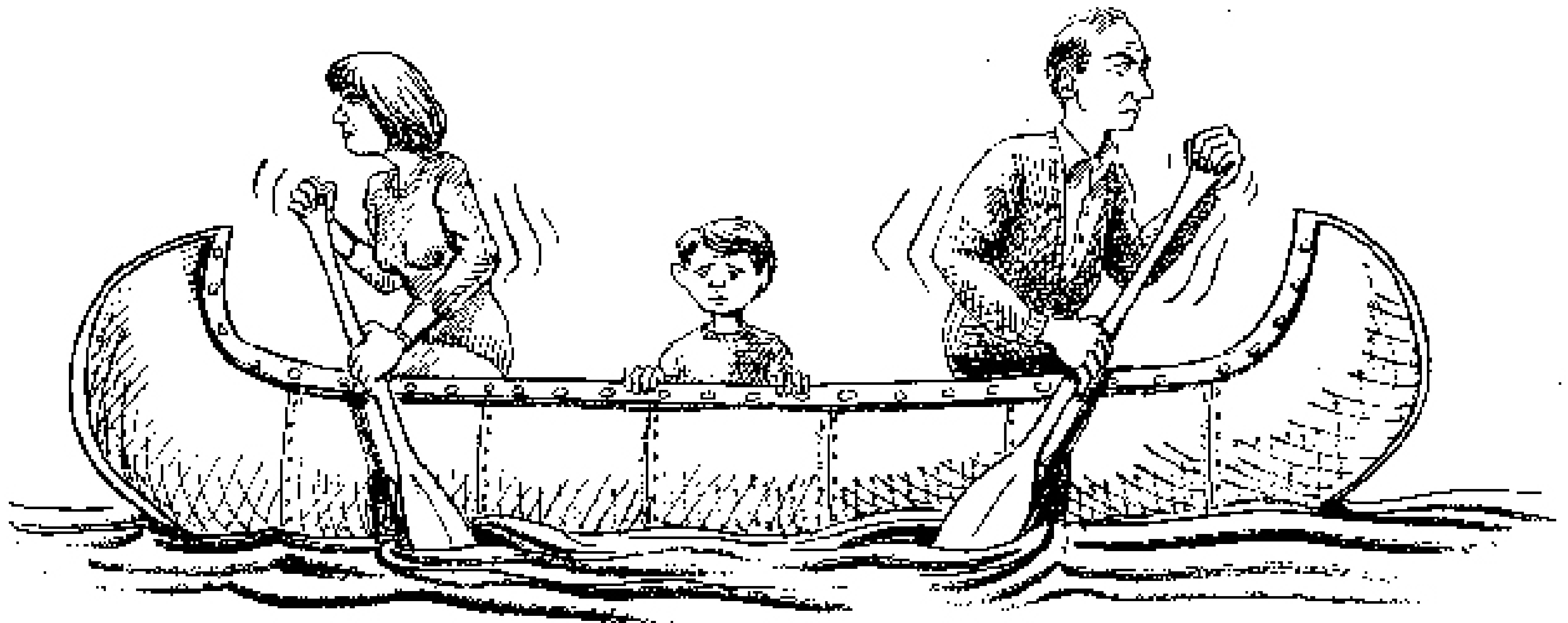

It has become commonplace for judicial officers to appoint counsel for minor children in cases where the parents cannot agree on custodial arrangements.

The authority for appointing counsel comes from Family Code Section 3150, which allows the appointment of counsel if that is in the "best interests" of the minor child. Section 20.5 of the California Standards of Judicial Administration provides certain guidelines for the appointment of counsel. Those guidelines include consideration of whether the dispute is "intense or protracted," the parents can provide a stable environment, and the attorney would provide information that otherwise would not be presented to the court.

In theory, the appointment of counsel for children seems like a good idea. But as with so many things that happen in family law proceedings, the implementation often becomes problematic.

While there are standards for appointment of counsel, there are no standards that govern what counsel does once appointed. While this is true in other contexts as well, there is a difference between an adult hiring a lawyer and one being appointed for a child. Children are appointed counsel because they are unable to speak for themselves and are caught in the middle of a dispute that is larger than they are. But sometimes, making that appointment serves only to exacerbate a dispute.

While it is important to hear from children who are able to form and express opinions and while it may often be necessary to give the helpless victims of a nasty custody battle some means of protection, the appointment of counsel is not always the best choice. Adolescent children believe they can call their lawyer to intervene any time they have a disagreement with their custodial parent. It is bad enough when the parents have a disagreement and call their lawyers rather than working it out, but it is even worse when the child does so.

There are cases in which, for reasons which may be based on factors that have nothing to do with a parent's capabilities, there is discord between a parent and a child. That discord is obviously capable of being inflamed or exacerbated during a custody dispute. The fact that the child now has a lawyer can make the situation even worse. Now the child doesn't think that he or she has to deal with the parent; he or she can deal with the lawyer, instead.

Imagine being in a situation in which you are attempting to make appropriate decisions for your child, only to be met with the child's constant threats to call counsel and with counsel having to intervene.

There is also the issue of the parent attempting to incite the child to call counsel whenever something is not going the way that parent would like. If the parents have a disagreement over a scheduling matter or one parent is alienating the child from the other, it is common for the parent to suggest that the child call counsel to have things done the way the parent would like, not in a manner which is necessarily best for the child. This advice to call counsel and to tell counsel specific things can only worsen the alienation. It sends a message to the child to enlist help because the other parent is bad or does not have the child's best interest at heart.

The lawyers who are appointed generally have some level of experience in family law proceedings of various types. Some of them have come from doing work in dependency court. Whatever their background, they are trained to be lawyers, not child therapists. While some may have some additional training in issues involving child psychology, that is not always the case. Yet, in the course of their representation, counsel for children often interject their own feelings, suggestions and biases into their interaction between the parents as well as with the court.

An adult client can and often does question what counsel is suggesting, but children likely are not capable of doing the same thing. It is one thing for the lawyer for a party to make suggestions and then let the adult client make the determination as to which way to go. It is another thing when the child is not capable of making that determination and is, therefore, subject to the whims of his or her counsel. The long-term effects of the strategy implemented by that counsel can be significant in terms of the child's well-being.

Ethical obligations prevent lawyers for individual parties from contacting and adverse party directly. In practice, these same prohibitions do not seem to apply to children's counsel. It is not uncommon for counsel to contact a parent directly and discuss issues with him or her. There is no reason that the same formalities governing communicating with adverse parties should not govern communication with a parent, especially one represented by counsel.

When parties make requests of the court, those requests require notice and an opportunity to be heard. When a minor's counsel makes a request on behalf of the child, the same rules should govern. Parties should be given the opportunity to consider the request and the evidence presented and then respond accordingly. As things now stand, that does not happen. A minor's counsel walks into court on the day of the hearing and then gives his or her report. There is no opportunity given to either party, nor even the court, to consider that report in advance. There should be.

Most important, the input that children's counsel has is often given significant weight by the court. It is often the judge who appoints a minor's counsel, usually on his or her own motion. Having done that, many judges are willing to allow a minor's counsel to make sweeping recommendations as to what should happen with regard to custody arrangements. Often, those recommendations are the order of the court without much consideration given to whether the recommendations are appropriate to this particular case.

While it is true that lawyers who act primarily as children's counsel do get more intimately involved with children than other lawyers and while it may be true that this additional level of experience gives them insight into things that the judge or parties' counsel may not have, they are not mental health professionals and should not be given carte blanche to dictate custodial arrangements. Once a judge appoints a minor's counsel, the judge should properly review the recommendations made by the minor's counsel before implementing them.

The existing system under which a minor's counsel is appointed needs an overhaul. Standards need to be implemented that dictate what happens once such counsel is appointed. Courts need to consider carefully whether appointing counsel will help the child and to insure that doing so will not make a bad situation worse. The Legislature needs to consider the issue to insure that children are helped, not harmed, by the process. We repeatedly hear the phrase "best interests" used in regard to legal proceedings involving children. It is not always in a child's best interests to appoint counsel, and if we are to really serve children's best interests, there needs to be more oversight and formality in the process.

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