

**ESSAYS FROM THE HONORABLE JAMES G. GILVARY SYMPOSIUM ON
LAW, RELIGION, AND SOCIAL JUSTICE: "CUSTODY THROUGH THE EYES
OF THE CHILD": CHALLENGES OF REPRESENTING ADOLESCENT
PARENTS IN CHILD WELFARE PROCEEDINGS**

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Author: Barbara Glesner Fines ¹

LexisNexis Summary

... In addition to those teen parents who find their parental rights at risk, 5% of teen birth mothers affirmatively relinquish their children for adoption. ... Representation of Minor Parents as Parents In addition to requirements that GALs or attorneys represent teen parents (or more commonly their best interests) as children in abuse and neglect actions, in most states these teen parents may have some rights to representation as parents as well. ... If teenagers are less culpable in the criminal setting, it stands to reason that they should not be as easily judged with the finality of termination of parental rights in the child welfare system without legal representation. ... To serve these clients, however, the attorney must overcome challenges of the ambiguity of the attorney's role, the uncertainty of the client's legal rights, the questions of the capacity of the child to direct the representation, the role and influence of other parties in these disputes, and the systemic and personal biases present in representing teen parents. ... Even if they do not truly overlook their client's needs and wishes, the habits or practice of those who regularly represent the best interest of children as children, rather than as parents, may be to conflate both interests into a "what's good for baby is good for mommy" philosophy that leaves the child-parent without effective representation. ... Teen parents, even more than other children involved in the child welfare system, need to have a voice in the process and to be spared the most negative psychological and legal consequences of a termination in which they were not empowered to make decisions about the representation. ... If the community provides home nurse visits and parenting educators, these programs are very effective in mitigating the negative outcomes for teen parents and their children, especially when they include clear and direct instruction regarding effective birth control practices.

Text

[*307]

For the past thirty years, arguments over the proper representation for children have been a focus of continuous academic debate. While the academic debate rages, in the majority of states, attorneys serve in a netherworld of unclear and conflicting standards.

One type of representation in particular focuses the terms of the debate: the representation of an adolescent parent in child welfare proceedings. Who are these child-clients? What are their rights to representation? What are the challenges for those representatives?

This article will advocate for strongly child-directed and child-centered representation of these teen parents.

¹ Associate Dean and Ruby M. Hulen Professor of Law, University of Missouri Kansas City. My deepest appreciation to Professor Mary Kay O'Malley for sharing her insights and experience in representing children, parents, and the state. Thanks to Ashley Williams for her timely research assistance.

[*308]

I. The Clients-Not Your Movie Teen Mom

The United States of America has the highest adolescent pregnancy and birth rates of any other industrialized nation.² Each year, almost 750,000 women in the United States between the ages of fifteen and nineteen become pregnant.³ Roughly 60% of these women give birth.⁴ "With the exception of a 2-year increase between 2005 and 2007, teenage birth rates have declined each year since 1991."⁵ In 2008, 141,428 girls under the age of eighteen gave birth.⁶ About 4% of these mothers were under the age of fifteen, 12% were age fifteen, 29% were age sixteen.⁷

Recent movie and television depictions of adolescent pregnancy have painted these adolescent pregnancies as minor challenges in a teenager's life. The 2007 Academy Award-winning movie *Juno*⁸ and the 2009 Golden Globe Award-winning television show *Glee*⁹ both depicted young, white, bright girls becoming pregnant after their first sexual experience with a boy their own age. Both girls (*Juno* and *Glee*'s Quinn) stay in high school through their pregnancy, and give their baby up for adoption to a middle-class single mother whom they have met before the baby is born.¹⁰ The teenage fathers are little more than observers to the entire drama. The teen mothers return to their everyday high school life without major changes in their life or even their outlook. In the news, seventeen-year-old Bristol Palin's pregnancy during her mother's 2008 vice-presidential campaign provided only a slightly different picture because of the more prominent role of the father, Levi Johnston.¹¹ Yet, the experiences of *Juno*, Quinn, and even Bristol bear little resemblance to the [*309] overwhelming majority of adolescent teen pregnancies.¹²

² Press Release, The American Congress of Obstetricians and Gynecologists, US Teen Births Still Highest Among Industrialized Nations (May 3, 2010), available at http://www.acog.org/from_home/publications/press_releases/nr05-03-10-2.cfm.

³ Kathryn Kost et al., U.S. Teenage Pregnancies, Births and Abortions: National and State Trends and Trends by Race and Ethnicity, Guttmacher Inst., 2 (Jan. 2010), <http://www.guttmacher.org/pubs/USTPtrends.pdf>.

⁴ Id. 41.9% of pregnancies among fifteen to nineteen-year-olds in 2006 ended in birth. Id.

⁵ T.J. Mathews et al., Nat'l Ctr. Health Stats., No. 46, State Disparities in Teenage Birth Rates in the United States 1 (2010). The birthrate for teenage mothers ages fifteen to nineteen in 2008 is approximately double that of teenage fathers: 41.5 per thousand for mothers and 19 per thousand for fathers. Joyce A. Martin et al., U.S. Dep. Health & Human Services, Births: Final Data for 2008, 59 Nat'l Vital Stats. Reps., 7, 16 (2010), available at http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_01.pdf. Rates for Hispanic teenagers fell to historic lows. Id. at 8.

⁶ Joyce A. Martin et al., U.S. Dep. Health & Human Services, Births: Final Data for 2008, 59 Nat'l Vital Stats. Reps., 7 (2010). "Among teenagers under 20 years, the rate for ages ten to fourteen was unchanged at 0.6 births per thousand. The number of births to this age group dropped 7% from 2007 to 2008, to 5,764, the fewest in more than half a century (5,316 in 1953)." Id.

⁷ A total of 440,522 births were to mothers ages ten to nineteen. Id. at Table 2. The numbers of mothers by age were age fifteen (17,093); age sixteen (41,540); age seventeen (77,031); age eighteen (125,010); and age nineteen (174,084). Id.

⁸ *Juno* (Fox Searchlight Pictures 2007), available at <http://www.imdb.com/title/tt0467406/>.

⁹ *Glee: PREGGERS* (20th Century Fox Television Sept. 23, 2009), available at <http://www.imdb.com/title/tt1442937/>.

¹⁰ *Juno*, supra note 8; *Glee*, supra note 9.

¹¹ Sarah Kershaw, Now, the Bad News on Teenage Marriage, N.Y. Times, Sept. 4, 2008, at G1.

¹² MTV has a reality series dedicated to depicting the lives of real-life pregnant teens. 16 and Pregnant (11th Street Productions). The first season of the show led to a spin-off. Teen Mom (11th Street Productions).

One of the most common characteristics of adolescent parents is poverty.¹³ The poorer the young woman, the more likely she will become a mother. Moreover, having a baby makes a poor teen poorer. Compared to women of similar socio-economic status who postpone childbearing, teen mothers are more likely to end up on public assistance. As with poverty, below average educational achievement is both a precursor to and a consequence of teen pregnancy.¹⁴ Teen mothers are substantially less likely than women who delay childbearing to complete high school or obtain a GED by the age of twenty-two (66% vs. 94%).¹⁵

Other demographic patterns predominate as well. Family structure can influence the likelihood of teen parenting. For example, girls whose sister, or mother and sister, were teen parents are more likely to be teen parents themselves.¹⁶ The majority of teenage births are to Hispanic or black mothers.¹⁷ Birth rates among black and Hispanic teenagers are significantly higher than for non-Hispanic white teenagers.¹⁸ Thirteen percent of births to teenagers are within marriage.¹⁹

Finally, one should recognize that not all of these pregnancies are unwanted. Eighteen percent of teen pregnancies are planned.²⁰ Most are neither planned nor are they entirely the product of ignorance and accident, but rather of what might be termed willful blindness to the risk of pregnancy.²¹ Poverty, alienation from educational institutions, and lack of low-skill, living wage jobs make early motherhood a choice with few [*310] perceived marginal costs. At one time, these young parents would have married and begun family formation with some economic stability, but without living wage opportunities for those without higher education and without the vision and support for attaining that higher education, this model of early family formation is not a successful strategy for these young people.²²

¹³ Douglas Kirby et al., Manifestations of Poverty and Birthrates Among Young Teenagers in California Zip Code Areas, 33 Fam. Plan. Persps. 67-68 (2001). Poverty appears to play a greater role in both the African-American and Hispanic populations than in the white population. Id. at 63.

¹⁴ William P. O'Hare, Teen Childbearing in America's Largest Cities 6-7 (Annie E. Casey Found., A Kids Count Working Paper, 1999), available at <http://www.eric.ed.gov/PDFS/ED445174.pdf>.

¹⁵ Kate Perper et al., Diploma Attainment Among Teen Mothers, Child Trends (Jan. 2010), http://www.childtrends.org/Files/ChildTrends-2010_01_22_FS_DiplomaAttainment.pdf.

¹⁶ Patricia L. East et al., Association Between Adolescent Pregnancy and a Family History of Teenage Births, 39 Persps. on Sexual & Reprod. Health 108, 113 (2007).

¹⁷ Martin, supra note 5, at Table 6. The number of births to mothers under the age of eighteen by race in 2008 are 44,095 for white mothers, 36,797 for African-Americans, and 55,198 for Hispanics. Id.

¹⁸ Id. at Table 8. The birth rate for teenagers ages fifteen to nineteen in the United States for 2007 was 27.2 per 1,000 for non-Hispanic whites, 81.8 per 1,000 for Hispanics, and 64.2 per 1,000 for non-Hispanic blacks. Id. Even after poverty, employment, and other community characteristics were controlled for, race and ethnicity had a statistically significant, but very small, positive effect on teen birthrates. Kirby, supra note 13, at 67.

¹⁹ Martin, supra note 5, at 16.

²⁰ See Guttmacher Inst., In Brief: Facts on American Teens' Sexual and Reproductive Health (Jan. **2011**), available at <http://www.guttmacher.org/pubs/FB-ATSRH.pdf>.

²¹ See Jennifer J. Frost & Selene Oslak, Guttmacher Inst., Teenagers' Pregnancy Intentions And Decisions: A Study of Young Women in California Choosing to Give Birth 9 (1999). Approximately 32% of the participants intended to get pregnant, 25% did not care if they became pregnant, and 43% had not intended to become pregnant. Id.

²² Naomi Cahn & June Carbone, Red Families v. Blue Families: Legal Polarization and the Creation of Culture 167 (2010). An inadvertent pregnancy, in communities in which they are the norm, poses little deterrent to sexual activity; yet, numerous studies find that delays in childbearing, even without marriage, increase mother and child prospects . . . Accordingly, marriage promotion by itself is likely to be ineffective, and limiting sexual activity in communities in which it is widespread is virtually impossible. Great attention to family planning is the indispensable link, but it too is unlikely to be effective absent more systematic support for education, comprehensive health care, and job opportunities. Id.

II. The Intervention of Juvenile Courts

For many reasons, these teenage parents are more likely to have their children come under the jurisdiction of the courts than other parents. For very young mothers (those less than sixteen years old), the risks of removal of their children by the abuse and neglect system for maltreatment or neglect of their child-while they themselves are still children-is double that of mothers ages twenty to twenty- one. ²³ Teen mothers between the ages of eighteen and nineteen are one- third more likely to have a child put in foster care and are nearly 40% more likely to have a case of abuse or neglect reported against them than women who waited until age twenty or twenty-one to have their first child. ²⁴

One group of adolescent parents-those who are themselves wards of the court-are more likely to become teen parents than their peers. ²⁵ Nearly half (48%) of the nineteen-year-old girls that have been in foster care have become pregnant at least once, compared to 20% of children not in foster care. ²⁶ Nearly one- third (32%) have at least one child, compared to 12% of children not in foster care. ²⁷ Children born to parents who are in foster care are not automatically considered wards of the court in the same sense as their parents. Federal law provides strong incentives for states to [*311] keep parent and child together in foster care. ²⁸ Nonetheless, these parents are far more likely to have their children become wards and be removed. ²⁹ As one author observed:

In New York, and in other states, "voluntary" separation of parenting wards from their children is frequently the result of coercive measures; specifically young mothers have been pushed into giving up their children because of a lack of available services and funding. Foster care staff may threaten removal of their children, coercing these mothers into following strict rules and into not complaining about inadequate care. ³⁰

These same pressures can cause teenagers to run away with their infants rather than conform to these strict rules. Of course, this action is likely to trigger immediate responses by the child welfare system, including issuance of a *caspias* to bring the teen into the physical custody of the court and immediate removal of the infant.

Even without such drastic action by teen parents, however, they may find their children removed under the guise of child protection. These removals are often without legal process. As one researcher noted:

The majority of caseworkers in the foster care system were terrified of being blamed for something happening to babies of teen mothers, and thus they tended to take the babies and put them in separate homes. They didn't worry

²³ Robert M. Goer et al., *Kids Having Kids: Economic Costs & Social Consequences of Teen Pregnancy* 276 (Saul D. Hoffman et al. eds., 2d ed. 2008).

²⁴ Saul D. Hoffman, *By The Numbers: The Public Costs of Teen Childbearing*, *The National Campaign to Prevent Teen Pregnancy*, 14 (2006), available at <http://www.thenationalcampaign.org/costs/pdf/report/ BTN National Report.pdf>.

²⁵ Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 *U. Fla. J.L. & Pub. Pol'y* 1, 6-7 (2006) ("[D]ata demonstrates not just that a significant number of foster youth are pregnant and parenting, but that the incidence of pregnancy and parenthood is higher among foster youth than among their peers.").

²⁶ Lucy A. Bilaver & Mark E. Courtney, *Science Says: Foster Care Youth*, 27 *The Nat'l Campaign to Prevent Teen Pregnancy* 1, 2 (2006), available at <http://www.thenationalcampaign.org/resources/pdf/SS/SS27FosterCare.pdf>.

²⁷ *Id.*

²⁸ See Stotland, *supra* note 25, at 10-11. (describing Title IV-E of the Social Security Act which provides that "payments made by the state for the teen's maintenance must include an additional amount for the infant's support" and if the state removes the infant from the teen parent, the state may not use federal funds to support the infant unless these is a court order for the removal).

²⁹ *Id.* at 6-7.

³⁰ Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 *Colum. J. Gender & L.* 175, 181-82 (2008).

that this was against the law, which permitted removal only in cases of imminent risk. For them imminent risk was synonymous with teenage mothers.³¹

It is not only teen parents in foster care who face this increased risk of removal of their children. Teen parents are likely to have their parenting scrutinized more carefully and be subjected to higher standards than that of their adult counterparts. Teenage parents are more likely to interact with individuals who are mandated reporters of abuse and neglect, and those reporters may be more likely to assume that children of teen parents are at risk simply by virtue of their parent's youth.

[*312]

Mandated reporters in hospitals will be assessing a teen's parenting ability and behavior as part of their caregiving. Some laws encourage physicians to involve others in the teen parent's caregiving. In some states, children do not have the right to access prenatal care without notification to their parents. While thirty-six states and the District of Columbia do allow some minors to consent to prenatal care, in thirteen of those states, doctors can inform parents that their minor daughters are seeking or receiving prenatal care, if the physician deems that to be in the best interest of the minor.³² North Dakota is the only state in which minors must have parental consent for most of their prenatal care.³³ The regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA)³⁴ presume that parents are personal representatives of their children, except if state law provides that minors do not need parental consent for treatment.³⁵

Minnesota has a unique law that requires that any birth to a teen parent be reported to the county social services agency within three days of the birth.³⁶ The agency then contacts the teen parent to determine whether she has a plan for herself and the child to address a range of issues, including steps to "address personal or family problems or to facilitate the personal growth and development and economic self-sufficiency of the minor parent and child."

³⁷ If a minor parent fails to plan-or follow her plan-the statute authorizes the agency to file a protective supervision

³¹ Betsy Krebs & Paul Pitcoff, *Beyond the Foster Care System: The Future for Teens* 82 (2006).

³² Guttmacher Inst., *State Policies in Brief: Minor's Access to Prenatal Care*, (Mar. 1, 2011) http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf.

³³ *N.D. Cent. Code § 14-10-19 (2011)* (providing that minors may obtain pregnancy testing and pain management related to pregnancy without parental consent and may be provided prenatal care in the first trimester; however, in the second and third trimesters the physician may provide only one visit without parental consent or a determination that parents are unavailable).

³⁴ Health Insurance Portability and Accountability Act of 1996, *42 U.S.C. § 1320d-1(c)(2)(A)* (2010).

³⁵ *45 C.F.R. § 164.502(g)(3)(i)(A) (2010)*.

³⁶ *Minn. Stat. § 257.33(2)* (2007), described in Marie A. Failinger, *Law and the Modern American Family: Ophelia with Child: A Restorative Approach to Legal Decision-Making by Teen Mothers*, *28 Law & Ineq.* 255, 258-64 (2010) (The statute is one of several laws relating to teen parent decision-making in Minnesota.).

³⁷ *Minn. Stat. § 257.33(2)*. The plan must consider: (1) the age of the minor parent; (2) the involvement of the minor's parents or of other adults who provide active, ongoing guidance, support, and supervision; (3) the involvement of the father of the minor's child, including steps being taken to establish paternity, if appropriate; (4) a decision of the minor to keep and raise her child or place the child for adoption; (5) completion of high school or GED; (6) current economic support of the minor parent and child and plans for economic self-sufficiency; (7) parenting skills of the minor parent; (8) living arrangement of the minor parent and child; (9) child care and transportation needed for education, training, or employment; (10) ongoing health care; and (11) other services as needed to address personal or family problems or to facilitate the personal growth and development and economic self-sufficiency of the minor parent and child. *Id.*

action due to the "immaturity of the minor parent."³⁸ While other states may [*313] not mandate such a procedure, one might suspect that similar requirements of planning and supervision arise less formally.

In most jurisdictions, a teen's newborn would not be placed automatically under jurisdiction of the state because the teen has not yet had the opportunity for parenting, and there would be little basis for intervention based on abuse and neglect. Nonetheless, additional scrutiny may come from other adults in the teen parent's life. A teen parent who stays in school may have her parenting scrutinized on a daily basis by teachers, nurses, and social workers in a way that an adult's relationship with her children would not be similarly monitored by her employers.

Moreover, just as with adult parents, poverty places teen parents at increased risk of being charged with abuse and neglect.³⁹ As poor teen parents apply for governmental assistance for themselves and their children, they may be subject to requirements for receiving that assistance that may lead to charges of abuse and neglect. The United States Supreme Court in *Wyman v. James* affirmed the right of states to condition welfare benefits upon the recipients' consent to periodic home visits by caseworkers.⁴⁰ Welfare reform in recent decades has increased the use of these home visits as means to investigate for fraud, but also to discourage applications for government benefits.⁴¹

In addition to those teen parents who find their parental rights at risk, 5% of teen birth mothers affirmatively relinquish their children for adoption.⁴² The degree to which these mothers' decisions are voluntary is difficult to assess. Programs, parents, and even potential adoptive parents may create subtle or overt pressures for voluntary relinquishment. These processes of relinquishment are less visible, with less certain rights to representation, than involuntary termination processes.

Whether a teen's parenting is placed into legal question because she is herself a ward of the state, the state initiates a separate dependency action for her child, or the teen has decided to relinquish her child, the question becomes what legal representation must be provided to these parents.

[*314]

III. The Attorneys-Multiple Routes to Uncertain Representation

Once a teen parent becomes a respondent in an abuse and neglect proceeding, or acts to voluntarily relinquish her child, who represents that parent? Across the states and even within each state, several sources provide for the teen parent's right to representation, but each source suggests a slightly different form of representation.

A. Representation of the Adolescent as a Child in the Abuse and Neglect System

As a minor in the abuse and neglect system, the parent must have a guardian ad litem (GAL) or other representative. The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires the states to provide a

³⁸ [Minn. Stat. § 257.33\(2\)\(c\)](#).

³⁹ Erica Turcios, *Remaining vs. Removal: Preventing Premature Removal when Poverty is Confused with Neglect*, 12 Mich. Child Welfare L.J. 20, 23 (2009).

⁴⁰ [Wyman v. James, 400 U.S. 309, 326 \(1971\)](#). But see Robert A. Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 Mich. L. Rev. 1259, 1260 (1971) (criticizing the decision as government intrusion of the privacy and decision-making capacities of families).

⁴¹ Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, [85 Ind. L.J. 355, 375-82 \(2010\)](#).

⁴² *How Many Women Place Their Children for Adoption?*, National Adoption Information Clearinghouse, <http://statistics.adoption.com/information/adoption-statistics-placing-children.html>.

GAL to represent the child's best interests in every case of abuse or neglect that results in a judicial proceeding.⁴³ The statute does not alter the requirement of representation simply because the child is the respondent rather than the subject of such a proceeding.⁴⁴ Accordingly, in all states and the District of Columbia, statutes provide for representation, but there are many variations on exactly what kind of representation is required.⁴⁵

In many states, the representative does not actually represent the child but is a GAL whose role is to serve as an officer of the court to investigate the child's situation, wishes, and interests, and recommend to the court those steps that would serve the best interest of the child.⁴⁶ Thirty-nine states provide for GAL representation.⁴⁷ Oregon requires the appointment of a Court Appointed Special Advocate (CASA).⁴⁸ In sixteen of these states, the District of Columbia, and the Virgin Islands, the GAL must be an attorney and is required to operate as a guardian of best interests [*315] rather than a client-directed advocate.⁴⁹

Whether or not a GAL is an attorney, the role of GAL is one that requires representation of the best interests of the child, and so leaves teen parents with little effective say in how their position will be presented to a court. In only seventeen states and Guam is the GAL even obligated to communicate the child's wishes to the court along with his or her own recommendations.⁵⁰ In ten states and Guam, the court may appoint a separate counsel to represent the child if the child's wishes conflict with the GAL's recommendations.⁵¹ However, this decision is a discretionary one and courts are reluctant to appoint additional representation, even when a child disagrees with her GAL's recommendations.⁵²

For example, in *In re Williams*, the Ohio Supreme Court held that in the circumstances in which an older child consistently expressed wishes that conflicted with her GAL's recommendations, due process required that the court

⁴³ Federal Child Abuse Prevention and Treatment Act (CAPTA), [42 U.S.C. § 5106a](#)(b)(2)(A)(xiii) (2006).

⁴⁴ See *id.*

⁴⁵ See *Representing Children Worldwide*, Yale Law School (2005), <http://www.law.yale.edu/rcw/rcw/jurisdictions/amn/usa/usa.htm> [hereinafter *Representing Children*] (providing information on all fifty states' practice with respect to the appointment of counsel for children in dependency cases organized by state).

⁴⁶ [42 U.S.C. § 5106a](#)(b)(2)(A)(xiii).

⁴⁷ See *Representing Children*, *supra* note 45 (<http://www.law.yale.edu/rcw/rcw/jurisdictions/amn/usa/usa.htm> (click on the hyperlink of each state; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information) (Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico (for a child under age fourteen; an attorney must be appointed for a child who is age fourteen or older), North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Tennessee, Vermont, Virginia, Washington, Wisconsin, and Wyoming). In Vermont, the GAL must advocate for the child's wishes if the child is able to effectively communicate them. *Id.* (follow the Vermont hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information).

⁴⁸ [Or. Rev. Stat. § 419A.170\(1\)](#) (2009).

⁴⁹ *Representing Children*, *supra* note 45 (Alabama, Arkansas, Colorado, Kansas, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

⁵⁰ *Id.* (Arkansas, Delaware, Hawaii, Maine, Michigan, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, Texas, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin).

⁵¹ *Id.* (Connecticut, Delaware, Hawaii, Illinois, Kansas, Maine, Michigan, New Hampshire, Washington (if a child who is age 12 or older requests separate counsel), and Wisconsin).

⁵² See, e.g., [In re Williams](#), 805 N.E.2d 1110, 1112-13 (Ohio 2004).

conduct a hearing to determine whether independent counsel for the child should be appointed.⁵³ Even when children have expressed wishes contrary to the GAL's recommendations, the courts have sometimes discounted that conflict because of the child's age,⁵⁴ maturity, mental abilities,⁵⁵ and psychological health.⁵⁶ Most often, the courts discount this conflict because the child expresses mixed emotions or desires,⁵⁷ rather than consistent, unequivocal, and repeated wishes that directly conflict with the recommendations of the GAL.⁵⁸ Given their general lack of power in adult- [*316] child relationships, few children will have the disposition to express their wishes so strongly and consistently.⁵⁹ Thus, the fact that courts rarely find the need for separate counsel should come as no surprise. Only a few states require client-directed legal representation of the teen parent. Fifteen states and Puerto Rico require the appointment of an attorney for the child.⁶⁰ Five states require both an attorney and

⁵³ *Id.*

⁵⁴ [In re K.H., No. 5-10-06, 2010 Ohio App. LEXIS 3226](#), at *27 (Ct. App. 3d Dist. Aug. 16, 2010) (no representation required for four-year-old who did not speak much and did not express wishes to GAL).

⁵⁵ *In re A.S., No. 05AP-351, 352, 2005 Ohio App. LEXIS 4963*, at **8 (Ct. App. 10th Dist. Oct. 18, 2005) (finding no error in failing to appoint counsel for child who was "low-functioning, has limited communication abilities, and is unable to express her wishes as to custody[]").

⁵⁶ For example, in *In re T.E.*, the court concluded that counsel for the children was not warranted taking into account in particular the fact that the child who's wishes conflicted with the GALs had "been forced to act in a parental capacity in that home." *In re T.E., No. 22835, 2006 WL 173132*, at *6 (Ohio Ct. App. Jan. 25, 2006).

⁵⁷ [In re Graham, 854 N.E.2d 1126, 1132 \(Ohio Ct. App. 1st Dist. 2006\)](#) (No need for independent representation of ten and eleven-year-old boys who "sometimes stated they wanted to be with their mother, but also expressed conflicting emotions about where they wanted to be placed[]" when GAL recommended against reunification).

⁵⁸ See, e.g., [In re M.C., No. L-09-1271, 2010 Ohio App. LEXIS 1145](#), at **18-21 (Ct. App. 6th Dist. Mar. 31, 2010) (finding no conflict requiring appointment of an attorney where a nine-year-old expressed priority of choices for her custody and the GAL recommended foster care-the child's third choice); [In re A.T., No. 23065, 2006 Ohio App. LEXIS 3883](#), at **1, 31-32 (Ct. App. 9th Dist. Aug. 2, 2006) (finding statements of a nine-year-old child expressing a desire to be reunited with mother were not sufficient to require independent representation because he did not have "the necessary maturity to understand the proceedings and provide a credible indication regarding his wishes as to custody", he was "in counseling and under psychiatric care" and he did not "consistently and repeatedly express[] a desire" for reunification with mother when the GAL recommended permanent custody with the state for the five siblings she represented).

⁵⁹ William A. Kell, Symposium: Law and the New American Family: Response: Voices Lost and Found: Training Ethical Lawyers for Children, [73 Ind. L.J. 635, 646 \(1998\)](#) ("Because she has learned that what she thinks and what she says matters little, the child is reluctant to speak her mind, often out of a sense that it would be a 'waste of time.'").

⁶⁰ [Representing Children, supra](#) note 45 (click on the hyperlink of each state; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information) (California, Connecticut, Kentucky, Louisiana, Maryland, Massachusetts, New York, Nevada, New Mexico, Oklahoma, South Dakota, West Virginia, Wisconsin, Washington, and Wyoming). In Connecticut and Wyoming, the attorney also may serve as the child's GAL. *Id.* (follow the Connecticut and Wyoming hyperlinks; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). In Nevada, an attorney is required only under certain circumstances. *Id.* (follow the Nevada hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). In New Mexico, an attorney is required if the child is fourteen or older. *Id.* (follow the New Mexico hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). In Washington, an attorney is required if the child is over twelve years old and requests an attorney. *Id.* (follow the Washington hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). In California, the appointment of an attorney is required; however, if the court finds the child would not benefit from an attorney the court must appoint a CASA for the child. *Id.* (follow the California hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). *Id.*

GAL.⁶¹ In Wisconsin, a child has the right to counsel and he or she may not be removed from the home unless counsel has been appointed.⁶² If the child is under age twelve, the court may appoint a GAL instead of counsel.⁶³

In summary, teen parents who are represented by GALs will often have very limited representation of their expressed wishes. In most systems, the GAL represents the court's interest in determining the best interest of the child, rather than the child's wishes. Moreover, funding, training, and caseload burdens create significant limitations on the abilities of GALs to [*317] provide zealous representation of these children.⁶⁴

B. Representation of Minor Parents as Parents

In addition to requirements that GALs or attorneys represent teen parents (or more commonly their best interests) as children in abuse and neglect actions, in most states these teen parents may have some rights to representation as parents as well. In *Lassiter v. Department of Social Services*,⁶⁵ the United States Supreme Court faced the question of whether an indigent parent facing a possible termination of her parental rights had a right to appointed counsel. The Court held that there was no absolute right to counsel in these types of cases.⁶⁶ Rather, the Court concluded that due process might, in an individual case, require appointed counsel and that the decision must be made on a case-by-case basis.⁶⁷

The right to counsel is determined by applying the three-part due process calculus of *Mathews v. Eldridge*,⁶⁸ in which the court weighs the state's interest against the private interest implicated and the risk of erroneous decision. The Court in *Lassiter* required that this balance operate in the context of a presumption against the right to counsel absent a threat to physical liberty.⁶⁹ Thus, indigent parents and children in the federal courts must establish their right to counsel on a case-by-case basis.⁷⁰

When one evaluates due process in instances in which teen parents are facing termination of their parental rights, the weight of the argument favors a right to representation. Children need legal counsel when making the decision to relinquish their infant or when facing termination of parental rights. First, the cost of error is profound. Termination

⁶¹ Id. (click on the hyperlink of each state; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information) (Mississippi, North Carolina, South Carolina, Texas, and Vermont). In Texas, the attorney may serve in the dual role of attorney and GAL, or a separate GAL may be appointed. Id. (follow the Texas hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information). In North Carolina and Mississippi, an attorney must also be appointed if the court appoints a non-attorney GAL. Id. (follow the North Carolina and Mississippi hyperlinks; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information).

⁶² Id. (follow the Wisconsin hyperlink; then, in the address bar, change the end of the URL from "htm" to "pdf" in order to find an Adobe portable document version of the relevant information).

⁶³ Id.

⁶⁴ See Barbara Glesner Fines, Pressures Toward Mediocrity in the Representation of Children, [37 Cap. U. L. Rev. 411, 448 \(2008\)](#).

⁶⁵ [Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 \(1981\)](#).

⁶⁶ [Id. at 31-32](#).

⁶⁷ Id.

⁶⁸ [Id. at 27](#) (citing [Mathews v. Eldridge, 424 U.S. 319, 335 \(1976\)](#)).

⁶⁹ Id. at 26-27.

⁷⁰ See, e.g., [Fowler v. Jones, 899 F.2d 1088, 1096 \(11th Cir. 1990\)](#); see also [United States v. Madden, 352 F.2d 792, 793 \(9th Cir. 1965\)](#).

of parental rights has been characterized as "the death penalty" of family law.⁷¹ For teen parents, that loss is not less than when adults have their parental rights terminated. A relinquishment is not cost free to any parent. Research presents "a growing body of recent research data which has supported the claims of birth parents that relinquishing a child is indeed a profound loss [*318] experience, and that this loss even can have long-term deleterious results."⁷² These negative effects can be mitigated with "sufficient resources and support to make an informed and deliberate choice."⁷³ One can presume that the loss is equal if not more profound when the parent has her rights terminated. For teen parents, the loss and grief of relinquishing or losing a child is aggravated by the circumstances of fewer resources to make these decisions and less emotional maturity to cope with the emotional fallout.

Second, there is a high risk of this profound error. As the Montana Supreme Court observed in recognizing a constitutional right to representation for indigent parents in termination proceedings:

The potential for unfairness is especially likely when an indigent parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.⁷⁴

If providing counsel to indigent parents with limited education is necessary to guarantee due process for adults facing termination of their parental rights, how much more so is this representation necessary for minor parents? In *Roper v. Simmons*,⁷⁵ the United States Supreme Court held that subjecting juveniles to the death penalty violates the Eighth Amendment. The Court justified its decision on the basis that teenagers are less culpable than their adult counterparts because they typically had not developed a mature sense of decision-making and were more often impulsive and subject to peer pressure.⁷⁶ If teenagers are less culpable in the criminal setting, it stands to reason that they should not be as easily judged with the finality of termination of parental rights in the child welfare system without legal representation. Moreover, their decision to consent to a voluntary termination is less stable if made without the advice of a legal representative. As one court noted:

Where the minor parent's own parent or guardian is not involved with the adoption, the minimum safeguard for protecting the minor parent's rights is independent legal counsel. A guardian ad litem should be appointed by the court where the minor is unable to secure such counsel. The [*319] relatively insignificant delay and expense involved in appointing a guardian ad litem should not outweigh the importance of ensuring that the minor parent understands the irrevocable nature of the proceedings.⁷⁷

The right to counsel profoundly affects the outcome in child welfare cases. Studies have demonstrated dramatically improved outcomes when lawyers are guaranteed to parents in child welfare proceedings. Those outcomes include

⁷¹ [In re Interest of K.A.W.](#), 133 S.W.3d 1, 12 (Mo. 2004). "The termination of parental rights has been characterized as tantamount to a civil death penalty . . . [i]t is a drastic intrusion into the sacred parent-child relationship." *Id.* (internal citations and quotations omitted). Accord [In re N.R.C.](#), 94 S.W.3d 799, 811 (Tex. Ct. App. 14th Dist. 2002); [In re Parental Rights as to K.D.L.](#), 118 Nev. 737, 58 P.3d 181, 186 (Nev. 2002); [In re Interest of P.C.](#), 62 S.W.3d 600, 603 (Mo. Ct. App. W.D. 2001).

⁷² Elizabeth J. Samuels, Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants, [72 Tenn. L. Rev. 509, 529 \(2005\)](#) (quoting Robin C. Winkler et al., *Clinical Practice in Adoption* 48 (1988)).

⁷³ [Id. at 530.](#)

⁷⁴ [In re A.S.A.](#), 258 Mont. 194, 198 (Mont. 1993).

⁷⁵ [Roper v. Simmons](#), 543 U.S. 551, 578 (2005).

⁷⁶ [Id. at 570.](#)

⁷⁷ See [In re Adoption of D.N.T.](#), 843 So. 2d 690, 713 (Miss. 2003).

reunification rates increasing by over 50%, termination of rights decreasing by 45%, foster children aging out of the system decreasing by 50%, and significantly shorter periods of time for children in foster care.⁷⁸ If these are the improved outcomes that result from providing counsel to parents in all child welfare cases, surely these results would be even truer within the subset of parents who are minors, where the need for guidance, empowerment, trust, and engagement is so much greater. These studies suggest that, without the right to counsel, many more families are disrupted for much greater periods of time than is necessary to serve the purposes of the child protection system. In terms of due process analysis, the risks and costs of error are both very high.

Third, ordinarily in a due process calculus, the risks of erroneous deprivation of private rights must be balanced against the government's "significant interests in informality, flexibility, and economy."⁷⁹ This presumes that the absence of counsel reduces costs and increases efficiency. With the child welfare system, however, much of the fiscal cost of error is borne by the state. From the costs of the termination proceeding itself, to the costs of foster care and placement proceedings, avoiding erroneous termination of parental rights actually reduces costs. Studies indicate that when parents have the right to counsel, hearings take place faster and the savings to governments are millions of dollars over short periods of time.⁸⁰

Most states have agreed with the due process analysis and provide broader protection for these litigants than Lassiter mandated. A number of states have established a constitutional right to counsel for parents in dependency cases, though most provide counsel only at the termination of the parental rights stage, rather than at the earlier dependency action proceedings.⁸¹ Other states prefer to provide the right by statute or court [*320] rule.⁸² Once granted, however, the right is protected by due process. In cases brought in these states, the court may not decline to recognize the right, as the legislature has preempted the court's balancing test.⁸³ Rather, the issue is more

⁷⁸ Vivek S. Sankaran, A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protective Proceeding, **89 Mich. B. J. 36, 38 (2010)**.

⁷⁹ [Gagnon v. Scarpelli](#), 411 U.S. 778, 788 (1973).

⁸⁰ Vivek S. Sankaran, Protecting a Parent's Right to Counsel in Child Welfare Cases, 13 Mich. Child Welfare J. 2, 3 (2009).

⁸¹ [Flores v. Flores](#), 598 P.2d 893, 895 (Alaska 1979) ("[D]ue process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child."); [J.B. v. Fla. Dep't of Children & Family Servs.](#), 768 So. 2d 1060, 1068 (Fla. 2000) (holding due process under the Florida Constitution requires right to counsel in proceeding to terminate parental rights); [Trowbridge v. Trowbridge](#), 401 N.W.2d 65, 66 (Mich. Ct. App. 1986) (holding that the right to counsel in termination proceedings is guaranteed by state statute and also by the Equal Protection Clauses of the United States and Michigan Constitutions); [In re A.S.A.](#), 852 P.2d 127 (Mont. 1993) (holding due process under the Montana Constitution requires effective assistance of counsel in termination proceedings); [In re Shelby R.](#), 804 A.2d 435, 439-40 (N.H. 2002) (holding that due process requires appointment of counsel to stepparents accused of abuse or neglect); [Adoption of Holly](#), 738 N.E.2d 1115, 1121 (Mass. 2000) (finding state constitutional right to court-appointed counsel for parents in termination of parental rights cases); [Danforth v. State Dep't of Health & Welfare](#), 303 A.2d 794, 800 (Me. 1973) (holding that due process requires appointment of counsel to indigent parents in child neglect cases); [In re D.D.F v. State ex rel. Dep't. of Human Servs.](#), 801 P.2d 703, 706-07 (Okla. 1990) (reaffirming, under the Oklahoma Constitution, that due process requires appointed counsel in all termination cases); [Dep't of Soc. & Health Servs. v. Moseley \(In re Moseley\)](#), 660 P.2d 315, 318 (Wash. Ct. App. 1983) (holding that the Washington Constitution requires effective assistance of counsel in termination proceedings); Patricia C. Kussmann, Annotation, Right of Indigent Parent to Appointed Counsel in Proceedings for Involuntary Termination of Parental Rights, [92 A.L.R. 5th 379 \(2011\)](#).

⁸² See, e.g., [Ward v. Jones](#), 757 N.Y.S.2d 127, 129 (N.Y. 2003) (no right to counsel for parents seeking visitation); [K.D.G.L.B.P. v. Hinds Cnty. Dep't of Human Servs.](#), 771 So. 2d 907, 914 (Miss. 2000) (no constitutional right to counsel in termination of parental rights proceedings).

⁸³ [Battishill v. Ark. Dep't of Human Servs.](#), 82 S.W.3d 178, 180 (Ark. Ct. App. 2002) (Arkansas statutes providing for right to counsel in abuse and neglect proceedings creates due process right in all cases).

often whether the litigant's waiver of counsel is valid,⁸⁴ or whether effective assistance of counsel has been rendered.⁸⁵

For example, in Missouri, in termination of parental rights cases, indigent parents have a right to appointed counsel⁸⁶ as do parents whose children are the subject of less drastic dependency proceedings.⁸⁷ In some instances, as when a parent is a minor or incompetent, the parents have the [*321] right to a GAL as well.⁸⁸ Even if a child has the right to an attorney to provide client-directed representation, a GAL may nonetheless be appointed. This appointment may result from the attorney's request for a GAL if the attorney believes a client is incompetent to direct the representation, but more often, the court will appoint the GAL under the assumption of incapacity. The resulting confusion of roles and authority can undermine effective representation by either or both of these attorneys.

C. Counsel in Voluntary Relinquishment

When the context shifts to a voluntary relinquishment, the same uncertainty of representation exists. In some states, a minor parent must be provided with separate counsel prior to the execution of consent, or a GAL must be appointed to either review or execute the consent.⁸⁹ In three states,⁹⁰ Guam,⁹¹ and Puerto Rico,⁹² the

⁸⁴ [In re Welfare of G.L.H.](#), 614 N.W.2d 718, 722 (Minn. 2000).

⁸⁵ See [In re Interest of K.L.](#), 91 S.W.3d 1, 15 (Tex. App. 2d Dist. 2002); [In re Interest of M.P.W.](#), 983 S.W.2d 593, 600 (Mo. Ct. App. W.D. 1999).

⁸⁶ [Mo. Rev. Stat. § 211.462](#) (2003) (requiring appointment of guardian ad litem and providing right to counsel to parent or guardian in proceedings to terminate parental rights). The statute does not establish an absolute right to counsel. *Id.* at § 211.462(2). Instead, it requires the court to appoint counsel only when: (1) the parent requests court-appointed counsel; and (2) the parent demonstrates that he or she is indigent and therefore is financially unable to employ counsel. *Id.* The Missouri court has held that, because of the severe nature of termination proceedings, the terms of § 211.462.2 are to be strictly applied, and a court's failure to appoint counsel without an affirmative waiver of those rights "has been held to be a reversible error." [J.D. v. L.D.](#), 34 S.W.3d 432, 434 (Mo. Ct. App. W.D. 2000). See generally Kussmann, *supra* note 81, at 379 (discussing rights to appointed counsel of indigent parents in various states).

⁸⁷ [Mo. Rev. Stat. § 211.211\(1\)](#) (2003). The statute provides that "[a] party is entitled to be represented by counsel in all proceedings." *Id.* This would include, then, proceedings to bring children under the [jurisdiction] of the state as the result of abuse, neglect, or incapacity of parents. These dependency proceedings do not necessarily result in termination of parental rights[,] if services can be provided to reunify the family under conditions in which the child's health and safety are assured. These statutory rights to representation are mandated by the federal Child Abuse Prevention and Treatment Act (CAPTA) as a condition of federal funding. Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, [72 UMKC L. Rev.](#) 337, 343 n.41 (2003); [42 U.S.C. § 5106c\(b\)\(1\)](#) (2006).

⁸⁸ [Mo. Rev. Stat. § 211.462\(2\)](#). "When the parent is a minor or incompetent the court shall appoint a guardian ad litem to represent such parent." *Id.* The statute provides little guidance on the issue of what constitutes 'incompetence' in a parent requiring the appointment of a GAL. Since common bases for termination of parental rights actions are the mental condition or chemical addiction of the parent, a low threshold for incompetency could result in the necessity of both attorney and guardian ad litem for a large number of parents. The issue is open, however, as the Missouri courts have not yet spoken on the question. Fines, *supra* note 87, at 343 n.42.

⁸⁹ [Ala. Code §§ 26-10A-7, 26-10A-8](#) (2009) (GAL); [Ark. Code § 9-9-208](#) (2009) (GAL); [Kan. Stat. §§ 59-2114, 59-2115](#) (2005) (independent legal counsel); [Ky. Rev. Stat. § 199.500](#) (2006) (GAL); Md. Code, Fam. Law § 5- 339 (2006) (counsel); [Mo. Rev. Stat. §§ 453.030, 453.030\(12\)](#) (2003) (attorney/ legal representation); [Mont. Code §§ 42-2-303, 42-2-405, 42-2-408](#) (2009) (separate legal counsel); [Tenn. Code §§ 36-1-110, 36-1-117](#) (2009) (GAL "if deemed necessary"); [W. Va. Code §§ 48-22-302, 48-22-304](#) (2002) (GAL).

⁹⁰ [La. Child. Code arts. 1193, 1113](#) (2010) (requiring that unless the minor parent has been judicially emancipated or emancipated by marriage); [Minn. Stat. § 259.24\(2\)](#) (2007) (requiring that the agency overseeing the adoption proceedings shall

consent of the minor's parents must be obtained. In two states, consent must be of either the teenager's parents or a GAL.⁹³ In other states, a minor parent has no particular procedural protections and statutes provide that their consent is valid, regardless of their minority.⁹⁴

Here again, the uncertainty of an attorney's role even within these states is profound. Is the role of an attorney in a teenager's voluntary relinquishment simply to ensure that the relinquishment is procedurally and substantively sound or is it to engage the teenager in thinking through the issue of relinquishment in order to ensure that the decision is truly informed and voluntary? How does that differ from the role of a GAL in this same setting?

[*322]

As the next section explores, whether the attorney is acting as an attorney or a GAL, for the teenager as a child or a parent, in termination or relinquishment actions, confusion and ambiguities abound.

IV. The Challenges of Good Lawyering for a Minor Parent

An attorney representing an adolescent parent client owes that client the same duties as an adult client.⁹⁵ To serve these clients, however, the attorney must overcome challenges of the ambiguity of the attorney's role, the uncertainty of the client's legal rights, the questions of the capacity of the child to direct the representation, the role and influence of other parties in these disputes, and the systemic and personal biases present in representing teen parents.

A. Confused and Conflicting Roles

As a preliminary matter, one of the most significant challenges to attorneys representing teen parents is to clarify their role. The role of an attorney for the child is difficult but at least better defined than that of an attorney GAL. Rule 1.2 of the ABA Model Rules of Professional Conduct provides that the client is to direct the objectives of the representation⁹⁶ and Rule 1.4 provides that the attorney shall keep clients reasonably informed, consult with them about the means of accomplishing their objectives, and provide sufficient information for the client to provide informed consent to those issues within the client's control.⁹⁷ Rule 1.14 acknowledges that some clients may have limited capacity for this decision-making. However, the rule makes clear that the attorney in these circumstances must "as far as reasonably possible, maintain a conventional relationship with the client."⁹⁸

ensure that the minor parent is offered the opportunity to consult with an attorney, a member of the clergy, or a physician before consenting to adoption of the child); N. H. Rev. Stat. § 170-B:5 (2010) (permitting courts to require assent of the parents).

⁹¹ 19 Guam Code Ann. § 4206 (2010).

⁹² P.R. Laws Ann. tit. 31, § 535 (2008).

⁹³ [R. I. Gen. Laws §§ 15-7-5](#), 15-7-10 (**2011**); [Mich. Comp. Laws § 710.43](#) (2010).

⁹⁴ E.g., [Ariz. Rev. Stat. § 8-206\(A\)-\(B\)](#) (2007).

⁹⁵ Marvin V. Ventrell, Rights & Duties: An Overview of the Attorney-Child Client Relationship, [26 Loy. U. Chi. L.J. 259, 267 \(1995\)](#).

⁹⁶ Model [Rules of Prof'l Conduct R. 1.2](#) (2010).

⁹⁷ Model [Rules of Prof'l Conduct R. 1.4](#); see also Model [Rules of Prof'l Conduct R. 1.0\(e\)](#) (defining informed consent).

⁹⁸ Model [Rules of Prof'l Conduct R. 1.14\(a\)](#).

The role of the GAL is less certain, with duties that range from advocacy for the child's wishes, advocacy for the child's best interest, and a quasi-judicial role as the "eyes and ears of the court."⁹⁹ Attorneys who [*323] regularly serve as GALs likely have a better sense of which of these roles their particular judges perceive as appropriate, but those understandings can be upset when translated into the unique setting of representing a child who is a parent. Since most GALs are primarily child advocates, it is difficult for some to keep their focus on representing the parent rather than concerning themselves with what would be good for the teen's infant. As one observer noted in discussing the attitude toward foster care teen parents: "Now that she has a child, the same system that cast the ward as a helpless victim is quick to cast her as the enemy."¹⁰⁰ Even if they do not truly overlook their client's needs and wishes, the habits or practice of those who regularly represent the best interest of children as children, rather than as parents, may be to conflate both interests into a "what's good for baby is good for mommy" philosophy that leaves the child-parent without effective representation.

To add to the confusion, as the previous section has discussed, in many cases a teenage parent will have both a GAL and an attorney. Who is in charge of decisions if there is both a GAL and an attorney for the child? May the GAL direct the attorney's representation? The answers to these questions are rarely clear in the law or even as a matter of common understandings among the attorneys in any given jurisdiction. However, logic dictates that there is little purpose in having a second attorney to represent the child's expressed wishes when they conflict with the GAL's recommendations if the GAL has the power to direct that attorney's representation. Nonetheless, courts faced with the issue have hedged with best interest and fact-specific decisions on this issue rather than clarifying the role.

For example, the Connecticut Court of Appeals addressed this confusion in a case in which the issue was custody of an infant born to an eleven-year-old girl who had been sexually assaulted by her grandfather.¹⁰¹ The young mother was appointed both an attorney and an attorney GAL.¹⁰² The court considered the GAL appointment to be discretionary, finding that the requirement of a GAL for a child in an abuse and neglect proceeding only applied to cases when the child was the object of a petition, not a [*324] parent who also happens to be a child.¹⁰³ When both the attorney and the GAL recommended that the infant be placed in temporary custody of the state, the grandmother appealed, arguing that she should have been the person to speak on behalf of her daughter rather than the GAL.¹⁰⁴ In resolving this standing question, the court attempted to bring some clarity to the respective

⁹⁹ Fines, *supra* note 64, at 441. Previously, I argued that the GAL role is commonly neither advocacy for the best interests of the child nor for the child's wishes but is more often a quasi-judicial role: The problem with this conception is that the role of judicial agent and the role of attorney are quite opposite in many respects. Judges are required to be neutral, disinterested and passive; attorneys represent a particular client's objectives with "warm zeal." While the ethical conflict of advocating for the child's interest as opposed to the child's wishes can be resolved by a clear identification of the client, it is more difficult to reconcile the roles of the attorney (whether for the child or the child's best interest) and agent of the court. The attorney must refrain from acting as a witness in the case, yet an agent of the court is expected to be the "eyes and ears of the court," investigating facts and preparing reports, testifying to facts and providing recommendations to the court. There are parallels of course. Both attorneys and court investigators bring facts to the court's attention, but with attorneys those facts are selected and advocated so as to represent the client's objective. Not so with judicial agents, whose presentation of facts is expected to be catholic and neutral. Attorneys advocate for results from a position of partisanship; judicial agents recommend results from a position of disinterested neutrality. Attorneys are held accountable to their clients; judicial agents are accountable only to the judges. *Id.*

¹⁰⁰ Stotland, *supra* note 25, at 23.

¹⁰¹ [In re Tayquon H., 821 A.2d 796, 799 \(Conn. App. 2003\).](#)

¹⁰² *Id.*

¹⁰³ [Id. at 802 n.7.](#)

¹⁰⁴ [Id. at 799-800.](#)

roles of the GAL and attorney.¹⁰⁵ The court considered the duties of the GAL as suggested by the National Court Appointed Special Advocate Association (NCASAA) and the American Academy of Matrimonial Lawyers (AAML), both of which deemphasize the role of the GAL as a legal representative in any capacity. While refusing to adopt a bright-line rule, the court's discussion suggested some distinctions between the GAL and the attorney for the child:

While the best interest of a child encompasses a catholic concern with the child's human needs regarding his or her psychological, emotional, and physical well-being, the representation of a child's legal interests requires vigilance over the child's legal rights. Those legal rights have been enumerated as the right to be a party to a legal proceeding, the right to be heard at that hearing and the right to be represented by a lawyer. When both a guardian ad litem and an attorney have been appointed for a child, their respective roles and the duties attendant to those roles should adhere to that basic distinction. Specifically, the guardian ad litem should refrain from acting as a second attorney for the child.¹⁰⁶

However, even with this clarification, the court recognized that, especially in the context of cases in which there is both a GAL and an attorney for the child, the only realistic source of clarity is in "precise, clear-cut orders by the court after input from counsel."¹⁰⁷ Those orders should address issues such as confidentiality, access to information, required reporting to the court, as well as the degree to which the GAL or the child should direct the representation.

B. The Client's Rights

The first task of the teen parent's attorney should be to ensure that the child's procedural and substantive rights are protected. However, the teen parent's rights are complicated by the unclear legal status of minors. In [*325] some jurisdictions, becoming a parent results in emancipation; in most it does not.¹⁰⁸ The rights of adolescents vary widely depending on the circumstances. Adolescents clearly do not have the same legal powers as adults- whether the question is driving a car, entering into a contract, voting, or serving in the military. When the question is the right of the child in matters of intimacy and reproduction, the status of a teenager's rights are even more unclear. As several commentators have noted, adolescents cannot access birth control or medical care, cannot choose to have an abortion, and cannot enter into marriage with the same rights and freedoms as adults. Yet, the adolescent appears to have an unlimited legal right to conceive, bear, and raise a child.¹⁰⁹

The right to parent is a fundamental constitutional interest. The United States Supreme Court in *Troxel v. Granville* most recently affirmed a parent's substantive due process right to parent their children, even as against the interests of grandparents.¹¹⁰ To terminate those rights, due process requires clear and convincing evidence that the grounds for termination exist and that termination is in the best interest of the child.¹¹¹ However, judicial proceedings prior to termination have fewer protections and lower standards of proof. The standard of proof for

¹⁰⁵ [Id. at 804 n.11](#) ("Given the unfortunate reality, however, that the status of being a child as well as a parent in a juvenile proceeding is not a rarity, we believe a discussion of the respective responsibilities of counsel and guardian ad litem for a child, here, is equally germane.")

¹⁰⁶ [Id. at 806.](#)

¹⁰⁷ [Id. at 807 n.20](#) (quoting 43 C.J.S. 609, Infants § 234 (1999)).

¹⁰⁸ E.g., [Purdy v. Purdy, 578 S.E.2d 30, 31-32 \(S.C. Ct. App. 2003\)](#) (no emancipation); [Caldwell v. Caldwell, 579 So. 2d 543, 549 \(Miss. 1991\)](#) (finding no emancipation occurred because of lack of a good relationship with noncustodial parent).

¹⁰⁹ Emily Buss, Legal Issues Facing Adolescents And Teens: The Parental Rights of Minors, [48 Buff. L. Rev. 785, 811 \(2000\)](#); Failinger, supra note 36, at 257.

¹¹⁰ [Troxel v. Granville, 530 U.S. 57, 72-73, 75 \(2000\).](#)

¹¹¹ [Santosky v. Kramer, 455 U.S. 745, 769-70 \(1982\).](#)

temporary removal hearings is probable cause in most states and the standard for civil adjudicatory hearings is the preponderance of the evidence standard.¹¹²

Just as the standard of proof varies at differing stages of the process, so the standards for intervention may vary. Across jurisdictions, definitions of abuse or neglect vary, but all require at a minimum some action, harm, or behavior that has harmed or poses an "imminent risk of serious harm" to a child.¹¹³ As a practical matter, however, the line between abuse, neglect, and merely bad parenting becomes blurred once the state is involved.

Even though the standard for bringing a child into the jurisdiction of the court may be clear, once the child is within the court's jurisdiction, the bar often is subtly raised. Whether they are not attending to the line or whether they want to ensure that a reunified family does not again fall below the line, child welfare agencies may provide services to promote the best interest of the child that are not absolutely necessary to bring the family [*326] above the line of abuse and neglect. In part, this is due to the world view of social workers and other child protection agents in child welfare agencies. Social workers and mental health professionals will be interested in broad system perspectives, and will work toward improved relationships, competencies, and outcomes over a longer period of time. Attorneys for the children are assessing a particular set of events and behaviors in the context of rules of evidence and specific legal standards.¹¹⁴ Releasing a child from jurisdiction as soon as the legal standards are met may appear to a social worker as particularly short-sighted and counterproductive when, with more intervention or services, the family will be less likely to re-enter the system at a later date. However, this systemic and preventative perspective is not the law. The court may not take or keep jurisdiction of a child simply because the family can "be better." Attorneys for teen parents must advocate for the legal right of the teens to be free from unwanted state intervention. This advocacy does not prevent the attorney from also helping the client to locate and access resources that can help improve the situation of both the teen parent and the child.

Most importantly, in the risk calculus used to determine whether intervention is appropriate,¹¹⁵ attorneys should ensure that risks are calculated based on their client's individual circumstances rather than broad generalizations regarding the status of the child. Just as poverty should not be confused with neglect, so too a parent's youth should not be taken as synonymous with an imminent risk of harm to their child. Youth of the parent is a double-edged sword in child dependency actions.¹¹⁶ A parent's immaturity makes it difficult to conclude that the conditions that brought their child into the court's jurisdiction are ones that could be treated and resolved. Courts have acknowledged that age and maturity may be taken into account. However, courts also have held that age and immaturity do not by themselves excuse a parent from the responsibility to meet the needs of the child.¹¹⁷ What advocates for young parents must take care to prevent is the assumption that youth and immaturity are themselves evidence of unfitness. As the Kentucky Supreme Court observed:

¹¹² See, e.g., *Jamison v. State*, 218 S.W.3d 399, 417 (Mo. 2007) (holding that provisions of the abuse and neglect laws requiring inclusion of an individual in the central registry before there had been a finding of abuse or neglect by a preponderance of the evidence by the Child Abuse and Neglect Review Board violated due process).

¹¹³ 42 U.S.C. § 5106g(2) (2006).

¹¹⁴ Mary Kay Kisthardt, Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases, 30 Rutgers L. Rec. 1, 34-35 (2006).

¹¹⁵ Charmaine Brittain & Deborah Esquibel Hunt, Helping in Child Protective Services: A Competency-Based Casework Handbook 219-24 (2d ed. 2004). Most child welfare agencies use a risk assessment as part of the overall assessment process in determining appropriate services to provide to a family. Id.

¹¹⁶ Donald L. Beschle, The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors, 48 Emory L.J. 65, 95-98 (1999).

¹¹⁷ *Commonwealth v. T.N.H.*, 302 S.W.3d 658, 664 (Ky. 2010) (citing *T.N.H. v. J.L.H.*, No. 2006-CA-001288-ME & No. 2006-CA-001736-ME, 2007 Ky. App. LEXIS 325, at *35 (Ky. Ct. App. Aug. 31, 2007)).

A minor may be ill-equipped to parent simply by virtue of his or her immaturity. Nevertheless, age and immaturity [*327] cannot excuse a parent from his or her responsibility to meet . . . the basic needs of the child "Adulthood is not a guarantee of parenting skills that meet even the minimum required under the law. The age of majority holds no magical formula to transform a mother who for years has refused to take her role as a mother seriously." ¹¹⁸

Just as adulthood is no guarantee of maturity and fit parenting, so too, attorneys should guard against the assumption that a parent's minority is accompanied by immaturity that makes the child categorically unfit as a parent.

C. The Capacity of a Teen to Direct the Representation

In states in which attorneys are appointed as GALs rather than as attorneys for the child, to what extent may the attorney treat the representation as client-directed representation rather than best interest determination? When representing adolescent parents, is it appropriate for an attorney GAL to conclude that the best interest of the child-parent is served by providing client-directed representation? Teen parents, even more than other children involved in the child welfare system, need to have a voice in the process and to be spared the most negative psychological and legal consequences of a termination in which they were not empowered to make decisions about the representation. When these same teenagers are the subjects of custody or adoption actions, courts consider their preferences, especially the choices of older teenagers. ¹¹⁹ Likewise, the consent of adolescents is generally required for their adoption. ¹²⁰ Concluding that an adolescent parent cannot direct the representation contributes to the overall conclusion of incapacity or unfitness. After all, if a teen cannot direct their representation with the assistance and counsel of their attorney, how can that same teen make decisions for the child with whom she may be fighting to preserve a relationship?

Client-directed advocacy does not mean that the attorney must simply accept the client's direction without question. Attorneys may engage the client in a discussion about the client's goals and whether those goals serve the client's best interests. Model Rule 2.1 provides that attorneys "shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that [*328] may be relevant to the client's situation." ¹²¹ In fact, if the client is taking actions that will be substantially detrimental, it would seem that a competent attorney would be required to provide this advice. Just as an attorney for a corporation or other entity under Rule 1.13 must ask his client to reconsider actions that would substantially harm the client, ¹²² so too the attorney's duties as an advisor under Rule 2.1 and the duties of communication under Rule 1.4 ¹²³ combine to provide a similar duty to counsel and communicate with the child client.

However, to what extent can child-clients actually direct a representation? Increasing understanding of brain science tells us that teenagers reason differently than adults. These differences have been cited to limit adolescent

¹¹⁸ Id. Similarly, in the context of relinquishment, courts have observed that youth and poverty do not raise a presumption of duress. *T.R. v. Adoption Servs., Inc.*, 724 So. 2d 1235, 1236 (Fla. 4th Dist. Ct. App. 1999) (holding youth and poverty do not constitute duress in securing relinquishment of child for adoption).

¹¹⁹ Linda D. Elrod, Client-Directed Lawyers for Children: It is the "Right" Thing to Do, *27 Pace L. Rev.* 869, 902-05 (2007).

¹²⁰ Joan Heifetz Hollinger, 1-2 Adoption Law & Practice § 2.08 (2000).

¹²¹ Model [Rules of Prof'l Conduct R. 2.1](#) (2010).

¹²² Model [Rules of Prof'l Conduct R. 1.13](#) (2010).

¹²³ Model [Rules of Prof'l Conduct R. 1.4](#) (2010).

culpability and also their rights.¹²⁴ However, research also indicates that, when guided by caring and competent adults, adolescents can make critical decisions for themselves and their children.¹²⁵ Attorneys representing children should not rush to conclusions about capacity based on limited information or assumptions based on age or upon the degree to which the attorney agrees with the client's decisions. "A great danger in capacity assessment is that eccentricities, aberrant character traits, or risk-taking decisions will be confused with incapacity. A capacity assessment first asks what kind of person is being assessed and what sorts of things that person has generally held to be important."¹²⁶ Comments to Model Rule 1.14 provide additional guidance for making an assessment of competency:

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reason leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.¹²⁷

[*329]

Assessing the capacity of any client requires time. Multiple meetings over time also allow an attorney to see temporal variations in functioning,¹²⁸ which can facilitate evaluating competency. Competency is not an on-off switch but a spectrum and the attorney should always strive to facilitate the client's decision-making in those circumstances in which the client has capacity. This facilitation cannot happen without a relationship with the client, and this is especially so with children. Only by understanding the child-parent's values, beliefs, and habits can the attorney counsel the child effectively.

Unless the attorney believes the child-client is simply incapable of providing direction to the representation, the child should be empowered to direct the representation. In addition to the due process and ethical considerations that point to this approach, the practical reality of the lives of teen parents necessitates this approach.

There is also a pragmatic reason for attorneys representing teens to advocate for their clients' expressed interests. As social workers in the field sometimes put it, "teenagers can walk." Adolescents easily and readily defy decisions made by their attorneys or by the court. Unlike infants and small children, they can run away from placements, refuse to attend visits with parents or siblings, and fail to keep counseling appointments scheduled by others. Given that a teenager has sufficient autonomy to disregard court and agency decisions regarding her care, an attorney who wants to ensure compliance with court orders has no choice but to enlist her client's active participation in setting the goals of representation.¹²⁹

¹²⁴ Buss, *supra* note 109, at 811.

¹²⁵ Jennifer L. Rosato, Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making, [51 DePaul L. Rev. 769, 770 \(2002\)](#) ("There is no set of findings that suggests that most children under the age of eighteen lack the capacity to make these [medical care] decisions. In fact, evidence suggests that some minors gain the requisite capacity considerably before reaching adulthood."); see also J. Shoshanna Ehrlich, Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents, [18 Berkeley Women's L.J. 61, 145 \(2003\)](#).

¹²⁶ Charles P. Sabatino, Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It? [16 J. Am. Acad. Matrimonial L. 481, 486 \(2000\)](#).

¹²⁷ Model [Rules of Prof'l Conduct R. 1.14](#), cmt 6 (2010).

¹²⁸ Sabatino, *supra* note 126, at 488.

¹²⁹ Stotland, *supra* note 25, at 34.

This observation requires attorneys to recognize that, regardless of whether the teen parent is a mature decision maker, they are in fact making decisions and have the power to act on those decisions. Whether serving as a GAL or as an attorney for the child, the best interest of a teen parent is representation that empowers the client to make wise decisions. To facilitate that decision-making, the attorney must provide independent professional judgment designed to protect the legal rights and powers of the child free from prejudgment.

D. Involving Other Adults in the Teen Parent's Decision-making

Rule 1.14 allows attorneys to involve other family members in decision-making when a client's capacity to make decisions is limited.¹³⁰ **[*330]** Research indicates that involvement of adults with teen parents improves decision-making and outcomes. In fact, one of the most important variables in determining whether a teen mother will become the respondent in an abuse and neglect action tends to be her living situation. Adolescent mothers living with an adult relative were much less likely to have their children removed for abuse and neglect than those who were not living with an adult relative.¹³¹

Once a child is involved in the child welfare system, however, an attorney must take great care in assessing the degree to which involvement of other adults in counseling the child client will enhance or diminish the client's decision-making. If the client insists on having family members present for meetings, attorneys must be aware of the interactions among the family members. They should "note any indication of discomfort by the client or influence by the younger family member . . . the content and tenor of comments, how supportive or dominating the family member may be, and how consistent or inconsistent the client's stated objectives are with prior wishes."¹³² If an attorney believes a family member is interfering with his client's decision-making, the attorney may take steps to limit that interference.

If an attorney believes that the client's capacity to act in his or her own best interest is diminished and the client is at risk of harm, the attorney may, under Rule 1.14 and its state counterparts, take "reasonably necessary protective action."¹³³ This can include revealing confidential information in order to consult with others or even, in the most extreme cases, seeing appointment of a guardian or conservator. "The appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available."¹³⁴ Given the negative effect of implying the teen parent is incapable of directing the representation, the attorney should proceed with caution.¹³⁵ An attorney in these circumstances should take great care to remember that the fundamental duty is to maintain a normal attorney-client relationship as much as is reasonably possible. This means the attorney will consider and respect the teen parent client's autonomy, dignity, and privacy when exercising this discretion to take steps to assist the client.

[*331]

E. The Problem of Bias and Appreciating the Client's Worldview

¹³⁰ Model [Rules of Prof'l Conduct R. 1.14](#) (2010).

¹³¹ Patricia Flanagan et al., Predicting Maltreatment of Children of Teenage Mothers, 149 *Pediatrics & Adolescent Med.* 451-55 (1995).

¹³² Aspirational Standards for the Practice of Elder Law with Commentaries, Professionalism and Ethics Comm. of the Nat'l Acad. of Elder Law Att's 9 (November 21, 2005), <http://www.naela.org/pdf/AspirationalStandards.pdf>.

¹³³ Model [Rules of Prof'l Conduct R. 1.14](#) (2010).

¹³⁴ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 404 (1996).

¹³⁵ See Leslie J. Harris et al., Guardians Ad Litem for Parents in Dependency and TPR Cases, The Or. Child Advocacy Project, 2 (Oct. 2008), <http://familylaw.uoregon.edu/docs/ethicsmemo.pdf>.

Bias in the child welfare protection system has been a topic of continued debate and study, as research indicates that poverty and race both place parents at greater risk of state intervention.¹³⁶ Advocates for teen parents should be aware of their own biases and those built into the child protection system: biases that judge these parents from the perspective of a paradigm that says that one must delay childbearing until one is economically and educationally prepared to provide adequate care for that child. The choice to have a child during adolescence presumes that there is a choice available to these youth or that any child who exercises this choice to bear a child is doing so for unworthy reasons.

Poor youth are driven by a logic that is profoundly counterintuitive to their middle-class critics, who sometimes assume that poor women have children in a twisted competition with their peers to gain status, because they have an insufficient knowledge of-or access to-birth control, or so they can milk the welfare system.¹³⁷

Yet in an economy and society in which poor women with little educational attachment have few opportunities for employment or stable family structures, the choice to have a child is not illogical or evil. These women rely on their children to bring validation, purpose, companionship, and order to their often chaotic lives- things they find hard to come by in other ways.¹³⁸

This desire for a close familial bond is constitutionally protected. The United States Supreme Court has declared that a parent's interest in relationships with his child is not merely one in which the parent has the right to direct or control the child's upbringing, but also an interest in the emotional relationship-the "companionship" of their children.¹³⁹

[*332]

Yet it is difficult to overcome the assumptions that children having children is a bad idea and that the best result for young people who do have children-for both them and their children-is to sever that relationship and free them to pursue education and employment opportunities. When study after study indicates that teen parents and their children are at significant risk for negative economic, educational, and health outcomes,¹⁴⁰ doesn't it make sense that the best goal for any teen parent would be to relinquish their child? Emily Buss has most clearly stated the argument for such a presumption:

While a bright line rule that all parents below a certain age are unfit will strike many, again, as inappropriate, identifying age as a factor to be considered along with others ought to be politically palatable. A statute might provide, for example, that the age of a minor could be viewed as an aggravating factor where another ground for unfitness were established. Or a parent's young age might be identified as relevant to a calculation of the likely speed of improvement in parenting. The youngest parents can be expected to take the longest to improve their

¹³⁶ Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 *S.C.L. Rev.* 577, 584 (1997) (arguing that the increased exposure of poor families exposes them to increased scrutiny of government actors); Nancy E. Dowd, *In Defense of Single-Parent Families* 76-77 (1997) (arguing that there is an inherent bias against poor and single parent families in the legal system).

¹³⁷ Kathryn Edin & Maria Kefalas, *Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage* 171 (2005).

¹³⁸ See *infra* text accompanying notes 144-148.

¹³⁹ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing as fundamental "the interest of a parent in the companionship, care, custody, and management of his or her children . . ."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring))).

¹⁴⁰ John Calvin et al., *Decision-making Rights of Teen Parents*, 12 *Mich. Child Welfare J.* 29, 32-33 (2009).

parenting abilities and commitment, and on this ground should be most vulnerable to the termination of their rights.
141

Despite the arguments for these approaches, the current law does not permit decisions on parental rights to be based on categorical presumptions. The question advocates must continually press decision-makers to ask is not whether teenage parenting is a good choice, but whether this teen, who already is a parent, is a fit parent. The client's situation must be assessed individually, without prejudging the capacity of a minor to be a fit parent. The United States Supreme Court, in *Stanley v. Illinois*,¹⁴² found unconstitutional a law that presumed unwed fathers to be unfit parents without an individual hearing. The court stated:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.¹⁴³

[*333]

The idea that terminating rights of minor parents is a positive for both parent and child is grounded in a number of assumptions for which there is little support. There is no clear evidence that punishing teen parents for making the choice to conceive a child before they are in a better position to care for the child will deter early childbearing. Moreover, there is little evidence that children whose parents voluntarily relinquish their children fare better than those who are raised by their teen parents. Despite economic and educational disadvantages, both teen parents and their children may be afforded important benefits from keeping their family intact. Removal of a child from his parent has significant negative consequences that "may be every bit as damaging to a child's psyche as harm caused by neglect."¹⁴⁴ For children, the foster care system is not ideal and adoption is not guaranteed. Moreover, even for children who are adopted, identity issues from adoption can create a lifetime of struggle.¹⁴⁵

For many teen parents, especially those from poor communities, having a child is a critical aspect of their own self-worth and identity. Research has indicated that, in the poorest Latino communities in the United States, childbearing gives girls self-worth and a feeling of respect.¹⁴⁶ Ambivalence in Latino communities toward contraception and a bias against abortion influences adolescent pregnancy rates.¹⁴⁷

In an America that is profoundly unequal, the poor and rich alike are supposed to wait to bear children until they can complete their schooling, find stable employment, and marry a man who has done the same. Yet poor women realize they may never have children if they hold to this standard. Middle-class taxpayers see the children born to a young, poor, and unmarried mother as barriers to her future achievement, shortcircuiting her chances for what might have been a better life, while the mother herself sees children as the best of what life offers.¹⁴⁸

From the standpoint of the child's legal rights, the termination of her parental rights has profound consequences for her future ability to parent. Many low skill job opportunities-child care and medical assisting, for example-which may

¹⁴¹ Buss, *supra* note 109, at 816.

¹⁴² [Stanley, 405 U.S. at 658.](#)

¹⁴³ [Id. at 656-57.](#)

¹⁴⁴ Turcios, *supra* note 39, at 20.

¹⁴⁵ Samuels, *supra* note 72, at 530-31 (reciting the psychological studies of adopted children, noting their "unique developmental challenges" and their "increased risk for psychological and academic problems").

¹⁴⁶ James Blair, *Why Latinas are More Likely to be Moms*, *Christian Sci. Monitor*, Oct. 28, 1999, at 1.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ Edin, *supra* note 137, at 170.

be the most available options for some of these young people, are likely to be foreclosed to individuals who have had parental rights terminated. Additionally, under the Adoption and Safe Families Act, a parent who has had her rights terminated as to one child is not entitled to "reasonable efforts" by the state agency to prevent removal of another child.¹⁴⁹ This rule has been criticized as unfairly burdening a parent who "has instituted major positive changes in their life between the first involuntary termination of the child and subsequent court proceedings involving another child."¹⁵⁰ This criticism seems especially relevant to the termination of a teen parent's rights and explains why many state courts will retain jurisdiction over a teen parent's child for a longer period of time, while delaying actions to terminate the rights of adolescent parents.

None of this is to say that an attorney should not counsel his teen parent client regarding options of voluntary termination or less drastic steps, such as a guardianship. Certainly an attorney should always provide a client with options and the advantages and disadvantages of each.¹⁵¹ But that counseling should be respectful of the client's culture, values, and the reality of their individual circumstances.

Probably the most important role an attorney for a teen parent can play is to ensure that the system provides adequate services to give the teen a reasonable choice and chance to succeed as a parent. "Effective programs are systematically planned, offer a comprehensive selection of services, address child development and health-care needs, are customized to the parent's developmental level, involve extended family members, and promote intergenerational relationships."¹⁵² In representing children with special needs in the educational setting, schools are required to provide individualized education plans to ensure that those children have a chance to succeed. It seems most appropriate that the child welfare system should approach adolescent parents who seek to maintain their parental rights as similarly requiring individualized parenting plans-services and resources to help them succeed.

What are the elements of such an individualized plan? Attorneys should ensure that their clients have opportunities for effective counseling. "[A]s many as 48% of adolescent mothers experience depressive symptoms, compared to 13% of adult mothers."¹⁵³ Depressive symptoms in teens following birth increase the risk of subsequent pregnancy.¹⁵⁴ If the community provides home nurse visits and parenting educators, these programs are very effective in mitigating the negative outcomes for teen parents and their children, especially when they include clear and direct instruction regarding effective birth control practices. Studies of these programs indicate that they result in fewer subsequent teen pregnancies, decreased welfare dependence, increased rates of employment, and improved health outcomes for the children, including reduced rates of child abuse.¹⁵⁵

¹⁴⁹ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, **111 Stat. 2115, 2116-17 (1997)** (reasonable efforts are not required where "the parental rights of the parent to a sibling have been terminated involuntarily").

¹⁵⁰ See, e.g., *In re Div. of Family Servs. v. Smith*, 896 A.2d 179, 189 (Del. Fam. Ct. 2005); *State v. Risland*, 51 P.3d 697, 705 (Or. Ct. App. 2002).

¹⁵¹ Model *Rules of Prof'l Conduct R. 1.0(e)* (2010).

¹⁵² Child Welfare Information Gateway, Specialized Services for Young Parents, U.S. Dep't Health & Human Servs., <http://www.childwelfare.gov/famcentered/services/youngparents.cfm> (last visited May 21, 2011).

¹⁵³ Donna A. Clemmens, Adolescent Mothers' Depression After the Birth of Their Babies: Weathering the Storm, 37 *Adolescence* 147, 551 (2002).

¹⁵⁴ Diana Mahoney, Depression and Repeat Pregnancy in Teen Mothers, *Clinical Psychiatry News* (Apr. 2008), <http://www.clinicalpsychiatrynews.com/views/prevention-in-action-by-dr-carl-c-bell/> blog/depression-and-repeat-pregnancy-in-teen-mothers/114bf249ea.html.

¹⁵⁵ Cynthia Dailard, Reviving Interest in Policies and Programs to Help Teens Prevent Repeat Births, 3 *The Guttmacher Report on Pub. Pol'y*, 2 (June 2000), available at <http://www.guttmacher.org/pubs/tgr/03/3/gr030301.pdf>.

Perhaps one of the most important effects of these programs is to reduce the likelihood of the teen parent having a second child before they reach adulthood. "Repeat births represent more than one in five births to teenagers" ¹⁵⁶ "Almost one in three women whose first birth occurred before age 17 has a second birth within 24 months." ¹⁵⁷ Most of these young mothers say they did not want to become pregnant again so soon. ¹⁵⁸

[Research] shows that teenagers who have subsequent births-particularly closely spaced births-are less likely to obtain a high school diploma, and are more likely to live in poverty or receive welfare, than those who have only one child during adolescence. The risks of low birth weight and poor health outcome also increase for babies born to teenagers who already have a child, and these children may also be more likely to suffer from child abuse or to be placed in foster care. Finally, the public costs of caring for many of these families are significant. ¹⁵⁹

Attorneys representing adolescent parents in the dependency actions must be aware of the resources available to their clients for family planning and contraception. ¹⁶⁰ They must continually search for and insist on the availability of these and other resources for their clients and be willing to assist the client in obtaining these resources. If attorneys are unwilling or [*336] unable to provide this counsel to their teen parent clients, they should have social work professionals available to whom they can refer their clients without endangering the client's legal rights.

V. Conclusion

Attorneys representing minor parents play an important role in the child welfare system. Given the teen parent's netherworld between protected and prosecuted, between child and adult, their best interest is to have the right to direct their attorney's representation. There are significant headwinds of age, race, and poverty that make it easy to assume that these parents are unfit. There are plenty of players in the system willing to judge the wisdom of these adolescents' decisions. Only the child's attorney is there to protect their right to make those decisions and to insist on the process they are due. Attorneys representing these clients should advocate for client-directed representation, strive to clarify and protect the child's legal rights, press for individualized decision-making regarding the choice to keep or relinquish their child, fight against decisions based on biased presumptions of unfitness, and work toward a plan of services that can support the teen's development as a responsible parent.

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¹⁵⁶ Id. at 1.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.; see also Susan N. Partington et al., *Second Births to Teenage Mothers: Risk Factors for Low Birth Weight and Preterm Birth*, 41 *Persps. on Sexual and Reprod. Health* 101, 104 (2009).

¹⁶⁰ Title X and other federal programs that provide subsidized family planning services play a vital role in serving teenagers in need of contraception, including teenage mothers. Specific responsibility for providing care to pregnant and parenting teenagers, however, has fallen for over two decades to the Adolescent Family Life Act (AFLA) and its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act. Dailard, *supra* note 155, at 2.