

# **SYMPOSIUM: THE RIGHT TO COUNSEL LANDSCAPE AFTER PASSAGE OF THE ABA MODEL ACT--IMPLICATIONS FOR REFORM**

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## **Text**

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### **[\*325] I. INTRODUCTION**

History was made this August 2011 in Toronto, Canada, when the American Bar Association (ABA) House of Delegates voted to adopt the ABA Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act).<sup>1</sup> Through several years of intense and effective collaboration, negotiation, and education, the ABA voted to adopt the Model Act, thus establishing a new nationally accepted standard of practice for attorneys representing children in dependency proceedings and a new standard of legal representation for maltreated children across America.<sup>2</sup>

**[\*326]** The ABA is by no means an advocacy organization. Rather, it represents the largest assemblage of attorneys from across the United States from every existing practice area.<sup>3</sup> The new standard established in the Model Act goes far beyond what is currently required in the relevant federal law, the Child Abuse Prevention and Treatment Act (CAPTA), creating a stark and troublesome dichotomy in the legal standards governing child representation that begs to be rectified. Although the Model Act does not in itself create binding law, it should be utilized as a powerful tool to advance state and federal legislative reform culminating in a CAPTA amendment mandating client-directed attorney representation for children in all abuse and neglect cases.

Over the last fifteen years, a broad national consensus has evolved across the country that is reflected in the provisions and practice framework of the Model Act.<sup>4</sup> Since passage of the ABA *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Standards of Practice)* in 1996,<sup>5</sup> the notion that children in dependency hearings have the right to client-centered traditional representation by an attorney has

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<sup>1</sup> HILARIE BASS, A.B.A. SECTION OF LITIG., REPORT TO THE HOUSE OF DELEGATES 1 (2011), *available at* [http://www.caichildlaw.org/Misc/ABA\\_Resolution.pdf](http://www.caichildlaw.org/Misc/ABA_Resolution.pdf).

<sup>2</sup> *See generally id.*

<sup>3</sup> *See id.* at 22.

<sup>4</sup> *See id.* at 18.22.

<sup>5</sup> STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES 1 (1996) [hereinafter STANDARDS OF PRACTICE].

gained widespread acceptance across a variety of forums.<sup>6</sup> Judges, state courts, academics, attorneys, and advocates nationwide have built a groundswell of support in the right to counsel movement culminating with passage of the Model Act.<sup>7</sup>

This article will track the groundswell of standards, research, and literature that, together, created the momentum for the Model Act's passage. It will go on to examine the federal CAPTA in more detail, explaining how it has dealt with the issue of legal representation over time. Then, CAPTA will [\*327] be viewed in contrast to the Model Act and the discrepancies between the two frameworks will be highlighted. Next, state statutes concerning the provision of representation to children in dependency hearings will be classified and placed along the CAPTA to Model Act spectrum. Finally, the article will conclude with a section on how the Model Act may be best utilized as a tool in pursuing state and federal legislative reform resulting in a nationally protected right to counsel for children in dependency cases.

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

For the last fifteen years or so, there has been an increasing amount of attention paid to the issue of child representation in abuse and neglect cases from many disciplines and entities. In 1995, the National Council of Juvenile and Family Court Judges Guidelines were published.<sup>8</sup> These guidelines do not go very far in discussing the parameters of attorney representation, but they did clearly state: "Both trained volunteers and attorneys must play a significant role in providing GAL representation for children," indicating the view that attorneys should have a role in representing the child in every case.<sup>9</sup>

Shortly later, in 1996, the ABA passed the *Standards of Practice*<sup>10</sup> recommending that "[a]ll children subject to court proceedings involving allegations of child abuse and neglect . . . have legal representation as long as . . . court jurisdiction continues."<sup>11</sup> The *Standards of Practice* did not present a statutory model, but rather spelled out

<sup>6</sup> See DONALD N. DUQUETTE ET AL., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN ch. VII (1999), available at <http://www.acf.hhs.gov/programs/cb/pubs/adopt02/index.htm>; see also LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 *FAM. CT. REV.* 605, 607-09 (2009); PERMANENT JUDICIAL COMM'N FOR CHILDREN, YOUTH, & FAMILIES, SUPREME COURT OF TEX., LEGAL REPRESENTATION STUDY: ASSESSMENT OF APPOINTED REPRESENTATION IN TEXAS CHILD-PROTECTION PROCEEDINGS 41 (2011), available at <http://www.supreme.courts.state.tx.us/children/pdf/LRS.pdf> (noting that there is a "clear conflict with the multitude of duties . . . suggested by the American Bar Association (ABA) and the National Association of Counsel for Children (NACC)" when "children's attorneys [who] do not view children as 'real clients,' and as a result, do not spend adequate time preparing and understanding the child's wishes").

<sup>7</sup> See Andrea Khoury, *ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases*, 30 *A.B.A. CHILD L. PRAC.* 106, 106 (2011).

<sup>8</sup> See generally PUBL'N DEV. COMM. ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), available at <https://www.ncjrs.gov/pdffiles/resguid.pdf>.

<sup>9</sup> *Id.* at 24.

<sup>10</sup> STANDARDS OF PRACTICE, *supra* note 5, at 1.

<sup>11</sup> *Id.*

These [s]tandards apply only to lawyers and take the position that although a lawyer may accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.

*Id.*

standards of representation both for traditional child attorneys and for attorney guardians ad litem (GALs) who represent only the child's best interests. <sup>12</sup> The standards clearly articulated that only attorneys can adequately safeguard the rights of, and advocate for, [\*328] the legal interests of children in the child welfare system and that children's attorneys are much preferable to best-interest attorney GALs. <sup>13</sup>

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

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

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

We recommend that [s]tates guarantee that all children who are subjects of child protection court proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process. The attorney owes the same duties of [\*329] competent representation and zealous advocacy to the child as are due an adult client. <sup>20</sup>

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

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<sup>12</sup> *Id.* A-2 cmt. at 2.

<sup>13</sup> See *id.* A-2 cmt. at 2; see also HOWARD DAVIDSON, A.B.A. CTR. ON CHILDREN & THE LAW, THE CHILD'S LEGAL REPRESENTATION IN CIVIL ABUSE/NEGLECT CASES IN THE U.S.--A COMPARATIVE ANALYSIS OF THREE DISTINCT APPROACHES (2011) (on file with *Nova Law Review*).

<sup>14</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, [64 FORDHAM L. REV. 1301, 1301 \(1996\)](#).

<sup>15</sup> Katherine R. Kruse, *Standing in Babylon, Looking Toward Zion*, [6 NEV. L.J. 1315, 1315 \(2006\)](#).

<sup>16</sup> NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 2 (2001), available at [http://www.naccchildlaw.org/resource/resmgr/resource\\_center/nacc\\_standards\\_and\\_recommend.pdf](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf).

<sup>17</sup> *Id.* at 4.

<sup>18</sup> DUQUETTE ET AL., *supra* note 6, at chs. I, VII.

<sup>19</sup> *Id.* at ch. I.

<sup>20</sup> *Id.* at ch. VII.

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

In 2005, the landmark case, *Kenny A. ex rel. Winn v. Perdue*,<sup>24</sup> was decided in Georgia, recognizing for the first time a state and federal constitutional due process right to counsel for children in dependency cases.<sup>25</sup> In relevant part, the Georgia court stated, "a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of hearings and review proceedings that occur as part of a deprivation case" and recognized that once a child is in state custody, a "special relationship" is created, triggering liberty interests as well.<sup>26</sup> This case established valuable precedent for a child's constitutional right to counsel.<sup>27</sup> Advocates in several states have attempted to use this as precedent to strengthen the right to counsel for children in their state,<sup>28</sup> and the case will no doubt be [\*330] used as landmark precedent in this area in courts across the country until it becomes the law of the land.

Shortly after the *Kenny A.* decision, The University of Nevada, Las Vegas convened child law experts from around the country at the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham, releasing a law review dedicated to the issue of right to counsel.<sup>29</sup> The most significant outcome from this conference included recommendations to amend CAPTA in the following ways:

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

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<sup>21</sup> See generally Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 *NEV. L.J.* 966 (2006); *How Children's Voices Are Heard in Child Protective Proceedings: Jurisdiction Research--50 States and Territories*, REPRESENTING CHILDREN WORLDWIDE, [http://www.law.yale.edu/rcw/rcw/jurisdictions/am\\_n/usa/united\\_states/frontpage.htm](http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/united_states/frontpage.htm) (last edited Dec. 2005) [hereinafter REPRESENTING CHILDREN WORLDWIDE].

<sup>22</sup> Peters, *supra* note 21, at 1011.12; see generally REPRESENTING CHILDREN WORLDWIDE, *supra* note 21.

<sup>23</sup> Peters, *supra* note 21, at 1013, 1019.

<sup>24</sup> [356 F. Supp. 2d 1353 \(N.D. Ga. 2005\)](#).

<sup>25</sup> [Id. at 1359.60](#).

<sup>26</sup> [Id. at 1360](#).

<sup>27</sup> See *id.* at 1359.60.

<sup>28</sup> Children's Joint Opening Brief at 10-11, *In re Termination of D.R. & A.R.*, No. 84132-2 (Wash. Aug. 27, 2010).

<sup>29</sup> *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 *NEV. L.J.* 592, 592 (2006) [hereinafter *Recommendations: Ten Years After Fordham*].

2. Laws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.<sup>30</sup>

Other UNLV Conference recommendations addressed the specific manner in which child-directed attorney representation should be executed.<sup>31</sup> Many of these recommendations are consistent with provisions of what was to become the Model Act.<sup>32</sup>

In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (NCCUSL Act).<sup>33</sup> NCCUSL, which is also known as the Uniform Law Commission, is an organization made up of attorneys from each U.S. jurisdiction that provides non-partisan legislation "in areas of state law where uniformity is desirable and practical."<sup>34</sup> The 2007 NCCUSL Act recognizes that a child's interest in abuse and neglect proceedings is of fundamental importance and calls for the appointment of an [\*331] attorney to each child involved in such proceedings<sup>35</sup> who may serve in a client-directed or best-interests capacity.<sup>36</sup> The Act emphasizes that the attorney for the child must fully participate in the proceedings.<sup>37</sup>

While in 2005, Professor Peters provided a survey of legal representation across the states,<sup>38</sup> it was not until 2007, with the publication by First Star of a national report card grading states on their provision of attorneys to children in abuse and neglect proceedings, that advocates and policy makers were able to see clearly how each state's laws provided representation.<sup>39</sup> States' policies were clearly exposed and were put in direct comparison with other states across the country.<sup>40</sup> First Star and the Children's Advocacy Institute utilized this opportunity of direct analysis to release a second report card in 2009, which highlighted states that had used the opportunity to improve their representation practices and kept the pressure on those states who continued policies of failing grades.<sup>41</sup>

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<sup>30</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996), reprinted in 6 *Nev. L.J.* 1408, 1409 (2006).

<sup>31</sup> *Recommendations: Ten Years After Fordham*, *supra* note 29, at 592-93.

<sup>32</sup> Compare MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS § 3 (2011) [hereinafter MODEL ACT 2011], with *Recommendations: Ten Years After Fordham*, *supra* note 29, at 592-93.

<sup>33</sup> See generally UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & CUSTODY PROCEEDINGS ACT, reprinted in NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS (2007).

<sup>34</sup> *Id.* at About ULC.

<sup>35</sup> See *id.* at 5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 28.

<sup>38</sup> Peters, *supra* note 21, at 1010.

<sup>39</sup> FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN 10-13 (1st ed. 2007) [hereinafter NATIONAL REPORT CARD, FIRST EDITION], available at <http://www.firststar.org/documents/firststarreportcard07.pdf>.

<sup>40</sup> *Id.* at 10.

<sup>41</sup> FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 8 (2d ed. 2009) [hereinafter NATIONAL REPORT CARD, SECOND EDITION], available at [http://www.caichildlaw.org/Misc/Final\\_RTC\\_2nd\\_Edition\\_Ir.pdf](http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_Ir.pdf).

In 2008, Chapin Hall Center for Children at the University of Chicago published a report entitled *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* based on an evaluation of the Legal Aid Society of Palm Beach County's Foster Children's Project (FCP), which provides client-directed attorney representation to the children it represents.<sup>42</sup> This study specifically focused on FCP's effect "on the nature and timing of children's permanency outcomes."<sup>43</sup> Further, it was the first to examine "court improvement efforts on . . . permanency" when subject children were provided with legal representation.<sup>44</sup> The result was that children represented by FCP achieved permanency at rates significantly higher than [\*332] children not represented by FCP, strengthening the argument that children involved in dependency proceedings benefit from client-directed counsel.<sup>45</sup>

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

The ABA sponsored a summit on the right to counsel at Northwestern University School of Law in 2009.<sup>47</sup> "This summit . . . allow[ed] policy makers, practitioners, academics, and advocates from around the country to collaborate and develop an aggressive national strategy to promote the right to counsel for children through legislation, litigation, and public engagement."<sup>48</sup> The purpose of the summit was to strategize the next steps in the "right to counsel" movement for children, including using litigation, federal and state legislative reform, and passage of the Model Act.<sup>49</sup>

Also in 2009, the federal government, for the first time, declared this issue so important that it dedicated sparse federal dollars to determine best practices.<sup>50</sup> In October of that year, the U.S. Children's Bureau named University of Michigan Law School its partner in establishing the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep).<sup>51</sup> "The QIC-ChildRep is a five-year, [five] million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child's legal representative, and provide one of the first empirically-based analyses of how legal representation

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<sup>42</sup> ANDREW E. ZINN & JACK SLOWRIVER, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHICAGO, *EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1* (2008), available at [http://www.chapinhall.org/sites/default/files/old\\_reports/428.pdf](http://www.chapinhall.org/sites/default/files/old_reports/428.pdf).

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

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 14.15.

<sup>46</sup> See, e.g., Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act--Promoting the Unauthorized Practice of Law*, 9 *J.L. & FAM. STUD.* 53, 53.54 (2007); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 663, 694-95 (2006); Taylor, *supra* note 6, at 617-20.

<sup>47</sup> Letter from Cathy Krebs & Rosa Hirji, Summit Organizers, A.B.A. Section of Litig. Children's Rights Litig. Comm., on Raising Our Hands: Creating a National Strategy for Children's Right to Education and Counsel 1 (Oct. 23, 2009) (on file with Northwestern University School of Law); see also Summary of Notes from Right to Counsel Workshops: Raising Our Hands (Oct. 23, 2009) (on file with *Nova Law Review*).

<sup>48</sup> NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 14.

<sup>49</sup> *Id.* at 4-5.

<sup>50</sup> See Overview, QIC-CHILDREP, <http://www.improvechildrep.org> (last visited Feb. 26, 2012).

<sup>51</sup> *Id.*

for the child might best be delivered." <sup>52</sup> Although the outcome of the research and data of the QIC-ChildRep is not yet in, it will be [\*333] complete in time for the next CAPTA reauthorization cycle in 2015-16. <sup>53</sup> There are high hopes that the research and results published will produce some of the evidence and data needed for further CAPTA reform on this topic.

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

### III. EVOLUTION OF FEDERAL LEGISLATION ON RIGHT TO COUNSEL

The key piece of federal legislation addressing the representation of children in child abuse and neglect cases is CAPTA, originally enacted in 1974. <sup>54</sup> CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities related to child maltreatment. <sup>55</sup> Although this funding usually makes up only a small portion of states' child welfare budgets, it represents the only direct block of federal funding for child representation, and hence, the greatest sphere of influence over state practice in this arena. <sup>56</sup>

Within the first iteration of the law, the only provision regarding representation required merely that a GAL be appointed to represent the child in abuse and neglect proceedings. <sup>57</sup> Although primitive, this provision actually "represented the birth of the field of representation of children in [these] proceedings." <sup>58</sup> That being said, there was no guidance provided regarding the nature of this GAL's or representative's role. Certainly the issue of whether this GAL would be an attorney and, if so, what role the attorney would play was not addressed.

[\*334] CAPTA has been amended a number of times since 1974. <sup>59</sup> The most significant amendment pertaining to representation of children came in 2003 when the simple requirement of a GAL was expanded to: 1) make clear that this representative may be an attorney--without requiring that it be so; 2) clarify the objectives of the representation--to obtain an understanding of the case, and to make best-interest recommendations to the court; and 3) require that the representative receive appropriate training. <sup>60</sup> This amendment made clear that the child

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<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 1, [88 Stat. 4, 4 \(1974\)](#) (codified as amended at [42 U.S.C. §§ 5101](#) et seq. (2006)).

<sup>55</sup> *See id.* § 2, 88 stat. at 5.

<sup>56</sup> Howard Davidson, *The CAPTA Reauthorization Act of 2010: What Advocates Should Know*, A.B.A. SECTION OF LITIG., (Jan. 3, 2011) [hereinafter Davidson, *What Advocates Should Know*], <http://apps.americanbar.org/litigation/committees/childrights/content/articles/010311-capta-reauthorization.html>.

<sup>57</sup> NATIONAL REPORT CARD, FIRST EDITION, *supra* note 39, at 5.

<sup>58</sup> Peters, *supra* note 21, at 997; *see also* REPRESENTING CHILDREN WORLDWIDE, *supra* note 21.

<sup>59</sup> *About CAPTA: A Legislative History*, CHILD WELFARE INFO. GATEWAY 1 (July 2011), *available at* <http://www.childwelfare.gov/pubs/factsheets/about.pdf>.

<sup>60</sup> Child Abuse Prevention Treatment Act [42 U.S.C. § 5106a](#)(b)(2)(A)(xiii) (2000) (amended by Keeping Children and Families Safe Act of 2003).

did not have the *right* to an attorney, and whatever representative the child had was primarily accountable to the court, not to the child.<sup>61</sup>

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

[\*335] In response to some concerns regarding the economic feasibility of making such an amendment, an alternative was proposed to provide attorney representation to children over the age of twelve.<sup>66</sup> This age provision would have significantly cut down on any expense created by this provision, yet the Senate HELP Committee dismissed even this alternative during CAPTA reauthorization.<sup>67</sup>

There was only one addition to the 2010 CAPTA Reauthorization related to the representation of children.<sup>68</sup> The 2003 amendment "that every child's court-appointed representatives have 'training appropriate to [that] role,'" never specified what this training was to consist of.<sup>69</sup> The 2010 amendment explicitly directs that this must include "training in early childhood, child, and adolescent development."<sup>70</sup> It is undoubtedly important that whoever the child's representative is have appropriate training in this area, but no training can substitute for a *bona fide* attorney who will zealously represent and advocate for their child client.

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

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<sup>61</sup> See *id.*

<sup>62</sup> See CAPTA Reauthorization Act of 2010, [42 U.S.C. §§ 5101-19](#) (2006 & Supp. IV 2010).

<sup>63</sup> See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 5, 10, 12, 14, 16; see generally MODEL RULES OF PROF'L CONDUCT (2011).

<sup>64</sup> See HOWARD DAVIDSON, A.B.A. CTR. ON CHILDREN & THE L., CAPTA PROPOSED AMENDMENTS REGARDING LEGAL REPRESENTATION OF CHILDREN (2010) [hereinafter DAVIDSON, CAPTA PROPOSED AMENDMENTS] (on file with *Nova Law Review*); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 201, **122 Stat. 3949, 3957** (codified at [42 U.S.C. § 1305](#) (2006 & Supp. IV 2010)). This included proposed amendments that would have required that: 1) "[e]very child involved in a court case be appointed an attorney;" 2) "[t]his appointed attorney be designated 'legal counsel' for the child, with his or her representation strictly following the [ABA] Model Rules of Professional Conduct;" 3) "[t]he appointed attorney have 'adequate time and resources' to properly handle each case, defined as not having an 'excessive' caseload and receiving 'reasonable and appropriate compensation;" and 4) "[t]his attorney appointment continue as long as the court maintain[s] its jurisdiction over the case, including all periods of foster care or other residential placement, as well as the process of the child's transition to adult independence." Davidson, *What Advocates Should Know*, *supra* note 56, at 1.

<sup>65</sup> Compare DAVIDSON, CAPTA PROPOSED AMENDMENTS, *supra* note 64, with [42 U.S.C. §§ 5101-19](#).

<sup>66</sup> See DAVIDSON, CAPTA PROPOSED AMENDMENTS, *supra* note 64.

<sup>67</sup> Compare *id.*, with S. REP. NO. 111-378, at 31 (2010).

<sup>68</sup> Davidson, *What Advocates Should Know*, *supra* note 56, at 2.

<sup>69</sup> *Id.*

<sup>70</sup> [42 U.S.C. § 5106a\(a\)\(6\)\(D\)](#).

The Model Act provides for a model of representation for abused and neglected children in dependency proceedings that protects their rights, provides full due process, gives them a voice in court, and ensures that their perspective is fully heard and considered before a judge makes a ruling on their best interest.<sup>71</sup> This model of representation differs starkly from the limited representation required under CAPTA, and this chasm should be appreciated.

Under CAPTA, the limited representation provided for ensures only that the child be appointed a properly trained GAL who may or may not be an attorney, that the GAL obtain first-hand information about the case, and that the GAL make best interest recommendations to the court.<sup>72</sup> This means that, in a state that provides only this level of representation, the child would not have an attorney, and therefore, none of the advantages and rights that attach to having legal counsel, and would not have his or her legal interests or wishes communicated in court to the judge, and therefore, not considered [\*336] in the case's adjudication.<sup>73</sup> Essentially, CAPTA and the Model Act set the respective ends of the spectrum of representation across America.

Following are some of the most compelling provisions under the Model Act that go beyond this limited representation to provide the child with full, meaningful, and appropriate legal representation during their child protective case: Lawyers will serve in a client-directed capacity to every child in an abuse or neglect case for the entire duration of the case<sup>74</sup> and will represent children with diminished capacity pursuant to relevant rules of professional conduct;<sup>75</sup> counsel must abide by relevant rules of professional conduct;<sup>76</sup> "right to counsel may not be waived;"<sup>77</sup> "court may appoint a best-interest advocate"--the type required by CAPTA--*in addition to the attorney* to provide best-interest recommendations;<sup>78</sup> lawyers must not carry a caseload that exceeds a reasonable standard;<sup>79</sup> specific duties of child's lawyer and the scope of representation are spelled out in detail;<sup>80</sup> attorney may request authority from the court to pursue ancillary legal matters on behalf of the child;<sup>81</sup> requires that the child and the child's attorney receive notice of all hearings and attorney access to all information required

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<sup>71</sup> See MODEL ACT 2011, *supra* note 32, §§ 3(a), 7(a)-(b).

<sup>72</sup> [42 U.S.C. § 5106a\(b\)\(2\)\(B\)\(xiii\)](#).

<sup>73</sup> See *id.*

<sup>74</sup> MODEL ACT 2011, *supra* note 32, § 6.

<sup>75</sup> *Id.* § 7(d).

<sup>76</sup> *Id.* § 3(d).

<sup>77</sup> *Id.* § 3(f).

<sup>78</sup> [42 U.S.C. § 5106a\(b\)\(2\)\(B\)\(xiii\)](#); MODEL ACT 2011, *supra* note 32, § 3(b).

<sup>79</sup> MODEL ACT 2011, *supra* note 32, § 4(c).

<sup>80</sup> See *id.* § 7.

<sup>81</sup> See *id.* § 7(b)(10).

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

*Id.* § 7(b) cmt.

for optimal representation; <sup>82</sup> grants subject children party status and "the right to attend and . . . participate in" each hearing; <sup>83</sup> and entitles child's counsel to reasonable compensation for their representation. <sup>84</sup>

### [\*337] V. WHERE STATES FALL IN THE SPECTRUM OF REPRESENTATION

Clearly, the gap between the representation required under CAPTA and that promoted in the Model Act is vast and has very significant implications for the child as well as for the outcome of the case. Children in foster care face a complicated and confusing court process that impacts their lives and their liberty on the most fundamental level. Because of the dichotomy that exists between the Model Act and CAPTA, children in some states find themselves without an advocate to counsel them regarding their legal rights, interests, and options; without an attorney to make objections, conduct discovery, or file motions and appeals; and without someone to give voice to and advocate for their position in court. <sup>85</sup> Thus, the child is disempowered throughout the process and has no vehicle to make his wishes heard and considered as his future is determined. The court is similarly negatively impacted by this as the judge is denied critical information that only a child's attorney would introduce, and cannot adequately consider the child's legal position and wishes as she determines the best interest according to all parties. <sup>86</sup>

The gap between CAPTA and the Model Act on this topic has created a cacophonous hodgepodge of state statutes across the country regarding the representation of children in dependency hearings, practically ensuring that a child's experience during this traumatic and critical period will be determined by her state of residence. <sup>87</sup> As a condition of funding under CAPTA, states must only provide that which is required by statute. <sup>88</sup> Fortunately, the majority of states have adopted something in between. Below is a brief summary of where along the continuum between these two standards most states fall.

#### A. Non-Attorney and Discretionary Attorney Representation

Predictably, many states have taken CAPTA's lead and have statutes that do not entitle a child to attorney representation in their dependency hearings. <sup>89</sup> [\*338] In 2005, the first study of state practice in this arena by Jean Koh Peters at Yale Law School found that well over half of states did not guarantee attorney representation to children in their abuse and neglect hearings. <sup>90</sup> As of 2009, First Star and the Children's Advocacy Institute

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<sup>82</sup> *Id.* § 9(b), (f)(2).

<sup>83</sup> MODEL ACT 2011, *supra* note 32, §§ 2(b), 9(a).

<sup>84</sup> *See id.* § 12(a).

<sup>85</sup> *See* Taylor, *supra* note 6, at 607-10.

<sup>86</sup> *Id.* at 608.

<sup>87</sup> *See* NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 4.

<sup>88</sup> *See* EMILIE STOLTZFUS, CONG. RESEARCH SERV., REP. NO. 40899, THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA): BACKGROUND, PROGRAMS, AND FUNDING 14-16 (2009), available at <http://www.napcwa.org/Legislative/docs/CAPTACongressionalResearchReport.pdf>.

<sup>89</sup> *See* Peters, *supra* note 21, at 1013; *see also* Jean Koh Peters, *U.S. Jurisdiction Summary Chart* (2006) [hereinafter Peters, *U.S. Jurisdiction Summary Chart*] (on file with Yale Law School), available at [http://www.law.yale.edu/rcw/rcw/us\\_summary\\_chart.ppt](http://www.law.yale.edu/rcw/rcw/us_summary_chart.ppt).

<sup>90</sup> *See* Peters, *supra* note 21, at 1013; Peters, *U.S. Jurisdiction Summary Chart*, *supra* note 89.

reported that there were fourteen such states.<sup>91</sup> This trend indicates that states are shifting away from the primitive requirements of CAPTA towards the standards espoused in the Model Act.

### B. *Best-Interest Attorney Representation*

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

**[\*339]** When a child is represented by a best-interest attorney, they are denied many advantages of the traditional attorney-client relationship.<sup>96</sup> These might include the right to zealous advocacy for their position and the right to be heard in court, the benefits of attorney-client privilege, right to notice, participation and party status, and the right to appeal if the decision goes against the child's position.<sup>97</sup> This model of representation is so contrary to the traditional function that lawyers vow to serve clients in almost all other capacities that some believe this model tantamount to forced malpractice.<sup>98</sup>

### C. *Client-Directed Attorney Representation*

The 2007 Report Card published by First Star and the Children's Advocacy Institute reported that seventeen states required that children be appointed client-directed attorneys to children in dependency cases in almost all

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

<sup>92</sup> *See id.* at 20, 22.23.

<sup>93</sup> *See* NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 20, 22.23.

<sup>94</sup> *See id.*

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

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

*Id.* at 96 (quoting [N.C. GEN. STAT. § 7B-601](#) (2011)).

<sup>96</sup> *See* Glynn, *supra* note 46, at 62.

<sup>97</sup> *See id.* at 64-65.

<sup>98</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 2 (2011); Glynn, *supra* note 46, at 63-64.

instances.<sup>99</sup> This is an impressive number of states that demonstrated their commitment to children's due process rights and went beyond CAPTA's requirements to a standard comporting more closely to the Model Act. An updated version of this report card, to be released in 2012, may demonstrate that even more states have come to the same conclusion.

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

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

### A. CAPTA Model in Action: Indiana

Indiana provides the most limited representation for children in child protective proceedings of anywhere in the United States.<sup>100</sup> It does not require the appointment of an attorney at any point in the proceedings or during appeal.<sup>101</sup> When an attorney is provided, their role is unclear.<sup>102</sup> There is **[\*340]** no specialized training requirement for the child's attorney when they get one, though the GAL is required to attend training.<sup>103</sup> And, although the child's lawyer, when appointed, is required to follow the state rules of professional conduct, Indiana law provides civil immunity to the GAL or attorney on the case who is not acting as the child's traditional attorney.<sup>104</sup>

### B. Model Act in Action: Massachusetts

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

Children are given express party status in the case.<sup>108</sup> The child's attorney must at all times follow the state rules of professional conduct and does not have civil immunity from malpractice suits.<sup>109</sup> Most impressive, however, is

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<sup>99</sup> NATIONAL REPORT CARD, FIRST EDITION, *supra* note 39, at 12-13.

<sup>100</sup> See [IND. CODE §§ 31-32-4-2](#), 31-32-3-3 (2011); see also NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 22-23, 58-59.

<sup>101</sup> See [IND. CODE § 31-32-4-2\(b\)](#); NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 58-59.

<sup>102</sup> See [IND. CODE § 31-32-3-3](#).

<sup>103</sup> *Id.* § 31-9-2-50.

<sup>104</sup> See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 59.

<sup>105</sup> Compare *id.* at 72-73, with STANDARDS OF PRACTICE, *supra* note 5, at 3-20.

<sup>106</sup> NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 72.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 73.

<sup>109</sup> See *id.*

that the state adopted a caseload limit of seventy-five child welfare cases for attorneys.<sup>110</sup> This provision goes beyond what is required in the Model Act and should serve as an example for other states to emulate.<sup>111</sup>

#### [\*341] VII. RIGHT TO COUNSEL LANDSCAPE AND PREPARING FOR REFORM

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

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

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<sup>110</sup> *Id.*

<sup>111</sup> Compare MODEL ACT 2011, *supra* note 32, § 3, with COMM. FOR PUB. COUNSEL SERVS., COMMONWEALTH OF MASS., PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN & PARENTS IN CHILD WELFARE CASES ch. 4, § 1.2(b), available at [http://www.publiccounsel.net/practice\\_areas/cafl\\_pages/civil\\_cafl\\_index.html](http://www.publiccounsel.net/practice_areas/cafl_pages/civil_cafl_index.html) (follow "Performance Standards for CAFL Attorneys" hyperlink; then follow "CAFL Trial Panel Performance Standards" hyperlink) (last visited Feb. 26, 2012), and COMM. FOR PUB. COUNSEL SERVS., COMMONWEALTH OF MASS., ASSIGNED COUNSEL MANUAL POLICIES AND PROCEDURES ch. 5, § 22 (2011), available at [http://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2010/MANUALChap5links3.pdf](http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf).

<sup>112</sup> See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 10.

<sup>113</sup> See, e.g., *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005); Pitchal, *supra* note 46, at 666.67; Taylor, *supra* note 6, at 607; Shireen Y. Husain, Note, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings*, 79 GEO. WASH. L. REV. 232, 239 (2010).

<sup>114</sup> See NATIONAL REPORT CARD, SECOND EDITION, *supra* note 41, at 8.

<sup>115</sup> Taylor, *supra* note 6, at 610-11; Husain, *supra* note 113, at 246-48.

<sup>116</sup> See *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011) (en banc).

<sup>117</sup> *262 P.3d 653 (Colo. 2011)* (en banc).

<sup>118</sup> See *id.* at 659.

<sup>119</sup> *Id.* at 659-60.

<sup>120</sup> See *id.* at 660.

When advocates press for legislative reform on this issue, there are several tools available for making their case. First is justice. It is sometimes [\*342] useful to use a narrative to tell the story of a child whose court case and life outcome was dramatically impacted either by a lack of legal representation, or one who had a highly beneficial outcome as a result of a good attorney.. Next, it is helpful to show state lawmakers where they fall on the spectrum of representation. Sometimes, legislators can be shamed into reform when they realize their state is an outlier on an issue that has the potential for bad disposition in the media. The third tool that can be used to argue for reform is the Model Act itself. Once lawmakers understand that an entity so large, mainstream, and powerful as the ABA has concluded that the proper standard of representation for children in these cases is a client-directed attorney, they will pause before dismissing the idea of reform on the issue. The final tool available is the specter of litigation. Advocates can use the example of Kenny A., as well as other cases, to argue that states that fall short of nationally accepted standards open themselves up to class action lawsuits.<sup>121</sup> Lawsuits of this nature are expensive and embarrassing to defend, making this prospect is most undesirable.

Of course not all states will be convinced by the above arguments to amend their statutes. The primary obstacles to further reform on this subject revolve around concern over two issues: 1) cost of implementation, and 2) data demonstrating that attorney representation leads to improved outcomes.<sup>122</sup> In the current economic climate, with many states cutting back significantly on services and personnel, it is difficult to make the argument that any service requiring additional expense should be considered. As mentioned earlier, there was a powerful study published several years ago demonstrating that the small initial investment in providing high-quality attorney representation to children in dependency hearings is incidental compared to the longer-term cost savings to the state when the child achieves permanency more quickly and the case flows through the courts in a much shorter period of time.<sup>123</sup> It is vital to argue this point. The main drawback of this study, however, is that it was fairly small in scope and limited to one county in Florida.<sup>124</sup> We must conduct further research that will allow us to nationalize the results of this study to make the case for national legislative reform. The QIC-ChildRep project may provide some of the data necessary for further reform, but if it does not, advocates must press for further research in this area.

[\*343] The passage of the Model Act represents the culmination of substantial research, advocacy, and litigation all urging national recognition of the right to counsel for children in dependency hearings, not only within the advocacy community, but in the legal community at large.

## VIII. CONCLUSION

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

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<sup>121</sup> See Kenny A. *ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1355, 1361 (N.D. Ga. 2005).

<sup>122</sup> Taylor, *supra* note 6, at 616; Husain, *supra* note 113, at 247.

<sup>123</sup> See ZINN & SLOWRIVER, *supra* note 42, at 14-15, 24-25.

<sup>124</sup> *Id.* at 1.

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