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## Legal Representation for Children: A Matter of Fairness

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**LEGAL REPRESENTATION FOR CHILDREN:  
A MATTER OF FAIRNESS**

Wendy Shea<sup>†</sup>

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I. INTRODUCTION

For decades, advocates, scholars, and practitioners have called on states to ensure quality legal representation for children in dependency, abuse and neglect, and termination of parental rights proceedings.<sup>1</sup> In 1996, the American Bar Association declared, “All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court’s jurisdiction continues.”<sup>2</sup> In its Enhanced Resource Guidelines, the National Conference of Juvenile and Family Court Judges asserted, “Children [in dependency and custody proceedings] are entitled to representation by attorneys.”<sup>3</sup> The need for

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<sup>1</sup> For the purposes of this article, these types of proceedings will be generally referred to as dependency proceedings or abuse and neglect proceedings. *See generally infra* text accompanying notes 3 and 4.

<sup>2</sup> STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES, preface (AM. BAR ASS’N 1996) [hereinafter ABA STANDARDS OF PRACTICE].

<sup>3</sup> SOPHIE I. GATOWSKI, NANCY B. MILLER, HONORABLE STEPHEN M. RUBIN, HONORABLE PATRICIA ESCHER & CANDICE MAZE, NAT’L COUNS. OF JUV. & FAM. CT. JUDGES,

such representation is backed by studies and research that have demonstrated procedural and substantive benefits arising from high-quality representation for children.<sup>4</sup>

Since its promulgation, many states have incorporated this mandate or strengthened it. Today, a majority of states and the District of Columbia mandate some form of legal representation for all children in dependency proceedings.<sup>5</sup> In fact, in the 2019 version of the Child's Right to Counsel National Report Card,<sup>6</sup> five states earned A+ ratings for their laws and procedures providing legal representation for all children.<sup>7</sup> Five states, however, received F ratings because, among other issues, they did not mandate legal representation and, in some instances, even limited when legal representatives could be appointed to children.<sup>8</sup>

Given the interests at stake, the complexity of the proceedings, and the mounting evidence supporting high-quality legal representation for all parties, states have few reasons not to mandate representation. Part II of this Article briefly explains dependency proceedings and the rights at stake, children's roles in those proceedings, and how those roles relate to the need for legal representation.<sup>9</sup> Although there are as many legal representation practice models as states, Part III looks at proposed uniform models and current models of representation.<sup>10</sup> Part IV compares the representation models in the five F-rated states with the models employed in some of the A+-rated states to illustrate the disparity between jurisdictions.<sup>11</sup> Finally, Part V considers recent research that provides empirical evidence of the value of quality legal representation for children and obstacles that still stand in the way of both legal representation and high-quality legal representation.<sup>12</sup>

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ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN ABUSE AND NEGLECT CASES 16 (2016) [hereinafter NCJFCJ GUIDELINES].

<sup>4</sup> See, e.g., CHILDREN'S BUREAU MEMORANDUM, *infra* note 22, at 6; LeVezu, *infra* note 160, at 158; ZINN & SLOWRIVER, *infra* note 172, at 1; CTR. ON CHILD. & L., *infra* note 180, at 2.

<sup>5</sup> See generally ABA STANDARDS OF PRACTICE, *supra* note 2.

<sup>6</sup> NOY DAVIS, AMY HARFELD & ELISA WEICHEL, FIRST STAR INST. & CHILD.'S ADVOC. INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (4th ed. 2019) [hereinafter CHILD REPRESENTATION REPORT CARD].

<sup>7</sup> *Id.* at 24. The ratings were based on state statutory law, case law, rules, and regulations. *Id.* at 20. The five states to receive the A+ rating were Connecticut, Louisiana, Massachusetts, New York, and Oklahoma. *Id.* at 24. In addition, 13 states received an A rating. *Id.*

<sup>8</sup> *Id.* at 25. The states receiving the F rating were Hawaii, Idaho, Indiana, Montana, and New Hampshire. *Id.* Six states received a D rating. *Id.*

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part IV.

<sup>12</sup> See *infra* Part V.

## II. DEPENDENCY PROCEEDINGS, CHILDREN'S INTERESTS, AND CHILDREN'S ROLES

In 2018, approximately 678,000 children were victims of some form of abuse or neglect.<sup>13</sup> In that same year, 1,770 children died as a result.<sup>14</sup> Parents were responsible for most of this abuse and neglect.<sup>15</sup> States respond to these situations through dependency proceedings.<sup>16</sup> While the exact procedures vary from state to state, dependency proceedings are designed to protect the children involved and provide appropriate services for families.<sup>17</sup>

Dependency proceedings are legal proceedings: attorneys gather evidence; parties participate in hearings; witnesses testify; and judges make binding, often life-altering, decisions.<sup>18</sup> During the proceedings, judges determine whether parents or guardians abused or neglected their children and whether those children are dependent, and ultimately, judges rule on the permanency plan for the family.<sup>19</sup> Judges also make decisions related to where children live, with whom they live, with whom they can visit, and what services the children and parents require.<sup>20</sup> Furthermore, these proceedings remain ongoing until permanency orders are issued or the children age out of the child protection system.<sup>21</sup>

<sup>13</sup> CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2018, at 19 (2020) [hereinafter CHILD MALTREATMENT]. For this report's purposes, a child is a victim if the state determined at least one incident of maltreatment was substantiated or indicated. *Id.* at 18.

<sup>14</sup> *Id.* at 46.

<sup>15</sup> *Id.* at 22. This number includes parents acting alone or in concert with another person. *Id.*

<sup>16</sup> See generally *Child Welfare Proceedings Benchbooks—Dependency Court State Links*, NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org/topics/children-families-and-elders/dependency-court/state-links3#Minnesota> [https://perma.cc/3UP6-53SL].

<sup>17</sup> See generally MINN. STAT. § 260C.163 (2020); MINN. STAT. § 518A.38 (2020); MINN. STAT. § 609.378 (2020); *Children's Justice Initiative*, MINN. JUD. BRANCH, <https://www.mncourts.gov/Help-Topics/CJL.aspx#tab04Benchbook> [https://perma.cc/2369-LHHB].

<sup>18</sup> Suparna Malempati, *Ethics, Advocacy, and the Child Client*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 633, 634 (2014).

<sup>19</sup> NCJFCJ GUIDELINES, *supra* note 3, at 25. Each state has its own definitions for abuse and neglect. Under the Child Abuse Prevention and Treatment Act (CAPTA), at minimum, abuse would occur when a caretaker acts or fails to act resulting in "death, serious physical or emotional harm, sexual abuse or exploitation." CHILD MALTREATMENT, *supra* note 13, at viii. A caretaker neglects a child when his or her act or failure to act "present an imminent risk of serious harm." *Id.*

<sup>20</sup> NCJFCJ GUIDELINES, *supra* note 3, at 25, 26; UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 4 cmt. at 15 (NAT'L CONF. OF COMM'NS ON UNIF. STATE LAWS 2007) [hereinafter UNIFORM ACT]; CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 10.

<sup>21</sup> Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233, 241 (2008) ("Once a TPR

Most states and the United States Department of Health and Human Services Children's Bureau recognize children as parties to dependency proceedings and provide children with party rights, including notice and the right to participate.<sup>22</sup> Some states provide children some party rights, but these rights may be conditioned by a child's age or capacity.<sup>23</sup> A few states do not recognize children as parties to dependency proceedings, and instead make a child's guardian ad litem a party to the proceedings.<sup>24</sup>

States have competing interests in abuse and neglect cases. On one hand, states need to protect children from harm.<sup>25</sup> On the other hand, states need to make sure procedural safeguards permit interested parties to fully engage in the legal process.<sup>26</sup> In some states, this tension is evident in statutes that determine whether and when children get attorneys and what those attorneys do (e.g., only children above a certain age are entitled to attorneys or attorneys represent only the best interests of a child). The state's competing interests, however, reinforce the need for legal representation.<sup>27</sup> A legal representative can answer both concerns: an attorney in a dependency proceeding can help protect a child by giving the child a voice in proceedings and advise, counsel, and advocate for that child's wishes.<sup>28</sup> Children need protection, but they are also "rights-bearing individuals" who need an actual say in the legal process.<sup>29</sup>

That designation, as rights-bearing individuals, is important because a child's fundamental liberty interests are at stake in dependency

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is granted, the court will continue to conduct permanency hearings until the child is ultimately adopted or, the child 'ages out' of foster care without having ever been adopted.").

<sup>22</sup> ADMIN. FOR CHILD. YOUTH & FAMS., DEP'T OF HEALTH & HUM. SERVS., HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 2 (2017) [hereinafter CHILDREN'S BUREAU MEMORANDUM]. The Department of Health and Human Services memo maintains that children, parents, and state agencies are all parties to these proceedings because they all have "significant liberties or liabilities at stake." *Id.*

<sup>23</sup> *See, e.g.*, VA. CODE ANN. § 16.1-252(B) (2019) (stating a child who is twelve years old or older shall receive notice of a preliminary hearing; otherwise, the guardian ad litem, guardian, legal custodian, or other person standing *in loco parentis* receives the notice); WIS. STAT. § 48.255(4) (2016) (stating a child 12-years-old or older shall receive a copy of the petition).

<sup>24</sup> *See, e.g.*, COLO. REV. STAT. § 19-1-111(3) (2016) ("[A child's guardian ad litem] shall have the right to participate in all proceedings as a party."); TENN. CODE ANN. § 37-1-602(a)(5) (2017) ("[A guardian ad litem is] a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, who shall be any party to any judicial proceeding as a representative of the child.").

<sup>25</sup> UNIFORM ACT, *supra* note 20, at 5.

<sup>26</sup> *Id.*

<sup>27</sup> *See* Noah Dennison, *State Constitutional Law—Due Process—Protecting the People and the State Beyond Constitutional Minimums*, in *Re C.M., 48 A.3d 942 (N.H. 2012)*, 44 RUTGERS L.J. 661, 677 (2014) (stating that states have an interest in protecting children, preserving family units, and helping parents).

<sup>28</sup> Malempati, *supra* note 18, at 637.

<sup>29</sup> *Id.* at 636.

proceedings.<sup>30</sup> Children, like their parents, have an interest in the “integrity of the family unit.”<sup>31</sup> Dependency proceedings will determine the scope of a parent-child relationship and whether children will have a legal relationship with their parents. In addition to this fundamental concern, dependency proceedings directly implicate a child’s immediate and potentially long-term health, welfare, and safety.<sup>32</sup> The seriousness of these interests demands that the process be as fair as possible for the child.<sup>33</sup>

During dependency proceedings, which often last months or years, judges should rely on information from parents, children, and state social service or child welfare agencies.<sup>34</sup> “In order for a judge to make the best possible decision for a family, it is critical that he or she receive the most accurate and complete information possible from all parties.”<sup>35</sup> If parties do not provide this information, a final permanency order may take longer to achieve, which can increase costs for the state and have lasting effects on parents and children, and their relationships with each other.<sup>36</sup>

The state’s and parties’ interests—the child’s health and safety and the familial relationship—are best served when all parties have legal representation.<sup>37</sup> Children need legal representation to navigate the judicial process, protect their legal rights, and ensure their voices are heard.<sup>38</sup> A legal representative can advocate for the child’s immediate needs, for the timely and permanent resolution of the case,<sup>39</sup> and protect a child from

<sup>30</sup> See Nicole K. *ex rel.* Linda R. v. Stigdon, No. 1:19-cv-01521-JPH-MJD, 2020 WL 1042619, at \*3 (S.D. Ind. March 3, 2020).

<sup>31</sup> Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2006).

<sup>32</sup> Merrill Sobie, *Representing the Child in Child Protective Proceedings: Toward A New Paradigm*, 28 WIDENER COMMONWEALTH L. REV. 169, 172-73 (2019). The author’s non-exhaustive list of legal and procedural interests include the following: safety and protection, autonomy and privacy; adequate consultation and advice; understanding of the procedures and the substance of the proceedings; participation in the proceedings; availability of government, education, and family services; visitation issues; and immigration issues.

<sup>33</sup> See Malempati, *supra* note 18, at 634.

<sup>34</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 10.

<sup>35</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 2. See Malempati, *supra* note 18, at 638 (due process suggests all parties should be heard); NCJFCJ GUIDELINES, *supra* note 3, at 5 (judges must also concern themselves with “principles of treatment, rehabilitation, family preservation, and permanency planning” and cultural responsiveness).

<sup>36</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 2. Permanency occurs when children are reunited with their parents, adopted, or placed with permanent guardians. *Id.*

<sup>37</sup> Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 90 (2012).

<sup>38</sup> Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 71 (2007) (“As parties, children should be permitted to be represented throughout the proceedings, receive all papers and communications with the court, attend all hearings, participate in formal discovery, including depositions, participate in settlement agreements, present evidence, including the calling of witnesses, and make arguments to the court.”).

<sup>39</sup> Duquette & Darwall, *supra* note 37, at 90.

unnecessary harms.<sup>40</sup> Without representation, children have “little prospect of successfully navigating the complexities of dependence proceedings” on their own.<sup>41</sup>

In *Kenny A. v. Perdue*, a district court in Georgia addressed the importance of legal representation and declared that under that state’s constitution, children have “fundamental liberty interests at stake in deprivation and [termination-of-parental-rights (TPR)] proceedings . . . includ[ing] a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit.”<sup>42</sup>

A class of foster children in Fulton and DeKalb Counties sued the state agencies and officials operating Georgia’s foster care system, arguing they were entitled to “adequate and effective legal representation in deprivation and [] TPR proceedings.”<sup>43</sup> Specifically, the class argued, “the inadequate number of child advocate attorney positions funded by County Defendants results in extremely high caseloads for the attorneys, making effective representation of the class of plaintiff foster children structurally impossible in all proceedings.”<sup>44</sup> At the time, Georgia state law guaranteed attorneys for kids in TPR proceedings, but not deprivation proceedings.<sup>45</sup>

The court held that the class had a statutory and state constitutional right to counsel in both the TPR and deprivation proceedings, and that the class members did not have an adequate legal remedy in the form of a state bar complaint.<sup>46</sup> The class had due process rights under the Georgia Constitution because “children have fundamental liberty interests at stake in deprivation and TPR proceedings.”<sup>47</sup> These rights included children’s interest in their safety, health, and well-being; an interest in maintaining the integrity of their family unit; and an interest in having a relationship with their biological parents.<sup>48</sup> The court explained that the other parties in the courtroom did not adequately represent children’s interests because judges cannot conduct their own investigation and are dependent on the information provided to them, citizen review panels also rely on the facts

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<sup>40</sup> DAVID KATNER, MIRIAM ROLLIN, PHILIP MCCARTHY, JR. & MARVIN VENTRELL, NAT’L ASS’N OF COUNS. FOR CHILD., NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 7 (2001) [hereinafter NACC RECOMMENDATIONS]. Attorneys who represent their client’s interest can advocate for court processes that minimize harm to the child and the attorneys can make sure that the child is prepared and supported during proceedings. *Id.*

<sup>41</sup> Duquette & Darwall, *supra* note 37, at 90.

<sup>42</sup> *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2006). TPR is shorthand for “termination of parental rights.” *Id.*

<sup>43</sup> *Id.* at 1355.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1357.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1360.

<sup>48</sup> *Id.*

presented to them, and Court Appointed Special Advocates (CASAs) are volunteers who do not provide legal representation.<sup>49</sup> Because children's liberty interests were at stake, it was in the state's and children's interest to appoint attorneys for them.<sup>50</sup> The ruling resulted in settlement agreements, guaranteeing every child the right to effective legal counsel.<sup>51</sup>

### III. MODELS OF REPRESENTATION

Although dependency laws developed on a state-by-state basis,<sup>52</sup> the federal government has tried to influence them by tying federal funding to specific requirements.<sup>53</sup> The federal government has used funding and these requirements to promote family reunification or expedite other permanent placements.<sup>54</sup>

The Child Abuse Prevention and Treatment Act (CAPTA) influenced the development of child representation models' with its guardian ad litem requirement.<sup>55</sup> In its current version, CAPTA provides federal grants to states to help improve child protective services.<sup>56</sup> This includes "improving legal preparation and representation" and provisions for "an individual appointed to represent a child in judicial proceedings."<sup>57</sup>

In order to receive funding under CAPTA, a state must, among other things, appoint a guardian ad litem in "every case involving a victim of child abuse or neglect which results in a judicial proceeding."<sup>58</sup> The guardian ad litem can be an attorney or a non-attorney court-appointed special advocate.<sup>59</sup> The guardian ad litem, however, must be trained in early childhood, child, and adolescent development.<sup>60</sup> The guardian ad litem must also "obtain first-hand, a clear understanding of the situation and needs of the child," and "make recommendations to the court concerning the best interests of the child."<sup>61</sup>

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<sup>49</sup> *Id.* at 1361.

<sup>50</sup> *Id.*

<sup>51</sup> Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from Kenny A.*, 36 NOVA L. REV. 407, 414 (2012).

<sup>52</sup> *Standards of Practice*, NAT'L ASS'N OF COUNS. FOR CHILD., <https://www.naccchildlaw.org/page/StandardsOfPractice> [<https://perma.cc/93RG-LLCE>].

<sup>53</sup> Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for A Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 2 (2017).

<sup>54</sup> *Id.*

<sup>55</sup> 42 U.S.C. § 5106a(a) (2018). CAPTA was originally enacted in 1974.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* § 5106a(a)(2)(B)(ii).

<sup>58</sup> *Id.* § 5106a(b)(2)(B)(xiii).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* § 5106a(b)(2)(B)(xiii)(I-II).



Despite calls to amend CAPTA to both require legal representation for children and clarify that children are parties in their own abuse and neglect proceedings, the current language related to the guardian ad litem requirement is likely to remain unchanged as the act goes through its current reauthorization process.<sup>62</sup>

#### A. *Proposed Uniform Models*

Over the past thirty years, organizations, scholars, and advocates have pushed for representation beyond the guardian ad litem model for children in these proceedings and for better-defined roles for legal representatives. This push has resulted in policies and model acts that have been adopted in varying degrees by different states.<sup>63</sup> While there are variations in the specific requirements, all the policies and model acts call for high-quality legal representation for all children in dependency proceedings.<sup>64</sup>

##### 1. *National Association of Counsel for Children (NACC) Guidelines*

In 2001, the NACC published its guidelines for children's legal representation.<sup>65</sup> The NACC's guidelines mandated legal representation and urged states to adopt a policy that met its checklist's requirements.<sup>66</sup> The checklist for systematic safeguards called for policies mandating that attorneys provide competent representation for children at every stage of the proceedings,<sup>67</sup> understand their roles,<sup>68</sup> and maintain caseloads that permit them to adequately represent children.<sup>69</sup> The NACC's

<sup>62</sup> See Stronger Child Abuse Prevention and Treatment Act, H.R. 2480, 116th Cong. (2019).

<sup>63</sup> See, e.g., *infra* Section III.A. (discussing the National Association of Counsel for Children's "Guidelines;" the National Conference of Commissioners on Uniform State Laws' "Uniform Representation of Children in Abuse and Neglect, and Custody Proceedings Uniform Act;" the American Bar Association's "Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings;" and the National Conference of Juvenile and Family Court Judges' "Enhanced Resource Guidelines"); *infra* Section III.B (discussing approaches in Kansas, Washington D.C., Connecticut, and Alabama).

<sup>64</sup> See generally *infra* Sections III.A.-B. The Model Acts and state approaches all require varying forms of representation for children in dependency proceedings, the recognition of children as parties to these proceedings, and minimum standards of training and conduct for child representatives.

<sup>65</sup> NACC RECOMMENDATIONS, *supra* note 40, at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* Other systematic safeguards included opportunities for children to engage in the legal process by presenting their positions to the court, confidentiality between children and their

recommended advocacy duties included regular and meaningful engagement with child clients, full and independent investigations, and “competent, independent, and zealous representation.”<sup>70</sup>

2. *National Conference of Commissioners on Uniform State Laws (NCCUSL) Uniform Representation of Children in Abuse and Neglect, and Custody Proceedings (Uniform Act)*

The Uniform Act,<sup>71</sup> published in 2006 and updated in 2007, identifies three potential advocates for children in dependency proceedings: a child’s attorney, who “provides legal representation for a child;”<sup>72</sup> a best interest attorney, who is neither an agent of the court nor the child but who advocates for “the child’s best interest without being bound by the child’s directives or objectives;”<sup>73</sup> and a court-appointed advisor, who does not act as a lawyer but can “assist the court in determining the best interest of a child.”<sup>74</sup>

The Uniform Act mandates legal representation for a child, either in the form of a child’s attorney or a best interest attorney.<sup>75</sup> When determining which type of attorney to appoint, courts consider the child’s wishes, objectives, age, and development.<sup>76</sup> A child who is “capable of communicating and exercising considered judgment” should normally be appointed a child’s attorney.<sup>77</sup> A non-verbal child or one who is very young and unable to express their choice should generally be appointed a best-interests attorney.<sup>78</sup> To avoid confusing the child, the comments to the Uniform Act suggest that a court should not appoint both a child’s attorney

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attorneys; and procedures that would empower children to hold their attorneys accountable. *Id.* at 5-6.

<sup>70</sup> *Id.* at 6-7.

<sup>71</sup> See Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 388-89 (2011). When first published, the Uniform Act was heavily criticized for its support for best-interest representation, and the NCCUSL withdrew the Act from consideration by the ABA House of Delegates.

<sup>72</sup> UNIFORM ACT, *supra* note 20, at § 2(2).

<sup>73</sup> *Id.* § 2(3).

<sup>74</sup> *Id.* § 2(4).

<sup>75</sup> *Id.* § 4(a). The legal representative should be appointed as soon as practicable but no later than “before the first court hearing that may substantially affect the interests of the child.” *Id.*

<sup>76</sup> *Id.* § 4(b). The Uniform Act would permit an attorney to represent siblings, even if the attorney’s role is different as to each sibling, so long as there is no conflict of interest. *Id.* § 4(c).

<sup>77</sup> *Id.* § 4 cmt. at 15.

<sup>78</sup> *Id.*

and a best interest attorney.<sup>79</sup> If a child's attorney is appointed, however, the court should also appoint a court-appointed advisor.<sup>80</sup>

As with all other policies and models, the Uniform Act recommends states adopt minimum training standards for attorneys representing children, including programming about relevant child welfare and protection laws, as well as child development standards.<sup>81</sup> In addition, the Uniform Act recommends that attorneys engage in traditional attorney functions, such as keeping their clients informed, investigating relevant information, filing motions, and attending hearings.<sup>82</sup> The Uniform Act outlines additional duties for children's attorneys meant to protect children and promote both the children's interests and their best interests.<sup>83</sup> These include directives to work directly with child clients to determine their needs, circumstances, and views, and, where a child lacks capacity, advocate for a position that serves the child's best interests without contradicting the child's own expressed intent.<sup>84</sup>

### 3. *American Bar Association (ABA)*

In 1996, the American Bar Association called for legal representation for children in abuse and neglect cases.<sup>85</sup> Since then, it has published books and model acts focused on this need. In 2011, the ABA House of Delegates adopted the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act).<sup>86</sup> In its report to the House of Delegates, the Model Act's authors pointed out the following:

Courts in abuse and neglect cases dramatically shape a child's entire future in that the court decides where a child lives, with whom the child will live and whether parental rights will be terminated. No other legal proceeding that pertains to children has such a major effect on their lives.<sup>87</sup>

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* §§ 5(a)(1)-(2). An adviser may also be appointed if a best interest attorney has been appointed, and the court wants an additional advisor. *Id.* This "form of dual representation does not pose the same tensions as would representation by two competing lawyers." *Id.* § 4 cmt. at 16.

<sup>81</sup> *Id.* § 7 cmt. at 22.

<sup>82</sup> *Id.* § 12 alternative A.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> ABA STANDARDS OF PRACTICE, *supra* note 2, at 1.

<sup>86</sup> MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (AM. BAR ASS'N 2011) [hereinafter ABA MODEL ACT].

<sup>87</sup> *Id.* report at 18.

As with the other models, the ABA's Model Act contemplates both child's attorneys and best interest attorneys.<sup>88</sup> The child's attorney "owes the same duties, including undivided loyalty, confidentiality, and competent representation, to the child as is due an adult client."<sup>89</sup> Best interest attorneys, on the other hand, are not lawyers for the children; they, instead, help the court determine the best interests of the child.<sup>90</sup>

Unlike the NCCUSL's Act and the NACC's guidelines, the ABA's Model Act calls for the appointment of a child's lawyer in all cases,<sup>91</sup> a right that cannot be waived at any stage in the proceedings.<sup>92</sup> The child's attorney should advise, counsel, and advocate for the child.<sup>93</sup> The attorney must be trained, meet continuing legal education requirements, and maintain a manageable caseload.<sup>94</sup> Training would "focus on applicable law, skills needed to develop a meaningful lawyer-client relationship . . . and techniques to assess capacity in children."<sup>95</sup> The Model Act explains that "In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected."<sup>96</sup> Under the Model Act, a court may, but is not required to, appoint a best interest advocate.<sup>97</sup>

#### 4. *National Conference of Juvenile and Family Court Judges (NCJFCJ)*

In its Enhanced Resource Guidelines, the NCJFCJ declares, "Children should be parties to their cases. Children are entitled to

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<sup>88</sup> *Id.* § 1(c)-(d).

<sup>89</sup> *Id.* § 1(c).

<sup>90</sup> *Id.* § 1(d).

<sup>91</sup> *Id.* § 3(a). If more than one child is subject to the petition, each child gets his or her own attorney unless the attorney can represent sibling without conflict.

This act recognizes the right of every child to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of developmental level. Nothing in this Act precludes a child from retaining a lawyer. States should provide a lawyer to a child who has been placed into state custody through a voluntary placement arrangement. The fact that the child is in the state's custody through the parent's voluntary decision should not diminish the child's entitlement to a lawyer.

*Id.* § 3 cmt. The NACC has since endorsed this Model Act.

<sup>92</sup> *Id.* § 3(f).

<sup>93</sup> *See id.* § 7(b).

<sup>94</sup> *Id.* §§ 4(a)-(c).

<sup>95</sup> *Id.* § 4 cmt.

<sup>96</sup> *Id.* § 7(c) cmt. at 8.

<sup>97</sup> *Id.* § 3(b).

representation by attorneys and [g]uardians *ad litem*, and judges must ensure that the child's wishes are presented to and considered by the court."<sup>98</sup> The Guidelines recognize that "fundamental rights of the child [and parent] are at stake in these proceedings, [so] . . . best practices call for the appointment of an attorney who will advocate for the child's position from the very beginning of the case."<sup>99</sup> The Guidelines recognize the value of both client-directed representation and best interest representation.<sup>100</sup>

### B. State Practices

Thirty-three states and Washington D.C. mandate that all children have some form of legal representation during the dependency proceedings, and some require representation throughout the appeals process.<sup>101</sup> In seven states, the appointment of legal representation falls within the court's discretion, and in nine states, legal representation is available in certain circumstances.<sup>102</sup> Most states that mandate legal representation follow a variation of one of the model acts and employ either a best-interest model, client-directed model, or hybrid model.<sup>103</sup>

Under the best-interest model, attorneys do not directly represent the child.<sup>104</sup> Instead, in consultation with all interested parties and witnesses, attorneys make recommendations based on the child's best interests.<sup>105</sup> While these attorneys both advise and counsel children, the child is not the client, so some of the traditional attorney-client rules, such as confidentiality, do not apply unless a state statute provides otherwise.<sup>106</sup> In some jurisdictions, the best-interest attorney may also be called as a fact or expert witness available to testify at hearings.<sup>107</sup>

Kansas and the District of Columbia follow the best-interest model and mandate legal representation for children. Under each state's laws, courts appoint an attorney guardian ad litem to represent a child's best

<sup>98</sup> NCJFCJ GUIDELINES, *supra* note 3, at 16.

<sup>99</sup> *Id.* at 43.

<sup>100</sup> *Id.*

<sup>101</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 23.

<sup>102</sup> *Id.* at 28.

<sup>103</sup> See Malempati, *supra* note 18, at 637-39 (describing the historical development of law practice focusing on children's rights).

<sup>104</sup> See *id.*

<sup>105</sup> Atwood, *supra* note 71, at 393-94.

<sup>106</sup> Victoria Sexton, *Wait, Who Am I Representing? The Need for States to Separate the Role of Child's Attorney and Guardian Ad Litem*, 31 GEO. J. LEGAL ETHICS 831, 837 (2018). See e.g., DEL. CODE ANN. tit. 29, § 9007A(c) (2019) (noting the best interest attorney has a "duty of confidentiality to the child unless disclosure is necessary to protect the child").

<sup>107</sup> Dana E. Prescott & Diane A. Tennies, *The Lawyer as Guardian Ad Litem: Should "Status" Make Expert Opinions "All-In" and Trump "Gatekeeping" Functions by Family Courts?*, 30 J. AM. ACAD. MATRIM. L. 379, 379-80 (2018).

interests during proceedings.<sup>108</sup> If the child's expressed position conflicts with the guardian ad litem's best interest determination, either the child or guardian ad litem can request that a second attorney be appointed to represent the child.<sup>109</sup>

Under the client-directed model, the relationship between a child and an attorney resembles a traditional adult attorney-client relationship.<sup>110</sup> This attorney will advise, counsel, *and* advocate for the child's expressed wishes within the bounds of law and the rules of professional conduct.<sup>111</sup>

Fifteen of the thirty-four states that require legal representation for a child mandate client-directed representation "under all reasonable circumstances."<sup>112</sup> The ABA and First Star, however, contend that the client-directed model is important in all cases where children can express their opinions and help with the case at an age-appropriate level.<sup>113</sup> Often children are in the best position to know what happened and the details of their situations, so the court needs to hear from the children.<sup>114</sup> Under this model, an attorney can ensure the child understands the process and the realities of his or her situation and can help plan for the child's permanency goals.<sup>115</sup> For example, Connecticut requires the appointment of an attorney who "shall act solely as attorney for the child."<sup>116</sup>

Hybrid models either permit the same attorney to act as both a best-interest and client-directed attorney, mandate that two attorneys fill these roles, or appoint a child's attorney and a non-legal advocate to represent the child's best interests.<sup>117</sup> Alabama's code provides for this type

<sup>108</sup> D.C. CODE § 16-2304(B)(5) (2020); KAN. STAT. ANN. § 38-2205 (2020).

<sup>109</sup> KAN. STAT. ANN. § 38-2205 (2020).

<sup>110</sup> ABA STANDARDS OF PRACTICE, *supra* note 2, at 1.

<sup>111</sup> *Id.*

<sup>112</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 23.

<sup>113</sup> ABA MODEL ACT, *supra* note 86, at § 3(a); CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 18; *cf.* Atwood, *supra* note 71, *passim*.

<sup>114</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 18. The First Star report explains that kids are best positioned to know what took place, whether they have been provided with services, and which relatives might be appropriate placements or provide support. *Id.* Only about half of the states, however, require courts to "at least hear the child's view." *Id.* at 23.

<sup>115</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 11, 18.

<sup>116</sup> CONN. GEN. STAT. § 46(b)-129(a) (2018).

<sup>117</sup> *See* Duquette & Darwall, *supra* note 37, at 100; Sobie explains that reframing how attorneys talk about representation avoids the confusion and conflict that has developed around these two designations:

If, when representing children, we erase the silly and largely unworkable word "best," concentrating instead on "legal" interests, we can merge these two contradictory and endlessly arguable principles of "best interests" versus "wishes." By the time the case's merits have been reached, the child's wishes should have been modified through counsel's realistic assessment and advice.

Sobie, *supra* note 32, at 185.

of hybrid representation: “an attorney shall be appointed to represent the child in [abuse and neglect] proceedings. Such attorney will represent the rights, interest, welfare, and well-being of the child, and serve as a guardian ad litem for the child.”<sup>118</sup> Alabama also requires an attorney guardian ad litem be appointed in all dependency and termination of parental rights proceedings.<sup>119</sup> That attorney, however, does not represent the child and is not bound by the child’s expressed wishes.<sup>120</sup>

In addition to legal representatives, courts may appoint non-legal advocates, lay guardians ad litem, or CASA volunteers to make recommendations about a child’s best interests.<sup>121</sup> These advocates, who do not act as attorneys, cannot provide children with legal advice or file motions on a child’s behalf.<sup>122</sup> Because these advocates focus on the best-interest standard, their recommendations can, and often times will, conflict with the child’s expressed wishes.<sup>123</sup>

#### IV. VAST DIFFERENCES

All the states that received an A+ rating from the Child’s Right to Counsel Report Card mandate legal representation for all children in abuse and neglect cases *and* provide for age and development appropriate client-directed representation.<sup>124</sup> Louisiana’s Children’s Code, which adopted key parts of the ABA Model Act, provides as follows:

Provision of independent counsel for abused and neglected children is an essential due process right provided by Louisiana law to ensure sound and fair decision-making concerning the children’s safety, permanency, and well-being. Counsel providing representation in child protection proceedings should have specialized knowledge and skills essential for effective representation, and should participate in multidisciplinary interaction together with other professionals involved with the child, including interdisciplinary communication,

<sup>118</sup> ALA. CODE § 26-14-11 (2020).

<sup>119</sup> *Id.* § 12-15-304 (2018).

<sup>120</sup> *Id.* § 12-15-102(10) (2019) (defining guardian ad litem as a licensed attorney appointed “to protect the best interests of an individual without being bound by the expressed wishes of that individual”).

<sup>121</sup> *See* UNIFORM ACT, *supra* note 20, at 8.

<sup>122</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 6.

<sup>123</sup> Duquette & Darwall, *supra* note 37, at 90.

<sup>124</sup> Lustbader & Pitchal, *supra* note 51, at 409-10 (questioning the meaning of the “A” rating: “Anecdotally, children’s lawyers around the nation—even in those states that earned an ‘A’ . . . regularly complain that they have far too many cases, not enough training, and inadequate pay”).

investigation, discovery, meetings, conferences, proceedings and administrative hearings. Resources to support the provision of legal representation of children should be used efficiently and equitably to assure qualified representation throughout the state.<sup>125</sup>

The statute in Connecticut reads, “A child shall be represented by counsel knowledgeable about representing such children,” and the counsel “shall act solely as attorney for the child.”<sup>126</sup> In Massachusetts, all children are appointed legal representation.<sup>127</sup> Those who can adequately assist the attorney and participate in the process are represented by a child’s attorney.<sup>128</sup> In Oklahoma, a court must appoint an attorney for the child, and that attorney “shall be independent of and not selected by the district attorney, the child’s parent, legal guardian, or custodian.”<sup>129</sup> The attorney represents the expressed wishes of the child unless the child is preverbal, very young, or incapable of judgment and meaningful conversation.<sup>130</sup> If the child is unable to express a meaningful desire, attorneys may substitute their judgment for the child’s, but the attorneys’ recommendation must be based on an objective set of criteria.<sup>131</sup>

In each of the states where representation laws were issued failing grades, legal representation is still not mandated in dependency proceedings.<sup>132</sup> Idaho mandates legal representation for some, but not all, children.<sup>133</sup> Idaho courts appoint a legal representative (a child’s attorney) and a guardian ad litem (a best interest advocate) for children who are twelve years old or older, unless the appointment of the legal representative “is not

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<sup>125</sup> LA. CHILD. CODE art. 551 (2008). The right to an attorney cannot be waived. *Id.* at art. 607 (2014). Additionally, Louisiana Supreme Court rules specifically provide that children’s attorneys owe the same duty of “loyalty, confidentiality, advocacy and competent representation to the child as are owed to any client.” LA. SUP. CT. R. XXXIII, Part III, Subpart II, Standard 2 (2012).

<sup>126</sup> CONN. GEN. STAT. § 46(b)-129(a) (2012).

<sup>127</sup> MASS. GEN. LAWS ch. 119, § 29 (2011).

<sup>128</sup> CHILD. & FAM. L. DIV., MASS. COMM. FOR PUB. COUNS. SERVS., PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES § 1.6(b).

<sup>129</sup> OKLA. STAT. 10A § 1-4-306(A)(2)(a) (2019). This right to an attorney cannot be waived. *Id.*

<sup>130</sup> *Id.* § (A)(2)(c). The statute also provides that if a meaningful attorney-client relationship cannot be established because of age or disability, the attorney must consult the child’s current custodian or caretaker. *Id.* § (A)(2)(b).

<sup>131</sup> *Id.* § (A)(2)(c) (stating courts must also appoint a guardian ad litem at the child’s or parent’s request and can also appoint one at the request of another party); *see also id.* § (B)(1).

<sup>132</sup> *See generally* HAW. REV. STAT. § 587A (2016); IDAHO CODE § 16-1614 (2020); IND. CODE § 31-32-4-2 (2020); MONT. CODE ANN. § 41-3-112 (2019); N.H. REV. STAT. ANN. § 169-C (2020).

<sup>133</sup> *See* IDAHO CODE § 16-1614(1) (2020).



practicable or not appropriate.”<sup>134</sup> In those cases, a guardian ad litem is appointed.<sup>135</sup> For children under twelve years of age, courts are required to appoint a guardian ad litem and an attorney for the guardian ad litem, but not for the child.<sup>136</sup>

Hawaii law provides for legal representation in even narrower circumstances. Hawaii law mandates the appointment of a guardian ad litem, who does not have to be an attorney, and makes the appointment of an attorney *permissible* if the child is in foster care and the child’s expressed position differs from the guardian ad litem or if the appointment of an attorney is in the child’s best interest.<sup>137</sup>

In both Montana and New Hampshire, a child’s legal representative is appointed only if a guardian ad litem or court-appointed special advocate is not available.<sup>138</sup> New Hampshire law mandates the appointment of a Court Appointed Special Advocate or an “approved program guardian ad litem[.]”<sup>139</sup> An attorney may be appointed if a CASA or guardian ad litem is not available for appointment,<sup>140</sup> or if “the child’s expressed interests’ conflict with the recommendation” by the CASA or guardian ad litem.<sup>141</sup>

Montana law also mandates the appointment of court-appointed special advocates to serve as guardians ad litem.<sup>142</sup> CASA volunteers are “agents of the court” and “effectively serve as the eyes and ears of the court.”<sup>143</sup> If a CASA is not available, then the state can appoint an attorney to serve as a guardian ad litem—best-interest legal representative.<sup>144</sup> A court may appoint the state’s public defender to assign an attorney to represent the child.<sup>145</sup> Until 2011, Montana law mandated that all children in

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<sup>134</sup> *Id.* § 16-1614(2)(a).

<sup>135</sup> *Id.* § 16-1614(2)(b).

<sup>136</sup> *Id.* § 16-1614(1) (indicating that if a guardian ad litem is not available, then a court “shall appoint counsel for the child”). In any instance, a guardian ad litem cannot also act as a child’s attorney. *Id.*

<sup>137</sup> HAW. REV. STAT. §§ 587A-4 (2016), 587A-3.1(b)(4) (2018). Even when the court-appointed guardian ad litem is an attorney, this individual is not the child’s lawyer. *See In re K Children*, 202 P.3d 577, 580 (Haw. Ct. App. 2007). A guardian ad litem is “any person who is appointed by the court under this chapter to protect and promote the needs and interests of a child or a party, including a court-appointed special advocate.” HAW. REV. STAT. § 587A-4 (2016).

<sup>138</sup> *See* N.H. REV. STAT. ANN. § 169-C:10(I) (2020); *see* MONT. CODE ANN. § 41-3-112(1) (2019).

<sup>139</sup> N.H. REV. STAT. ANN. § 169-C:10(I) (2020).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* § 169-C:10(II)(a).

<sup>142</sup> MONT. CODE ANN. § 41-3-112(1) (2019).

<sup>143</sup> *In re J.D.*, 437 P.3d 131, 139 (Mont. 2019).

<sup>144</sup> MONT. CODE ANN. § 41-3-112(1) (2019).

<sup>145</sup> *Id.* § 41-3-425(3).

dependency proceeding be appointed both an attorney and a guardian ad litem, but fiscal concerns prompted change.<sup>146</sup> As of 2017, Montana law prioritizes the appointment of a CASA over a guardian ad litem because, according to one legislator, “CASAs, unlike [Guardian ad Litem] or Attorneys, were free.”<sup>147</sup>

In Indiana, the appointment of legal representation for a child is always discretionary.<sup>148</sup> A class of children recently appealed a decision of the Federal District Court for the Southern District of Indiana that had dismissed the class action brought by ten children involved in Indiana’s child welfare proceedings.<sup>149</sup> The children, who, at the time of the brief, were in foster care and not represented by counsel, sued the state, arguing that they were entitled to legal representation to protect their due process rights.<sup>150</sup> The complaint alleged that, in practice, attorneys are rarely appointed.<sup>151</sup> For example, in Marion, Lake, and Scott County Superior Courts,<sup>152</sup> as well as Scott County Circuit Court, the complaint alleges that legal representation is appointed for children in fewer than ten percent of cases.<sup>153</sup>

The District Court dismissed the case under the *Younger* abstention doctrine,<sup>154</sup> holding “The exercise of federal jurisdiction here would intrude into state quasi-criminal civil enforcement proceedings.”<sup>155</sup> The court reasoned that “nothing less than the ‘fundamental right’ of parents to raise their children is at stake.”<sup>156</sup>

Interestingly, the court’s order dismissing the complaint reinforces the class action’s argument. Because fundamental rights are at stake, the

<sup>146</sup> Jennifer Shannon, *The Analysis is Simple: A Child’s Right to Counsel in Dependency and Neglect Proceedings Under the Montana Constitution*, 79 MONT. L. REV. 231, 233 (2018). This article argues the Montana Constitution provides the basis for legal representation for all children in abuse and neglect cases. *Id.* at 255.

<sup>147</sup> *Id.* at 235. This change was a cost-savings measure. *Id.*

<sup>148</sup> IND. CODE § 31-32-4-2(b) (2020).

<sup>149</sup> Nicole K. v. Stigdon, No. 1:19-cv-01521, 2020 WL 1042619, at \*1 (S.D. Ind. Mar. 3, 2020).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Marion and Lake are the most populous counties in Indiana. *Indiana Counties by Population*, IND. DEMOGRAPHICS (2020), [https://www.indiana-demographics.com/counties\\_by\\_population](https://www.indiana-demographics.com/counties_by_population) [https://perma.cc/5YX2-N9KV].

<sup>153</sup> Class Action Complaint at ¶ 6, Nicole K. *ex rel.* Linda R. v. Marion County, No. 3:19-cv-00025 (S.D. Ind. Feb. 6, 2019).

<sup>154</sup> *Younger v. Harris*, 401 U.S. 37 (1971). “The *Younger* abstention doctrine, as it has evolved, provides that federal courts should abstain from exercising jurisdiction when (1) there is an ongoing state proceeding, (2) which implicates important state interests, and (3) there is an adequate opportunity to raise any relevant federal questions in the state proceeding.” *Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010).

<sup>155</sup> *Nicole K.*, 2020 WL 1042619, at \*3.

<sup>156</sup> *Id.* (quoting *In re Ma.H.*, 134 N.E.3d 41, 44–46 (Ind. 2019)).

state has an interest in protecting the health and welfare of children.<sup>157</sup> As research has shown, one of the best ways to protect these rights is to guarantee that children have high-quality legal representation during dependency proceedings.<sup>158</sup>

#### V. RESEARCH AND THE BARRIERS THAT STILL STAND IN THE WAY

Advocates and practitioners all recognize the importance of quality legal representation for children in abuse and neglect cases.<sup>159</sup> Mandating this type of representation could close some of the loopholes that not only deprive children of quality legal representation but also deprive children of all representation. One of the more troubling recent studies looked not at the quality of legal representation, but whether children had *any* representation at all.<sup>160</sup> Alicia LeVezu conducted a six-month observation study in Washington state, a state which does not mandate legal representation or even guarantee a non-legal advocate for children.<sup>161</sup> She concluded that “nearly one quarter of children in dependency court may be left without any form of advocacy.”<sup>162</sup> This lack of advocacy was demonstrated at the hearings: in a majority of cases where children did not have an advocate, the children were not even mentioned during hearings.<sup>163</sup> Judges, making potentially life-altering decisions, heard about the unrepresented children’s preferences in only six percent of the cases, and only three percent of these children attended their hearings.<sup>164</sup> While most children represented by attorneys were at least mentioned during the hearings, twenty-one percent “of children with best-interest advocates were not discussed in their hearings at all.”<sup>165</sup> Twenty percent of children represented by attorneys and seventy-five percent of children with best interest advocates did not have “their preferences relayed to the

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<sup>157</sup> *Id.*

<sup>158</sup> *See, e.g.*, CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 6; LeVezu, *infra* note 160, at 158; ZINN & SLOWRIVER, *infra* note 172, at 1; CTR. ON CHILD. & L., *infra* note 180, at 2.

<sup>159</sup> *See generally* ABA STANDARDS OF PRACTICE, *supra* note 2.

<sup>160</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 3.

<sup>161</sup> Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. CIV. RTS. & C.L. 125, 128 (2018).

<sup>162</sup> WASH. REV. CODE § 13.34.100 (2019). The statute requires courts appoint guardians ad litem unless the court finds good cause as to why the appointment is unnecessary. *Id.* § 13.34.100, subdiv. 1.

<sup>163</sup> LeVezu, *supra* note 160, at 151.

<sup>164</sup> *Id.* (“72% of children with no advocates had their well-being completely ignored by the court and other parties in the hearing.”).

<sup>165</sup> *Id.*

<sup>165</sup> *Id.* at 154.

court.”<sup>166</sup> Although there were problems with all models of representation, LeVeze found that children with child’s attorneys were more likely to participate in and be mentioned during hearings than children who were represented by best-interest advocates.<sup>167</sup>

As a result, LeVeze recommends that states close loopholes that permit children to go unrepresented; that courts actually appoint representatives for all children; and that representatives act as children’s attorneys.<sup>168</sup> She also recommended that states require training and improve oversight of children’s advocates and representatives.<sup>169</sup>

Mandating legal representation for all children could help avoid and eliminate some of the issues uncovered in LeVeze’s study. First, and most obviously, mandating appointments would close the loopholes that leave children unrepresented. Judges could modify proceedings to ensure that representatives speak on behalf of the child or the child’s best interests. Relatedly, states could require both children’s attorneys and best-interest attorneys to inform the court of their child client’s expressed interests. Second, when appointed attorneys are children’s attorneys who owe ethical obligations to their child-clients, children should have remedies against attorneys who do not fulfill those obligations.<sup>170</sup>

In addition, the appointment of high-quality legal advocates for children, parents, and agencies can improve outcomes and save money.<sup>171</sup> In the early 2000s, Palm Beach County, Florida, sought to expedite permanency placements by providing legal representation to children age three and under who entered shelter care.<sup>172</sup> Eventually, the program was expanded to include children aged twelve and below.<sup>173</sup> A study of the program found that the children it served had “a significantly higher rate of

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<sup>166</sup> *Id.* at 149. The author noted that age could be a factor in the disparity between attorney and best interest representation, but “even estimating one third of children as pre-verbal, a large portion of children are left without their perspectives being heard by the court.” *Id.*

<sup>167</sup> *Id.* at 158. “The data demonstrate that appointment of an attorney alone, without training and support for those attorneys does not guarantee a child’s voice will be heard and respected in court.” *Id.* at 157.

<sup>168</sup> *Id.* at 159.

<sup>169</sup> *Id.*

<sup>170</sup> See Malempati, *supra* note 18, at 634. These attorneys should have clearly defined obligations to the children they serve so they cannot ignore or bypass these ethical rules.

<sup>171</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 6 (citing a small study in Washington state that showed that the clients of high-quality legal representatives were forty percent more likely to experience permanency within six months than other children).

<sup>172</sup> ANDREW E. ZINN & JACK SLOWRIVER, CHAPIN HALL CTR. FOR CHILD. AT THE UNIV. OF CHI., EXPEDITING PERMANENCY 1 (2008) (discussing a small study that showed how high-quality legal representatives were able to obtain tailored and specific case plan services for their clients). The program covered approximately 350 children. *Id.*

<sup>173</sup> *Id.*

exit to permanency” than children not in the program.<sup>174</sup> These rates resulted from higher rates of adoption and long-term custody placements, not significantly lower rates of reunification.<sup>175</sup> Children with legal representation moved from case plan approval to permanency “at approximately twice the rate” as children without the same type of representation.<sup>176</sup> In addition, there were some overall savings, despite the up-front investment because children required less state-funded, out-of-home care.<sup>177</sup>

Quality legal representation requires money, training, and manageable caseloads.<sup>178</sup> Some states are unable or unwilling to make initial investments, even though evidence suggests they may save money in the long run.<sup>179</sup> A recent study out of California, a state that mandates court-appointed legal representation for children and parents,<sup>180</sup> considered the effects of funding for child and parent attorneys on the quality of legal representation, including caseloads, staffing, training, advocacy, and multidisciplinary models.<sup>181</sup> For the duration of the study, which started in 2014, state funding was allocated based on a workload formula with the goal of addressing inequities in funding.<sup>182</sup> The study included a location that received increased funding and two with funding decreases.<sup>183</sup> The study found that funding—in addition to child welfare system practices and outside

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<sup>174</sup> *Id.* at 14–15.

<sup>175</sup> *Id.* at 15. Because the reunification rates between groups were similar, the study concluded the program was not “pursuing adoption or long-term custody *in lieu of* reunification.” *Id.* The adoption and permanent custody rates were significantly lower for African American children as compared to white children, but the rate of reunification was not significantly different. *Id.* at 18.

<sup>176</sup> *Id.* at 20.

<sup>177</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 12. Note, however, the study’s authors suggested that children represented by attorneys placed a heavier burden on social service providers. ZINN & SLOWRIVER, *supra* note 172, at 32. The reasons for this were not clear—it is possible attorney representation led to additional time spent in court or complying with service-related court orders—but the authors expressed concern that the burden could leave social service workers with less time to work with parents and children. *Id.*

<sup>178</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 12.

<sup>179</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 4.

<sup>180</sup> CTR. ON CHILD. & L., AM. BAR ASS’N, EFFECTS OF FUNDING CHANGES ON LEGAL REPRESENTATION QUALITY IN CALIFORNIA DEPENDENCY CASES 2 (2020).

<sup>181</sup> *Id.* at 1.

<sup>182</sup> *Id.* The study was part of a four-year plan to more equitably allocate funding to each of California’s fifty-eight superior courts. *Id.* at 2, 3. As a result, some counties received increased budgets, while others received less money. *Id.* at 2. The funding modifications were significant—in the first year, funding decreased for twenty-nine superior courts by three percent and increased in twenty-eight superior courts by roughly fifty percent. *Id.* The next year, funding decreased by twelve percent for thirty courts and increased sixty-eight percent for twenty courts. *Id.* at 3.

<sup>183</sup> *Id.* at 1.

factors, including poverty, family circumstances, and geography—had a direct impact on several factors affecting quality legal representation.<sup>184</sup>

The study found that funding changes affect staffing considerations, such as recruitment, retention, and the amount of time an attorney could spend on a case.<sup>185</sup> At the increased funding site, attorneys were provided “fair compensation,” which attracted more qualified candidates.<sup>186</sup> At the decreased funding sites, caseloads and inadequate pay made it more difficult to attract qualified candidates.<sup>187</sup> Across all sites, however, adequate compensation was an issue—it was just felt more directly at decreased funding sites due to attorney turnover.<sup>188</sup> And even though time with clients increased with increased funding, there was not enough time “to support clients and meet children’s needs.”<sup>189</sup> In particular, children’s attorneys indicated they did not have sufficient time to meet with children, investigate, prepare for hearings, or determine what services their child-clients needed.<sup>190</sup>

Money will always be a barrier to providing high-quality legal representation for children, but today, states have some federal funding assistance. Starting in 2019, federal matching funds through Title IV-E of the Social Security Act were available to be used in certain instances—namely when a child is in foster care—to help cover the costs for attorneys to represent children and parents and help them navigate the process.<sup>191</sup>

High-quality legal representation is necessary to ensure “salient information is conveyed to the court, parties’ legal rights are protected and the wishes of the parties are effectively voiced.”<sup>192</sup> This type of legal representation has led to the following results:

[I]ncreases in party perceptions of fairness; increases in party engagement in case planning, services and court

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<sup>184</sup> *Id.* at 1, 6.

<sup>185</sup> *Id.* at 6.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* Attorney turnover can affect the perceived quality of representation and most directly affects child clients. *Id.* at 7.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 9–10.

<sup>191</sup> Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents’ and Children’s Attorneys: A Brief Technical Overview*, AM. BAR ASS’N (Feb. 25, 2019), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practice\\_online/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practice_online/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/) [https://perma.cc/J7FR-EA63]. See also CHILDREN’S BUREAU, DEPT. OF HEALTH & HUM. SERV.’S, CHILD WELFARE POLICY MANUAL § 8.1B (2020), [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36) [https://perma.cc/GZ3Y-NEY3].

<sup>192</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 2.

hearings; more personally tailored and specific case plans and services; increases in visitation and parenting time; expedited permanency; and cost savings to state government due to reductions of time children and youth spend in care.<sup>193</sup>

Quality legal representation is associated with shorter times in care and better outcomes.<sup>194</sup> Lack of, or incompetent, legal representation can create “barriers to engagement,”<sup>195</sup> and it can affect a child’s procedural and substantive rights.<sup>196</sup> If a child is not engaged in the process, the court will likely be without relevant information, and the child is likely to view the process as unfair.<sup>197</sup> Studies of procedural justice suggest that when parties feel a process is fair, they are more likely to engage by attending hearings and complying with court orders.<sup>198</sup> One way to improve perceptions of fairness is to make it easier for children to participate in the process by ensuring they have quality legal representation. “[P]eople value the opportunity to present their arguments and state their views,” even when those views are inconsistent with the judge’s decision.<sup>199</sup> Children who are engaged in the process can act as checks on their legal representatives by ensuring that their lawyers represent their wishes and by voicing their displeasure if their lawyer does not.<sup>200</sup>

High-quality legal representatives can also protect a child’s substantive rights by contesting unnecessary orders and proactively seeking out services and programs for their child-clients. Attorneys can challenge unnecessary removals, and if removals are necessary, attorneys can advocate for safe and healthy living conditions and services that protect the child “from physical, psychological, and emotional harm.”<sup>201</sup>

## VI. CONCLUSION

For more than thirty years, advocates have called for legal representation of children in abuse and neglect cases. Judges around the country recognize the liberties at stake and have advocated for this type of

<sup>193</sup> *Id.* See also ABA MODEL ACT, *supra* note 87, at 21; UNIFORM ACT, *supra* note 20, at § 11 alternative B, cmt. at 29.

<sup>194</sup> CHILD REPRESENTATION REPORT CARD, *supra* note 6, at 7.

<sup>195</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 5.

<sup>196</sup> *Child Abuse Prevention and Treatment Act*, NAT’L ASS’N OF COUNS. FOR CHILD., <https://www.naccchildlaw.org/page/CAPTAreauthorization> [<https://perma.cc/FL35-7TW9>].

<sup>197</sup> CHILDREN’S BUREAU MEMORANDUM, *supra* note 22, at 5.

<sup>198</sup> NAT’L ASS’N OF COUNS. FOR CHILD., *supra* note 197.

<sup>199</sup> LeVezu, *supra* note 161, at 130. This can also help make sure the child’s interaction with the court is not harmful to the child’s wellbeing.

<sup>200</sup> *Id.* at 131–32.

<sup>201</sup> Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2006).

representation. Recent studies have also demonstrated the value of quality legal representation for children.

The federal and state governments can take steps to ensure the right to legal representation for children. CAPTA, which has been amended over the years to require training for guardians ad litem and individualized, personal representation,<sup>202</sup> should be further amended to mandate legal representation for all children and require states to treat children as parties to proceedings, guaranteeing children the rights that come with party status. Further, federal and state governments need to better monitor these proceedings to verify that, at minimum, children are actually advocated for and represented during dependency proceedings.

States that do not yet mandate legal representation for all children in abuse and neglect cases must do so. Title IV-E federal funding can help defer some of the costs for cases involving eligible children. States that do not clearly define the role of the legal representative, in policy or practice, must do so. Finally, the few states that still do not directly recognize children as parties to proceedings that could legally terminate their parental relationships need to explicitly do so. Children need attorneys to protect and advance their interests; provide legal advice, counsel, and advocacy; help them understand the process; and empower them.<sup>203</sup> Legal representation for children should not be a controversial issue. In fact, fairness should demand it.<sup>204</sup>

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<sup>202</sup> CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, § 106, 124 Stat. 3467, 3470 (2010).

<sup>203</sup> CHILDREN'S BUREAU MEMORANDUM, *supra* note 22, at 3-4.

<sup>204</sup> *See generally* Kevin Lapp, *A Child Litigant's Right to Counsel*, 52 LOY. OF L.A. L. REV. 463 (2019) (arguing that the state should provide an attorney to a child in any legal proceeding where significant legal rights or interests are at stake).



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