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THE RIGHT TO COUNSEL LANDSCAPE AFTER PASSAGE OF THE ABA MODEL ACT—IMPLICATIONS FOR REFORM

AMY C. HARFELD*

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I. INTRODUCTION

History was made this August 2011 in Toronto, Canada, when the American Bar Association (ABA) House of Delegates voted to adopt the ABA Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act). Through several years of intense and effective collaboration, negotiation, and education, the ABA voted to adopt the Model Act, thus establishing a new nationally accepted standard of practice for attorneys representing children in dependency proceedings and a new standard of legal representation for maltreated children across America.²

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2. See generally id.
The ABA is by no means an advocacy organization. Rather, it represents the largest assemblage of attorneys from across the United States from every existing practice area. The new standard established in the Model Act goes far beyond what is currently required in the relevant federal law, the Child Abuse Prevention and Treatment Act (CAPTA), creating a stark and troublesome dichotomy in the legal standards governing child representation that begs to be rectified. Although the Model Act does not in itself create binding law, it should be utilized as a powerful tool to advance state and federal legislative reform culminating in a CAPTA amendment mandating client-directed attorney representation for children in all abuse and neglect cases.

Over the last fifteen years, a broad national consensus has evolved across the country that is reflected in the provisions and practice framework of the Model Act. Since passage of the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Standards of Practice) in 1996, the notion that children in dependency hearings have the right to client-centered traditional representation by an attorney has gained widespread acceptance across a variety of forums. Judges, state courts, academics, attorneys, and advocates nationwide have built a groundswell of support in the right to counsel movement culminating with passage of the Model Act.

This article will track the groundswell of standards, research, and literature that, together, created the momentum for the Model Act’s passage. It will go on to examine the federal CAPTA in more detail, explaining how it has dealt with the issue of legal representation over time. Then, CAPTA will

3. See id. at 22.
4. See id. at 18–22.
5. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES 1 (1996) [hereinafter STANDARDS OF PRACTICE].
be viewed in contrast to the Model Act and the discrepancies between the two frameworks will be highlighted. Next, state statutes concerning the provision of representation to children in dependency hearings will be classified and placed along the CAPTA to Model Act spectrum. Finally, the article will conclude with a section on how the Model Act may be best utilized as a tool in pursuing state and federal legislative reform resulting in a nationally protected right to counsel for children in dependency cases.

II. TRACKING THE RIGHT TO COUNSEL GROUNDSWELL OVER THE PAST FIFTEEN YEARS

For the last fifteen years or so, there has been an increasing amount of attention paid to the issue of child representation in abuse and neglect cases from many disciplines and entities. In 1995, the National Council of Juvenile and Family Court Judges Guidelines were published. These guidelines do not go very far in discussing the parameters of attorney representation, but they did clearly state: “Both trained volunteers and attorneys must play a significant role in providing GAL representation for children,” indicating the view that attorneys should have a role in representing the child in every case.9

Shortly later, in 1996, the ABA passed the Standards of Practice recommending that “[a]ll children subject to court proceedings involving allegations of child abuse and neglect . . . have legal representation as long as . . . court jurisdiction continues.”10 The Standards of Practice did not present a statutory model, but rather spelled out standards of representation both for traditional child attorneys and for attorney guardians ad litem (GALs) who represent only the child’s best interests.11 The standards clearly articulated that only attorneys can adequately safeguard the rights of, and advocate for,
the legal interests of children in the child welfare system and that children’s attorneys are much preferable to best-interest attorney GALs.\textsuperscript{13}

Shortly after publication of the Standards of Practice, Fordham Law School hosted the Fordham Conference on Ethical Issues in the Legal Representation of Children.\textsuperscript{14} The primary recommendation from this gathering was premised upon the presumption that all children must be represented by counsel in their abuse/neglect cases and further, that their “lawyer[] should represent the expressed wishes of their child clients rather than [what the attorney determines to be in] their [child] clients’ best interests.”\textsuperscript{15}

Several years later, in 2001, the National Association of Counsel for Children released its report titled, \textit{NACC Recommendations for Representation of Children in Abuse and Neglect Cases}.\textsuperscript{16} The foundational principle is “that every child subject to a child protection proceeding must be provided an independent, competent, and zealous attorney, trained in the law of child protection and the art of trial advocacy, with adequate time and resources to handle the case.”\textsuperscript{17} This established the new recommended standard of practice for children’s attorneys nationwide.

Recommendations to appoint attorneys to maltreated children were issued by the U.S. Department of Health and Human Services in 2002.\textsuperscript{18} The recommendations, found in the \textit{Guidelines for Public Policy and State Legislation Governing Permanence for Children (Guidelines)}, were developed in response to President Clinton's 2002 initiative on adoption and foster care.\textsuperscript{19} In relevant part, the \textit{Guidelines} state:

\begin{quote}
We recommend that [s]tates guarantee that all children who are subjects of child protection court proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process. The attorney owes the same duties of
\end{quote}

\begin{itemize}
\item \textsuperscript{14} \textit{Recommendations of the Conference on Ethical Issues in the Legal Representation of Children}, 64 FORDHAM L. REV. 1301, 1301 (1996).
\item \textsuperscript{15} Katherine R. Kruse, \textit{Standing in Babylon, Looking Toward Zion}, 6 NEV. L.J. 1315, 1315 (2006).
\item \textsuperscript{17} Id. at 4.
\item \textsuperscript{18} DUQUETTE ET AL., \textit{supra} note 6, at chs. I, VII.
\item \textsuperscript{19} Id. at ch. I.
\end{itemize}
compotent representation and zealous advocacy to the child as are due an adult client.\textsuperscript{20}

This was a significant step forward, providing the first federal policy statement in support of attorney representation for all children.

In 2005, Professor Jean Koh Peters at Yale Law School released the first survey of legal representation of children in dependency cases by state and juxtaposed to international law on the topic.\textsuperscript{21} She broke down the representation by categorizing states that provided only lay best interest representation, those that also required the lay GAL to communicate child's views, those that provided attorney representation on a permissive or mandatory basis, and those that provided client-directed attorneys.\textsuperscript{22} This survey permitted advocates and practitioners, as well as lawmakers, a big-picture view into the messy hodgepodge of state laws governing representation of children in child welfare cases.\textsuperscript{23}

In 2005, the landmark case, \textit{Kenny A. ex rel. Winn v. Perdue},\textsuperscript{24} was decided in Georgia, recognizing for the first time a state and federal constitutional due process right to counsel for children in dependency cases.\textsuperscript{25} In relevant part, the Georgia court stated, “a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of hearings and review proceedings that occur as part of a deprivation case” and recognized that once a child is in state custody, a “special relationship” is created, triggering liberty interests as well.\textsuperscript{26} This case established valuable precedent for a child's constitutional right to counsel.\textsuperscript{27} Advocates in several states have attempted to use this as precedent to strengthen the right to counsel for children in their state,\textsuperscript{28} and the case will no doubt be

\begin{footnotesize}

\textsuperscript{20} Id. at ch. VII.


\textsuperscript{22} Peters, \textit{supra} note 21, at 1011–12; see generally REPRESENTING CHILDREN WORLDWIDE, \textit{supra} note 21.

\textsuperscript{23} Peters, \textit{supra} note 21, at 1013, 1019.


\textsuperscript{25} Id. at 1359–60.

\textsuperscript{26} Id. at 1360.

\textsuperscript{27} See id. at 1359–60.


\end{footnotesize}
used as landmark precedent in this area in courts across the country until it becomes the law of the land.

Shortly after the Kenny A. decision, The University of Nevada, Las Vegas convened child law experts from around the country at the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham, releasing a law review dedicated to the issue of right to counsel. The most significant outcome from this conference included recommendations to amend CAPTA in the following ways:

1. Laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child’s guardian ad litem should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding.

2. Laws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.

Other UNLV Conference recommendations addressed the specific manner in which child-directed attorney representation should be executed. Many of these recommendations are consistent with provisions of what was to become the Model Act.

In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (NCCUSL Act). NCCUSL, which is also known as the Uniform Law Commission, is an organization made up of attorneys from each U.S. jurisdiction that provides non-partisan legislation "in areas of state law where uniformity is desirable and practical." The 2007 NCCUSL Act recognizes that a child’s interest in abuse and neglect proceedings is of fundamental importance and calls for the appointment of an

34. Id. at About ULC.
attorney to each child involved in such proceedings who may serve in a client-directed or best-interests capacity. The Act emphasizes that the attorney for the child must fully participate in the proceedings.

While in 2005, Professor Peters provided a survey of legal representation across the states, it was not until 2007, with the publication by First Star of a national report card grading states on their provision of attorneys to children in abuse and neglect proceedings, that advocates and policy makers were able to see clearly how each state’s laws provided representation. States’ policies were clearly exposed and were put in direct comparison with other states across the country. First Star and the Children’s Advocacy Institute utilized this opportunity of direct analysis to release a second report card in 2009, which highlighted states that had used the opportunity to improve their representation practices and kept the pressure on those states who continued policies of failing grades.

In 2008, Chapin Hall Center for Children at the University of Chicago published a report entitled Expediting Permanency: Legal Representation for Foster Children in Palm Beach County based on an evaluation of the Legal Aid Society of Palm Beach County’s Foster Children’s Project (FCP), which provides client-directed attorney representation to the children it represents. This study specifically focused on FCP’s effect “on the nature and timing of children’s permanency outcomes.” Further, it was the first to examine “court improvement efforts on . . . permanency” when subject children were provided with legal representation. The result was that children represented by FCP achieved permanency at rates significantly higher than

35. See id. at 5.
36. Id.
37. Id. at 28.
38. Peters, supra note 21, at 1010.
40. Id. at 10.
43. Id.
44. Id. at 3.
children not represented by FCP, strengthening the argument that children involved in dependency proceedings benefit from client-directed counsel.45

On the academic front, several “right to counsel” law review articles have been published making the case for national reform; these articles allege that the GAL requirement of CAPTA is tantamount to the unauthorized practice of law and underscores the importance of a client-directed model with reasonable caseloads.46

The ABA sponsored a summit on the right to counsel at Northwestern University School of Law in 2009.47 “This summit . . . allow[ed] policy makers, practitioners, academics, and advocates from around the country to collaborate and develop an aggressive national strategy to promote the right to counsel for children through legislation, litigation, and public engagement.”48 The purpose of the summit was to strategize the next steps in the “right to counsel” movement for children, including using litigation, federal and state legislative reform, and passage of the Model Act.49

Also in 2009, the federal government, for the first time, declared this issue so important that it dedicated sparse federal dollars to determine best practices.50 In October of that year, the U.S. Children’s Bureau named University of Michigan Law School its partner in establishing the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep).51 “The QIC-ChildRep is a five-year, [five] million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child’s legal representative, and provide one of the first empirically-based analyses of how legal representation for the child might best be delivered.”52 Although the outcome of the research and data of the QIC-ChildRep is not yet in, it will be

45. Id. at 14–15.
48. NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 14.
49. Id. at 4–5.
51. Id.
52. Id.
complete in time for the next CAPTA reauthorization cycle in 2015–16.53 There are high hopes that the research and results published will produce some of the evidence and data needed for further CAPTA reform on this topic.

The passage of the Model Act represents the crest of this tidal wave of attention, advocacy, and consensus on the topic of right to counsel for abused and neglected children in their dependency cases. Now that the children's legal community, judicial, court, academic and advocacy communities, and the ABA itself have decisively concluded that all children in abuse and neglect cases must have competent attorney representation, it has become even more conspicuously shameful how far behind the curve our national legislation stagnates.

III. EVOLUTION OF FEDERAL LEGISLATION ON RIGHT TO COUNSEL

The key piece of federal legislation addressing the representation of children in child abuse and neglect cases is CAPTA, originally enacted in 1974.54 CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities related to child maltreatment.55 Although this funding usually makes up only a small portion of states' child welfare budgets, it represents the only direct block of federal funding for child representation, and hence, the greatest sphere of influence over state practice in this arena.56

Within the first iteration of the law, the only provision regarding representation required merely that a GAL be appointed to represent the child in abuse and neglect proceedings.57 Although primitive, this provision actually "represented the birth of the field of representation of children in [these] proceedings."58 That being said, there was no guidance provided regarding the nature of this GAL's or representative's role. Certainly the issue of whether this GAL would be an attorney and, if so, what role the attorney would play was not addressed.
CAPTA has been amended a number of times since 1974.\(^{59}\) The most significant amendment pertaining to representation of children came in 2003 when the simple requirement of a GAL was expanded to: 1) make clear that this representative may be an attorney—without requiring that it be so; 2) clarify the objectives of the representation—to obtain an understanding of the case, and to make best-interest recommendations to the court; and 3) require that the representative receive appropriate training.\(^{60}\) This amendment made clear that the child did not have the right to an attorney, and whatever representative the child had was primarily accountable to the court, not to the child.\(^{61}\)

CAPTA was most recently reauthorized in 2010.\(^{62}\) Many organizations including the ABA, the Children’s Advocacy Institute, the National Association of Counsel for Children, First Star, and other groups worked over several years to amend the representation provisions to specify that traditional attorney representation be provided in accordance with the ABA Model Rules of Professional Conduct.\(^{63}\) The National Child Abuse Coalition also advocated for an amendment to the Act requiring that representation continue for the entire duration of the case, even if the child remains in care past the age of eighteen, as allowed by the Fostering Connections to Success and Increasing Adoptions Act.\(^{64}\) This amendment was not adopted in whole or in part.\(^{65}\)

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61. See id.
63. See NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 5, 10, 12, 14, 16; see generally MODEL RULES OF PROF’L CONDUCT (2011).
64. See Howard Davidson, A.B.A. CTR. ON CHILDREN & THE L., CAPTA PROPOSED AMENDMENTS REGARDING LEGAL REPRESENTATION OF CHILDREN (2010) [hereinafter DAVIDSON, CAPTA PROPOSED AMENDMENTS] (on file with Nova Law Review); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 201, 122 Stat. 3949, 3957 (codified at 42 U.S.C. § 1305 (2006 & Supp. IV 2010)). This included proposed amendments that would have required that: 1) “[e]very child involved in a court case be appointed an attorney;” 2) “[t]his appointed attorney be designated ‘legal counsel’ for the child, with his or her representation strictly following the [ABA] Model Rules of Professional Conduct;” 3) “[t]he appointed attorney have ‘adequate time and resources’ to properly handle each case, defined as not having an ‘excessive’ caseload and receiving ‘reasonable and appropriate compensation;’” and 4) “[t]his attorney appointment continue as long as the court maintain[s] its jurisdiction over the case, including all periods of foster care or other residential placement, as well as the process of the child’s transition to adult independence.” Davidson, What Advocates Should Know, supra note 56, at 1.
In response to some concerns regarding the economic feasibility of making such an amendment, an alternative was proposed to provide attorney representation to children over the age of twelve. This age provision would have significantly cut down on any expense created by this provision, yet the Senate HELP Committee dismissed even this alternative during CAPTA reauthorization.

There was only one addition to the 2010 CAPTA Reauthorization related to the representation of children. The 2003 amendment “that every child’s court-appointed representatives have ‘training appropriate to [that] role,’” never specified what this training was to consist of. The 2010 amendment explicitly directs that this must include “training in early childhood, child, and adolescent development.” It is undoubtedly important that whoever the child’s representative is have appropriate training in this area, but no training can substitute for a *bona fide* attorney who will zealously represent and advocate for their child client.

**IV. HOW CAPTA FALLS SHORT OF THE MODEL ACT**

The Model Act provides for a model of representation for abused and neglected children in dependency proceedings that protects their rights, provides full due process, gives them a voice in court, and ensures that their perspective is fully heard and considered before a judge makes a ruling on their best interest. This model of representation differs starkly from the limited representation required under CAPTA, and this chasm should be appreciated.

Under CAPTA, the limited representation provided for ensures only that the child be appointed a properly trained GAL who may or may not be an attorney, that the GAL obtain first-hand information about the case, and that the GAL make best interest recommendations to the court. This means that, in a state that provides only this level of representation, the child would not have an attorney, and therefore, none of the advantages and rights that attach to having legal counsel, and would not have his or her legal interests or wishes communicated in court to the judge, and therefore, not considered

66. See *Davidson, CAPTA Proposed Amendments*, supra note 64.
69. Id.
70. 42 U.S.C. § 5106a(a)(6)(D).
71. See *Model Act 2011*, supra note 32, §§ 3(a), 7(a)–(b).
in the case’s adjudication. Essentially, CAPTA and the Model Act set the respective ends of the spectrum of representation across America.

Following are some of the most compelling provisions under the Model Act that go beyond this limited representation to provide the child with full, meaningful, and appropriate legal representation during their child protective case: Lawyers will serve in a client-directed capacity to every child in an abuse or neglect case for the entire duration of the case and will represent children with diminished capacity pursuant to relevant rules of professional conduct; counsel must abide by relevant rules of professional conduct; “right to counsel may not be waived;” “court may appoint a best-interest advocate”—the type required by CAPTA—in addition to the attorney to provide best-interest recommendations; lawyers must not carry a caseload that exceeds a reasonable standard; specific duties of child’s lawyer and the scope of representation are spelled out in detail; attorney may request authority from the court to pursue ancillary legal matters on behalf of the child; requires that the child and the child’s attorney receive notice of all hearings and attorney access to all information required for optimal representation; grants subject children party status and “the right to attend and . . . participate in” each hearing; and entitles child’s counsel to reasonable compensation for their representation.

73. See id.
74. MODEL ACT 2011, supra note 32, § 6.
75. Id. § 7(d).
76. Id. § 3(d).
77. Id. § 3(f).
78. 42 U.S.C. § 5106a(b)(2)(B)(xiii); MODEL ACT 2011, supra note 32, § 3(b).
79. MODEL ACT 2011, supra note 32, § 4(c).
80. See id. § 7.
81. See id. § 7(b)(10).

Such ancillary matters include special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, guardianship, adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification, and tort actions for injury, as appropriate. The lawyer should make every effort to ensure that the child is represented by legal counsel in all ancillary legal proceedings, either personally, when the lawyer is competent to do so, or through referral or collaboration.

Id. § 7(b) cmt.
82. Id. § 9(b), (f)(2).
83. MODEL ACT 2011, supra note 32, §§ 2(b), 9(a).
84. See id. § 12(a).
V. WHERE STATES FALL IN THE SPECTRUM OF REPRESENTATION

Clearly, the gap between the representation required under CAPTA and that promoted in the Model Act is vast and has very significant implications for the child as well as for the outcome of the case. Children in foster care face a complicated and confusing court process that impacts their lives and their liberty on the most fundamental level. Because of the dichotomy that exists between the Model Act and CAPTA, children in some states find themselves without an advocate to counsel them regarding their legal rights, interests, and options; without an attorney to make objections, conduct discovery, or file motions and appeals; and without someone to give voice to and advocate for their position in court. Thus, the child is disempowered throughout the process and has no vehicle to make his wishes heard and considered as his future is determined. The court is similarly negatively impacted by this as the judge is denied critical information that only a child's attorney would introduce, and cannot adequately consider the child's legal position and wishes as she determines the best interest according to all parties.

The gap between CAPTA and the Model Act on this topic has created a cacophonous hodgepodge of state statutes across the country regarding the representation of children in dependency hearings, practically ensuring that a child’s experience during this traumatic and critical period will be determined by her state of residence. As a condition of funding under CAPTA, states must only provide that which is required by statute. Fortunately, the majority of states have adopted something in between. Below is a brief summary of where along the continuum between these two standards most states fall.

A. Non-Attorney and Discretionary Attorney Representation

Predictably, many states have taken CAPTA’s lead and have statutes that do not entitle a child to attorney representation in their dependency hear-

85. See Taylor, supra note 6, at 607–10.
86. Id. at 608.
87. See NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 4.
ings.\textsuperscript{89} In 2005, the first study of state practice in this arena by Jean Koh Peters at Yale Law School found that well over half of states did not guarantee attorney representation to children in their abuse and neglect hearings.\textsuperscript{90} As of 2009, First Star and the Children's Advocacy Institute reported that there were fourteen such states.\textsuperscript{91} This trend indicates that states are shifting away from the primitive requirements of CAPTA towards the standards espoused in the Model Act.

B. Best-Interest Attorney Representation

Many other states offer a model of representation which falls squarely between what is required under CAPTA and that which the Model Act proposes.\textsuperscript{92} As of 2009, in twenty-two states, when an attorney is provided, the attorney is not required to advocate for the child's position in court.\textsuperscript{93} This might mean that the attorney represents only the "best interest" position of the child, or that the law is vague on what role the attorney is to play, or that the attorney may serve in a best-interest capacity at the discretion of the court.\textsuperscript{94} Some states do not provide an attorney for the child, but provide one for the GAL appointed to represent the child's best interest.\textsuperscript{95}


\textsuperscript{90} See Peters, supra note 21, at 1013; Peters, U.S. Jurisdiction Summary Chart, supra note 89.

\textsuperscript{91} NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 26–29, 42–43, 46–47, 52–59, 68–69, 80–81, 86–89, 98–99, 126–28. Alaska, Arizona, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Maine, Missouri, Nevada, New Hampshire, North Dakota, and Washington State, either have no state law providing for the appointment of counsel or counsel is provided only on a discretionary basis. \textit{Id.} It is important to note that this report reflects only the attorney representation provisions reflected in state law. \textit{Id.} at 20. Some of these states may have practices in part or all of the state that do provide attorneys for children in dependency cases, but there is no statutory requirement to do so, which means that such provisions are subject to the vagaries of state government and politics. \textit{See id.} at 8.

\textsuperscript{92} See \textit{id.} at 20, 22–23.

\textsuperscript{93} See NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 20, 22–23.

\textsuperscript{94} See \textit{id.}

\textsuperscript{95} See, \textit{e.g.}, \textit{id.} at 54. Idaho requires, "the court shall appoint a guardian ad litem for the child or children to serve at each stage of the proceeding and in appropriate cases shall appoint counsel to represent the guardian, and in appropriate cases, may appoint separate counsel for the child." \textit{Id.} (quoting IDAHO CODE ANN. § 16-1614(1) (2011)) (internal quotation marks omitted).

[North Carolina] mandates that "when in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile \ldots [i]n every case where a non-attorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding."

https://nsuworks.nova.edu/nlr/vol36/iss2/1
When a child is represented by a best-interest attorney, they are denied many advantages of the traditional attorney-client relationship. These might include the right to zealous advocacy for their position and the right to be heard in court, the benefits of attorney-client privilege, right to notice, participation and party status, and the right to appeal if the decision goes against the child's position. This model of representation is so contrary to the traditional function that lawyers vow to serve clients in almost all other capacities that some believe this model tantamount to forced malpractice.

C. Client-Directed Attorney Representation

The 2007 Report Card published by First Star and the Children's Advocacy Institute reported that seventeen states required that children be appointed client-directed attorneys to children in dependency cases in almost all instances. This is an impressive number of states that demonstrated their commitment to children's due process rights and went beyond CAPTA's requirements to a standard comporting more closely to the Model Act. An updated version of this report card, to be released in 2012, may demonstrate that even more states have come to the same conclusion.

VI. WHERE TO FIND THE LEAST AND MOST COMPREHENSIVE REPRESENTATION MODELS

In analyzing the differences between the two standards espoused in CAPTA and the Model Act respectively, it is useful to take a snapshot of the states that represent both ends of the spectrum of representation.

A. CAPTA Model in Action: Indiana

Indiana provides the most limited representation for children in child protective proceedings of anywhere in the United States. It does not require the appointment of an attorney at any point in the proceedings or during appeal. When an attorney is provided, their role is unclear. There is

Id. at 96 (quoting N.C. GEN. STAT. § 7B-601 (2011)).
96. See Glynn, supra note 46, at 62.
97. See id. at 64–65.
98. See MODEL RULES OF PROF'L CONDUCT R. 2 (2011); Glynn, supra note 46, at 63–64.
100. See IND. CODE §§ 31-32-4-2, 31-32-3-3 (2011); see also NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 22–23, 58–59.
101. See IND. CODE § 31-32-4-2(b); NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 58–59.
no specialized training requirement for the child’s attorney when they get one, though the GAL is required to attend training.\(^{103}\) And, although the child’s lawyer, when appointed, is required to follow the state rules of professional conduct, Indiana law provides civil immunity to the GAL or attorney on the case who is not acting as the child’s traditional attorney.\(^{104}\)

B. Model Act in Action: Massachusetts

Massachusetts represents the pinnacle of child legal representation in America. It goes even beyond what the Model Act proposes in its provision of legal protections to children involved in child protective proceedings.\(^{105}\) Children in Massachusetts receive a client-directed attorney at all stages of the case.\(^{106}\) Attorneys must complete a thorough training and certification in how to represent their child clients as well as complete continuing legal education.\(^{107}\)

Children are given express party status in the case.\(^{108}\) The child’s attorney must at all times follow the state rules of professional conduct and does not have civil immunity from malpractice suits.\(^{109}\) Most impressive, however, is that the state adopted a caseload limit of seventy-five child welfare cases for attorneys.\(^{110}\) This provision goes beyond what is required in the Model Act and should serve as an example for other states to emulate.\(^{111}\)

\(^{102}\) See Ind. Code § 31-32-3-3.

\(^{103}\) Id. § 31-9-2-50.


\(^{105}\) Compare id. at 72–73, with Standards of Practice, supra note 5, at 3–20.


\(^{107}\) Id.

\(^{108}\) Id. at 73.

\(^{109}\) See id.

\(^{110}\) Id.

VII. RIGHT TO COUNSEL LANDSCAPE AND PREPARING FOR REFORM

Since 1996, an overwhelming consensus has developed across a wide spectrum of disciplines that there must be a right to counsel for children during their dependency hearings.\(^{112}\) Although some difference of opinion remains over the ideal form of this representation, there are few who do not understand the basic due process implications of these proceedings to children as outlined in *Kenny A.*\(^{113}\) In the process of attempting to advocate for state and federal legislative reform to bring the country closer to the standards outlined in the Model Act, there are few left standing, after this tidal wave of evolution on the issue, that continue to object to the premise that children in dependency hearings need an attorney.\(^{114}\) Federal and state lawmakers are no exception.\(^{115}\)

Advocates must now take advantage of the Model Act as a valuable weapon in the arsenal to advance right to counsel legislation in states, and in several years, in CAPTA. A recent decision from the Supreme Court of Colorado demonstrates the imminent need for state and federal policymakers to adopt language that mirrors the Model Act.\(^{116}\) In *People v. Gabriesheski*,\(^ {117}\) the court noted that attorney GALs are not representatives of the child, but are merely charged with making recommendations to the court regarding the child’s best interest.\(^ {118}\) Based on this interpretation, it held that communications between the GAL and the child are not protected by the attorney-client privilege.\(^ {119}\) The result of this decision is that a court may compel a GAL to disclose communications regardless of whether the child, or even the GAL himself or herself, would otherwise intend to disclose it.\(^ {120}\) Without state and federal law that clearly articulates a child’s right to counsel, courts may continue to interpret GAL representation in the same manner as this court and persist in denying a child the right to an attorney in their dependency case.

When advocates press for legislative reform on this issue, there are several tools available for making their case. First is justice. It is sometimes

\(^{112}\) See [NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 10.](#)


\(^{114}\) See [NATIONAL REPORT CARD, SECOND EDITION, supra note 41, at 8.](#)


\(^{116}\) See *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011) (en banc).

\(^{117}\) 262 P.3d 653 (Colo. 2011) (en banc).

\(^{118}\) See *id.* at 659.

\(^{119}\) *Id.* at 659–60.

\(^{120}\) See *id.* at 660.
useful to use a narrative to tell the story of a child whose court case and life outcome was dramatically impacted either by a lack of legal representation, or one who had a highly beneficial outcome as a result of a good attorney. Next, it is helpful to show state lawmakers where they fall on the spectrum of representation. Sometimes, legislators can be shamed into reform when they realize their state is an outlier on an issue that has the potential for bad disposition in the media. The third tool that can be used to argue for reform is the Model Act itself. Once lawmakers understand that an entity so large, mainstream, and powerful as the ABA has concluded that the proper standard of representation for children in these cases is a client-directed attorney, they will pause before dismissing the idea of reform on the issue. The final tool available is the specter of litigation. Advocates can use the example of Kenny A., as well as other cases, to argue that states that fall short of nationally accepted standards open themselves up to class action lawsuits. Lawsuits of this nature are expensive and embarrassing to defend, making this prospect is most undesirable.

Of course not all states will be convinced by the above arguments to amend their statutes. The primary obstacles to further reform on this subject revolve around concern over two issues: 1) cost of implementation, and 2) data demonstrating that attorney representation leads to improved outcomes. In the current economic climate, with many states cutting back significantly on services and personnel, it is difficult to make the argument that any service requiring additional expense should be considered. As mentioned earlier, there was a powerful study published several years ago demonstrating that the small initial investment in providing high-quality attorney representation to children in dependency hearings is incidental compared to the longer-term cost savings to the state when the child achieves permanency more quickly and the case flows through the courts in a much shorter period of time. It is vital to argue this point. The main drawback of this study, however, is that it was fairly small in scope and limited to one county in Florida. We must conduct further research that will allow us to nationalize the results of this study to make the case for national legislative reform. The QIC-ChildRep project may provide some of the data necessary for further reform, but if it does not, advocates must press for further research in this area.

122. Taylor, supra note 6, at 616; Husain, supra note 113, at 247.
124. Id. at 1.
The passage of the Model Act represents the culmination of substantial research, advocacy, and litigation all urging national recognition of the right to counsel for children in dependency hearings, not only within the advocacy community, but in the legal community at large.

**VIII. CONCLUSION**

As we continue to celebrate passage of the Model Act and work to maximize its potential, let us not forget what it symbolizes. Child advocates have been sounding the right to counsel trumpet for decades. They have made substantial progress within the advocacy community, but, more importantly have made great strides across disciplines to establish a consensus on the issue in the legal community at large. The ABA is not an advocacy organization. It represents the largest group of attorneys in every legal specialty all across America. The passage of the Model Act represents the widest possible mainstream support for the proposition that children in abuse and neglect cases deserve not only to be represented by a bona fide attorney, but one who for all intents and purposes represents the child client in an almost identical fashion as he or she would represent any other client. For children who have already been betrayed in the most fundamental way by those who are supposed to love them best, this is the least we can do to protect their rights during these critical and confusing court proceedings.
THE KIDS AREN'T ALRIGHT: EVERY CHILD SHOULD HAVE AN ATTORNEY IN CHILD WELFARE PROCEEDINGS IN FLORIDA*

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I. INTRODUCTION

On Valentine's Day 2011, a ten-year-old girl, Nubia Barahona, was found dead in a garbage bag in the rear flatbed of the vehicle owned by her adoptive father, Jorge Barahona.1 Victor Barahona, Nubia's twin brother, was also found in critical condition in the truck, which was parked just off I-95 in Palm Beach County, Florida.2 Nubia and Victor Barahona had entered

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the Florida dependency system in June 2000. At no time since entering the system, and until they were adopted, did any of the three subsequent reports confirm that either child had ever been represented by his or her own attorney.

On September 20, 2011, at a hearing of the Florida Senate Children, Families and Elder Affairs Committee, State Senator Nan Rich of Weston stated that the case workers in the Barahonas' dependency case should have been visiting the children monthly. Senator Rich said: "Its [sic] mind-boggling that [the Barahonas] could ever have been approved to be foster parents . . . . Something is dramatically and drastically wrong if all of these red flags are not seen." The Senator's comments followed shortly after three separate investigations into the Barahona matter—a grand jury report in Miami-Dade County, a Blue Ribbon Panel Report, and a report by David E. Wilkins, Secretary of the Department of Children and Families (DCF).
Each report, and the Senator’s comments, focused on the shortcomings by DCF and the community-based agency which came into existence as a result of Florida’s move towards privatization of its child welfare system. It is significant that neither the reports, nor the Senator’s comments, focused on or analyzed the role of Florida’s Guardian ad Litem (GAL) Program in the Barahona case. It is unclear from the available information whether the GAL Program carried out its responsibilities over the time period the children were in care. Arguably, an independent attorney for the children would have produced a different result for the Barahona children.

This article is a continuation of a discussion as to why, as a matter of Florida constitutional law, public policy, and professional ethics, Florida’s children need independent attorneys from the inception of all dependency and termination of parental rights cases to their completion. It is based upon events which have occurred since the authors’ last article on this topic in the Nova Law Review, including the Barahona case, the resolution by the


American Bar Association (ABA) in August 2011 at its Annual Convention in Toronto adopting the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act), and a series of comments, pronouncements, and policy statements by Florida State officials and advocates.

This article will review the March 2011 Nubia Report: The Investigative Panel’s Findings and Recommendations by the Blue Ribbon Panel, (Nubia Report), the Barahona Case Findings and Recommendations summary report of the Secretary of the DCF, and the Miami-Dade Grand Jury Report, each of which contains comments and conclusions about the Barahona case that no one person was responsible to protect the children’s rights. The article will also review recent representations by the GAL Program suggesting the Program may be engaged in the unauthorized practice of law, as well as the past, present, and future financial issues concerning the operation of the Program. It will discuss recent literature from DCF, the GAL Program, the court system, and a Pro Bono Attorney Program in Broward County. The article will demonstrate the inability of each to correctly articulate its legal and ethical mandate, the result of which is confusion, duplication, and a fundamental misunderstanding of the proper role of each, and the meaning of being the attorney for the child. The article will also comment upon updated information regarding the Gabriel Myers case and will point out the similarity of the conclusions in that matter to the Barahona case. Finally, the article will conclude, based upon this additional evidence, as the authors concluded in their prior article, that children in Florida must have an independent attorney. Children cannot remain the only party in a dependency proceeding who appear pro se.

II. ANALYSIS OF THE BARAHONA REPORTS

An analysis of the findings and recommendations of the Blue Ribbon Panel entitled the Nubia Report, the DCF report on the Barahona matter, and the Miami-Dade Grand Jury Report each illustrates the deficiencies in the
Florida dependency system. Three of the deficiencies require comment and discussion in this article because they demonstrate a child’s need for an independent attorney.

The first deficiency involves the fact that none of the reports analyzes the role of the GAL Program in the Barahona case, specifically through the time of the children’s adoption. What the “Barahona Case—Key Events” attachment (Key Events) of the Barahona Case Findings and Recommendations shows, is that the GAL Program supported continued placement with the Barahonas prior to adoption on six occasions between 2005 and 2009, even though questions were repeatedly raised as to the propriety of the placement. For example, the report contains a 2005 hotline report that the then foster father, Jorge Barahona, sexually abused Nubia, which was investigated and closed with no indications. In 2006, a hotline report stated that Nubia had bruises on her chin and face and had been absent from school. The Child Protection Agency then determined the bruises were not from abuse and the investigation was closed. In 2007, a hotline report stated that Nubia and Victor were allegedly “coming to school unkempt.” The investigation was closed with no indications. Yet, there is no detailed discussion in the secretary’s report of the role of the GAL or the GAL Program, if any, in the investigation of these matters. The Key Events document does not even reference the discharge of the individual GAL assigned to the Barahona children prior to the adoption. However, the Wilkins summary report does state that at one point “[t]he Guardian ad Litem was barred from the Barahonas home due to inquiries made with the school.” The Wilkins finding was that:

There was no assessment made of the lack of access to Nubia by the Guardian ad Litem. The Guardian ad Litem was discharged
from the case to smooth over relationships with the Barahonas. The case manager never documented concerns over the apparent deceptions as to Nubia’s whereabouts or made any attempt [to] resolve the discrepancies in information.25

The Miami-Dade Grand Jury Report states that, in May 2007:

Guardian ad Litem objects in Court to continued placement of the children with the Barahonas (Court held hearing, found placement safe and appropriate. In addition, it is important to note that at some point during the pre-adoption period, the Guardian ad Litem was barred from the Barahona home due to inquiries made with the school. According to the DCF report, Guardian ad Litem was dismissed from the case to “smooth things over with the Barahonas.”)26

The second deficiency in the Florida dependency system is illustrated in the Miami-Dade Grand Jury Report, which says that no one person said, “I am responsible,” acted as “point person,” acted as “system integrator,” or fulfilled the role of “ombudsman.”27 The Miami-Dade Grand Jury Report states that:

It has been suggested to us, and we wholeheartedly agree, that there must be a point person, someone who will take charge of each case. In other words, there must be one designated person who has the responsibility of knowing everything about a case and making absolutely sure that knowledge is communicated to every person who has a need to know the information. The most logical and best way to accomplish this is to assign the Case Manager the job of being the point person.28

This suggestion is curious because chapter 39 and the contracts between DCF and the lead agency provide for staffing where the case manager29 as well as Children’s Legal Services (CLS) attorneys, GAL, parents’ attorneys,
GAL attorneys, and agency staff should be present to discuss the case.\textsuperscript{30} The idea of a point person is not a new one. Earlier reports involving another child, Gabriel Myers, who died while in care in Florida, also concluded that there was a need for a “champion”\textsuperscript{31} and that nine year old Gabriel, who allegedly committed suicide by hanging himself while in foster care, was “no one’s child.”\textsuperscript{32} The major failure with the proposals in the various reports that the child have a “champion” or “point person” in every case is that no individual or organization in a dependency or Termination of Parental Rights (TPR) proceeding in Florida has, as his or her sole duty and responsibility, the representation of the child as attorneys understand these terms.\textsuperscript{33}

A third deficiency in the Florida dependency system is found in Secretary Wilkins’ Barahona Case Findings and Recommendations summary report where he points to a failure in “critical thinking.”\textsuperscript{34} The Blue Ribbon Panel also points to a failure in critical thinking.\textsuperscript{35} The ninth finding of the Nubia Report states that “technology should never substitute for the exercise of critical thinking, sound judgment and common sense. Technology should be used to augment and enhance those skills.”\textsuperscript{36} “Critical thinking” has particular significance for attorneys. Starting in the first year of law school, students are immersed in a process of learning how to think critically and analytically.\textsuperscript{37} This training continues throughout their legal education.\textsuperscript{38} If the Barahona children had their own attorney, one assurance, albeit not a failsafe, would have been that the children would have had an advocate representing them who was well-trained in “critical thinking.”

Despite these facts, none of the reports evaluate the role of the GAL Program or its attorneys.\textsuperscript{39} Nor, obviously, is there any reference in the re-

\begin{thebibliography}{9}
\bibitem{30} FLA. STAT. § 39.6011(1)(a).
\bibitem{31} GABRIEL MYERS WORK GROUP, supra note 14, at 3–4; see Dale & Reidenberg, supra note 10, at 308–09.
\bibitem{32} GABRIEL MYERS WORK GROUP, supra note 14, at 4; Dale & Reidenberg, supra note 10, at 309.
\bibitem{33} See Dale & Reidenberg, supra note 10, at 310.
\bibitem{34} BARAHONA CASE FINDINGS AND RECOMMENDATIONS SUMMARY, supra note 1, at 5.
\bibitem{35} BLUE RIBBON PANEL, supra note 1, at 3, 7.
\bibitem{36} Id. at 7 (emphasis added).
\bibitem{37} See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 24, 87 (2007); KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 1 (1996); Sarah E. Redfield, The Educational Pipeline to Law School—Too Broken and Too Narrow to Provide Diversity, 8 PIERCE L. REV. 347, 374–75 (2010).
\bibitem{38} See VANDEVELDE, supra note 37, at 48, 53.
\bibitem{39} See generally BARAHONA CASE FINDINGS AND RECOMMENDATIONS SUMMARY, supra note 1; BLUE RIBBON PANEL, supra note 1. Illustrative of the lack of critical thinking by the panels themselves appears to be the methodology of investigation of the failures in the Bara-
\end{thebibliography}
ports to what might have happened or what role would have been played had an attorney been appointed for Nubia and Victor Barahona. It is this lack of critical analysis of the GAL Program and its attorneys and the failure to analyze the role of independent attorneys for the children, which is troubling and of on-going concern.  

III. THE ON-GOING MISCHARACTERIZATION OF THE ROLE OF THE GUARDIAN AD LITEM IN FLORIDA

In a September 2011 PowerPoint presentation at a meeting of the Florida Children and Youth Cabinet, the Executive Director of the GAL Program stated that, "[l]ooking into the [f]uture," the first of the GAL Program’s goals and missions was “to provide quality legal and best interest representation for every child in our dependency system.” This statement mischaracterizes both the law and the ethical obligations of the GAL Program attor-

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hona case. The presentations to the panels were conducted by the department itself through its CLS lawyers. BLUE RIBBON PANEL, supra note 1, at 3-5. Neither the persons in charge of DCF nor the GAL Program at the time the children were in care prior to their adoption were called to appear before the panels. See id. at 4-5.

40. There is, however, one elliptical reference to an attorney for the child in one of the reports—on the last page of the March 10, 2011 Nubia Report under the title “Other Thoughts.” BLUE RIBBON PANEL, supra note 1, at 14. Just prior to the “List of Documents Reviewed” is the following curious statement: “Children’s Legal Services and the chief judge should review practices in the appointment of private lawyers to represent dependent children to ensure that the Rules of Professional Responsibility are fulfilled.” Id. There is no explanation in either report of the meaning of this comment or why CLS should be charged with this responsibility. An earlier effort to investigate the concept of lawyers representing children in dependency and TPR cases went by the boards in February 2010. TASK FORCE ON FOSTERING SUCCESS, DEP’T OF CHILDREN & FAMILIES, MEETING SUMMARY 1-2 (Feb. 25, 2010), available at http://www.dcf.state.fl.us/initiatives/childsafety/meetings/20100225materials.shtml (follow “2/25/10 Minutes” hyperlink). At a meeting of the Task Force on Fostering Success, chaired by former DCF Secretary Robert Butterworth, it was reported that a work group of the Task Force on Legal Representation had “planned an outstanding two day session with national experts from around the country. Regrettably, the governor’s office selected this as one of many such meetings cancelled due to the budget crisis.” Id. at 2.


The program attorney is not the child’s attorney, and it is unethical to provide legal advice to an individual who is a party to a case and who is not one’s client. The GAL Program is a separate party distinct from the child, who is also a party. Under Florida law, the GAL Program advocates for what it considers to be the best interests of the child and nothing else. The GAL Program’s website is seeking volunteers, and in response to a hypothetical question, it currently states incorrectly that a “Guardian ad Litem is . . . appointed by the court to advocate for [a child].” The statement is misleading for two reasons: First, the GAL Program is the party appointed, and second, the GAL Program is appointed to advocate for the best interest of the child.

A second example of what may be a violation of the Florida Rules of Professional Conduct is found in the Guardian ad Litem Revised Program Attorney Standards of Practice effective September 2010 at section 2. The Guardian ad Litem Revised Program Attorney Standards of Practice states that: “As needed, the Program Attorney shall be available to discuss the nature of the proceedings with the child except when the child is represented by counsel. The Program Attorney should use sound judgment and reasonable diligence when explaining the nature of the legal proceedings to the child.”

This standard of practice fails to consider that the child is a separate party unrepresented by an attorney and a minor, and that the GAL attorney represents the GAL Program as a party. The Florida Rules of Professional Conduct...
Conduct governing contact with unrepresented parties apply to this situation. The commentary to the Florida rule states that:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.

A third area of concern involves a comparison of the 2006 Guardian ad Litem Program Attorney Standards of Practice and the 2010 Guardian ad Litem Revised Program Attorney Standards of Practice. Both state at Rule 1.4 that: “The Program Attorney shall at all times comply with the Rules Regulating the Florida Bar, all of which are incorporated herein by reference.” The 2006 standards also contain a description of the GAL Program as the client.

The Program Attorney represents the GAL Program as a legal entity, and the GAL Program is the client as referenced [to] in Rule 4-1.13, Rules Regulating the Florida Bar. The GAL Program is appointed to represent the child’s best interests in dependency court proceedings. The Program Attorney provides counsel regarding the child’s best interest and shall fully participate in the decisions regarding the child’s best interests as indicated in Standard 4.6 of the GAL Standards of Operation.

Inexplicably, the September 2010 Guardian ad Litem Revised Program Attorney Standards no longer contain this explanation of the ethical obligations of a GAL Program attorney to the client, nor does it contain a reference to the applicable Florida Rules of Professional Conduct. Whether and why

52. FLA. R. PROF’L CONDUCT 4-4.3.
53. FLA. R. PROF’L CONDUCT 4-4.3 cmt.
55. GUARDIAN AD LITEM REVISED PROGRAM ATT’Y STANDARDS OF PRACTICE § 1.4 (2010); GUARDIAN AD LITEM PROGRAM ATT’Y STANDARDS OF PRACTICE § 1.4 (2006).
56. GUARDIAN AD LITEM PROGRAM ATT’Y STANDARDS OF PRACTICE § 1.4.1 (2006).
57. Id. (endnote omitted).
58. See generally GUARDIAN AD LITEM REVISED PROGRAM ATT’Y STANDARDS OF PRACTICE (2010).
this information should have been removed from the standards of practice is itself an ethical question.

Finally, the GAL Program continues to cite to the suspect 2003 legislative finding regarding the GAL Program, which originated in the original Blue Ribbon Panel Report as support for the Program.\(^{59}\) According to the Program Director, "if there is a program that costs the least and benefits the most, this one is it. [T]he volunteer is an 'indispensable intermediary between the child and the court, between the child and DCF.'\(^{60}\)

The GAL Program Director failed to refer to the additional findings of the 2002 Blue Ribbon Panel that:

Sixteen times since 1985, other scandals have prompted governors to appoint [eleven] special panels, and state's attorneys to convene five separate grand juries, to investigate DCF or its predecessor agency, the Department of Health and Rehabilitative Services. Now this gubernatorial panel, the [twelfth], has answered a governor's call to do the same.

... 

Twenty-two times in the past [thirty three] years, the Florida Legislature has mandated that DCF or its predecessor reorganize in ways great or small.\(^{61}\)

The Blue Ribbon Panel then said: "We urge the governor to use his moral suasion with the Florida Bar to [request] more pro bono attorneys for children in DCF's custody."\(^{62}\)

IV. ANALYSIS OF THE FY 2012/13 GAL PROGRAM BUDGET REQUEST

A review of recent GAL Program documents amplifies the problem of continuing to rely on the eleven-year-old statement that the GAL Program

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61. BLUE RIBBON PANEL REPORT, supra note 60.
62. Id.
“costs the least and benefits the most.” In 2001, when the first Blue Ribbon Committee initially made the statement, later adopted by the Florida Legislature amending chapter 39, the budget of the Program was approximately $14.1 million of which $8.6 million were state general revenue funds. In 2001, there were approximately 5000 GAL volunteers. The FY 2009/10 GAL Program budget was $31.9 million of which $30.4 million were general revenue funds. That year, there were approximately 8000 volunteers. The GAL Program’s FY 2012/13 Legislative Budget Request (LBR) dated October 1, 2011, seeks an additional $3.9 million to “increase the average number of children represented by the GAL program from 21,497 (FY 2010/11) to 24,864 children (FY 2012/13). This increase of +15.7% or 3367 more children receiving GAL advocacy, will improve our overall representation to 80% of the total Dependency children: up from 70% for FY 2010/11.” The LBR states that: “We will recruit and train an addi-
tional 1650 certified volunteers, by June 30, 2013, bringing our total . . . to 9283 certified volunteers,” and to hire sixty-four new staff, that are comprised of volunteer supervisors, program attorneys, and other support staff.72 Finally, the LBR states that the “LBR request is part of a five year incremental strategy that will result in GAL Program representation of 100% of our State’s dependent children by June 30, 2018, finally achieving the goal of a GAL for every child.”73

The GAL Program state-funded general revenue budget alone has increased from $8.6 million in 200174 to $30.4 million in 2010,75 and is projected by the Program to increase to $34.3 million in FY 2012/13.76 The total state-funded budget more than doubled from $14.1 million in 2002 to $31.9 million in 2010.77 It can be expected to rise to $40.6 million in FY 2012/13.78 There were 5000 volunteers in 2001.79 That number rose to 8000 in 2009, and the Program expects it to rise to 9283 in FY 2012/13.80 The state-funded general revenue budget in ten years will have gone up by almost four times.81 Yet, the number of volunteers will not even have doubled,82 and the Program will have to wait another six years to reach 100% volunteer coverage.83

Despite these facts, the director of the GAL Program has stated that, “[d]ay after day our staff struggles to determine how to effectively and efficiently allocate our very slim resources.”84 He adds, “[o]ur staff and volunteers are forced to ‘triage’ the huge number of cases we see every day.”85

72. Id.
74. OPPAGA INFORMATION BRIEF, supra note 64, at 2.
76. See GAL: BUDGET REQUEST, supra note 71.
78. See id. at 327.
79. COMM. ON JUDICIARY, supra note 65, at 18.
80. Dale & Reidenberg, supra note 10, at 329; GAL: BUDGET REQUEST, supra note 71.
81. See Dale & Reidenberg, supra note 10, at 325–27.
82. See COMM. ON JUDICIARY, supra note 65, at 18; GAL: BUDGET REQUEST, supra note 71.
83. See GAL: BUDGET REQUEST, supra note 71.
84. Press Release, Alan Abramowitz, supra note 60 (emphasis added).
85. Id.; see GAL 2011 REPORT, supra note 42, at 1.
The director also announced in January 2012, in a press release from the Statewide Guardian ad Litem Foundation, that the GAL Program plans to start a campaign to recruit 10,000 additional volunteer GALs. The press release states that "[t]here are approximately 31,000 children in Florida’s foster care system today. With nearly 8000 volunteers, the Program is able to give a voice to 22,000 of those children. Who will be the voice for those 10,000 children?"

According to the press release, the GAL Program represents the best interests of 70.9% of the children in care. At other times, the Program has stated other percentages of volunteer coverage. Regardless of the actual numbers, two conclusions can be drawn. A substantial number of children in the system have no involvement with the GAL Program. And, as the Program expands, it will hire more attorneys at greater cost to the Florida taxpayers.

As an alternative solution to the issues confronted by the GAL Program, the authors propose that the approximately 145 full time attorneys now employed by the GAL Program, and those to be hired in the future, be transferred together with their funding to a program that represents children and that pro bono attorneys be recruited to represent the Program and its volunteer GALs.

V. DUPLICATION OF AND CONFUSION IN ROLES OF DCF (CLS) AND GAL PROGRAM ATTORNEYS

Both the GAL Program and DCF continue to claim through their attorney leadership that they represent and advocate for the best interest of the child in dependency and TPR proceedings. Both agencies assert that they

87. Press Release, Abramowitz, Strategic Campaign, supra note 86 (emphasis omitted).
88. See id.
89. See Dale & Reidenberg, supra note 10, at 329 (discussing the legislatively approved foundation support for the GAL Program).
90. See GAL: BUDGET REQUEST, supra note 71.
91. See id.
92. See STANDARDS OF OPERATION § 1 (2006); Press Release, Fla. Dep’t of Children & Families, Children’s Legal Services Host Training at Stetson University (Jan. 5, 2012), http://www.dcf.state.fl.us/newsroom/pressreleases/20120105_ChildrensLegalServices.shtml;
are legal advocates for children. The GAL Program standards state that the GAL lawyers may explain the nature of legal proceedings to the child, while at the same time explaining that there is no confidentiality between the program attorney and the child. The Florida Department of Children and Families, Child and Family Services Plan for 2010–2014 describes changes in the role of CLS attorneys. “This change in focus has empowered the attorneys in [CLS] to become true advocates for children, driving their outcomes from the time of initial court involvement to permanency.” The plan also states that “[t]he CLS attorneys will act as legal advocates for the children, and focus on each child’s achieving timely permanency.”

Duplication in the role of the GAL and CLS attorneys is also demonstrated in a recent decision by the Second District Court of Appeal involving a dispute between the Statewide GAL Program and the Office of the State Attorney in the Twentieth Judicial Circuit. In that case, the court held that the Statewide GAL Program is an office in the executive branch of government and “is not an office within the judicial branch.” The opinion raises the issue of duplication of roles and resources given the fact that the mission statement of CLS, as the lawyers for DCF in the executive branch, is “[t]o advocate in the best interests of children to achieve permanency, stability, Mary Cagle, About the Department, FLA. DEP’T OF CHILDREN & FAMILIES, http://www.dcf.state.fl.us/admin/cls/index.shtml (last visited Feb. 26, 2012).

94. GUARDIAN AD LITEM REVISED PROGRAM ATT’Y STANDARDS OF PRACTICE § 2 (2010); see also FLA. R. PROF’L CONDUCT 4-4.3, -5.1 (2011) (demonstrating that it is ethically impossible to do what the standards state the GAL lawyers should do).
96. CHILD & FAMILY SERVICES PLAN 2010–2014, supra note 95, at 11. This misstatement of the law is compounded by the internally contradictory statement by CLS that it represents the State of Florida in child welfare proceedings and that it does so using a prosecutorial model. See Dale & Reidenberg, supra note 10, at 335 (citing About the Department, FLA. DEP’T OF CHILDREN & FAMILIES, http://www.dcf.state.fl.us/admin/cls/focus.shtml (last visited Feb. 26, 2012)).
99. Id. at 749. See Dale & Reidenberg, supra note 10, at 332–33 for a discussion of the transfer of the GAL Program from the judicial to the executive branch.
and security."[100] At the same time, the Standards of Operation of the GAL Program, also in the executive branch, states that "the GAL is the only party mandated to advocate solely for the best interests of the children."[101]

The DCF approach to legal representation by its CLS attorneys is also confused. On the one hand, in the description of CLS on the DCF web page, the Statewide Director stated: "Children's Legal Services . . . is the Department's law firm . . . providing counsel advice and technical assistance to . . . Community-Based Care (CBC) [parties] in child welfare legal issues."[102] On the other hand, in the statewide director's written presentation to the Barahona Blue Ribbon Panel in March 2011, the director wrote that there is "[n]o attorney-client privilege with case managers or PIs."[103] This apparent confusion is further illustrated by the presentation to the Barahona Blue Ribbon Panel on March 7, 2011, by the director of CLS in which the director provided the panel with a chart including a statement that "CLS attorneys [are now] empowered to advocate for what the State believes is in the best interest[s] of the child."[104] The director added, "CLS [is] not responsible for defending/advocating for the Agency."[105]

100. Cagle, supra note 92; see Press Release, Fla. Dep't of Children & Families, supra note 92.


How will my representation make a difference in a child's life? Under our current Juvenile Dependency system there is no one who speaks and advocates for the child. As a pro bono attorney you will enable your child client to be heard, respected, protected and provided with the myriad protections and services that the child is entitled to under state and federal law.

Id. (emphasis added).

102. Cagle, supra note 92; see OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 09-S24, RESEARCH MEMORANDUM: CHILDREN'S LEGAL SERVICES HAS MADE CHANGES TO ADDRESS RECOMMENDATIONS FOR IMPROVEMENT; SOME CHALLENGES REMAIN 1–2 (2009), available at http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/09-s24.pdf. This misstatement of who is the CLS lawyer's client and the ethical ramifications of such a misstatement are discussed in detail in Dale & Reidenberg, supra note 10, at 334–36.

103. Mary Cagle, Statewide Dir. of Children's Legal Servs., Fla. Dep't of Children & Families, Address during the public hearing at DCF's S. Region Headquarters 2 (Mar. 7, 2011) [hereinafter Cagle's Address], available at http://www.dcf.state.fl.us/newsroom/publicdocuments/southern/barahona/Barahona%20Independent%20Review%20panel/Final%20Report/List%20of%20Documents%20Referenced/08%20%20Recommendations%20to%20the%20Panel%20for%20Children's%20Legal%20Services%20030711.pdf.

104. Id.

105. Id. Of course, chapter 39 provides that "the Agency" (DCF) is a party in dependency proceedings and must appear by counsel. See FLA. STAT. § 39.01(51) (2011); see also Dale & Reidenberg, supra note 10, at 332–33.
VI. CONCLUSION

Florida's public officials, past and present, confirm the failure of the dependency system in general and specifically in the Barahona case. The problems have existed for decades. Blue Ribbon Panels, commissions, legislative committees, and grand juries have investigated and studied the issues involved in the system and made recommendations. Nothing appears to have worked. Not one of these entities or individuals has suggested that the appointment of attorneys for all children in dependency and TPR cases in Florida in lieu of the GAL Program is an appropriate option. On the other hand, the ABA has forcefully advocated for precisely this option in the Model Act. As the foregoing discussion shows, DCF and the GAL Programs in Florida continue to fundamentally and publicly misstate their legal and ethical roles. This combination of duplication and confusion only exacerbates the problem of proper legal representation of children.

106. See Ana Valdes, DCF Strives to Avoid Errors of Past Overhauls; Some Panels’ Safety Ideas Worked, but Others Were Ineffective or Ignored, PALM BEACH POST, Apr. 11, 2011, at A1. DCF Secretary David Wilkins has described what he found in early 2010 as a “total systemic failure of the child welfare system.” Id. On the other hand, former DCF Secretary Bob Butterworth said it was too soon to say it was a systemic failure: “That’s [just] not the agency I knew.” Michael Mayo, Could Tragedy Have Been Avoided for Adopted Twins?, SUN-SENTINEL, Feb. 20, 2011, at A1. In 1999 Governor Jeb Bush stated during a preliminary injunction hearing in federal court in a case challenging conditions in the Broward County foster care system that: I am here to tell you that this administration is committed to transforming our child welfare system across the board, not just foster care, but from the beginning to the very end to place children that abused [sic] and neglected to a much higher priority that has been in the past.

The legislature is a partner in this, and I intend to use the resources and the bully pulpit and the power that the executive branch has to make that partnership work.

We have a temporary problem that we are going to solve, we are going to work on. A lot of the problems that exist, sadly we don’t even have a baseline numbers [sic] to measure—how we measure progress.

We are so far behind. It is such a tragedy to see how the mismanagement combined with the lack of resources has developed this situation . . . .


108. See Valdes, supra note 106, at A1; see also Barry, supra note 7.


110. See MODEL ACT 2011, supra note 12, § 3.

111. See Dale & Reidenberg, supra note 10, at 357, 362.
While traditional legal representation of children by attorneys in all child welfare cases is not necessarily a panacea for the problem, it is an alternative whose time in Florida has come. Thus, the unseen "red flags" referred to by Senator Rich in the Barahona case will hopefully be reduced or eliminated by the appointment of attorneys for the children. Florida has never provided attorneys to children in dependency cases statewide to address these "problems." The Model Act is the means to effect this end. Florida should adopt the Act.
KENNY A. DOES NOT LIVE HERE: EFFORTS IN WASHINGTON STATE TO IMPROVE LEGAL REPRESENTATION FOR CHILDREN IN FOSTER CARE

ERIN SHEA MCCANN*
CASEY TRUPIN**

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I. INTRODUCTION

While many states in the nation are conducting complex discussions about the role that children’s attorneys should play in dependency and termination of parental rights proceedings, a smaller number of states are still looking forward to merely beginning that discussion. Advocates in states like Florida and Washington, where most children are denied a legal advocate in their dependency and termination proceedings, are struggling to convince anyone who will listen that the interests of children, families, and due process demand legal counsel be appointed for every child.

This article discusses advocates’ efforts in Washington State to build consensus around the right to counsel for children and youth in foster care and how that consensus can be used to convince decision-makers to ensure that each child has an attorney who can protect their rights, who can promote their interests, and who can ensure that children and youths’ voices are heard in legal proceedings that impact so many areas of a child’s life and liberty. Whether the advocacy in Washington will ultimately prevail is yet to be determined, but the process has resulted in a strong alliance that will not likely disappear in the near future.
II. THE LEGAL LANDSCAPE IN WASHINGTON STATE

A. The Law

Washington State’s legal representation landscape in dependency proceedings reflects a baffling mix of approaches. The state’s jurisprudence boasts some of the earliest and most powerful declarations about parents’ rights to counsel in dependencies and terminations.1 Recently, the state has invested substantial resources into improving the quality of parents’ legal counsel, helping the innovative Parents Representation Program improve the legal process for many adults in child welfare proceedings.2

Around the same time as the Washington Supreme Court’s strong endorsement of the need for parent representation, the issue of children’s representation took a different course. In 1977, the nation’s first Court Appointed Special Advocates (CASA) program was launched in Seattle—the program’s model was conceived out of a judge’s frustration that juvenile courts were being deprived of sufficient information to protect a child’s best interests in abuse and neglect proceedings.3 The CASA program enlisted citizen volunteers to serve as non-attorney guardians ad litem (GALs) who would speak up for children’s best interests in the courtroom.4 Currently, there is a volunt-

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4. Id.
teer CASA or non-attorney GAL program in the vast majority of the state’s thirty-nine counties.5

As for dependent children receiving the protection of lawyers, however, the state has remained solidly stuck among the worst states in the nation—current state law fails to guarantee counsel to any child involved in an ongoing dependency proceeding and provides unfettered discretion to the courts to decide whether children get counsel (with two very small exceptions, as discussed below).6 The statute only empowers children to raise the issue of counsel when they reach the age of twelve.7 Prior to that age, the statute dictates that they must rely on the non-attorney GAL, who is most often a volunteer CASA, or the court, sua sponte, to raise the issue of appointment of counsel.8 And, even if the child or non-attorney GAL requests counsel for the child, the court may deny the request.9 Additionally, nothing in state law requires juvenile courts to even make a finding as to whether a child needs counsel if it is raised by another party—there is no way for advocates to know under what circumstances children are being provided counsel.

In looking back, it is interesting that Washington’s statute was actually stronger in years past. Prior to 1993, the statute specifically articulated that the court could appoint an attorney to represent the child—with no mention of age—but that year the legislature amended the dependency chapter and struck the provision articulating that “[t]he court shall . . . appoint an attorney and/or a [GAL] for a child”—leaving only the requirement that the court shall appoint a non-attorney GAL for the child “unless a court for good cause finds the appointment unnecessary.”10 This last provision sets Washington apart from the rest of the nation yet again, in that it statutorily empowers juvenile courts to deny even a GAL to the child, even though this provision clearly violates federal law.11

7. Id. § 13.34.100(6)(a)(i)–(iii).
8. See id. § 13.34.100(1)–(2). “If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child’s position.” Id. § 13.34.100(6)(f).
9. See id. “[T]he court may appoint an attorney to represent the child’s position.” WASH. REV. CODE § 13.34.100(6)(f) (emphasis added).
11. See VICKIE WALLEN, OFFICE OF THE FAMILY & CHILDREN’S OMBUDSMAN, 1999 ANNUAL REPORT 32 (1999), available at http://governor.wa.gov/ofco/reports/1999/ofco_1999_annual.pdf, which “found that approximately one-third of Washington children who are involved in child abuse and neglect proceedings do not have a GAL to represent their best interests.” The report recommended that “state law be amended to make clear that a GAL
The two seemingly arbitrary circumstances under which children are guaranteed the protection of an attorney in a dependency proceeding include the instances where a child does not have a GAL and a party or the court raises the issue with the juvenile court, or where a legally free child petitions the juvenile court to reinstate his/her parents' parental rights. Interestingly, in other civil legal areas, the courts and the legislature have not been shy about providing children with counsel, ensuring that they have attorneys in most status offense proceedings—including At-Risk Youth (ARY) and Child in Need of Services petitions—as well as mental health commitment proceedings and the contempt phase for both truancy and dependency proceedings.

Thus, Washington’s Legislature has created a situation in which no child is required to have counsel until and unless he or she tries to reestablish

shall be appointed to represent the best interests of every child who is the subject of a child abuse and neglect proceeding.” *Id.* The Child Abuse Prevention and Treatment Act (CAPTA) requires State plans to include:

an assurance . . . that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes . . . provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role . . . and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings.


12. *See* WASH. STATE CT. JuCR 9.2(c)(1) (1997). This rule *requires* the appointment of an attorney for a juvenile who has no GAL, “[u]pon request of a party or on the court’s own initiative.” *Id.* The authors believe this provision is almost never invoked.

13. *See* WASH. REV. CODE § 13.34.215(3). This statute *requires* the appointment of an attorney for a juvenile who petitions the juvenile court to have his/her parents’ parental rights reinstated. *Id.* The child must be twelve years old to file a petition, although “[u]pon the child’s motion for good cause shown, or on its own motion, the court may hear a petition filed by a child younger than twelve years old.” *Id.* § 13.34.215(1)(e). To be able to petition, in the three years since parental rights were terminated, the child must have not achieved permanency. *Id.* § 13.34.215(1)(c)–(d).

14. *Id.* § 13.32A.192(1)(c). “When a proper at-risk youth petition is filed by a child’s parent under this chapter, the juvenile court shall . . . [a]ppoint legal counsel for the child.” WASH. REV. CODE § 13.32A.192(1).

15. *Id.* § 13.32A.190(1). “[T]he court shall . . . appoint legal counsel and/or a guardian ad litem to represent the child at the review hearing.” *Id.*

16. *Id.* § 71.34.710(3). “The minor . . . has a right to have an attorney appointed to represent him or her before and at the hearing if the minor is indigent.” *Id.*

17. *See* Tetro v. Tetro, 544 P.2d 17, 19–20 (Wash. 1975) (en banc) (“[W]herever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation.”).

18. WASH. REV. CODE § 13.34.267(4); see also *In re* Dependency of A.K., 174 P.3d 11, 22 (Wash. 2007) (en banc) (Madsen, J., concurring).
parental rights after three years floating around in foster care. Additionally, the legislature has, in violation of federal law, made it legal for children to even be denied a GAL, resulting in children being completely unrepresented in their dependency and termination proceedings. This system has deservedly placed Washington State among the bottom ten states in each of First Star's National Report Card on Legal Representation for Abused and Neglected Children (2007 and 2009).

Perhaps more problematic, it is an undecided question as to whether children in Washington State are actually parties to the legal proceedings that deal with their physical and other fundamental liberty interests or when the State seeks to permanently sever their relationships with their families. Though children were clearly parties to dependency proceedings until 1993, when the legislature amended the dependency chapter that year and removed the provision allowing courts to appoint attorneys, as noted above, it also struck the section of the statute that articulated that a child was a party to the proceedings. What is clear about children's party status, however, is that the court, pursuant to section 13.34.165 of the Revised Code of Washington (RCW), recognizes a child as a party capable of being held in civil contempt and detained when not in compliance with an order entered by the juvenile court in a dependency action.

23. See Wash. Rev. Code § 13.34.165; In re Dependency of A.K., 174 P.3d at 21 (Madsen, J., concurring) ("[A]s long as a dependency court employing the sanctions . . . under RCW 13.34.165(2) provides an opportunity for a juvenile to purge the contempt, the sanction is remedial.").
B. Justice by Geography

Despite Washington's weak statutory protections, some counties have taken it upon themselves to provide greater protection than is required by state law. King County, the state's most populous county, provides attorneys to all children twelve years old and older. Another judicial jurisdiction, Benton-Franklin County, provides attorneys to all children nine years old and older, although the local court rules allow the appointment of an attorney for any child who is six years old or older who does not have a GAL. In the other thirty-seven counties, attorney appointment appears to follow no pattern, except for in the counties where attorneys are never appointed.

In 2008, spurred on by legislative efforts discussed below and in an attempt to map appointment of attorneys to adolescents, the Washington State Office of Civil Legal Aid (OCLA) surveyed stakeholders in the dependency judicial system. The result was as advocates expected; the study found that "there is no discernable basis for decision-making in this area either state-


25. WASH. KING SUPER. CT. LJC R 2.4(a) (2005).
Any parent, guardian and/or legal custodian of the child, or child age [twelve] or older, who appears at the [seventy-two] hour hearing may be represented, at [the initial shelter care] hearing, by [c]ourt-appointed counsel regardless of financial status unless the party expressly waives this right or has retained counsel. Id. (emphasis added).

26. WASH. BENTON/FRANKLIN SUPER. CT. LJC R 9.4(A) (2008); WASH. BENTON/FRANKLIN SUPER. CT. LJC R 9.2(A)(1)(e)–(i) (1988). In speaking with the Benton-Franklin Counties Juvenile Court Administrator, Sharon Paradis, the authors learned that the two local court rules work in tandem to ensure that no child goes without some sort of advocate in their dependency and termination proceedings. Telephone Interview with Sharon Paradis, Juvenile Court Adm'r for Benton-Franklin Cnty's. (Dec. 16, 2011) (on file with Nova Law Review). Ultimately, all children ages nine and older are provided attorneys, but the court rules "fill the gap" if there are not enough volunteer non-attorney GALs to represent children ages eight and under. Id.; see also WASH. BENTON-FRANKLIN SUPER. CT. LJC R 9.4(A) (2008). Thus, the court rules allow children as young as six to be appointed an attorney if there are not enough volunteer GALs in the county. Telephone Interview with Sharon Paradis, supra; see also WASH. BENTON/FRANKLIN SUPER. CT. LJC R 9.2(A)(1)(e)–(i) (1988).


wide or in the counties." Further, even within individual counties "there is little consistency in perceptions relating to the practice of appointment of counsel." In many other counties, however, adolescents are appointed counsel in less than one-third of the cases. As one judge interviewed for the study put it, "[t]here seem to be two models for adolescent representation: ‘[A]lmost always’ and ‘almost never.’"

Thus, whether a child gets an attorney in Washington State depends mostly on where the child lives, as opposed to some individualized determination of need. The current approach to the appointment of counsel is highly problematic and results in the arbitrary denial of justice. This result is unsurprising, given that neither the statute nor case law requires the trial court to consider whether to appoint an attorney; nor does either provide any standards or guidelines for the courts to consider whatsoever.

III. LEGISLATIVE EFFORTS TO CHANGE THE LANDSCAPE

In 1977, the Washington Legislature passed the Juvenile Court Act, setting up the framework for dependency proceedings. As noted above, in 1993, the legislature amended the statute to account for the federal requirement that all children must be appointed a GAL. Unfortunately, the amendment actually narrowed not only the type of advocate a child could receive—removing the provision that children may be represented by “an attorney”—but it also added the “good cause” exception for appointing a GAL. Additionally, the amendment removed the explicit provision that children were parties to the proceedings, and made them “subjects” of the proceeding—though it likely did not truly remove their party status. Since that time, no meaningful changes had been made to the statutory system of representation, until 2007, when the legislature granted children—not parents—the ability to petition the court to reinstate their parents’ parental rights if the child had floundered in the foster care system for three years after termination. In such a case, with the urging of child advocates,

29. Id. at 9.
30. Id. at 7.
31. Id. at 6. The report did not analyze how often children younger than twelve were appointed counsel. See id. at 5.
32. WASH. STATE OFFICE OF CIVIL LEGAL AID, supra note 28, at 5.
33. See id. at 6.
36. Id. § 2(1); see WALLEN, supra note 11, at 60.
the legislature included in the bill a provision that the child petitioner would have an attorney to assist in pursuing reinstatement.\(^{39}\)

By 2008, a strong coalition of child advocates had been formed and began focusing on the need to improve the statutes that govern the appointment of attorneys to children and youth involved in dependency proceedings.\(^{40}\) The coalition included advocates from civil legal services and the public defense community, child welfare lobbyists, clinical law professors, and, perhaps most importantly, youth who were at that time, or had been, in foster care.\(^{41}\) These youth were brought into the conversation by a local foster care advocacy organization, the Mockingbird Society, which has come to represent the "youth voice" in Washington.\(^{42}\)

Despite momentum from the child advocacy community and the youth themselves, there was, and remains, major resistance to the idea of legal representation within the legislature.\(^{43}\) One opposition camp believes that if children are provided lawyers, those lawyers may advocate for children to return to their biological homes, which may be unsafe.\(^{44}\) Another camp expressed concern that children’s lawyers would argue against their parents, putting parents in the position of defending themselves against their children in court.\(^{45}\) Advocates quickly realized that any work done in the legislature was going to require a great deal of education about the complex dependency process, in addition to the intricacies of the different roles and obligations of

\(^{39}\) Id. § 13.34.215(2).


\(^{42}\) The Mockingbird Society is "dedicated to building a world-class foster care system that ensures the care, support, and resources necessary for children, youth, and families to thrive." Our Mission, THE MOCKINGBIRD SOCY, http://www.mockingbirdsoociety.org/about/our-mission (last visited Feb. 26, 2012). Its mission "is to advocate for systems reform based on the personal experiences of children, youth, and families impacted by the foster care system." Id.


\(^{45}\) See Supplemental Brief of Respondent Department of Social & Health Services at 21, Dep’t of Soc. & Health Servs. v. Luak (In re Dependency of M.S.R. & T.S.R.), No. 85729-6 (Wash. Aug. 10, 2011).
a non-attorney GAL or volunteer CASA and an attorney. This posed a challenge, considering only a very small handful of the forty-nine senators and ninety-eight representatives were lawyers themselves, and considering the legislature had provided millions of dollars in funding to the CASA program in recent years.

Despite initial resistance, advocates began talking with legislators about House Bill 3048, which proposed developing the Dependent Youth Representation Pilot Program. The pilot would operate in at least two counties that “lack[ed] a strong system [of] appointing attorneys for dependent children [twelve] years and older.” The pilot would not only ensure that all children ages twelve and older are appointed an attorney, but also that all of the attorneys involved are trained in dependency matters; that no attorney has a caseload larger than [eighty] current cases; and that the judges, commissioners, GALs, and CASAs receive training in dependency matters to better understand the attorney’s role in the proceedings with respect to their own roles.

The bill also required an evaluation. House Bill 3048 died, as did a budget provision that would have accomplished the same end. Both efforts were killed due to opposition to the legal representation for dependent children, as opposed to representation by a non-attorney GAL or volunteer CASA. Despite the failure, the effort generated enough interest by members of the House Judiciary committee that it led to the OCLA study referenced above. Legislators wanted to know where and why children were being provided attorneys and under what circumstances were they being denied an attorney. Again, the OCLA study found wide disparities throughout the state.

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46. See Press Release, supra note 27.
48. WALLEN, supra note 11, at 59.
51. Id.
52. Id.
53. See id.
54. See WASH. STATE OFFICE OF CIVIL LEGAL AID, supra note 28, at 1–2.
55. Id. at 1.
56. Id.
57. Id.
The survey study, though far from scientific, would become very useful to later efforts.

In 2009, with the economic picture looking quite different than it did in the spring of 2008, advocates attempted to craft a budget-neutral bill. The result was House Bill 1183, which reflected the information found in the OCLA study and would have simply required dependency courts to make a finding, on the record, as to whether counsel for children twelve and older was necessary and the reasons for the finding. As long as some reason was noted on the record, the bill would have still allowed the court to exercise unfettered discretion in denying counsel to a child. Unfortunately, judges’ and clerks’ associations expressed concern that this would take significant judicial time and would thus cost too much to implement. The fiscal note estimated that five minutes of court time at each hearing would be required for the “judicial officer inquiring and then stating reasons for the appointment of an attorney, or the reasons for not appointing an attorney.” As a result of the costs associated with this estimate, the bill died.

In 2010, advocates had to yet again revise their expectations downward and attempt to craft a bill that even in the eyes of judges and court clerks would be fiscally neutral, but that would keep the legislature’s attention focused on providing adequate protection of children’s rights in dependency proceedings. That bill, House Bill 2735, was the meekest of all the bills to date, requiring solely that children twelve and older be advised of their already-existing right to request legal counsel. Advocates reasoned that since adolescents already had a right to request counsel, and GALs and agency caseworkers were already required to talk to children, it would be difficult to justify how the bill would impose a fiscal impact. However, the Superior Court Judges Association, despite testifying that the Association “certainly

59. Compare id., with WASH. STATE OFFICE OF CIVIL LEGAL AID, supra note 28. The legislative intent section of the bill noted that “[t]he legislature recognizes that inconsistent practices in and among counties have resulted in few children in Washington being afforded adequate legal representation in dependency proceedings, thereby putting the health, safety, and welfare of children at risk.” H.R. 1183.
60. Id.
61. Id.
63. Id.
65. Id. at 2.
concur[red] with the underlying policy,” again expressed concern about the fiscal impact, reasoning that judges

want[ed] to make sure if the request for counsel is there that there is going to be counsel that is going to be available and . . . that we have the funding necessary to ensure that those rights of the individuals are protected with the attorney. . . . [T]he concern is that it’s, in a sense, an unfunded mandate because there is not going to be opportunity to pay for the counsel to be there when they request it.67

The fact that children were being denied attorneys simply because they were not asking for an attorney came as no surprise to advocates working on the bill. The fiscal note expressed an additional concern that requiring judges to inquire about whether children were notified of their right to request counsel would add an average of five minutes to court hearings.68

Based on strong testimony and advocacy from youth, coupled with ongoing reassurances that the bill established no right to counsel and retained the judges’ absolute discretion to deny counsel for any reason or no reason whatsoever, the bill passed both houses unanimously, and was signed into law with no amendment ever being offered.69 While the requirement of notice to adolescents that they could ask for an attorney was a meaningful step in the right direction, the bill’s intent section bolstered arguments made by youth and advocates for several years—that attorneys did, in fact, “have different skills and obligations than [GALs and CASAs], especially in forming a confidential and privileged relationship with a child.”70 The bill added that “[w]ell-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care.”71 Perhaps the bill’s most important contribution, however, was the requirement that “the administrative office of the courts . . . [along] with the state supreme court commission on children in foster care, shall develop recommen-

68. ADMIN. OFFICE OF THE COURTS, supra note 62. The fiscal note said that this would cost the counties and the state more than $150,000 in a fiscal year. See id.
70. Id. § 1(2).
71. Id.
dations for voluntary training and caseload standards for attorneys who represent youth in dependency proceedings.72

House Bill 2735's small legislative victory regarding notice to youth in foster care was couched in what some advocates believe was a far more important win—the recognition by the legislature that attorneys have an important role to play in the lives of children and youth in abuse and neglect proceedings.

IV. LITIGATION EFFORTS TO CHANGE THE SYSTEM

From the beginning of the local advocacy community's renewed focus on this issue, advocates were under no illusion that meaningful change would likely have to come through the establishment of a constitutional right to counsel—legislative advocacy would not likely yield the same result as a court holding. How to obtain a court victory, however, was subject to some debate.

A. Could We Have a Kenny A.?

One approach advocates discussed, and the most recent example of success, was the Georgia litigation brought by the organization Children's Rights in the 2005 Kenny A. ex rel. Winn v. Perdue73 case. The litigation, a child welfare class action reform case, included a claim that the extraordinarily high caseloads of children's attorneys in Fulton and DeKalb Counties resulted in a violation of dependent children's constitutional due process rights.74 In the most clear decision on children's right to counsel to date, the Federal District Court of the Northern District of Georgia held that indeed, pursuant to Georgia statute and the Due Process Clause of the Georgia Constitution, children in foster care had a right to counsel in deprivation proceedings, and that the caseloads carried by attorneys there were violating that right.75

Later that year, the Supreme Court of Washington took note of Kenny A. The citation came in Carvin v. Britain (In re Parentage of L.B.)76—in which the court avoided ruling on children's rights to counsel, but noted that "[w]hen adjudicating the 'best interests of the child,' we must in fact remain centrally focused on those whose interests with which we are concerned,

72. Id. § 5.
74. Id. at 1355.
75. Id. at 1357–59.
76. 122 P.3d 161 (Wash. 2005) (en banc).
recognizing that not only are they often the most vulnerable, but also powerless and voiceless."\textsuperscript{77} This citation led advocates to believe successful litigation in state court was a distinct possibility. However, a number of problems still stood in the way of bringing any claim in Washington, much less a successful one. First, unlike in Georgia, attorneys were not being provided to children by statute in Washington State, thus the claim would have been significantly different.\textsuperscript{78} Second, the claims in \textit{Kenny A.} were smartly made in the context of a larger reform case. In Washington, the class action reform case, \textit{Braam ex rel. Braam v. State},\textsuperscript{79} had been initiated seven years prior to the \textit{Kenny A.} ruling, and such claims were not included.\textsuperscript{80} Additionally, the fact that children were not appointed attorneys created a tricky situation, in that it became difficult to access children who could actually assert the necessary claims.\textsuperscript{81}

Some progress was made when, in 2007, the Washington Defender Association, with the help of funding from the Children’s Justice Act, created a Children’s Representation Project (CRP).\textsuperscript{82} The goals of the CRP were to both improve the quality of legal representation for dependent children, and also to improve the accessibility of it.\textsuperscript{83} Advocates worked with the CRP to create a template motion for appointment of counsel for children, adaptable for any situation.\textsuperscript{84} Using the template, and with the technical assistance of the CRP, advocates intervened in a number of cases throughout the state to obtain counsel for children in their cases.\textsuperscript{85} The idea was, first and foremost, to make it easier for parents’ attorneys or GALs to move the juvenile court to appoint legal counsel for children in individual cases—other parties would not have to reinvent the wheel if they wanted to obtain an attorney for a

\textsuperscript{77} \textit{Id.} at 179 n.29.
\textsuperscript{79} 81 P.3d 851 (Wash. 2003) (en banc).
\textsuperscript{80} Compare \textit{id.} at 854, with \textit{Kenny A.}, 356 F. Supp. 2d at 1355.
\textsuperscript{81} See Braam ex rel. Braam, 81 P.3d at 854–57, 863.
\textsuperscript{83} Children’s Representation Project, supra note 82.
\textsuperscript{84} See generally Sample Motion to Appoint Counsel for Dependent Youth, WASH. DEFENDER ASS’N, available at http://www.defensenet.org/childrens-representation-project (follow “Motion to Appoint Counsel for Dependent Youth” hyperlink; then follow “Sample Motion for Appointment of Counsel FINAL 11-13-09(2).doc” hyperlink).
\textsuperscript{85} See generally \textit{id.; Children’s Representation Project, supra note 82.}
child/children. Another purpose behind posting the template motion, however, was that if any motion was denied, it would be appealable and the attorney would already be connected to the statewide association that supports public defense agencies. Prior to 2009, however, the authors were unaware of any motions for counsel that were not resolved before appeal, thwarting, or at least complicating, an affirmative litigation effort.

B. Bellevue School District v. E.S. Provides a Glimmer of Hope

As the years stretched on after the Kenny A. ruling, it became more apparent that appellate advocacy, rather than affirmative litigation, might be the best way to resolve the issue in Washington State. In 2009, the state court of appeals ruled in Bellevue School District v. E.S. that children in initial truancy hearings had a constitutional due process right to counsel, given the educational, privacy and physical liberty interests at stake in those proceedings. Though the decision mistakenly indicated that dependent children already had a statutory right to counsel, underscoring the confusion around the issue, the ruling appeared to clear the way to establish such a right for dependent children given that dependency proceedings turn over almost all decisions about a child’s life to the state and require years—perhaps a child’s entire lifetime—of court involvement.

In 2009, shortly after the Bellevue decision was issued by the court of appeals, there was an opening to bring the dependency issue before the appellate courts. After her children had spent four years in foster care, a trial court in rural northeastern Washington terminated the parental rights of T.R. T.R.’s then twelve-year-old daughter, D.R., and eleven-year-old son, A.R., had been represented by the same volunteer CASA since their entry

86. See Children’s Representation Project, supra note 82.
87. See id.
89. 199 P.3d 1010 (Wash. Ct. App. 2009), reh’g granted, 210 P.2d 3d 1018 (Wash. 2009), and rev’d, 257 P.3d 570 (Wash. 2011).
90. Id. at 1017.
91. Id. at 1014, 1017. The court noted that “[t]ruancy hearings are the only type of proceeding, civil or criminal, in which a juvenile respondent is not provided counsel.” Id. at 1013 (citing WASH. REV. CODE § 13.34.100(6) (2011)). That statute, however, fails to guarantee attorneys for children twelve or older in dependencies. See WASH. REV. CODE § 13.34.100(6). See supra Section II(A) of this article for an overview of what section 13.34.100(6) does and does not provide.
into care. At no point during the life of the dependency did the CASA ever meet A.R., who had been involuntarily institutionalized for a year in the state’s most intensive child psychiatric hospital and then placed across the state away from his mother and sister. The CASA met face-to-face with D.R. no more than three times since being assigned to the case, the longest encounter being forty-five minutes.

During the termination trial (during which D.R. turned twelve), T.R.’s counsel asked for the court to appoint counsel to D.R. The court asked the CASA to speak to the child about the issue. The CASA did not talk with D.R. about the issue of counsel, despite several requests from the court. The CASA testified at the termination trial that she did not want to bring up with D.R. the idea of getting an attorney because she was concerned the discussion might cause D.R. anxiety. Despite that the CASA and D.R.’s therapist testified that they did not understand the legal impact the termination would have on D.R., the court denied the mother’s motion to appoint counsel to D.R. The court noted that the “denial of counsel would raise an [appealable] issue,” but “that it was simply ‘too late in the game’ for another lawyer to catch up with the progress of the case.”

The mother, T.R., appealed the termination and her counsel moved to appoint appellate counsel for the children. The court appointed Columbia Legal Services and the Center for Justice to represent D.R. and A.R., respectively. The children filed briefs supplementing the mother’s argument that her children’s due process rights were violated and that all dependent children have a constitutional right to counsel in dependency and termination proceedings. The children’s briefs added salient facts about the effect upon the children of being “represented” by only a CASA who never met with

95. Appellant Child D.R.’s Opening Brief, supra note 93, at 4.
97. Id. at 13.
98. Id. at 14.
99. Id.
100. See Motion to Reverse & Remand Case to Superior Court at 2, In re Dependency of D.R. & A.R., No. 27394-6-III (Wash. Ct. App. July 1, 2009).
102. Id. at 14–15 (citations omitted).
103. Appellant Child D.R.’s Opening Brief, supra note 93, at 10.
104. See id.; Brief of Appellant A.R., supra note 94.
105. Appellant Child D.R.’s Opening Brief, supra note 93, at 1–2; Brief of Appellant A.R., supra note 94, at 2.
A.R. and who testified in favor of termination even though D.R.—who she had barely met with, over four years—opposed the termination.\textsuperscript{106}

Instead of responding to the children’s briefs, the State surprisingly filed a motion to reverse and remand the termination, conceding that both D.R. and A.R. should have had counsel during the termination (despite the fact that nobody had ever requested counsel for A.R.).\textsuperscript{107} In its concession, the State wrote “that the trial court abused its discretion in denying legal counsel for A.R. and D.R.; [and] that this error may well have affected the outcome of the case.”\textsuperscript{108} The State admitted that D.R. opposed the termination and that “her significant legal concerns were not represented” at trial by the children’s volunteer CASA and that the CASA did not have “the ability to advocate for [D.R.’s] legal position.”\textsuperscript{109} The State further admitted that “A.R. also had significant legal issues” and “[l]ike D.R., [he] was not able to adequately present a legal argument to the court opposing termination because he did not have counsel.”\textsuperscript{110} The State recommended reversal—stating counsel would be appointed for the children in the underlying dependency—but opposed any consideration by the court of appeals of the children’s claim regarding any dependent child’s \textit{constitutional} right to counsel.\textsuperscript{111} The court of appeals reversed and remanded the case but did not rule on the constitutional issue presented by the children.\textsuperscript{112} At the children’s request, the Supreme Court of Washington accepted review in May 2010.\textsuperscript{113} Even though the children had asked the Court to review the right to counsel in both dependencies and terminations, the Court limited its review to the right to counsel in termination proceedings.\textsuperscript{114}

The children briefed the issue of the right to counsel in terminations under the federal and state due process clauses and coordinated an amicus ef-

\begin{align*}
\textsuperscript{106}. & \text{Appellant Child D.R.’s Opening Brief, supra note 93, at 4; Brief of Appellant A.R., supra note 94, at 12.}
\textsuperscript{107}. & \text{Motion to Reverse & Remand Case to Superior Court, supra note 100, at 1.}
\textsuperscript{108}. & \text{Id. at 1–2.}
\textsuperscript{109}. & \text{Id. at 2.}
\textsuperscript{110}. & \text{Id. at 3.}
\textsuperscript{111}. & \text{See id. at 3–4.}
\textsuperscript{112}. & \text{Order Denying Motion to Modify Commissioner’s Ruling at A2, A4, In re Termination of D.R. & A.R., No. 27394-6-III consolidated with No. 27395-4-III (Wash. Ct. App. Dec. 28, 2009).}
\textsuperscript{114}. & \text{In re Termination of D.R. & A.R., 231 P.3d at 840.}
\end{align*}
fort that resulted in the filing of eight briefs in support of the children.\footnote{115} The amici represented a diverse group of stakeholders that ranged from foster youth and alumni of care, to foster parent advocacy groups, local legal service agencies and the statewide chapter of the ACLU, national advocacy groups, and the Washington State Psychological Association.\footnote{116}

On January 27, 2011, the Supreme Court of Washington heard oral arguments.\footnote{117} As this was an issue of first impression, it was unclear what to expect from the court, but the questions ranged from whether a ruling on this issue would impact children’s right to an attorney in a private dissolution action, to whether the issue would be resolved if all CASAs and GALs were provided attorneys.\footnote{118} The court seemed to struggle with the notion that attorneys could represent even very young children, and focused on the fact, at the time of oral argument, D.R. and A.R. had attorneys because of the State’s concession.\footnote{119} The court wanted to know why it should rule on a case that appeared to lack aggrieved parties, given that the children had prevailed at the court of appeals.\footnote{120} Advocates for the children argued that the case presented an issue of continuing and substantial public interest, was likely to continue evading review, and that the court should decide the issue because it had never before come to the court’s attention.\footnote{121}

Only five days after oral argument, the Supreme Court of Washington dismissed review of the case, pointing to the statutory amendments in House

\begin{footnotes}
\footnote{119} Id. at 16:23–17:00, 58:23.
\footnote{120} Id. at 16:40, 57:00.
\footnote{121} See id. at 16:25.
\end{footnotes}
Bill 2735 that came about since the appeal\(^{122}\) and that there was no aggrieved party.\(^{123}\) It was unclear what the amendment to the statute had to do with the status of the parties, given that the statute still provided no right to counsel and would not have pertained to A.R.\(^{124}\) The outcome was devastating to the clients and the advocates who had been working on this case since early 2009.

C. *Life After In re* Termination of D.R. & A.R.

The attention brought to the issue through *In re Termination of D.R. & A.R.*\(^{125}\) prompted attorneys regularly working on dependency and termination appeals to consider making the right to counsel argument in their cases. While *In re Termination of D.R. & A.R.* was being briefed for argument before the Supreme Court of Washington, another case was working its way up the appellate chain.

*Department of Social & Health Services v. Luak (In re Dependency of M.S.R. & T.S.R.)*\(^{126}\) involved twin children who were nine years old when their mother’s rights were terminated.\(^{127}\) In that case, unlike in *In re Termination of D.R. & A.R.*, counsel had never been requested for the children, perhaps due to the fact that the statute allowed appointment for children under age twelve only upon request by the GAL or where the trial court, *sua sponte*, felt it necessary.\(^{128}\) But the mother, frustrated by the fact that the volunteer CASA would only stipulate to how the children might feel about the termination, wanted the children’s actual wishes to be represented to the court.\(^{129}\) The trial court denied the request to hear directly from the child-

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122. See discussion *supra* Part III.
124. See H.B. 2735.
125. 231 P.3d 840 (Wash. 2010).
127. *Id.*
128. Supplemental Brief of Respondent Department of Social & Health Services, *supra* note 45, at 5–6 (quoting WASH. REV. CODE § 13.34.100(6)(f) (2011)); see also discussion *supra* Part III.
The mother appealed the termination and argued that due process requires that all children have an attorney to protect their fundamental liberty interests during termination of parental rights proceedings.

Shortly after dismissal of In re Termination of D.R. & A.R., and prior to the In re Dependency of M.S.R. & T.S.R. court of appeal’s oral argument date, the Supreme Court certified the case for review. The mother’s attorney, having been well-versed in the issues in her prior job where she represented national amici in In re Termination of D.R. & A.R., moved the court to appoint appellate counsel for the children. The State opposed the motion, and the court denied the mother’s request. The court did, however, allow nineteen amicus parties—almost all of whom had also participated as amici in In re Termination of D.R. & A.R.—to submit six briefs to the court. Thus, in a case examining whether children have a constitutional right to counsel in termination proceedings, the children in the case went unrepresented in the dependency, the termination, and on appeal, and amici would be left to argue about the children’s rights and interests without any access to the record. The CASA did not appear in the appeal, leaving any

130. Id.
131. Id. at 3-4.
133. See Motion to Appoint Counsel for Children at 1, Dep’t of Soc. & Health Servs. v. Luak (In re Dependency of M.S.R. & T.S.R.), No. 85729-6 (Wash. Apr. 6, 2011).
136. See Amicus Curiae Brief of the Mockingbird Society, In re Termination of M.S.R. & T.S.R., supra note 135, at 1; Amici Curiae Brief of Columbia Legal Services & the Center for Children & Youth Justice, supra note 135, at 2; Amici Curiae Brief of the Children & Youth Advocacy Clinic, supra note 135, at 3; Brief of Amici Curiae American Civil Liberties Union of Washington et al., supra note 135, at 1; Amicus Curiae Brief of the Washington State Psy-
child’s representative completely absent from the process. Ultimately, the arguments presented to the court mirrored those argued in In re Termination of D.R. & A.R.—that because termination proceedings are among the most intrusive and destructive legal proceedings to which any child or adult could ever be subjected, every court in the past thirty years has found that appointment of counsel to all children is constitutionally required. 137 The mother’s counsel and amici argued that Washington is among a minority of states that fail to provide a universal right to counsel and that its method of appointing counsel is sporadic and results in “justice by geography.” 138 Amici brought the perspective of the people most affected by the decisions made in a termination proceeding—children and youth. 139 One example of this perspective was found in the brief submitted by the Mockingbird Society, which stated that:

If the parent-child relationship is terminated, it is the child who is exposed to the foster care system. It is the child who is often bounced from one foster home to another. It is the child who is forced to live in sometimes overcrowded and unsanitary conditions. It is the child who may suffer from abuse and neglect at the hands of substitute guardians. It is the child who is punished or detained in contempt for contacting the estranged biological parents. It is the child—not the State, not the parents, not the judge, and not the [GAL or CASA]—who must cope with living in a strange and often daunting world that lacks any nurturing or stability. 140

Finally, amici reminded the court that unlike almost any other criminal or civil proceeding, there is little certainty when state involvement will end, with cases lasting up to eighteen years—an entire childhood. 141 The State’s argument largely rested on its belief that because parents did not have a right to counsel under Lassiter v. Department of Social Services of Durham County, North Carolina, 142 then children could not possibly

chological Association, supra note 135, at 2; Amicus Curiae Brief of Kidsvoice et al., supra note 78, at 2.


139. See id.


have a right to counsel.\textsuperscript{143} The State's argument not only ignored the strong constitutional pronouncements made by the Supreme Court of Washington in \textit{In re Welfare of Luscier}\textsuperscript{144} and \textit{In re Welfare of Myricks}\textsuperscript{145}—instead arguing that these holdings were eviscerated by \textit{Lassiter}—but also equated children to chattel who could not have greater or even equal rights to their parents.\textsuperscript{146}

The court heard oral argument in \textit{In re Dependency of M.S.R. \& T.S.R.} on October 18, 2011, nine months after the dismissal of \textit{In re Termination of D.R. \& A.R.}\textsuperscript{147} It will be perhaps quite some time before a decision is issued, but advocates hope that the Supreme Court of Washington is not the first in thirty years to declare that children lack a constitutional right to counsel in cases that permanently sever children from their family members.

\textbf{D. What About Dependency Proceedings?}

While Washington's child advocacy community waits for a decision from the state supreme court regarding the right to counsel in termination proceedings, advocates are keeping a close eye on another case in the Washington Court of Appeals. \textit{In re Dependency of K.A.S.},\textsuperscript{148} raises the issue of the right to counsel in dependency proceedings, which could affect the nearly 10,000 children that are in the foster care system in Washington State.\textsuperscript{149} In K.A.S., a parent appealed the finding of dependency and argued that all children have a right to counsel in dependency proceedings, relying heavily on

\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 24, 26–27, 34; Supplemental Brief of Respondent Department of Social \& Health Services, \textit{supra} note 45, at 8–13.
\item \textsuperscript{144} 524 P.2d 906 (Wash. 1974) (en banc), abrogated by \textit{Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18 (1981), as stated in Bellevue Sch. Dist. v. E.S., 257 P.3d 570 (Wash. 2011)).
\item \textsuperscript{145} 533 P.2d 841 (Wash. 1975) (en banc).
\item \textsuperscript{146} \textit{Id.} at 841; \textit{In re Welfare of Luscier}, 524 P.2d at 908; Supplemental Brief of Respondent Department of Social \& Health Services, \textit{supra} note 45, at 8–13.
\item \textsuperscript{147} \textit{See generally} Oral Argument, Dep't of Soc. \& Health Servs. v. Luak (\textit{In re Dependency of M.S.R. \& T.S.R.}), No. 85729-6 (Wash. Oct. 18, 2011) available at http://tvw.org/media/mediaplayer.cfm?evid=2011100005C\&TYPE=V\&CFID=8351653\&CFTOKEN=38197884\&bhcp=1; Order Dismissing Review, \textit{supra} note 123.
\item \textsuperscript{148} Brief in Support of Motion for Accelerated Review at 1, \textit{In re Dependency of K.A.S.} No. 65769-1-1 (Wash. Ct. App. Dec. 17, 2010).
\item \textsuperscript{149} \textit{Id.} For information about the number of children in the care of the Children's Administration, see the 2010 Year in Review Report. \textit{See Wash. State Dep't of Soc. \& Health Servs., CHILDREN'S ADMINISTRATION: 2010 YEAR IN REVIEW} (2011), http://www.dshs.wa.gov/pdf/ca/year-in-review2010.pdf. The report notes that of the "11,625 children in the care of Children's Administration" in 2010, "9757 were in out-of-home care such as foster care or group homes." \textit{Id.}
\end{itemize}
briefing from In re Termination of D.R. & A.R.\textsuperscript{150} Despite arguing that all children should have counsel at their dependency trial, the mother declined to request appellate counsel for the child.\textsuperscript{151} When advocates filed a motion requesting leave to file amicus briefs, the court of appeals denied the motion and proceeded to oral argument without hearing any arguments directly from the child, the GAL—who did not participate in the appeal—or from the legions of stakeholders that participated as amici in In re Termination of D.R. & A.R. and In re Dependency of M.S.R. & T.S.R.\textsuperscript{152}

The court of appeals heard oral argument on November 4, 2011, less than a month after oral argument in In re Dependency of M.S.R. & T.S.R.\textsuperscript{153} Like the supreme court case, it is unclear when a decision will be issued, or how it might be affected by the supreme court’s ruling in In re Dependency of M.S.R. & T.S.R.

\textbf{V. CONCLUSION: WASHINGTON’S LONG ROAD AHEAD}

The right to counsel remains to be established, but significant gains have been made. For example, House Bill 2735 resulted in the development of a report on standards and caseloads by experts from the key child welfare constituency groups, including the Attorney General’s Office and CASA which begins with the pronouncement that, “[a]ll children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues.”\textsuperscript{154} This consensus is no small feat, and it is one that came about after significant community education and consistent pressure.\textsuperscript{155} Obviously, the pronouncement is likely to have little effect until the supreme court or the legislature become part of

\begin{itemize}
\item \textsuperscript{150} See Brief in Support of Motion for Accelerated Review, supra note 148, at 8–22; see also Amicus Curiae Brief of the American Civil Liberties Union of Washington, supra note 113, at 5–7; Amici Curiae Brief of Kidsvoice et al., In re Termination of D.R. & A.R., supra note 115, at 4–7.
\item \textsuperscript{151} See Brief in Support of Motion for Accelerated Review, supra note 148, at 8–22.
\item \textsuperscript{152} See generally In re Dependency of K.A.S. No. 65769-1-I (Wash. Ct. App. Dec. 17, 2010); see sources cited supra note 115, 135.
\item \textsuperscript{153} Appellate Court Case Summary, In re Dependency of K.A.S., No. 657691, WASH. CTS. (July 29, 2010), http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=657691&searchtype=aNumber&crt_itl_nu=A01&filingDate=2010-0729%2000:00:00.0&courtClassCode=A&casekey=152650874&courtname=COA,%20Division%201.
\item \textsuperscript{155} See id. at 1–2.
\end{itemize}
the consensus, but the decisions of both of these bodies are necessarily affected by a community’s maturation on an issue. Advocates hope that either, or both, will take note of this fact, as well as the emerging national consensus reflected by the American Bar Association’s Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Cases. There have been other advances as well. Anecdotal information indicates that the substantive provisions of House Bill 2735 have resulted in more children being appointed attorneys simply because more children are asking for attorneys. More attorneys for parents, bolstered by the availability of briefing, are moving for counsel for children. Appellate attorneys, as well, are looking at this issue.

In light of the recession, efforts in Washington may only get more difficult. The only certainty, it appears, is that the issue is coming to a head with the result having major repercussions for the rights of children in Washington State and beyond. It is certainly possible that the courts and the legislature may reinforce the status of children as chattel. But such a result would be contrary to the now overwhelming opinion among stakeholders and the youth themselves—that children and youth have the most at stake in these proceedings and that their rights can only fully be protected by well-trained and well-supported attorneys.
PERSPECTIVE: NEW ERA IN REPRESENTING CHILDREN

GARY SOLOMON*
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I. INTRODUCTION

For as long as lawyers have been representing children in New York state and elsewhere, the unfortunate backdrop for this otherwise noble and rewarding work has been an often heated debate regarding the proper role of a child’s lawyer in neglect and abuse, permanency and termination of parental rights proceedings. While a state has considerable discretion in defining that role, New York, like many other states, has provided only general guidance to children’s lawyers, who are referred to as counsel or confusingly, as “law guardians” in New York statutes. As a result, while everyone agrees that the child’s lawyer, like any other lawyer, must conduct an adequate factual investigation, communicate regularly with any verbal client and help such a client understand the proceedings and make sound decisions, and prepare for and advocate at court hearings, lawyers have been left relatively free to follow, or override in their discretion, positions taken by their young and immature clients. In other words, lawyers have been able to navigate freely between the traditional lawyer’s role—advocating for the client’s expressed interests, and a guardian ad litem role—advocating for what the guardian determines to be in the child’s interest.

On October 17, 2007, Chief Judge Judith S. Kaye, a long-time children’s rights champion, signed new section 7.2 of the Rules of the Chief Judge, which states that in juvenile delinquency and person in need of supervision proceedings, “the attorney for the child must zealously defend the child,” and that in other proceedings, the child’s attorney “should be directed by the wishes of the child” if “the child is capable of knowing, voluntary and considered judgment,” even if the attorney “believes that what the child wants is not in the child’s best interests.”

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Under Rule 7.2, the attorney “would be justified in advocating a position that is contrary to the child’s wishes” when the attorney “is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child.”

Rule 7.2 was promulgated shortly after the New York State Bar Association’s formal adoption of Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, which strike a similar theme. Even before these developments, The Legal Aid Society’s Juvenile Rights Practice, for the first time in its forty-six-year existence, engaged its staff in a comprehensive discussion of the role of the child’s lawyer with a view towards developing formal written guidelines for juvenile rights lawyers.

Now, against the complementary backdrop created by Rule 7.2 and the state bar standards, Legal Aid’s guidelines, Giving the Children a Meaningful Voice: The Role of the Child’s Lawyer in Child Protective, Permanency, and Termination of Parental Rights Proceedings, have been released.2

We believe that the strength of the adversarial process lies in the full presentation and consideration of the affected parties’ points of view. The child, whose liberty interests are implicated in the proceeding, is entitled to this opportunity no less than any other party. Accordingly, like Rule 7.2 and the state bar standards, the Juvenile Rights Practice guidelines endorse the traditional lawyer’s role as advocate for the child’s wishes, while also recognizing narrow exceptions to the general rule.

Juvenile Rights Practice lawyers may, but are not required to, take positions that are inconsistent with the client’s expressed wishes only when the client “lacks the capacity to fully comprehend the nature of the proceeding and the issues raised and communicate a preference and comprehensible reasons for it,” or when arguing successfully for the result the child prefers would expose the child to a risk of “grave physical harm.”

However, we recognize the residual danger that lawyers will evaluate “capacity” using different standards. For instance, a lawyer might equate capacity with maturity, and thus believe that any child of fifteen or sixteen lacks capacity. Or, while evaluating the child’s capacity, a lawyer might treat what appears to the lawyer to be a bad decision by a child as evidence of a lack of capacity. To insure that capacity determinations will be as consistent as possible, the guidelines endorse the view that by age ten, a child usually

has decision-making ability, and that many children ages seven through nine possess such ability.

II. EXTENSIVE RESEARCH

The Juvenile Rights Practice guidelines do not adopt this view without good reason or without exhaustive research. Before arriving at this result, the guidelines: 1) carefully analyze New York statutes, case law, and attorney ethics and practice standards, as well as other authorities, and conclude that this model of representation is permissible; 2) highlight the ways in which the effectiveness and integrity of the judicial process, and the child’s confidence in that process, are enhanced when there is a lawyer who advocates in accordance with the child’s unique perspective; and 3) rely on expert authority supporting the view that by age seven a child’s social, language, and cognitive abilities have become more complex and sophisticated.

At the same time, however, the guidelines recognize that although many young children do possess sufficient capacity to make decisions and ought to have a loyal advocate, their deficits in experience, insight, and maturity heighten the importance of the lawyer’s counseling role. Even when the lawyer is “client-directed” in that the child’s wishes will prevail in the end if the lawyer and the child disagree, a lawyer’s representation of a child, like a lawyer’s representation of an adult, also is “lawyer-directed” in the sense that a lawyer should, without overwhelming the client’s will, attempt to steer the client away from self-destructive and other ill-conceived positions and towards better ones. The guidelines also recognize that while a child has the right to make certain fundamental decisions that implicate his or her liberty interests, decisions involving litigation strategy, including the means by which to achieve the child’s litigation goals, are made by the lawyer.

The guidelines also lay out a methodology for attorneys to use when making decisions on behalf of non-verbal infants and other children who lack capacity. This is often referred to as “substituted judgment” representation. The lawyer, lacking the direction provided by a client, has no alternative but to advocate in accordance with the governing legal standard.

For instance, the lawyer will look to the imminent risk standard at a removal hearing, and to the preponderance of the evidence or clear and convincing evidence standard at a fact-finding hearing. When making decisions on behalf of a child who lacks capacity in certain other contexts, for instance, a custody dispute involving non-parental custodians, the lawyer may, consistent with applicable legal standards, consider the child’s best interests.

The guidelines also instruct the lawyer to give at least some weight to the wishes of a child who lacks decision-making capacity, since the child has first-hand knowledge of the home environment and even very young children
can make a substantial contribution to the decision-making process. The lawyer also should keep in mind the disparity between the lawyer’s own life experiences and expectations, and those of the child. At a formal hearing, the lawyer should seek to elicit as much information as possible; although in many cases the lawyer already will have adopted at least a tentative position before the hearing commences, the lawyer cannot be certain that new information will not change his or her position.

III. CONCLUSION: WORKING WITH JUDGES

We recognize that many Family Court judges have come to expect the child’s lawyer to employ a “substituted judgment” model much more broadly than is permitted by section 7.2 of the Rules of the Chief Judge or by the guidelines we now adopt, and that the judges value that model because it seems to insure that they will get as much information as possible.

There are a number of ways to address such concerns. First, if the child’s lawyer engages in effective counseling, makes appropriate determinations regarding a client’s incapacity and/or the risk of grave physical harm, and avoids making frivolous arguments, judges should not be faced with a child’s lawyer who is advocating for a result that would place the child at risk of serious harm. In any event, the judge can choose to reject the lawyer’s arguments.

Moreover, the evidence the judge requires will be presented by lawyers representing other, highly adversarial parties. If those lawyers are ineffective, the judge has the option of soliciting additional evidence; indeed, appellate courts have instructed judges to do precisely that when important evidence has not been produced. Finally, with promulgation of Rule 7.2, and adoption of the state bar standards, a new era of child advocacy in New York has officially begun, and there is no turning back.
CONNECTICUT’S ROAD TO “REAL” ATTORNEYS FOR KIDS

CAROLYN SIGNORELLI*

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I. INTRODUCTION

During the 2011 Legislative Session, Connecticut took a tremendous step forward by giving children involved in child protection proceedings “real” attorneys through Public Act 11-51.1 Ironically, in the very same act, it took an immense step backward by eliminating the very agency responsible for proposing and shepherding this enactment through the legislature, and just six years earlier, created to ensure the quality of children’s attorneys.2 While this article’s focus is not the effect of the current budget crisis on state agencies and not-for-profit organizations serving the poor, the recent experience of Connecticut and its stalled effort to provide quality legal representation to children and indigent parents in child protection cases highlights the fragility of the commitment to legal representation as a means to hold the child welfare system accountable. Providing client-directed attorneys for children consistent with the Connecticut Rules of Professional Conduct and the American Bar Association’s (ABA’s) Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act) is a critical measure for improving legal protection for children involved with the state’s child welfare system. However, it must be accompanied by an adequate system of attorney compensation and accountability to

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achieve its promise of a true voice for children with the court and the child welfare agency.

Public Act 11-51 section 17 eliminates Connecticut's requirement that counsel for children in neglect, abuse, and termination of parental rights proceedings serve in a dual capacity as attorney and guardian ad litem (GAL). It clearly defines the attorney role consistent with the Connecticut Rules of Professional Conduct by stating: "Counsel for the child shall act solely as attorney for the child." This amendment is the product of the author's de-

4. Id. The following is the version of section 17 of Public Act 11-51 with the additions and deletions to the former General Statutes of Connecticut section 46b-129a, thus demonstrating the amendments:

(2) [a] (A) A child shall be represented by counsel knowledgeable about representing such children who shall be [appointed by the court] assigned to represent the child [and to act as guardian ad litem for the child.] by the office of Chief Public Defender, or appointed by the court if there is an immediate need for the appointment of counsel during a court proceeding. The court shall give the parties prior notice of such assignment or appointment. Counsel for the child shall act solely as attorney for the child.

(B) If a child requiring assignment of counsel in a proceeding under section 46b-129, as amended by this act, is represented by an attorney for a minor child in an ongoing probate or family matter proceeding, the court may appoint the attorney to represent the child in the proceeding under section 46b-129, as amended by this act, provided (i) such counsel is knowledgeable about representing such children, and (ii) the court notifies the office of Chief Public Defender of the appointment. Any child who is subject to an ongoing probate or family matters proceeding who has been appointed a guardian ad litem in such proceeding shall be assigned a separate guardian ad litem in a proceeding under section 46b-129, as amended by this act, if it is deemed necessary pursuant to subparagraph (D) of this subdivision.

(C) The primary role of any counsel for the child [including the counsel who also serves as guardian ad litem,] shall be to advocate for the child in accordance with the Rules of Professional Conduct. [When a conflict arises between the child's wishes or position and that which counsel for the child believes is in the best interest of the child, the court shall appoint another person as guardian ad litem for the child.]

(D) If the court, based on evidence before it, or counsel for the child, determines that the child cannot adequately act in his or her own best interests and the child's wishes, as determined by counsel, if followed, could lead to substantial physical, financial or other harm to the child unless protective action is taken, counsel may request and the court may order that a separate guardian ad litem be assigned for the child, in which case the court shall either appoint a guardian ad litem to serve on a voluntary basis or notify the office of Chief Public Defender who shall assign a separate guardian ad litem for the child. The guardian ad litem shall [speak on behalf] perform an independent investigation of the case and may present at any hearing information pertinent to the court's determination of the best [interest] interests of the child, [and] The guardian ad litem shall be subject to cross-examination upon the request of opposing counsel. The guardian ad litem is not required to be an attorney-at-law but shall be knowledgeable about the needs and protection of children and relevant court procedures. [In the event that] If a separate guardian ad litem is [appointed] assigned, the person previously serving as [both] counsel [and guardian ad litem] for the child shall continue to serve as counsel for the child and a
termination that client-directed representation for children was essential to a strategy to improve representation for children subject to neglect, abuse, and termination of parental rights petitions filed in juvenile court by the Department of Children and Families (DCF). 5 What follows is a story that starts somewhere in the middle of Connecticut's twisted and broken road towards quality legal representation for children and parents in child welfare proceedings.

II. THE ESTABLISHMENT OF THE OFFICE OF THE CHIEF CHILD PROTECTION ATTORNEY

The story of this legislation began when the general assembly created the Commission on Child Protection (COCP) during the 2005 Legislative Session through Public Act 05-3 sections 44 through 47.6 The decision to create this Commission was a culmination of several factors, not the least of which was a lawsuit brought by the Juvenile Matters Trial Lawyers Association (JMTLA) against the Judicial Department for violating the rights of their indigent clients by not adequately paying court-appointed counsel.7 While the lawsuit was dismissed on standing grounds, the conclusion of district court Judge Christopher Droney essentially directed the Judicial Department and the legislature to address the issues raised by the suit:

Although the pay structure for appointed counsel representing indigent families and children in the Connecticut state courts may result in inadequate resources for effective representation in par-

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5. The author was appointed as Connecticut's first Chief Child Protection Attorney, head of the Commission on Child Protection, on March 31, 2006. See Thomas B. Scheffey, Training Now a Must for All Children's Lawyers, CONN. L. TRIB., Jan. 16, 2012, http://www.ctlawtribune.com/getarticle.aspx?id=40982. Early on, the author was invited by CT Voices for Children, Casey Family Services, and DCF to listen to different groups of foster youth about their experiences with courts and attorneys. Her own experience in court as an Assistant Attorney General representing DCF and the stories of the youth helped to shape her decision that clearly defining the role of counsel for children as a traditional client-directed attorney was critical to improving representation.


ticular cases, the Association has not shown that it has standing to make that claim in this case. This Court is bound by the constitutional and prudential requirements of standing, and cannot permit cases to proceed which do not meet those requirements. Of course, the decision here on the standing of the Association does not mean that other parties could not raise these issues in this Court or the Connecticut Superior Court. Finally, it may very well be that an administrative or legislative review of the issues raised in this suit may be an appropriate course.\(^8\)

That decision came out on March 28, 2005, and the legislation passed during a special session in June 2005.\(^9\) The intent was to create an independent agency devoted to improving attorney services for children and indigent parents in child protection matters.\(^10\) The Act provided for the appointment of a Chief Child Protection Attorney (CCPA) by an eleven member COCP.\(^11\) The CCPA was responsible for providing a system of state-paid legal representation in juvenile and family matters and ensuring the quality of that representation.\(^12\) While the primary impetus of this legislation was the problems with the system of legal representation in neglect, abuse, and termination of parental rights cases, the administration of billing for state-paid attorneys in family matters cases—including attorneys for minor children and GALs for children of indigent divorce and custody litigants—was also transitioned to the CCPA.\(^13\) The legislation called for the CCPA to:

(3) Establish training, practice and caseload standards for the representation of children, youths, indigent respondents and indigent legal parties pursuant to subdivision (1) of this subsection. Such standards shall apply to each attorney who represents children, youths, indigent respondents or indigent legal parties pursuant to this section and shall be designed to ensure a high quality of legal representation. The training standards for attorneys required by this subdivision shall be designed to ensure proficiency in the procedural and substantive law related to such matters and to establish a minimum level of proficiency in relevant subject areas, includ-

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\(^8\) Id. at 251.
\(^9\) See id. at 239; see generally 2005 Conn. Acts.
\(^11\) Id. at 25–26.
\(^12\) Id. at 26–27.
\(^13\) Id.
ing, but not limited to, family violence, child development, behavioral health, educational disabilities and cultural competence.14

A. Step One: Standards of Practice

In order to address the issue of practice standards, the author established two working groups to conform the Standards of Practice for Parent Representation and the NACC's Model Standards for Representation of Children (NACC Standards) to Connecticut law.15 The working groups consisted of volunteer judges, child advocates, lawyers, and law professors who began their work in the Summer of 2006.16 At this time, most case law in Connecticut regarding the respective roles of counsel for minor children and GALs arose from dissolution and custody actions.17 In 2003, the appellate court in In re Tayquon H.,18 decided the first child protection case outlining the authority and function of a separate GAL in the context of a child protection proceeding.19 While In re Tayquon H. focused on whether the authority of a separate GAL for a minor parent usurped the authority of the minor parent’s biological parent in the neglect proceedings, it also analyzed the historical distinctions between counsel and GALs.20 In its discussion, the court relied on decisions in family matter cases, even though the statutory scheme for appointment of counsel and GALs in child protection proceedings under section 46b-129a of the General Statutes of Connecticut as very different than those in family matter proceedings where authority was derived from section 46b-54 to appoint a separate attorney.21 A probate court statute, sec-
tion 45a-620, provided discretion to appoint a separate GAL. This cross-citing was concerning because of the very different legal rights and interests at stake for children in child protection proceedings who are considered parties to the case, as compared to the interests of children in custody battles. It became alarming in July of 2005, when the family court case, Carrubba v. Moskowitz, was decided. The court described the role of an attorney appointed as counsel for a minor child in dissolution actions as follows:

Of course, we recognize that such attorneys perform a hybrid role because of their simultaneous duty to function as an advocate for the child. That function, however, must always be subordinated to the attorney’s duty to serve the best interests of the child. Even when an attorney for the minor child functions less as a guardian ad litem and more as an advocate because of factors such as the child’s advanced age, maturity level and ability to articulate her preferences, the shifting of the balance from an objective evaluator of the child’s best interests to personal advocate happens because those factors increase the likelihood that the child is able accurately to identify and to make choices to pursue her own best interests independently, without the aid of an objective assistant to the court. Thus, even the advocacy role of the appointed attorney for the minor child may be reconciled with the attorney’s primary duty—to assist the court in serving the best interests of the child.

The Working Group on the Connecticut Standards of Practice for Attorneys & Guardians ad Litem Representing Children in Child Protection Cases determined that since the appellate court in In re Tayquon H. had referenced the need for courts to define the roles and duties of counsel and GALs on a case by case basis “absent firm guidelines from [the] legislature or other sources,” and since the legislature had granted the CCPA the authority to promulgate practice standards, our standards would seek to reinforce and clarify the role of counsel as that of a client-directed attorney. This had to

22. CONN. GEN. STAT. § 45a-620 (2011).
23. See In re Tayquon H., 821 A.2d at 801-02, 807 n.20. The author recognizes that several interests coincide for children in dissolution and custody actions and children in neglect proceedings, such as safety, continuity of care, stability of placement and maintenance of family relationships. However, in child protection cases where the state is a party and potential custodian, the stakes for children are even greater and the enforcement of rights while in foster care, even more critical.
25. Id. at 783.
26. In re Tayquon H., 821 A.2d at 807 n.20 (alteration in original); CONN. STANDARDS OF PRACTICE, supra note 16, at 1, 4.
be done within the boundaries of the existing appointment statute. The Working Group therefore focused on the statute’s provision: “The primary role of any counsel for the child including the counsel who also serves as guardian ad litem, shall be to advocate for the child in accordance with the [Connecticut] Rules of Professional Conduct.”

It also sought to provide guidelines for assessing best interest and whether or not a conflict existed through objective criteria. The Working Group was provided the NACC Standards as well as the reports from the Fordham Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, and the Draft UNLV Recommendations of the Conference on Representing Children in Families to assist in the task.

Under the heading Role of Attorney/GAL for Minor Child, the Connecticut Standards of Practice for Attorneys & Guardians ad Litem Representing Children in Child Protection Cases provides:

Under Connecticut’s framework of dual representation for a minor child in juvenile matters, as set forth in [General Statutes of Connecticut section] 46b-129a(2) and discussed in In re Tayquon H. . . . , the attorney/GAL for a child must attempt to provide traditional client-directed representation whenever possible. To that end the attorney/GAL must assess the child’s competency to render decisions concerning the objectives of representation and his or her own best interest. Only when it is determined that the child client does not have such competency or has diminished capacity can an attorney/GAL substitute his or her objective determination of the child’s best interest and request a separate GAL due to the existence of a conflict.

By bringing the need to assess competency into the standards, since it was absent from the statute, the Working Group attempted to address the

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27. See CONN. GEN. STAT. § 46b-129a.

28. Id. § 46b-129a(2).


existing practice of substituting the attorney’s assessment of best interest for all children’s expressed wishes. The commentary went on to explain:

These [s]tandards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position. Consequently, the child’s attorney owes traditional duties to the child as client. Consistent with Rule of Professional Conduct 1.14, “Client with Diminished Capacity” the attorney/GAL must seek the appointment of a guardian only when a client’s ability to make an adequately considered decision is diminished.31

The aspect of the statute that was difficult to reconcile with the Connecticut Rules of Professional Conduct was its provision of a subjective test for determining the existence of a conflict, requiring a separate GAL whenever the child’s wishes or position varied from that which counsel believed was in his or her client’s best interest.32 With no express requirement that a child’s capacity be assessed before an attorney could substitute his or her own view of best interest and no statutory framework, case law, or training on deciphering a particular child’s best interest from an objective standpoint, many children were not having their perspectives presented to the court in a manner consistent with the traditional duties of competency, diligence, loyalty, zealouosity, and confidentiality.33 While the NACC Standards attempted to accomplish this, the statute’s language was very limiting and of course took precedence over the standards.34 Attorneys continued to substitute their judgment for their client’s expressed wishes, to treat their role as that of best interest advocate, and to assert they could adequately represent their client’s wishes simply by stating them on the record and then defer to the GAL to advocate for his or her subjective view of best interest. Many attorneys be-

lieve the appointment in a dual capacity permitted them to express their client’s wishes and simultaneously advocate for what the attorney believed to be in their client’s best interest. As a result, a legislative amendment was needed to clarify the role of counsel and ensure each child in neglect and abuse proceedings received an advocate and advisor bound by the Connecticut Rules of Professional Conduct.

B. Step Two: Educating Stakeholders About the Importance of the Child’s Voice in Child Protection Proceedings

While the CCPA was a very new image in the Connecticut child advocacy landscape in 2006, the existence of the position helped focus some additional attention on the issue of children’s rights in child protection proceedings. Existing advocacy organizations that were influential in the legislature’s decision to establish the COCP collaborated with the CCPA to continue the momentum of the new agency. On November 20, 2006, The Annie E. Casey Foundation/Casey Family Services, Connecticut Voices for Children (CT Voices) and the President Pro Tempore of Connecticut’s Senate held a symposium at the Capitol called “Their Day in Court: Ensuring Adequate Representation for Children and Parents in Child Protective Services Cases.” The main theme of the day outlined in the symposium brochure was a recognition of the legislature’s “important first step in tackling the critical issue of how best to ensure that children and parents involved in child protection proceedings have adequate legal representation by establishing the Commission on Child Protection” and the need to support its mission. The brochure, as well as many speakers that day, went on to sow the seed for the importance of client-directed attorneys for children: “These complicated legal decisions are best made when all parties have the benefit of zealous and competent legal counsel as required by law and professional ethics.”

In the Fall of 2006, at the request of its President and COCP member, Shelley Geballe, CT Voices took over a research project the author had undertaken to examine the most effective means to provide legal representation; and in March of 2007, published with Yale's Legislative Services program, a white paper entitled Giving Families a Chance: Necessary Reforms for the Adequate Representation of Connecticut's Children and Families in

35. ANNIE E. CASEY FOUND. ET AL., supra note 33.
36. Id. Co-sponsors included the COCP, Center for Children’s Advocacy, Connecticut Bar Foundation James W. Cooper Fellows, Connecticut Jim Casey Youth Opportunities Initiative, and the Office of the Child Advocate. Id.
37. Id.
38. Id.
Child Abuse and Neglect Cases.\textsuperscript{39} While this paper focused on the need for improved competency and an organizational model of representation as best practice, it served as a valuable reminder to legislators about the importance of the work.\textsuperscript{40} The CCPA and the Judicial Department's Court Improvement Program Coordinator, Marilou T. Giovannucci, collaborated to bring Andrea Khoury, Assistant Director of Child Welfare for the National Child Welfare Resource Center and Director of the ABA's Youth at Risk Bar-Youth Empowerment Project, to Connecticut. Attorney Khoury spent a day presenting to lawyers and judges about the importance of children attending court and participating in the formulation of their case goals through a traditional attorney-client relationship. This training included former foster youth sharing their experiences in an effort to help judges and lawyers understand the need to give children in the system a meaningful voice. The author in the COCP's First Annual Report pointed out to the Governor, legislators and the Judicial Department how the current statutory framework, which is tied to both federal funding requirements and philosophical perspectives on the ability of minors to enforce legal rights, has significant ethical and training implications for contract attorneys, as well as financial implications for the COCP due to the number of separate GALs that are appointed whenever an attorney/GAL perceives a conflict between their child client's expressed or implied wishes and their client's best interest.\textsuperscript{41}

C. Step Three: Legislative Proposals

During the 2008 Legislative Session, the CCPA submitted a proposal to amend section 46b-129a of the General Statutes of Connecticut, which was voted on favorably by the Judiciary Committee and included in Senate Bill 325.\textsuperscript{42} This bill provided for a cut off at age seven, whereby attorneys would no longer act in a dual capacity for children ages seven and older.\textsuperscript{43} This was a compromise position based upon concerns raised by the Office of the Child Advocate. The legislation actually passed in the Senate and was slated for a


\textsuperscript{40} See id. at 3.

\textsuperscript{41} Signorelli, First Annual Report, supra note 15, at 16.


\textsuperscript{43} Id.
vote on the consent calendar of the House on the last day of the session.\textsuperscript{44} Unfortunately, a controversial amendment was attached to it.\textsuperscript{45} By the time the author convinced the proponent of the amendment not to call the amendment, it was too late and the bill was never called. The author was back to the drawing board in 2009.

In 2009, the proposal was contained in Senate Bill 1057.\textsuperscript{46} Only five entities submitted written testimony concerning the bill.\textsuperscript{47} The Connecticut Association of Nonprofits summarily opposed it without explanation and the State of Connecticut Division of Criminal Justice opposed another technical amendment of the bill that it mistakenly believed applied in delinquency proceedings.\textsuperscript{48} Given that 2009 was a difficult budget session, the bill did not make it out of committee.\textsuperscript{49}

In 2009, the author published an article in the Connecticut Law Tribune entitled \textit{When Children Are Clients: Ethical Dilemmas Emerge in Child Protection Proceedings}.\textsuperscript{50} This effort to "educate" the bar and others on the issue may have backfired in that the family bar became aware of the CCPA's agenda. Since the COCP's enabling legislation also referenced the need for standards for state paid lawyers in family matters cases and the COCP was responsible for "qualifying" attorneys and GALs to represent children in divorce and custody matters when the parents were indigent, they were concerned that the legislation would eventually extend to eliminate the "hybrid" role of attorneys for minor children enunciated in \textit{Carrubba}.\textsuperscript{51} Apparently there was some backroom opposition mounted. In addition, the proposal was now opposed by the very legislator who had originally introduced it in 2008.


\textsuperscript{48} See Div. of Criminal Justice, Testimony of the Division of Criminal Justice: S.B. 1057, at 3 (Mar. 2, 2009).


\textsuperscript{51} 2007 Conn. Acts 3 (Reg. Sess.); \textit{Carrubba v. Moskowitz}, 877 A.2d 773, 783 (Conn. 2005). "Upon a finding that a party is unable to afford counsel [in a family relations matter], the judicial authority shall appoint . . . an attorney to provide representation from a list of qualified attorneys provided by the Chief Child Protection Attorney." 2007 Conn. Acts 3.
She expressed pessimism about the ability to form an attorney-client relationship with minors due to their poor judgment and inconsistent positions. Also, some of the contract attorneys disagreed with a provision in the proposal that allowed the court to raise the issue of a conflict or the need for a separate GAL. The latter provision was a result of a compromise with the Judicial Department, as well as concern over the fact that in 2008 DCF had suggested this amendment to the bill. The Judicial Department was concerned about losing a best interest advocate. It wanted any amendment to clarify that judges had the authority to appoint a GAL in the event counsel for the child was not requesting one but that the court needed information from an objective source. Courts were already appointing separate GALs on occasion without a request from counsel for the child even though the existing statute did not expressly authorize *sua sponte* appointments or another party to raise the issue. In addition, the Supreme Court of Connecticut’s decision in *In re Christina M.* held that courts did have an obligation to appoint a separate GAL absent a request from counsel when there was sufficient evidence on the record of a conflict. Since the critical goal of the proposal was to secure a loyal and zealous advocate for each child’s wishes in the courtroom, and the language of the proposed amendment required a finding of impaired judgment and risk of substantial harm, before the court could exercise that discretion, from the author’s perspective, it was an easy concession to secure Judicial Department support. Unfortunately, even with the Judicial Department’s official support, reservations communicated to the Judiciary Committee leadership by a fellow legislator resulted in the proposal dying in committee.

After the 2011 defeat, in preparation for the 2011 Legislative Session, the author attended a Connecticut Bar Association Family Section meeting in order to explain the need for the amendment to section 46b-129a of the *General Statutes of Connecticut* on behalf of children involved with DCF, to assure members of the family bar that the COCP had no intention of getting


54. *See id.* at 1.

55. *See id.*

56. 908 A.2d 1073 (Conn. 2006).

57. *Id.* at 1086.

involved in the role of counsel debate in the dissolution and custody context, and to answer any questions they had. The author also undertook to revitalize the all but defunct Children and the Law Committee of the Connecticut Bar Association (CBA). Given the fact that the COCP’s legislative agenda had garnered more attention and opposition since 2008 when it almost quietly passed into law and the lack of a constant presence on the legislative lobbying floor, the author determined that it would be critical to gain support from the CBA House of Delegates and its lobbying efforts. The Secretary of the JMTLA, who was the instigator of the suit against the Judicial Department and a major proponent of the establishment of the Commission, Douglas Monaghan, agreed to volunteer with the CBA to serve as the new Chair of the Committee. At the first meeting of the “new” Children and the Law Committee, the proposal to amend section 46b-129a of the General Statutes of Connecticut—to provide traditional client-directed representation—became part of the Committee’s legislative agenda along with, the advocacy for the COCP’s budget in order to ensure the improvements put in place continued and for a new permanency option to termination of parental rights—permanent guardianship. In fact, the Committee voted to amend the proposal to eliminate the seven-year age cutoff. The Committee requested a favorable vote from the CBA House of Delegates, and without any opposition from the Family Law Section, the request passed at the January 10, 2011 meeting of the House of Delegates.

With the lobbying efforts of the CBA and the unanimous support at the public hearing held on February 28, 2011, House Bill 6442 progressed.


62. See Monaghan, supra note 60.


through the session.\textsuperscript{65} One of its selling points during this extremely dire budget session was the fact that if the proposed standard for appointing a separate GAL—specifically requiring that the conflict concern substantial harm and a finding of impaired capacity—was implemented, fewer separate GALs would be appointed.\textsuperscript{66} This would translate into a cost savings. It appears this argument did resonate with legislators because instead of permitting the potential cost savings to remain in the budget for the program of legal representation, which was deficient, an amount equal to the estimated cost savings was subtracted from the Child Protection Commission’s budget for GALs.\textsuperscript{67} This approach was fortuitous of the unfortunate turn of events when House Bill 6442 was subsumed into the budget bill Public Act 11-51, which consolidated the COCP into the Public Defender’s Commission.\textsuperscript{68} So while the COCP died, one of its most important initiatives finally survived the legislative session and became law.\textsuperscript{69}

\textbf{III. CONCLUSION}

So while it remains to be seen under the new leadership of the system of legal representation in child protection cases how this new law will be implemented, the passage of this legislation remains a positive development in child welfare law in Connecticut. Hopefully, by joining the list of states that

\textsuperscript{65}. See \textit{e.g.}, \textit{An Act Concerning the Appointment of Counsel and Guardians ad Litem in Child Protection Matters, and the Appointment of Permanent Legal Guardians: Hearing on H.B. 6442 Before the Judiciary Comm.}, Feb. Reg. Sess. (Conn. 2011) (testimony of Carolyn Signorelli, Chief Child Protection Att’y for the State of Conn.). Each legislative session the author drafted extensive written testimony explaining the inherent conflict created by the dual capacity appointment and how that diminished the voice of children in child protection proceedings. The testimony also cited to the ABA Model Act, the Conferences at Fordham and UNLV and the NACC and ABA Standards of Practice. \textit{See id.} at 4 n.6. In 2011, borrowing from the ABA’s Litigation Section, Children’s Rights Committee’s Video on giving children a true voice (with permission), the author put together a PowerPoint presentation on “Why Lawyer’s for Children in Child Protection Matters Should Always Provide Client-Directed Representation,” and provided it to legislators. Presentation by Carolyn Signorelli, Chief Child Prot. Att’y, Why Lawyers for Children in Child Protection Matters Should Always Provide Client-Directed Representation, to State Legislatures (Oct. 19, 2011) (on file with \textit{Nova Law Review}).


\textsuperscript{68}. \textit{See} \textit{OFFICE OF LEGISLATIVE RESEARCH, supra} note 66, at 80, 82.

\textsuperscript{69}. \textit{See} id.
have client-directed attorneys for children, Connecticut will contribute to the momentum behind the ABA’s passage of the Model Act and more states will follow suit. For those states or programs considering adopting the Model Act or similar legislation, the author hopes this article will provide some important lessons about identifying and educating potential opponents and navigating the vagaries of the legislative process.
IMPLEMENTATION OF THE RIGHT TO COUNSEL FOR CHILDREN IN JUVENILE COURT DEPENDENCY PROCEEDINGS: LESSONS FROM KENNY A.

IRA LUSTBADER*
ERIK PITCHAL**

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I. INTRODUCTION

For more than 400,000 children currently in the custody of state-run foster care systems,¹ and for over a million more who will become subjects of dependency court litigation in the next decade,² the American Bar Associ-

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² Based on data from forty-three states, 17.6% of child victims had court actions in 2009. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009 85 (2009), available at http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf. In the same year, an estimated “702,000 . . . children were victims of maltreatment.” Id. at 21. Additionally, an estimated 98,339 child victims had court actions in 2009. Id. at 93. If the maltreatment num-
The ABA's 2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings offers tremendous hope. To be sure, the 2011 Model Act is a ringing reaffirmation of the ABA's 1996 pronouncement of what child advocacy should look like. However, the 2011 Model Act is also a concession by the ABA that the promulgation of standards of practice was insufficient to convince states to actually provide adequate, effective, and zealous counsel to all children in the child welfare system. With the 2011 Model Act, the ABA now takes the official policy position that states should implement a very specific approach to child representation—one that guarantees that all children in dependency cases are provided a lawyer who is well trained, decently paid, committed to the fundamental principles of lawyering, and who has a reasonable caseload.

Unquestionably, the practice of child welfare law has matured greatly in the forty years since the Child Abuse Prevention and Treatment Act first required states to provide a "guardian ad litem" to all children in dependency cases, as a mandate in exchange for each state's receipt of federal financial support for child abuse programs. Most states now require the appointment of a lawyer in these circumstances, and a variety of professional organizations, training programs, academic scholarship, and financial resources stay consistent. 983,390 child victims will have court actions over the next ten years. See id.


5. Sadly, there has not yet been any clear action at the federal level, either through specific federal legislation or through the judicial recognition of a federal constitutional right to counsel for children in all dependency proceedings.


are now available to support this advocacy work. The National Association of Counsel for Children (NACC), based in Denver, has over 2000 members—mostly child welfare lawyers and judges—and offers a certification program in thirty-one states, providing experienced attorneys an appropriate credential to show the world their expertise in child welfare law and elevate the reputation of the profession generally.12

Despite this progress, states’ performance in implementing the Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases (ABA Standards) lags. In a recent national report card by First Star and Children’s Advocacy Institution (CAI),13 assessing the degree to which states are fulfilling the promise of counsel for children, researchers determined that only eleven states earned an “A.”14 Fifteen states earned a “D” or “F,” and roughly one-third of the states do not require the appointment of counsel at all.15 Notably, the First Star and CAI report card only analyzed the law, not its implementation.16 Anecdotally, children’s lawyers around the nation—even in those states that earned an “A” on the First Star and CAI report card—regularly complain that they have far too many cases, not enough training, and inadequate pay.17 In short, it is well known in this field, if not openly recognized within the legal profession, that well-meaning and


14. Id. at 8.

15. See id.

16. Id. at 6.

17. Id. at 13–14.
talented lawyers who want to do the right thing for their child-clients are nonetheless committing malpractice every day.

At the very least, the 2011 Model Act provides an opportunity for renewed attention, energy, and commitment to the principle that every child who is the subject of an abuse or neglect petition should have an effective lawyer at all stages of his or her experience in the dependency courts. With its passage, advocates are well poised to press legislatures and court officials in many states to enact its language and fulfill its promises. Any state that adopts the 2011 Model Act is likely to earn an “A” on the next report card.

Importantly, the question remains whether an “A” for excellence in legislative drafting translates to something meaningful for children on the ground. Certainly, successful implementation will depend on who is involved in the translation effort and what steps they take. This essay describes one radical, systemic transformation of child advocacy—one that was inspired by the ABA Standards—and pushed in part by impact litigation—and how it happened. Because this change was grounded in core principles that later found animation in the 2011 Model Act, the story of how this overhaul happened may be instructive for those jurisdictions interested in implementing the 2011 Model Act. This is the story of the Kenny A. ex rel. Winn v. Perdue litigation.

II. Establishing the Right to Counsel

Anyone familiar with the American child welfare system knows of the significant challenges state and local governments have faced over the last forty years in safely and effectively caring for foster children. While a full recitation of the often sorry state of public child welfare systems is beyond the scope of this essay, it is worth noting that Kenny A.’s right-to-counsel narrative is part of a broader story of a failing foster care system in metropolitan Atlanta. As they had done successfully in many other jurisdictions, in 2002, lawyers from the national non-profit advocacy group, Children’s Rights—in conjunction with prominent local counsel—brought a class ac-

18. See 2011 MODEL ACT, supra note 3, § 3(a).
19. 218 F.R.D. 277 (N.D. Ga. 2003). The authors were part of the team of lawyers who represented the plaintiff foster children in Kenny A. Id. at 283. No confidential or privileged material is described in this essay.
21. The authors would be remiss if they did not recognize the extraordinary contribution of Jeffrey O. Bramlett, an attorney and partner at the firm of Bondurant Mixson & Elmore, L.L.P. in Atlanta, who has continued to serve as co-lead counsel from the very beginning of
tion suit on behalf of all 3000 foster children in the custody of Georgia's child welfare agency whose cases originated in Fulton and DeKalb Counties. The claims that would become known as the “state case” alleged that as a direct result of systemic agency failures, Georgia officials—in their official capacities—were violating the federal constitutional and statutory rights of children to be safe while in state custody in foster care, to receive required services, and to be provided opportunities for and efforts toward finding a permanent home. As with Children's Rights' other cases, the allegations lodged against the Georgia system were deservedly explosive: Children who had been removed from their parents' homes for their own safety were being severely abused, horribly neglected, denied basic health care and educational services, and left to languish for years if not their entire childhood in state custody. The complaint laid out the utter brokenness of the State's Department of Human Resources and its statewide Division of Family and Children's Services, as operated in metropolitan Atlanta (Fulton and DeKalb Counties).

Of course, no child ends up in foster care without the approval of a juvenile court judge; and as plaintiffs' counsel investigated the problems in the Atlanta area foster care system, they discovered that the provision of counsel for foster children in the Atlanta juvenile courts was illusory. Indeed, those charged with protecting individual foster children's interests during the pendency of their child protection cases in juvenile court—the "child advocate attorneys"—were unable to perform the minimum duties one might expect of them, due to crushing caseloads of 500 or more children per lawyer. The children were thus “caught in the grip of an uncaring, unconstitutional vice

The Kenny A. reform campaign, and actively illustrates the power of partnership between the private bar and public interest organizations in civil rights reform litigation.


23. First Amended Complaint, supra note 22, at 3-6, 34-37; see Kenny A., 218 F.R.D. at 283.

24. See First Amended Complaint, supra note 22, at 3-5.

25. See generally id.


27. First Amended Complaint, supra note 22, at 5; Pitchal, supra note 26, at 669.
where even their own putative advocates were unable to help them." 28 Advocates for children in metropolitan Atlanta were galvanized by the need for significant reform in the representation of children in the juvenile court. Because Georgia law makes each of the 159 counties responsible for providing lawyers in juvenile court proceedings to litigants who cannot afford them, plaintiffs in Kenny A. named Fulton and DeKalb Counties as defendants, in addition to state officials. 29 The right-to-counsel aspect of the lawsuit thus became known as the "county case."

The county case was aggressively litigated. During discovery, plaintiffs deposed several key leaders in the counties, including the Fulton County Juvenile Court Administrator and the Chief Judge of the DeKalb County Juvenile Court. 30 Plaintiffs' counsel also deposed child advocate attorneys from each county, learning more details about their inability to, among other things, meet each client on their caseload and conduct robust, independent investigations of each case. 31 One of the attorneys characterized the task of meeting with each child client as "aspirational." 32 Plaintiffs' counsel also deposed the then-executive director of the NACC regarding the NACC's recommendation that a full-time children's attorney in dependency court should have no more than 100 open child clients at any time, including adequate support staff. 33 By the time discovery ended, caseloads were down to an average of 439 in Fulton County and 183 in DeKalb County—lower than

28. Pitchal, supra note 26, at 669 (describing Kenny A. litigation). The "vice" turned out to be an important element of the complaint when it came to staving off the state's motion to dismiss on Younger abstention grounds. See Kenny A., 218 F.R.D. at 285–87; State Defendant's Motion to Dismiss at 1–2, Kenny A. ex rel. Winn v. Perdue, No. 1:02-CV-1686-MHS (N.D. Ga. Nov. 4, 2002). Under the Younger abstention doctrine, providing a rare and extraordinary exception to a federal court hearing cases properly before it, Younger v. Harris, 401 U.S. 37, 41 (1971), federal courts must abstain from deciding cases when, among other things, to do so would interfere with an ongoing state court proceeding involving the same litigants. In Kenny A., plaintiffs successfully argued that the Younger test was not met, among other things, because—as alleged in the complaint—they were not able to obtain any meaningful relief in Juvenile Court on account of their advocates' overwhelming caseloads. Kenny A., 218 F.R.D. at 287. The court was also persuaded that the defendants had waived any abstention argument when they voluntarily removed the case from state court to the federal forum. Id. at 285.

29. First Amended Complaint, supra note 22, at 9–13; Pitchal, supra note 26, at 667–69.


32. Id. at 1363.

33. Id. at 1362; NAT'L ASS'N OF COUNSEL FOR CHILDREN, supra note 9, at 7.
at the initiation of the case, but still well above the NACC recommendation.\textsuperscript{34} At the close of discovery, the counties moved for summary judgment, essentially arguing that foster children in Georgia do not have the right to counsel in juvenile court dependency cases.\textsuperscript{35} Because children lacked this right—the argument went—the counties’ decision to provide lawyers who may be practicing below minimum standards was of no legal significance.\textsuperscript{36} Thus, the first challenge of the case—and the first major victory—was to establish, as a matter of law, that foster children have the right to a lawyer in dependency court.\textsuperscript{37} Plaintiffs’ right-to-counsel claim was based on the Georgia State Constitution’s due process clause, but the district court analyzed the issue under the \textit{Mathews v. Eldridge}\textsuperscript{38} test because under Georgia law, due process protections are co-extensive with the federal analogue.\textsuperscript{39} \textit{Mathews} teaches that when determining whether a given procedural protection is required, courts must balance three factors: 1) the liberty interest at stake; 2) the risk of erroneous results without the desired protection; and 3) the state’s interest, including fiscal considerations.\textsuperscript{40} As one of us has previously written,\textsuperscript{41} the court’s decision in \textit{Kenny A.} was as straightforward in approach as it was remarkable in outcome. Finding that foster children have a liberty interest at stake in all dependency cases,

\textsuperscript{34} \textit{Kenny A.}, 356 F. Supp. 2d at 1356; NAT’L ASS’N OF COUNSEL FOR CHILDREN, \textit{supra} note 9, at 7. There were two reasons for the drop in caseloads. First, there was a decline in the foster care census—something that was outside the control of the counties—a trend that continued in the years following. \textit{See} JAMES T. DIMAS & SARAH A. MORRISON, \textit{PERIOD 10 MONITORING REPORT} 126, 128 (2011) [hereinafter \textit{STATE TENTH PERIOD MONITORING REPORT}], available at http://www.childrensrights.org/wp-content/uploads/2011/06/2011-0606_ga_period_10_monitoring_report.pdf. Second, between the filing of the case and the resolution of the summary judgment motion, DeKalb County—the smaller of the two—had hired an additional three child advocate attorneys, bringing their total staffing to five. \textit{See Kenny A.}, 356 F. Supp. 2d at 1356, 1356 n.3.


\textsuperscript{36} \textit{See generally id.}

\textsuperscript{37} \textit{See generally id.} Less challenging was prevailing on the related argument that if there is a right to counsel, then there is also a right to \textit{effective} counsel. \textit{See} Evitts v. Lucey, 469 U.S. 387, 395 (1985) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel." (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (internal quotation marks omitted))).

\textsuperscript{38} 424 U.S. 319 (1976).

\textsuperscript{39} \textit{See Kenny A.}, 356 F. Supp. 2d at 1355, 1360; Hood v. Carsten, 481 S.E.2d 525, 527 (Ga. 1997).

\textsuperscript{40} \textit{Mathews}, 424 U.S. at 321.

\textsuperscript{41} \textit{See} Pitchal, \textit{supra} note 26, at 675.
due to the possibility that they could be placed by the public agency in an environment restrictive of their physical movements, and finding that the imprecise standards used in juvenile court proceedings led to an unacceptably high risk of erroneous outcomes, the court held that no remedy short of appointing a lawyer to every child would suffice for constitutional purposes. If anything, the court could have better justified its decision by defining children's liberty interests far more broadly, which would have perhaps been more persuasive to other courts considering the same issue in the future. In any event, upon holding that foster children in Georgia have the right to counsel in all abuse, neglect, and dependency proceedings, the court concluded that plaintiffs had demonstrated a genuine issue of material fact as to whether they were receiving effective assistance of counsel, making summary judgment for the defendants inappropriate.

III. DEFINING EFFECTIVE COUNSEL FOR CHILDREN

Once the court denied the counties' summary judgment motions, the parties quickly came to the settlement table to discuss a mutually agreeable outcome. Separate mediated settlement negotiations were held with each county, as the factual and political landscape in each locale was quite different. After several months of negotiations, separate consent decrees were agreed to, and following preliminary approval, notice, and a fairness hearing, the district court so-ordered them. The main features of the decrees are summarized in this table:

43. See Pitchal, supra note 26, at 681.
46. See DeKalb County Notice of Proposed Settlement, supra note 45, at 2; Fulton County Notice of Proposed Settlement, supra note 45, at 2.
In addition to the substance, both decrees had detailed provisions regarding enforcement and duration. Generally speaking, each county had to be in substantial compliance with the caseload, staffing, and performance standards.
provisions for a sustained period of eighteen months before it could request an exit from the federal court. 51

With respect to the caseloads in Fulton (caseloads in DeKalb County were limited to 130) the workload study (conducted by the University of Georgia) concluded that there were too many additional factors that impacted the efficiency of child advocate attorneys to settle on one static caseload maximum. 52 Instead, the study identified a list of structural impediments within the Juvenile Court and the state’s public child welfare agency (“external” problems), as well as ongoing issues within the Child Advocate Office (“internal” concerns). 53 The study concluded that if no reforms took place, then the maximum caseload for child advocate attorneys should be eighty child-clients at a time. 54 If the internal issues were resolved, then the caseloads could appropriately rise to 100 per attorney, and if the external impediments were also removed, then child advocate attorneys could effectively represent up to 120 child-clients at any one time. 55 Neither party objected to the workload study’s conclusions, so its recommendations were incorporated automatically into the consent decree as enforceable caseload requirements. 56

The performance standards required by both decrees are the type of lawyering tasks that have wide acceptance in the field as fundamental activities required of all attorneys representing children. Indeed, as the decrees were being drafted and negotiated, we relied explicitly on the ABA Standards, 57 and in many cases incorporated the ABA’s approach verbatim. 58 For example, both decrees require the child advocate attorney to “establish and maintain an attorney-client relationship” with the child-client. 59 These provisions were inspired by ABA Standard C-1, which states that “[e]stablishing and maintaining a relationship . . . is the foundation of representation” and calls on children’s lawyers to meet with their clients—regardless of age—before

51. DeKalb County Consent Decree, supra note 48, at 9–10; Fulton County Consent Decree, supra note 49, at 9.
53. See id. at 67–70.
54. Id. at 4.
55. Id.
56. See Fulton County Consent Decree, supra note 49, at 6–7.
57. See STANDARDS OF PRACTICE, supra note 4, at 1–15.
58. See DeKalb County Consent Decree, supra note 48, at 3, 5–6; Fulton County Consent Decree, supra note 49, at 3–4.
59. DeKalb County Consent Decree, supra note 48, at 6; Fulton County Consent Decree, supra note 49, at 3.
court hearings and whenever a case development warrants it. Not surprisingly, the 2011 Model Act has a similar requirement. Other provisions in the decrees that came directly from the ABA Standards (and were later codified in the 2011 Model Act) included: file pleadings, request services by court order if necessary, enforce compliance with court orders that favor the client, negotiate settlements, and participate in appeals.

The county case, along with the state case, plainly met the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(2), and indeed the Kenny A. litigation was directed at reforming a system in which agency-wide (state case) and county-wide (county case) failures harmed children and exposed them all to risks of harm in violation of their rights. Discretion in individual cases—or, unfortunately, the absence of discretion—was occurring within a fundamentally broken system. However, in terms of implementing the right-to-counsel remedy in the county case, the parties agreed that the exercise of professional legal discretion did not require every lawyering task to be done on every case. Thus, the language in the consent decrees around practice standards provided some flexibility. For example, in DeKalb, most performance standards were said to be required as “necessary in the reasonable exercise of professional judgment.” An exception was to “establish and maintain an attorney-client relationship” with each child as the parties agreed
that this was something that simply had to be done in every case. 71 Similarly, in Fulton, many of the standards were applicable "[w]here appropriate and necessary to the case," though again, the requirement to meet with and establish an attorney-client relationship with the child was required in every case. 72

71. Id. at 6.
72. See Fulton County Consent Decree, supra note 49, app. A at 4. The parties did not negotiate for a specific provision regarding the role that the child advocate attorneys should play—client-directed or "best interests." See id. app. A at 3–4; DeKalb County Consent Decree, supra note 48, at 5. It certainly would have been a reasonable position to argue that "right to counsel" means the right to a traditional lawyer who operates in accordance with the ABA Model Rules of Professional Conduct, including Rule 1.14's directions concerning the representation of a client with a disability (such as minority). See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2011). Instead, as implemented, Kenny A. focused more on the right to have a lawyer functioning as an attorney—establishing a relationship, investigating the case, developing a theory, and being a zealous advocate. See DeKalb County Consent Decree, supra note 48, at 6; Fulton County Consent Decree, supra note 49, at 3. If the position advocated was the lawyer's view of the client's best interests as opposed to the child's wishes, the parties were content to let that lie. See DeKalb County Consent Decree, supra note 48, at 5–6; Fulton County Consent Decree, supra note 49, at 3. As it turned out, the DeKalb Child Advocate Office took the following position regarding the role of its lawyers:

Counsel's principal duty is to zealously advocate for the client's best interests. The lawyer's duty is to form a principled position of the child's best interests and advocate for that position. Nevertheless, the child advocate attorney also has an obligation to inform the court of the child's desires, even when the child's wishes diverge from the attorney's determination of the child's best interests. The determination of a child's best interests must be formed by an explicit analysis of the actual available options.

DeKalb County Consent Decree, supra note 48, app. B at 3–4. Fulton took a view somewhat closer to the 1996 ABA Standards:

In Fulton County, child advocate attorneys represent the best interests of the child, while at the same time representing the child's expressed preferences. This model allows the child to explain what he or she believes is in his or her best interests. If the child advocate determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the child advocate attorney may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference as the child's attorney, unless the child's position is prohibited by law or without any factual foundation.

For the objective “input” requirements of the right-to-counsel decrees such as caseloads, staffing, and training, a neutral monitor was required to review and validate county data and records. However, assessing the counties’ performance with the agreed-upon lawyering standards required the involvement of a neutral party to essentially look over the shoulders of the attorneys. In each county, an “Accountability Agent” was selected to determine whether or not the lawyers were practicing in accordance with the input requirements and performance standards. On the latter, if in a given case a lawyer did not file a particular motion, for example, it would also be up to the accountability agents to determine if this was a reasonable exercise of professional judgment or a practice error outside such judgment.

IV. IMPLEMENTING THE RIGHT TO COUNSEL

Designing a monitoring regime that balanced the imperative to assess the quality of counsel with the need to respect legal professional judgment was challenging, and made more difficult because Kenny A. was sui generis. The implementation phase of the county case raised an interesting performance question: Assuming that it is possible to judge quality lawyering in the first place, how “good” is “good enough”? In other words, what is the minimum quality job performance that would still be considered “effective” under the consent decrees and would satisfy children’s procedural due process rights? Certainly, the assertion by one of the deponents early in the litigation that meeting each of her clients was “aspirational,” if considered a normative claim, would be repugnant. But is there a difference between “best practices” and the constitutional minimum? The Kenny A. decrees and the monitoring protocols developed to implement them did not address this issue directly.

73. Fulton County Consent Decree, supra note 49, at 7. After delineating the many duties of a child’s lawyer, the 2011 Model Act notes that “lawyers must have caseloads that allow realistic performance of these functions.” 2011 MODEL ACT, supra note 3, § 7(b) cmt.
74. See Fulton County Consent Decree, supra note 49, at 8.
75. See id. For Fulton County, the parties agreed on the appointment of Judge William Jones, a retired dependency judge from North Carolina with a national reputation. Id. at 7. For DeKalb County, the parties selected Karen Beatrice Baynes-Dunning, a former Georgia juvenile court judge and Associate Director of the Governmental Services Division at the University of Georgia’s Carl Vinson Institute of Government. DeKalb County Consent Decree, supra note 48, at 6, 11.
77. See id. app. A at 1.
78. See generally Fulton County Consent Decree, supra note 49. Nor did they need to as a legal matter. A clear line of Supreme Court precedent allows parties to a consent decree to agree and enforce terms beyond federal constitutional or statutory minima, and plaintiffs are
In both counties, after the accountability agents verified that the structural requirements of the decrees had been met—and both defendants complied with the staffing and caseload obligations in relatively short order79—their focus turned to assessing compliance with the performance standards not required to re-prove constitutional violations in an original complaint against challenges over compliance with a decree that goes beyond such minima. See Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 439-40 (2004) (showing the remedy was one that the defendant state officials "had accepted when they asked the District Court to approve the decree" and "[o]nce entered, a consent decree may be enforced"); Suter v. Artist M., 503 U.S. 347, 354 n.6 (1992) ("[P]arties may agree to provisions in a consent decree which exceed the requirements of federal law.") (citing Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992)); Rufo, 502 U.S. at 389-90 ("The position urged by [the defendants] 'would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements.'" (quoting Plyler v. Evatt, 924 F.2d 1321, 1327 (4th Cir. 1991))); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."). The Supreme Court's decision in Horne v. Flores, 129 S. Ct. 2579, 2594-95 (2009)—in which the Court, in the context of Fed. R. Civ. P. 60(b)(5), instructed lower courts to evaluate whether a "durable remedy" had been achieved and to make sure that "responsibility for discharging the State’s obligations is returned promptly to the State and its officials" when the circumstances warrant—did not alter this precedent. See, e.g., Juan F. v. Rell, No. 3:89-CV-859, 2010 WL 5590094, at *3 (D. Conn. Sept. 22, 2010) ("Horne . . . did not turn 60(b)(5) motions into vehicles to relitigate the original claims of the underlying litigation, in an effort to determine whether ongoing violations of federal law exist."); Evans v. Fenty, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) (emphasizing that a court "may not rewrite the existing consent orders so as to reduce defendants’ promise to some ill-defined constitutional floor"); see also LaShawn A. ex rel. Moore v. Gray, 412 F. App’x 315, 315 (D.C. Cir. 2011) (per curiam) (affirming the district court’s rejection of a claim under 60(b)(5) of “durable statutory compliance” under Horne).

79. See KAREN B. BAYNES, DEKALB COUNTY CHILD ADVOCACY CENTER COMPLIANCE REPORT 4-5 [hereinafter DEKALB COUNTY FIRST PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/06/2007-0724_ga_dekalb_1st_compliance_report.pdf (last visited Feb. 26, 2012); WILLIAM G. JONES, THIRD KENNY A. REPORT FOR FULTON COUNTY 4-8 (2009) [hereinafter FULTON COUNTY THIRD PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2009/11/2009-10-30_ga_fulton_county_third_period_monitoring_report.pdf. DeKalb was in compliance with the caseload standard of 130 almost from the day the court so-ordered the decree, as officials there increased staffing dramatically even before the summary judgment motion was decided. See DEKALB COUNTY FIRST PERIOD MONITORING REPORT, supra at 4-5. Fulton lagged behind somewhat, as the structural impediments identified by the authors of the Workload Study remained in place for approximately eighteen months, triggering a caseload obligation of eighty. See FULTON COUNTY THIRD PERIOD MONITORING REPORT, supra at 5, 18. It was not until the Third Monitoring Report found that all of the structural blocks had been removed that the caseload requirement changed to 100. See id. at 18.
set forth in each decree. They did this by looking carefully at a sample of individual cases, assessing whether the attorneys' performance on a variety of measures was acceptable in each case, and then aggregating the data to get a systemic view of quality. It was left to the parties to decide whether the accountability agents' findings would support a judicial finding of "substantial compliance" with the consent decrees in the legal sense; by agreement of the parties, the accountability agents did not draw this ultimate legal conclusion themselves.

Constructing a metric for assessing lawyer performance was a challenge, but a familiar one for anyone charged with determining compliance with a standard as opposed to a rule. Courts, of course, are used to working in the world of standards. The advantage of having a rule as opposed to a standard is that it provides clarity as to what is expected and how one's performance will be measured. The child advocate attorneys and attorney supervisors in DeKalb and Fulton certainly wanted clarity, but they also wanted flexibility. For example, the DeKalb County decree required attorneys "[t]o establish and maintain an attorney-client relationship with each Class Member client and to maintain such contacts with the client as are necessary in the reasonable exercise of professional judgment to ensure adequate and effective legal representation." The Fulton County decree contained similar language. One could easily imagine a rule that would operationalize this standard more concretely such as: The child advocate attorney shall meet with each client within thirty days of the case opening, once a quarter thereafter, and within ten days of any placement move. This rule would provide clarity to the lawyer about

80. See DeKalb County First Period Monitoring Report, supra note 79, at 5–7; Fulton County Third Period Monitoring Report, supra note 79, at 13–14, 64–66.
82. DeKalb County Consent Decree, supra note 48, at 10–11; Fulton County Consent Decree, supra note 49, at 7–9.
83. See DeKalb County First Period Monitoring Report, supra note 79, at 23; Fulton County Third Period Monitoring Report, supra note 79, at 5.
84. See DeKalb County Consent Decree, supra note 48, at 5–6; Fulton County Consent Decree, supra note 49, app. A at 1.
85. DeKalb County Consent Decree, supra note 48, at 6.
what is expected and to the monitor about what to look for. However, in the context of legal services, the parties decided against a minimum number of contacts and instead agreed upon implementation and measurement that was flexible.

The accountability agent in each county constructed a protocol to analyze several dozen lawyer activities—activities that came from the requirements of each respective decree. In both counties, a random sample of cases was selected during each monitoring period—approximately every six months—to be reviewed using the protocol. A numerical scale was created, and each activity in each case was scored on the scale. In DeKalb, the accountability agent looked at the child’s attorney file for each case in the sample and then interviewed the attorney to get a better understanding of what did and did not occur in that particular case. The accountability agent assigned a score of zero to four for each item on the protocol for each case and aggregated the data by item. The Fulton accountability agent also used a protocol for file reviews, but supplemented this with a separate protocol, which he used to assess in-court performance. He used a scale of zero to three for each item on these protocols.

87. See 2011 Model Act, supra note 3, § 7(b)(5), (8). The 2011 Model Act requires lawyers to meet with child-clients before every court hearing, after every placement change, and at least once a quarter. Id.
88. See DeKalb County Consent Decree, supra note 48, at 5–6; Fulton County Consent Decree, supra note 49, app. A at 1, 3–5.
90. DEKALB COUNTY SECOND PERIOD MONITORING REPORT, supra note 89, at 2; FULTON COUNTY FIRST PERIOD MONITORING REPORT, supra note 89, at 49.
91. DEKALB COUNTY SECOND PERIOD MONITORING REPORT, supra note 89, at 2; e.g., FULTON COUNTY FIRST PERIOD MONITORING REPORT, supra note 89, at 49, 51–52.
92. An item scored “0” was deemed not applicable for that given case. DEKALB COUNTY FIRST PERIOD MONITORING REPORT, supra note 79, at 8. Otherwise, “1” was for poor performance, “2” for needs improvement, “3” for satisfactory, and “4” for excellent. Id.
93. Id.
94. DEKALB COUNTY SECOND PERIOD MONITORING REPORT, supra note 89, at 14.
95. FULTON COUNTY FIRST PERIOD MONITORING REPORT, supra note 89, at 49; FULTON COUNTY THIRD PERIOD MONITORING REPORT, supra note 79, at 14.
96. FULTON COUNTY THIRD PERIOD MONITORING REPORT, supra note 79, at 14. Initially, the Fulton agent used a zero-to-four scale similar to that in the DeKalb study. See FULTON...
The accountability agents operationalized the requirement to "establish and maintain an attorney-client relationship," for example, by looking for evidence of meetings with clients and content containing the client's position. In reviewing the DeKalb files, the accountability agent looked for content evidencing "client interviews" and also assessed whether the attorney notes contained the "child's position." She rated each file on the zero-to-four scale for these items. Similarly, in Fulton, the file review protocol looked at child interviews, but there were five separate items assessed under this category, including the: 1) child's position, 2) number of contacts, 3) explanation of the court process, 4) length of contact, and 5) attorney-client relationship. The court observation protocol contained an item called "[c]ourt informed of [c]hild's [p]osition." All of these items were rated on the Fulton zero-to-three scale.

This approach to monitoring lawyer performance raised interesting measurement challenges. For a given case, what distinguishes "client interviews" that need improvement from those that are satisfactory? From an attorney file alone, is it possible to say that an attorney's explanation of the court process to a ten year-old met expectations, as opposed to exceeded them? What factors are used to determine whether the overall attorney-client relationship met expectations? The parties simply trusted the neutrality and experience of the accountability agents to be able to assess performance, giving appropriate deference to the professional judgment of the attorneys, while still holding them accountable for a certain base level of performance.

97. See DeKalb County Second Period Monitoring Report, supra note 89, at 24, 27.
98. Id.
100. Fulton County First Period Monitoring Report, supra note 89, at 59.
101. Id. at 70.
102. Fulton County Fourth Period Monitoring Report, supra note 72, at 74.
103. The consent decrees did not preclude challenges to the findings of the respective accountability agents. See DeKalb County Consent Decree, supra note 48, at 6–8; Fulton County Consent Decree, supra note 49, at 6. Additionally, the accountability agents shared drafts of their findings and each of their monitoring reports for comment before finalizing them and before they were filed with the court. See, e.g., DeKalb County Second Period Monitoring Report, supra note 89, at 13. As it turned out, the parties never disputed the findings. See generally DeKalb County Third Period Monitoring Report, supra note 81;
The aggregation of this data presented a legal enforcement challenge and, at least in theory, a constitutional question. If, for example, in 75% of cases the number and length of the contacts were satisfactory or better, but in only 30% of cases did the attorney satisfactorily explain the court process, has there been effective assistance of counsel in the constitutional sense? What percentage of items, in what percentage of cases, have to be at the "satisfactory" level or higher to say that there has been "substantial compliance" with the decree? To say that constitutionally effective representation has been provided? To say that the 1996 ABA Standards or the 2011 Model Act standards have been met?

The parties never had to confront these questions in Kenny A. because the conclusions that could be drawn from each monitoring report were quite clear. DeKalb showed evidence of compliance with the decree from the first monitoring report and sustained this level for eighteen months, entitling it to court-approved exit from court supervision. Fulton initially struggled to meet the caseload requirements of its decree, and it took multiple monitoring reports before it began to show consistent compliance with the performance requirements. Once it demonstrated compliance with the quality standards, there was no dispute, and after sustaining its performance for eighteen months, Fulton also exited with court approval.

The changes over the life of the Kenny A. litigation in both counties' approaches to child advocacy and actual performance were remarkable. In 2002 when the case was filed, the child advocate attorneys had upwards of 500 clients each, could not have possibly—and had not—met most of their clients, and had no support staff, investigators, or access to social workers or...
independent experts. They were hired and supervised directly by the Juvenile Court judges before whom they appeared, often functioning more as courtroom managers than as advocates or lawyers. Fulton County had four lawyers with virtually no support, and DeKalb County had two. In contrast, when DeKalb exited in 2008, attorneys there had caseloads ranging from sixty-five to ninety. There was an independent Child Advocacy Center staffed by a director and eleven full-time case-carrying attorneys—including two supervisors, as well as four investigators and four paralegals; regular internal performance reviews were being conducted, with corrective action plans instituted where appropriate; attorneys attended trainings on a regular basis on child welfare law and related topics, at both local and national conferences; and the level of advocacy was consistently high. In the words of the DeKalb accountability agent, "[t]here is a systemic and deliberate process of quality improvement that while originally mandated [as part of] the consent decree, has now become [part of] the culture of the [Child Advocacy] Center."

Likewise, by the time Fulton exited in 2011, all internal reforms called for by the workload study had been implemented, triggering a caseload maximum of 100, caseloads were in fact consistently far under 100, an independent Child Advocate Board had been established under county government, which was responsible for hiring and supervising the director of the Child Advocate Office; the Child Advocate Office was staffed with the director, sixteen full-time attorneys—including one supervisor, four administrative support staff, four investigators, two social services coordinators, and one educational advocate; the staff participated in a variety of comprehensive training courses; the rate and number of client contacts and attorney

109. Georgia County Exits Court Oversight After Reform of Legal Representation for Foster Children, supra note 106.
110. Id.
111. See Georgia’s Fulton County Poised to Exit Court Oversight, supra note 108.
112. See Georgia County Exits Court Oversight After Reform of Legal Representation for Foster Children, supra note 106.
113. Id.
114. DEKALB COUNTY SECOND PERIOD MONITORING REPORT, supra note 89, at 3.
115. Id. at 12–13.
116. DEKALB COUNTY FIRST PERIOD MONITORING REPORT, supra note 79, at 6.
117. DEKALB COUNTY SECOND PERIOD MONITORING REPORT, supra note 89, at 5.
118. DEKALB COUNTY THIRD PERIOD MONITORING REPORT, supra note 81, at 6.
119. Georgia’s Fulton County Poised to Exit Court Oversight, supra note 108.
120. Id.
121. FULTON COUNTY SECOND PERIOD MONITORING REPORT, supra note 103, at 40.
122. FULTON COUNTY FOURTH PERIOD MONITORING REPORT, supra note 72, at 21.
123. Id. at 42–51.
participation in extra-judicial meetings and proceedings was exceptionally high; and for most of the items on the attorney file and court observation protocols, the accountability agent found the performance to meet or exceed expectations in well over 90% of the cases. Remarkably, during the final year of the consent decree, the assistant county attorney who had represented Fulton County throughout the Kenny A. case elected to leave his position and become the director of the Child Advocate Office, surely having been inspired by the level of practice the office had achieved and the challenge of sustaining it once the incentive of satisfying the federal court's order was gone.

A number of factors explain this dramatic turnaround and the counties' successful experience under the Kenny A. right-to-counsel reform effort. Clearly, a significant but-for cause was the existence of the litigation itself; there is no action quite like a civil rights class action to protect and remedy violations of the rights of vulnerable citizens by a government defendant. Securing the right to counsel and negotiating a favorable consent decree was only part of the litigation story, however; the implementation that followed was successful for independent reasons. First, the presence of the accountability agents in the case and the seriousness of purpose with which they approached their role cannot be overstated. Judge Baynes was local and was deeply familiar with the Georgia Juvenile Court and child welfare systems, and she had the credibility and back-up support from the University of Georgia. While Judge Jones was based in North Carolina, he spent countless days and weeks on-site in Fulton County, not only conducting his reviews but also offering meaningful technical assistance to the Child Advocate Office leadership and staff as they revamped processes and procedures and created a new culture of advocacy. Both Judges Baynes and Jones had enormous credibility with the parties from the beginning.

Second, there was complete commitment from local leadership; both within the new child advocacy structures in each county as well as the broader county government, and the county leaders involved in Kenny A. set their

124. See id. at 59, 61.
125. Id. at 75.
126. Id. at 19.
127. See DeKalb County Notice of Proposed Settlement, supra note 45, at 6.
128. Judge Baynes was also the author of the Fulton County Child Advocate Attorney Representation and Workload Study. Fulton County Consent Decree, supra note 49, at 6. Plaintiffs readily agreed to Fulton County’s request that a study be conducted in order to set the caseload requirements. Id. at 5. The fact that the study was so well done, by a respected former judge, who was part of a respected institute at the University of Georgia, eliminated the prospect of further litigation and created conditions for buy-in and conciliation. See id. at 6-7.
LESSONS FROM KENNY A.

sights early on full and sustained compliance. After trying a few different ways to structure the program, Fulton County ultimately settled on the creation of an independent Child Advocate Board to oversee the office, removing it from the Fulton County Juvenile Court.129 DeKalb hired a charismatic and passionate attorney to direct its new Child Advocacy Center,130 and she made compliance with the Kenny A. decree her number one management priority.

Third, while Plaintiffs’ counsel maintained the ability to enforce the decrees through contempt litigation (and had done so in the state case),131 the ongoing monitoring and negotiation process in the county case very quickly took on an atmosphere of open sharing of problems and collaboration among the parties, and the accountability agents effectively acted as both reporters of performance and conveners of the parties, sometimes by effectively utilizing shuttle diplomacy.132 This factor, without question in our view, limited the delay and expense of separate enforcement litigation.

Undoubtedly, compliance in both counties was aided by a fourth reason outside the parties’ control: a rapidly declining foster care census. Many of the problems in the delivery of effective, adequate, and zealous counsel flowed from grossly unmanageable caseloads. Because of changes at the state level (among other reasons), the overall caseloads that child advocate attorneys carried in DeKalb County dropped from approximately 900 when the case was filed to 750 when DeKalb exited in 2008,133 The decline in Fulton was from approximately 2000 when the case was filed to 1005 in 2010.134 Notwithstanding the enormous increase in staffing in both counties, the drop in the foster care census made the caseload ratios in the county decrees more quickly attainable.

129. Id. at 4–5.
132. See generally DEKALB COUNTY FIRST PERIOD MONITORING REPORT, supra note 79; FULTON COUNTY FIRST PERIOD MONITORING REPORT, supra note 89.
133. DEKALB COUNTY THIRD PERIOD MONITORING REPORT, supra note 81, at 7.
134. FULTON COUNTY FIRST PERIOD MONITORING REPORT, supra note 89, at 41; FULTON COUNTY FOURTH PERIOD MONITORING REPORT, supra note 72, at 25.
V. WHAT DIFFERENCE DOES A LAWYER MAKE?

Asserting the Kenny A. right-to-counsel claims in tandem with claims seeking comprehensive reforms in the state child welfare agency allowed the dangerously poor Atlanta foster care system to provide a compelling context for the need for counsel for children in the juvenile courts. As it turned out, Kenny A. offers something of a natural experiment in which to observe the impact of improvements in child advocacy with parallel improvements in outcomes for the lawyers’ clients. At the same time that the county case was progressing, the plaintiffs’ claims against the state—with respect to the operation of the foster care system in metropolitan Atlanta—were moving forward. The state case was settled with a negotiated consent decree in 2005, requiring the state to increase its performance on thirty-one outcome measures, many of them phased-in over several years, related to the safety, permanency, and well-being of class members. The State Consent Decree also included process and infrastructure requirements in many areas, including, among others, caseload limits for agency case managers and supervisors assigned to foster children; the investigation of reports of abuse or neglect; limits on the use of non-family placements—shelters, groups, homes, and institutions—for foster children; the oversight of private providers under contract with the state to deliver services for foster children; the delivery of medical, dental, and mental health for foster children; and the requirements of a child welfare management information system.

To date, in several areas of the State Consent Decree, significant progress has been made for foster children in DeKalb and Fulton County. For example, the State Consent Decree requires children who enter foster care along with one or more siblings to be placed together with all of their siblings; from 2006 to 2010, compliance increased from 73% to 94%. The State Consent Decree also requires the state to make appropriate ar-
rangements for parent-child visits when the child’s permanency goal is reunification;\textsuperscript{143} from 2007 to 2010, compliance increased from 25\% to 88\%.\textsuperscript{144} Additionally, according to data compiled by the state and verified by the court-appointed “Accountability Agents” in the state case, improvements have been made and sustained in placing foster children closer to their home communities and limiting the use of facilities and institutions as placements for foster children, especially young children.\textsuperscript{145}

The correlation between reforms in the right-to-counsel decrees from 2006 to 2010 and some of the positive outcomes for foster children under the state decree are striking. Needless to say, however, correlation does not necessarily indicate causation. Many variables contribute to success in child welfare outcomes. For example, while zealous advocacy by child advocate attorneys may well have contributed to keeping more siblings together in foster care or ensuring more visits with children and their parents, the continued pressure of the Kenny A. state case and increased resources and tools available to agency case managers likely played a role as well. Absent a tightly designed, randomized control group study—in which the control group gets “regular” advocacy, the experimental group gets a model of advocacy based on the requirements of the Kenny A. county decrees, and all other variables are controlled for—it would be nearly impossible to draw causal links between the “input” of adequate, effective, and zealous advocacy in the juvenile courts and measurable improvements in child welfare outcomes.\textsuperscript{146}

\textsuperscript{143} State Consent Decree, supra note 135, at 36.

\textsuperscript{144} STATE THIRD PERIOD MONITORING REPORT, supra note 142, at 41; STATE TENTH PERIOD MONITORING REPORT, supra note 34, at 45.

\textsuperscript{145} STATE TENTH PERIOD MONITORING REPORT, supra note 34, at 6, 102. To be sure, despite areas of progress, the defendants in the state case still lag in making required improvements in a number of areas, such as efforts to move children into permanent homes out of state custody, particularly through adoption; the timely investigation of reports of child abuse or neglect for foster children already in state custody; the delivery of mental health and development screens and treatment for foster children; and providing required services for children before they are discharged from custody. \textit{See id.} at 23–29, 53–59, 63–66, 93–97, 105–06, 110, 112–15.

\textsuperscript{146} At least one national project currently underway has the potential to evaluate the delivery of quality representation for children in dependency cases. \textit{Overview, QIC-ChildRep,} http://www.improvechildrep.org (last visited Feb. 26, 2012). “In . . . 2009, the U.S. Children’s Bureau [selected the] University of Michigan Law School [for] the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep).” \textit{Id.} According to the official website of the QIC-ChildRep, “[t]he QIC-ChildRep, is a five-year, [five] million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child’s legal representative, and provide one of the first empirically-based analyses of how legal representation for the child might best be delivered.” \textit{Id.}
Importantly, is such research even desirable to show the utility of adopting the 2011 Model Act? Even if one could design and conduct such research and draw causal inferences, it is not at all clear that such a project would be good for children or for the rule of law. The normative value of providing lawyers to those who face a significant liberty deprivation—the clarion promise of Gideon v. Wainwright,\textsuperscript{147} In re Gault,\textsuperscript{148} and Mathews—outweighs the cold calculus of whether or not these lawyers contribute, in the aggregate, to faster permanency or increased placements of siblings together, among other desirable outcomes. Firstly, the lawyer’s charge is to zealously represent the individual client, without regard to what, in the aggregate, constitutes a “good” outcome for a class of children. Indeed, the Kenny A. right to counsel litigation sought to establish a right to counsel, ensure lawyers had the tools to do their work—caseload caps, training, etc.—and ensure at least a minimal quality of lawyering in practice.\textsuperscript{149} The Kenny A. case never sought particular outcomes in individual cases.

Secondly, and perhaps more vitally, lawyers serve an inherently critical role in the justice system that far exceeds quantifiable outcomes, whether in the aggregate or in individual cases. To be sure, lawyers seek to achieve outcomes that can be said to be “good” for their clients.\textsuperscript{150} But they also directly and indirectly work zealously to protect, enhance, and champion their clients’ procedural rights. As a voice for the voiceless, lawyers for children—as well as lawyers for indigent clients throughout the civil and criminal systems—“make a difference” by telling clients’ stories and seeking justice regardless of outcomes. Regardless of how many criminal trials end in a guilty verdict, we do not question the value of defense lawyers’ advocacy merely because it cannot be proven that they achieve “good” outcomes for their clients.\textsuperscript{151}

\begin{footnotes}
\item[147.] 372 U.S. 335 (1963).
\item[148.] 387 U.S. 1 (1967).
\item[150.] This is true even for children’s lawyers in the dependency context, whether they follow a client-directed or a best interests model; the only difference is who gets to decide what a “good” outcome looks like—the client, or the lawyer. \textit{QIC Best Practice Model of Child Representation}, QIC-CHILDREP, http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx (last visited Feb. 26, 2012).
\item[151.] [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers
\end{footnotes}
VI. CONCLUSION: LESSONS LEARNED FROM KENNY A. FOR PROONENTS OF THE 2011 MODEL ACT

Unsurprisingly, many provisions of the 2011 Model Act are very similar to the 1996 ABA Standards. Because the Kenny A. county decrees drew upon the ABA Standards, anyone interested in implementing the 2011 Model Act can fairly look to the Kenny A. experience for lessons on how to put its principles into practice.

A. Implementation Matters

The right to counsel, like all rights—especially positive rights—requires ongoing, systematic attention to transform it from a principle into practice. In the absence of a meaningful implementation plan that addresses all core components, the right will at best be provided in an idiosyncratic, ad hoc way.

B. Caseloads Matter

By far the biggest controlled “input” under the right-to-counsel county decrees was the workloads of lawyers. Without question, at a certain level, caseloads become so high that the right to counsel is compromised. Before performance standards or other aspects of the right to counsel can be fully addressed, the caseload issue must be tackled.

C. Leadership Matters

Implementation of the right to counsel for all children in all dependency cases represents a major change in values for most jurisdictions. To be effective, the reform efforts must be led by creative, passionate, and dedicated
leaders who can simultaneously understand the big picture while focusing on
details. They need to be able to form and maintain good relationships with
many stakeholders while still being advocates for their program in order to
develop the internal capacity within the advocacy office for maintaining fi-
delity to the practice model and to be able to develop policies and proce-
dures, mentor staff, identify problems, and self-correct.

D. Client Directed Representation is Achievable

Fulton County, the largest urban county comprising metropolitan Atlan-
ta,155 made the change relatively smoothly while meeting all the performance
standards for quality representation in the decree.156

E. Training and Support Matter

Child welfare law is a specialized area of practice. Implementing the
right to counsel in this area requires a comprehensive training plan and ade-
quate support from social workers, investigators, and paraprofessionals.157
Fulton and DeKalb County were successful because program leaders recog-
nized this and political leaders made an appropriate investment in these
areas.

F. Independence from the Judiciary Matters

States vary in how their programs for appointing counsel to indigent
clients are operated. Some are administered by an executive branch agency
and some are by the administrative office of the courts; some are run as a
state government function and others are at the county level.158 Regardless, it
is critical that the individuals who serve as court-appointed counsel do so
independently of the bench officers before whom they appear.

156. See Fulton County Fourth Period Monitoring Report, supra note 72, at 4.
157. Nat’l Ass’n of Counsel for Children, supra note 9, at 4–5, 8.
G. Performance Can Be Measured Without Invading Professional Discretion or Requiring “Good Results”

When the client population is too young to lodge formal complaints and lacks the capacity and resources to select their own counsel, there must be a mechanism to ensure quality professional performance. The Kenny A. experience shows this can be done effectively even in the absence of consensus over what “good outcomes” are or an easy ability to measure causation—in addition to the questionable utility in measuring causation. It is important to develop a culture of process in which it is accepted wisdom that lawyers are an essential protection for children regardless of how any one case turns out.

Our experience in the investigation, litigation, settlement, and implementation phases of the Kenny A. litigation strongly suggests that ultimately, while impact litigation created a needed push, these two county defendants genuinely recognized that providing effective counsel to all children in abuse, neglect, and dependency proceedings was, and remains, the right thing to do. That realization, perhaps more than any factor, transformed the system for representing children in those counties.

159. See supra Part V.
FISCAL RETURNS ON IMPROVED REPRESENTATION OF CHILDREN IN DEPENDENCY COURT: THE STATE OF THE EVIDENCE

CLARK PETERS*
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I. INTRODUCTION

Compelling normative arguments alone may justify the embrace of the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act) recently adopted by the American Bar Association.1 However, policy makers and court administrators will look beyond the potential to improve procedural justice in considering whether to adopt the new standards and devote limited state resources to providing for representation under the Model Act. They will examine the potential

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of improving actual case outcomes and the overall fiscal impact such representation will yield.

This article explores the evidence that the new standards may yield benefits that outweigh the fiscal costs of implementing the Model Act, and those of competing models of representation. It first examines the few extant studies that shed light on whether the new standards might achieve the stated aims of the child welfare system—especially with regard to timely permanency—better than competing models of representation. One particular study, which evaluated the outcomes and fiscal impact of legal representation akin to that of the Model Act, is examined in greater depth. While research so far is promising that enhanced representation yields fiscal returns, the evidence remains very limited. In the final section, the authors provide suggestions for future study to develop our understanding of the broader impact of the Model Act on case outcomes, which in turn affects the bottom line of agencies, courts, and broader society.

II. CAPTURING OUTCOMES

Key to understanding the changes brought on by the new standards is an identification of the important, measurable outcomes expected in dependency cases. Commentators have long emphasized the importance of finding stable, permanent homes for children and that achieving resolution of dependency cases must be done quickly to limit the duration of disruption of children’s lives. Consequently, child welfare and juvenile court professionals have heretofore focused on two primary outcomes: the achievement of permanence for children and the disposition of cases in a timely manner.

Economic evaluation of reforms aimed at achieving these objectives, however, is rare, and recent commentators have emphasized the need to expand such research. The outcomes of timeliness and permanence are relatively easy to calculate. With improvements in information technology that permit tracking of cases, researchers in recent decades have engaged in increasingly sophisticated analyses of service use and duration. The fiscal impact of achieving permanence is also clear: Once children are reunited with their families of origin, adopted, or placed in permanent guardianship,

5. See id. at 723–25, 735–38.
their cases are essentially closed. While some cases may continue to receive limited financial subsidies from dedicated revenue streams, court personnel, case managers, and child welfare service providers end their involvement. To the extent that permanence can be achieved quickly, the benefits of permanence are realized earlier and thus, reduce the overall fiscal impact of the case.

Of course, achieving permanence and timeliness does not represent the universe of benefits that may attach to enhanced legal representation or improved child welfare outcomes. We address other benefits, how a study might measure them, and the challenges involved in capturing and monetizing their value in the final section of this article.

III. IMPROVING CHILD WELFARE OUTCOMES THROUGH COURT-BASED REFORM

Since the inception of the juvenile court, it has played an integral role in supervising child welfare cases. Although there is often tension between child welfare professionals and juvenile court personnel, legislative reforms have often targeted court practice in an effort to improve child welfare case outcomes. The Adoption Assistance and Child Welfare Act of 1980 made explicit the court's role in overseeing all cases involving maltreated children. Courts identify which cases are subject to the jurisdiction of child welfare agency intervention and monitor the progress of these cases. The federal State Court Improvement Program provides resources to dependency courts with an aim of improving how courts supervise child welfare cases. The Adoption and Safe Families Act of 1997 mandated dependency case timelines that emphasized the termination of parental rights—and adoption—if reunification could not be achieved quickly.

7. See id. at 387.
Given the value placed on the speedy resolution of cases, one might expect that enhanced legal representation would necessarily reduce delay and lead to quicker resolution of cases. However, zealous advocacy may require additional legal motions and activity that may act to prolong a dependency case. Moreover, there may be strategic reasons to slow the pace of a case; speedier cases—while serving the developmental needs of children—may reduce the opportunities of parents to demonstrate that they are fit to be reunified. Indeed, research in other civil court contexts reveals that enhanced legal representation does not lead inexorably to speedier proceedings, even when timeliness is a primary concern.

The past two decades have yielded a small number of studies that have examined how different models of representing children’s interests might be effective in improving case outcomes. Evaluations of Court Appointed Special Advocates, which assigns trained lay volunteers to advocate for the “best interests” of children, have demonstrated some promising results. Several other studies have examined guardian ad litem models for children. Most, however, rely on descriptive, non-experimental methods that often identify some evidence of improved outcomes, but without the benefit of

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12. Mark E. Courtney et al., Discussion Paper, Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care, 1 PARTNERS FOR OUR CHILDREN 1, 1–3 (2011). One recent study, however, found improved timely permanence from a program that provided enhanced legal representation to parents; the Parent Representation Program in Washington State was associated with an 11% increase in the speed of reunification, a 102% increase in the speed of establishing guardianship, and an 83% increase in the speed of adoption. Id. at 4.

13. D. James Greiner et al., The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, SOC. SCI. ELECTRONIC PUB. (forthcoming) (manuscript at 1–2), available at http://ssrn.com/abstract=1948286 (reviewing recent methodologically impressive studies while examining enhanced legal representation programs in housing and unemployment hearings, and finding that such representation was associated with prolonged cases).


16. Id. at 4.
adequate comparison groups that would give confidence that the reforms—and no other factors—occasioned the improvements identified.\footnote{See D. James Greiner & Cassandra Wolos Pattanayak, Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?, 121 YALE L.J. (forthcoming 2012) (manuscript at 22), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708664. A thorough critique of these studies is beyond the scope of this article.}

Only one study has examined the effect of a program featuring client-centered children’s representation akin to the Model Act.\footnote{See, e.g., PALM BEACH STUDY, supra note 14.} Chapin Hall’s study of the Foster Children’s Project of Palm Beach County, Florida (Palm Beach Study) calculated the effect of the program in improving the proportion of cases that achieve permanency in a timely fashion.\footnote{Id. at 1.} In the next section, we examine the Foster Children’s Project (FCP) and the Palm Beach Study in greater depth, drawing on the experience of co-author, John Walsh, the supervising attorney of the program.

IV. THE FOSTER CHILDREN’S PROJECT OF PALM BEACH COUNTY

FCP is an office within the Legal Aid Society of Palm Beach County, Florida that provides attorneys for dependent children in Palm Beach County, specifically children ages zero to twelve and their siblings, placed in licensed care with the state.\footnote{Id. at 1, 4 n.3.} The representation model is a stark contrast to the alternative. Most children in Florida dependency courts do not receive legal representation at all,\footnote{See FIRST STAR & CHILDREN’S ADVOCACY INST., A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 9, 47 (2d ed. 2009), available at http://caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf.} and children as a rule are unrepresented parties to their own cases.\footnote{See id.} A volunteer or staff guardian ad litem is appointed to represent the child’s best interests, as determined by the appointee, with some consideration given to the child’s wishes in making recommendations to the court.\footnote{PALM BEACH STUDY, supra note 14, at 2.} In implementing FCP, this legal environment was a mixed blessing. On one hand, FCP entered a context that was unfamiliar, if not hostile, towards counsel for children. On the other hand, the program had the benefit of having a “clean slate” on which to design and implement client-based legal representation in dependency court.

FCP draws its funding from the Children’s Services Council of Palm Beach County, a county taxing district, which had viewed with alarm the
protracted stays of children in foster care in the jurisdiction.\textsuperscript{24} FCP was designed with the express purpose of providing attorneys for children with the intent of affecting outcomes, especially reducing the time children spent in care through achieving more timely permanent placements.\textsuperscript{25}

In creating FCP, the attorneys made two key strategic decisions that likely impact their ability to affect client outcomes. First, the Legal Aid Society identified its target client population.\textsuperscript{26} Representing all the children in dependency court would have led to a caseload size of approximately 250 children per attorney, likely too high to provide effective advocacy for each client. Rather, the Legal Aid Society decided to focus on those clients most in need of intervention and whose outcomes might best be improved through representation.\textsuperscript{27} After deliberation, FCP determined that children aged five and younger in the licensed care population were the most vulnerable client population.\textsuperscript{28} These youngest clients had the most immediate need to have a primary caregiver and permanent home, and lacked relatives who could act as caregivers.\textsuperscript{29} These children also tended to exhibit more severe abuse than those children left with parents or placed with relatives.\textsuperscript{30} Second, based on the Legal Aid Society’s experience with representing children in other capacities, attorneys agreed to limit the FCP caseload size to thirty-five children per attorney.\textsuperscript{31}

Once operational, the FCP attorneys were charged with performing their advocacy with a focus on achieving timely permanency.\textsuperscript{32} FCP attorneys were trained from the outset that their clients, while each unique and presenting multiple issues, all essentially had the same legal problem: They were “in the custody of the [S]tate [and] they need[ed] to be in the custody of a family,” within the time mandated by law.\textsuperscript{33} Under Florida law, the time frames in the statute “are a right of the child,”\textsuperscript{34} and attorneys have the duty

\begin{itemize}
\item \textsuperscript{24} See id. at 1.
\item \textsuperscript{25} See id.
\item \textsuperscript{26} Id. at 4.
\item \textsuperscript{27} Id.; see \textit{Foster Children's Project, Legal Aid Soc'y of Palm Beach Cnty.}, available at http://www.legalaidpbc.org/downloads/brochures/Foster-Childrens-Project.pdf.
\item \textsuperscript{28} See \textit{Palm Beach Study, supra} note 14, at 4 n.2.
\item \textsuperscript{29} See id. at 4.
\item \textsuperscript{30} See \textit{generally First Star & Children's Advocacy Inst.}, supra note 21. FCP would later expand to represent zero to twelve year olds. \textit{Palm Beach Study, supra} note 14, at 4 n.2. Older clients also could be represented if they were a sibling of a client meeting eligibility criteria. Id. at 4 n.3.
\item \textsuperscript{31} Id. at 22; Elizabeth Dewey et al., \textit{Message from the Chairs}, 11 A.B.A. CHILDREN'S RIGHTS LITIG. COMM. 1, 3 (2009).
\item \textsuperscript{32} \textit{Palm Beach Study, supra} note 14, at 1.
\item \textsuperscript{33} \textit{Foster Children's Project, supra} note 27.
\item \textsuperscript{34} \textit{Fla. Stat.} § 39.0136(1) (2011).
\end{itemize}
of zealously protecting clients' rights under the statute.\textsuperscript{35} The focus of representation is more than a mission statement for FCP; the quest for permanent homes for its clients infuses every task it undertakes.\textsuperscript{36}

Negotiating the case plan with an eye on the eventual outcome of the case is a critical aspect of representation of FCP clients. Typically, the child's expressed desire is to be reunified with his or her parent or parents, a preference echoed in child welfare law.\textsuperscript{37} In negotiating the case plan, the child's attorney views this document as a roadmap that identifies a path to a permanent home for his or her client. The complete case plan should be clear and identify the specific reasons for removing the child from his or her home, and the tasks required of the parents to regain custody. Such tasks should be materially related to the reasons for removal. Each task should identify service provider information, expected completion dates, and if appropriate, interim time frames. The document should leave little doubt what is expected of a parent and other parties. Attorneys should also work to exclude certain tasks that are unrelated to the reasons for removal and may impede the parent's progress toward reunification; these extraneous tasks often work against the client's desire to be returned home quickly.

Expert evaluations are essential in some FCP cases for two reasons. First, such evaluations may identify the root cause of a family's dysfunction. Without clarity, a case plan risks treating symptoms rather than the central problem or problems that led to removal. For example, if a child is neglected and failing to thrive, a parenting class may provide parents important guidance. However, if the underlying problem is maternal depression, then the behaviors that led to neglect are likely to reoccur if that depression remains untreated. Second, as the ultimate goal of the child's attorney is a permanent home for the client, regardless of what the parent decides to do or not do, it is important that parental deficits are identified early, in the event that adoption becomes the case plan's goal. Undetected and untreated underlying conditions that led to the initial abuse or neglect may prolong a case as additional sets of services are identified and provided. The child's attorney should anticipate and address any defenses that the parent could use at a trial seeking to terminate parental rights. In any case, evaluators become valuable witnesses in the event of compliance and reunification, or in the event of non-compliance and termination.

The realities of child welfare agencies often present additional challenges to effective legal representation. Inadequate staffing, high turnover,
and conflicting agendas with agencies sometimes make it difficult to move forward with advocacy, case planning, and services. The State is sometimes reluctant to spend scarce resources on needed evaluations or particular services. Advocacy to particularize services, when tied to the individual needs of cases, may indeed incur additional costs, but also effectively avoid the costs associated with unneeded services and tasks that courts may routinely order. More importantly, thorough case planning efforts tend to make timely permanent resolutions more likely.

A. Chapin Hall’s Palm Beach Study

The Children’s Services Council of Palm Beach County sought to examine the impact of FCP, and contracted Chapin Hall at the University of Chicago, a policy research center, to evaluate the program. The results of that study demonstrate that representation by attorneys from FCP was associated with positive outcomes on the length of stay of foster children, when compared to a cohort of unrepresented children. The study employed a quasi-experimental design, comparing those receiving FCP representation with those otherwise eligible but excluded due to conflict arising from representation by the Legal Aid Society in the past. Researchers examined administrative data from the child welfare agency and court case records. The key findings in brief indicate:

Children represented by FCP were found to have a significantly higher rate of exit to permanency than children not served by FCP. In the main, this difference appears to be a function of much higher rates of adoption and long-term custody among FCP children.

The higher rates of adoption and long-term custody experienced by FCP children were not found to be offset by significantly lower rates of reunification.

Consequently, the pre-permanency costs of substitute care for children in FCP are less than those without this legal representation. Based on these

38. Palm Beach Study, supra note 14, at 1.
39. Id. The study is discussed in brief here, and readers are encouraged to review the study itself.
40. Id. at 4–5.
41. Id. at 6.
42. Id. at 1.
43. See Palm Beach Study, supra note 14, at 22.
findings, the authors go on to estimate the overall fiscal impact of FCP. They estimated the costs associated with out-of-home care by considering the average board rate, case management costs, and adoption subsidies, finding that substitute care costs of children in FCP were just an approximate eighty-four percent of those in the comparison group. They derived the daily cost of legal representation under FCP by dividing the annual budget by 365 and the target caseload for the program. Using three-year projections, they found that the savings associated with reduced substitute care considerably offset the costs of the FCP program. That is, they estimated that FCP enhanced permanency in a case at the cost of about sixty-eight dollars per day, but that cost was reduced more than half by the savings realized from reduced substitute care costs. Ultimately, they estimated that the net cost of each additional day in a permanent home was about thirty-two dollars.

The authors of the Palm Beach Study identify several limitations in their inventory of costs and benefits. Non-placement services and additional costs of case management associated with FCP cases were outside their calculations. Also, due to limitations of available data, the study extends estimates of benefits to only three years into the future; additional benefits may be evident in ensuing years. In any case, the study is an important step forward in providing guidance as to how the field might collect additional evidence regarding the effects of enhanced child representation.

V. NEXT STEPS IN ASSESSING THE FISCAL IMPACT OF JUVENILE REPRESENTATION REFORMS IN DEPENDENCY COURT

While timeliness and permanence are critical areas for identifying any returns on investment associated with implementing the Model Act, jurisdictions should consider expanding their measures to other outcomes in order to capture additional benefits that may emerge. In recent years, scholars have increasingly called for the child welfare system to focus more broadly on the well-being of children, a concept that includes timeliness and permanency,
but also includes physical health, mental health, and education. To the extent that the Model Act demonstrates empirical improvements in these other realms, advocates can employ research that monetizes such benefits. For example, economists have estimated the enhanced income that is associated with increases in educational attainment. It is also conceivable that children placed in stable, permanent homes may exhibit lower levels of offending than those who do not achieve timely permanence. To the extent that improved outcomes yield measurable reductions in criminality, the monetary returns would be considerable.

Measuring the variables that would demonstrate such benefits, however, would require careful tracking of a longitudinal sample of foster children and identifying those represented by attorneys adhering to the Model Act. While such research tends to be costly, one opportunity for such tracking of older youths is found in the nascent National Youth in Transition Database (NYTD), which is a federal mandate on state child welfare agencies. NYTD mandates that states survey a sample of foster youth at age seventeen before they exit care and then every two years. Local agencies may consider working with state authorities charged with implementing NYTD to identify ways to track clients in jurisdictions where the Model Act is implemented into adulthood.

In calculating the local fiscal impact, jurisdictions must endeavor to be thorough in identifying all associated costs and benefits and transparent in the assumptions on fiscal impact. Given the importance that policymakers place on the overall costs of new reforms, it is not surprising that assessments of implementation in human services increasingly address overall fis-


57. See id. at 7. Public Law section 106–169 established the John H. Chafee Foster Care Independence Program in 1999, but the final rule for the NYTD was not issued until February 26, 2008. 42 U.S.C. § 677 (2006 & Supp. IV 2010); see Dworsky & Crayton, supra note 56, at 1.
IMPROVED REPRESENTATION OF CHILDREN

Improvemental impact of changes in policy and practice. Economists have provided guidance for undertaking comprehensive cost-benefit analyses which have so far found limited application in dependency courts. In brief, the key steps involve identifying: 1) existing costs of baseline services provided; 2) the additional costs arising from new standards; and 3) the present value of future costs and benefits attached to the baseline and innovation. In the context of reforms of representation in dependency court, costs include those of the competing practice modalities and the costs associated with services provided by the state. The most evident benefits include any reductions in court and service costs. For a comprehensive assessment, however, costs should include not just those associated with implementation and those internal to the child welfare system and dependency court. The study, in calculating costs, also accounted for the cost savings resulting from the public aid benefits that some youth did not receive as they remained in care. Moreover, so far studies have not attempted to monetize benefits associated with the outcome with the highest value: permanency itself. The benefit of a stable family, beyond the benefits that spring from such a positive outcome, is the justification itself for making it the primary goal for most dependency cases. The next section identifies one way that the field might be able to monetize such benefits.

A. Identifying Willingness-to-Pay Estimates

One way to more globally capture any benefits associated with the Model Act would be to directly estimate the “contingent value” of the benefits of enhanced representation under the new standards. Contingent valuation methods seek to identify how much members of broader society would be willing to pay with their own money to improve a particular outcome. The approach has been employed extensively in the field of environmental economics and, more recently, to examine crime reduction programs. One

58. For an excellent explanation of this method and a discussion of possibilities in the field of child welfare, see generally STEPHANIE LEE ET AL., WASH. ST. INST. FOR PUB. POLICY, EVIDENCE-BASED PROGRAMS TO PREVENT CHILDREN FROM ENTERING AND REMAINING IN THE CHILD WELFARE SYSTEM: BENEFITS AND COSTS FOR WASHINGTON (2008), available at http://www.wsipp.wa.gov/rptfiles/08-07-3901.pdf.

59. See PALM BEACH STUDY, supra note 14, at 22.

60. Id. at 22.


very recent study applied the method to examine the cost of death resulting from child maltreatment. The authors found that respondents on average were willing to pay about $150 each to reduce the annual child maltreatment mortality rate from two to one per 100,000.63 The authors note that the contingent value placed on the "saved" life—$15,000,000—is far higher than the $1,000,000 estimate drawn from the human capital method, which employs estimates of decedents' lost wages.64 This methodology involves using random-digit-dialing techniques in identifying respondents whom are queried on their own preferences to pay for programs.65 In one study, for example, respondents were given an explanation of the research project and asked questions such as the following: "Last year, a new crime prevention program supported by your community successfully prevented one in every ten [burglaries] from occurring in your community. Would you be willing to pay [fifty dollars] per year to continue this program?"66 In this particular study, crimes and payment amounts were randomized, with differing alternatives and amounts, within a specific range, queried of each respondent.67

Taking the lead from the Palm Beach Study and assuming that the Model Act consistently yields improvements in overall timeliness and permanency, research could poll individuals to have them place a monetary value of having maltreated children placed in homes more quickly.68 Such contingent value research would provide several advantages.69 It would seek to capture all benefits associated with a particular program, including intangible benefits, such as the psychological stress of family separation, and thus provide better normative guidance than alternative means of calculating benefits.70 Such studies are also relatively inexpensive, at least compared to longitudinal survey studies.71 Such research, however, could face some challenges in the context of child welfare; the population of interest is small and

64. Id.
65. Cohen et al., supra note 61, at 93–95.
66. Id. at 94.
67. Id. at 93–94.
68. See PALM BEACH STUDY, supra note 14, at 22; Andrew Healey & Daniel Chisholm, Willingness to Pay as a Measure of the Benefits of Mental Health Care, 2 J. MENTAL HEALTH POLICY ECON. 55, 57 (1999). See generally MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS § 1 (2011) [hereinafter MODEL ACT 2011].
69. See Healey & Chisholm, supra note 68, at 55, 57–58.
70. Id. at 55.
for many, foster care and permanency for children may be obscure topics. Consequently, identifying reliable estimates could be difficult. However, if a study could establish "willingness-to-pay" or contingent value for timely permanency, then the value could be paired with the Palm Beach Study and similar research to identify more thoroughly the monetary returns of the new representation model.

B. Additional Challenges in Improving Estimates of Fiscal Returns from Model Act Implementation

Improving estimates of the benefits associated with implementing the Model Act will require more studies that employ rigorous quasi-experimental or—better yet—experimental design, the "gold standard" of evaluation involved random assignment. Such studies are rare in examining programs seeking to improve legal representation in civil proceedings, with none so far in dependency court. In recent years, James Greiner and colleagues have demonstrated the intriguing possibilities of such research in examining employment and housing court. However, such studies require the randomization of cases to achieve true experimental design. Beyond logistical, informational, and administrative hurdles, random assignment may be resisted as unfair to those in the control group, if services provided to the treatment group are perceived as superior.

A second challenge involves capturing the broader context of the local child welfare system and dependency court when implementing the Model

72. Martin Shanahan & Ron Donato, Counting the Cost: Estimating the Economic Benefit of Pedophile Treatment Programs, 25 CHILD ABUSE & NEGLECT 541, 548 (2001) (speculating that child sexual abuse may be inapt for contingent valuation, given the rare and hidden nature of the offense and that child maltreatment and court outcomes likely suffer from the same limitation in this context).

73. See Greiner et al., supra note 13 (manuscript at 5).

74. So far, only five randomized evaluations of civil legal assistance are evident. Id. Greiner and colleagues identify two studies examining representation in delinquency court, two in housing court, and one in unemployment benefit proceedings. Id. (manuscript at 5 n.13).

75. See, e.g., id. (manuscript at 6, 8).

76. These hurdles may present considerable challenges. In the Palm Beach Study, for example, different data sources suggested distinct findings regarding key outcomes: While agency administrative data identified that sixty-two percent of the sample exited to permanency, court records indicated that eighty-four percent exited to permanency. PALM BEACH STUDY, supra note 14, at 13-14. The authors note that these data discrepancies were due in part to the distinct sampling procedures used to identify cases in the respective samples, but likely reflect distinct methods that explain the divergence. Id. at 6 n.6, 13-14.

77. Such a concern is discussed in the context of evaluation of CASA representation. See CALIBER ASSOC S., EVALUATION OF CASA REPRESENTATION: FINAL REPORT 4-5 (2004).
Act. Other ongoing initiatives, such as programs under the State Court Improvement Program or other broad-based court reform efforts, seek to improve the same child welfare outcomes that evaluations of programs implementing the Model Act will target.\textsuperscript{78} Other activities, including family group conference programs, IV-E waiver demonstrations, and family drug courts, may also affect these outcomes, as well as the expectations and duties of legal representatives of children.\textsuperscript{79} Finally, the structure of representation of other parties to dependency proceedings is an important component of the court's context; improved representation of parents, for example, has been shown to achieve some of the same improvements in timely permanency found in the Palm Beach Study.\textsuperscript{80} Indeed, optimal results in dependency court may be a function of the degree to which all parties receive adequate representation.\textsuperscript{81}

Third, not all efforts to implement the Model Act will be identical, and evaluators may want to consider representation that clients receive in terms of "dosage," quantifying the legal service provided. Dosage here would be a function of two characteristics of the representation. First, the caseload of children's attorneys will dictate the time and attention each lawyer can devote to each case. Indeed, in the Palm Beach Study, the resulting improvements in timely permanency exhibited by FCP may, in large measure, be a function of the relatively low caseload of each attorney.\textsuperscript{82} Second, the expected scope of representation will determine the set of responsibilities in each case, and may have important effects on outcomes. The Model Act explicitly provides latitude, for example, in the degree to which children's attorneys are expected to represent clients in ancillary matters.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{79} See generally Greiner & Pattanayak, supra note 17. While studies that randomly assign subjects to treatment and control groups have some protection from the vagaries of different contexts, it is critical to account for these contextual factors in quasi-experimental and other non-experimental research work. See generally id.
\item \textsuperscript{80} See Courtney et al., supra note 12, at 3–4; see also supra note 12 and accompanying text.
\item \textsuperscript{81} See Greiner et al., supra note 13 (manuscript at 4–5); PALM BEACH STUDY, supra note 14, at 1.
\item \textsuperscript{82} See PALM BEACH STUDY, supra note 14, at 13–15, 22.
\item \textsuperscript{83} MODEL ACT 2011, supra note 68, § 7, 7(b) cmt.
\end{itemize}
Finally, the Palm Beach Study found significantly improved outcomes among clients represented by FCP.84 However, what if the subsequent studies provide less impressive or ambiguous results? Such findings are not a remote possibility; one randomized evaluation of a program providing enhanced representation of claimants seeking unemployment benefits found that representation showed no discernible improvement in outcomes over *pro se* representation.85 More importantly, such representation measurably delayed the proceedings, even though timeliness is—as in dependency proceedings—a primary concern.86 If future research yields similarly impressive results, advocates of the Model Act may need to seek other ways to justify implementation, such as identifying improvements in due process or perhaps in elevated client satisfaction.87

VI. CONCLUSION

Chapin Hall’s Study of the Legal Aid Society of Palm Beach County Foster Children’s Project provides both evidence of client benefits who are represented by attorneys acting in concordance with the Model Act, and a blueprint for future research to examine additional benefits that clients may receive. As jurisdictions begin to put the Model Act into practice, they should be sure to put in place ways to measure the outcomes of timeliness and permanence, as well as other benefits that may be associated with enhanced representation. Advances in information technology and research methodologies offer the possibility of providing justification for the Model Act on fiscal grounds. That is, while due process may dictate that an embrace of the Model Act is the right thing to do, additional research may provide more evidence that it is the fiscally prudent thing to do as well.

85. Greiner & Pattanayak, *supra* note 17 (manuscript at 26, 30).
86. *Id.* (manuscript at 6, 16).
87. Evaluation of the promising National Quality Improvement Center on the Representation of Children in the Child Welfare System Best Practice Model (QIC-ChildRep), discussed in Duquette *supra* note 1, will likely also further illuminate how improved representation affect outcomes of young people involved in dependency courts.