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Who Speaks for the Child?

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Child advocacy is a recent phenomenon. Fifty years ago there was little concern about who would speak for children in legal proceedings that affected them.¹ Not until the 1967 decision in *In re Gault*² were children guaranteed the right to an attorney in delinquency proceedings.³ A few years later, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA),⁴ which, in part, provided federal financial assistance to state child protective services agencies so long as the state enacted legislation ensuring that every child involved in a child welfare proceeding had a court-appointed guardian *ad litem*.⁵ While neither *Gault* nor CAPTA has resulted in representation for all children in juvenile delinquency or dependency cases, they at least established the goal of full representation for all jurisdictions to follow. In other legal settings the law has been even slower to provide for the representation of children.

The dramatic rise in child abuse and neglect reports over the past twenty years has led many persons within the legal system to examine how best to represent children. A growing consensus has rejected the traditional assumption that persons involved in legal proceedings will look out for the interests of the

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1. President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 82 (US Dept of Justice, 1967).

2. 387 US 1 (1967).

3. A child is entitled to counsel in "proceedings to determine delinquency which may result in commitment to an institution." *Id* at 41.

4. Child Abuse Prevention and Treatment Act, Pub L No 93-247, 88 Stat 4 (1974), codified at 42 USC §§ 5101 et seq (1988 & Supp 1993).

5. 42 USC § 5106(a). "A guardian *ad litem* is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of the guardian *ad litem* exists only in that specific litigation in which the appointment occurs." *Black's Law Dictionary* 706 (West, 6th ed 1990).

child.⁶ Even when a child's interests are at stake, the other participants in the proceeding cannot be counted on to speak for the child. Parents and those who represent them have their own perspectives to present,⁷ while the court, with all of its other legal responsibilities, cannot be expected to focus upon the needs of the child.⁸ Moreover, child advocacy is needed both within and outside of the courtroom. Many now recognize that the legal system was not designed for children and that a child may be traumatized by the very system designed to provide protection.⁹

This Article will address the expanding role of child advocates in legal proceedings. We define a child advocate as a person who speaks on behalf of a child in a legal proceeding, whether that person be an attorney, a guardian *ad litem*, a hired staff member, or a volunteer. We then discuss the different types of advocates and their roles in legal proceedings. We next review the role of child advocates in a number of different legal settings, including juvenile, criminal, and domestic relations proceedings. Finally, we describe some efforts to improve the quality of child advocacy in local communities and across the country.

I. The Problem: Providing a Voice for the Child

All children should have someone who speaks for them in any legal proceeding in which their significant interests are at stake.¹⁰ This means children should have access to a primary knowledgeable, caring person whose responsibility is to guide the child through the investigative and court processes, to look out for the child's emotional well-being and best interests, to protect the child's legal rights, and to identify other advocacy and support services for the child.¹¹ Depending on the type of proceeding and the persons in-

6. See, for example, James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 Vill L Rev 521 (1977); Jacob B. Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in C. Henry Kempe and Roy E. Helfer, eds, *Helping the Battered Child and His Family* 225 (Lippincott, 1972).

7. Comment, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse Is Alleged*, 138 U Pa L Rev 1383, 1387 (1990). In some situations in which the child is the subject of adversarial proceedings, the adults may focus upon their own disagreements and interests and forget the special needs and desires of the child. The possibility that a child's interests will be overlooked is especially real in custody and other domestic relations proceedings. See, for example, *Higgins v Higgins*, 629 SW2d 20, 22 (Tenn App 1981) (hostile custody proceedings prevented adequate representation of the children's interests).

8. Comment, 138 U Pa L Rev at 1390-91 (cited in note 7).

9. See, for example, California Child Victim Witness Judicial Advisory Committee, *Final Report* 64 (Cal Atty Gen, 1988).

10. *Id.* at 14. See also Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 Family L Q 417 (1993).

11. California Child Victim Witness Judicial Advisory Committee, *Final Report* at 65

volved, different persons can provide that advocacy. A parent or relative may be the appropriate support in a legal proceeding. Guardians *ad litem*, volunteer support persons, and attorneys are other sources of advocacy and support.

An advocate assures that at least one person in the legal proceeding focuses on the child's needs and desires. Furthermore, a child advocate ensures that judges receive information critical to making the best possible decisions about children. Unfortunately, high costs make it difficult to provide comprehensive advocacy for children in legal proceedings. Child advocates, whether attorneys or volunteers, cost money. With limited resources, legal systems have often resisted providing advocates for children.¹² Even when required by the Constitution or by statute, courts and political leaders have balked at providing adequate representation for children.¹³

Another problem has been the resistance of those within the legal system to recognize that children have legitimate interests and that child advocates are necessary to protect those interests. Some believe that a child's views are not worthy of consideration in court proceedings.¹⁴ Others believe that the adults in the court can speak for the child, even though they may have other interests at stake.¹⁵ Any analysis of child advocacy is complex. Because there are many

(cited in note 9).

12. See generally Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J Crim L & Criminol 1185 (1989); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 NC L Rev 1083 (1991); Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 Juv & Family Ct J 1, 26-27 (1992). See also CSR, Inc., *Final Report on the Validation and Effectiveness Study of Legal Representation through Guardian ad Litem 6.5* (US Dept of Health and Human Services, 1993). This national study of the practices of guardians *ad litem* (GALs) concluded that attorneys who serve as GALs need to earn an adequate income. The study found that counties had a maximum limit on cases ranging from \$300 to \$1,500 a case. It also found that private attorneys are typically compensated only for those hours billed and actually approved by a judge. *Id.*

13. Edwards, 43 Juv & Family Ct J at 26-27 (cited in note 12). See also Senate Task Force on Family Relations Court, *Final Report* 10-11 (Cal Senate, 1990).

14. This conclusion is based on the fact that in many jurisdictions not all children are represented by counsel or by a GAL in delinquency or abuse and neglect proceedings. See CSR, Inc., *National Study of Guardian ad Litem Representation* 41 (US Dept of Health & Human Services, 1990); Sharon Kalemkiarian and Susan Drake, *Do Children Get Competent Counsel?* (Children's Advocacy Inst, 1994). Kalemkiarian and Drake examined the representation of children in civil abuse and neglect proceedings in all fifty-eight California counties and found a number of counties in which separate counsel was not regularly appointed. They discussed these findings with several California juvenile court judges who take the position that young children do not need separate representation since they are too immature to express a preference. *Id.*

15. In juvenile delinquency proceedings, "*Gault* reaffirms the right of the child to have his own parents make decisions about what he needs." Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Before the Best Interests of the Child* 129 (Free, 1979). See also Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 NYU L Rev 76 (1984) (arguing a delineation between children's rights and children's welfare). "Since parents are free to raise their children without state

distinctive types of legal proceedings with different rights and interests at stake, the law regarding the representation of children differs depending on the jurisdiction and the nature of the legal action.



II. Approaches to Representation

There are various approaches to child advocacy. Attorneys, trained volunteers, and non-attorneys can all serve as child advocates. Their roles may be different, depending on the type of legal proceedings, the jurisdiction, and the resources available to children in the legal system. The two most widely used types of child advocates in the United States are attorneys and guardians *ad litem* (GALs). Each has a unique role in any given legal proceeding.

Specifically, in the attorney-client relationship, the lawyer's principal duty is to represent the client's legitimate interests as determined by the client.¹⁶ Yet, when the client is a child, an important question is **whether the attorney should follow the child's wishes when they conflict with what he or she believes to be best for the child.** Attorneys and scholars have debated this issue for years, and considerable disagreement still persists.¹⁷ The age and maturity of the child make this issue even more complex. While little disagreement exists when the child is a teenager capable of expressing her views, there is

interference except under the most compelling circumstances, the 'rights' of children are limited: they have only the right to be free from serious physical or emotional harm inflicted by their parents." *Id.* at 114-15.

16. Model Rules of Professional Conduct, Rule 1.2(a) (ABA, 1983) ("A lawyer shall abide by a client's decisions concerning the objectives at representation, subject to [certain limited exceptions], and shall consult with the client as to the means by which they are to be persuaded . . .").

17. See Redeker, 23 *Vill L Rev* at 544 (cited in note 6) (arguing that the attorney's role is to represent the child's wishes); Donald C. Bross, *An Introduction to Child Representation*, in Donald C. Bross and Lavra Freeman Michaels, eds, *Foundations of Child Advocacy: Legal Representation for the Maltreated Child* 85, 86 (Bookmaker's Guild, 1987) (arguing that the attorney's role is to voice the child's wishes); Isaacs, *The Role of the Lawyer* at 230-32 (cited in note 6) (arguing that the attorney's role is to assess the best course of action for the child).

Isaacs argues that a child's counsel should take the role of "guardian," which he defines as one concerned with determining and presenting to the court the position best calculated to serve the child's welfare. Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 *Buff L R* 501, 506-07 (1963). A slightly different position is that counsel should serve as an intermediary between the participants and explain the significance of the proceedings to the client. See Charles E. Cayton, *Relationship of the Probation Officer and the Defense Attorney after Gault*, 34 *Fed Probation* 8, 10 (1970); Daniel L. Skoler and Charles W. Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 *J Family L* 77 (1964).

Other commentators have joined the debate. Nathan Edelstein, *The Duties and Functions of the Law Guardian in the Family Court*, 45 *NY St B J* 183, 184 (1973); Spencer Coxe, *Lawyers in Juvenile Court*, 13 *Crim & Delinquency* 488, 490 (1967); Richard Kay and Daniel Segal, *The Role of the Attorney in Juvenile Court: A Non-Polar Approach*, 61 *Georgetown L J* 1401 (1973); Ruth Steinfeldt, Hazel B. Kerper, and Charles M. Friel, *The Impact of the Gault Decision in Texas*, 20 *Juv Ct Judges J* 154 (1969).

less consensus when the child is younger, for example between six and ten years old, and her views are more immature.¹⁸ Finally, if an infant cannot express an opinion at all, the attorney may need to decide what the infant would want if she could express an opinion.¹⁹

The American Bar Association (ABA) recommends that attorneys representing children in juvenile court assume a role similar to that in other areas of legal representation. Thus the attorney's role would be to further the "lawful objectives of her client through all reasonably available means permitted by law."²⁰ The ABA Standards Relating to Counsel for Private Parties acknowledges that a child may be incapable of considered judgment in her own behalf. In that situation the Standards recommends that the attorney consult with a guardian *ad litem* or, if one is not available, to (1) remain neutral concerning the proceeding or (2) adopt the position requiring the least intrusive intervention justified by the circumstances of the case.²¹ The ABA Model Rules of Professional Conduct also acknowledges that an attorney's role will change when representing immature children.²²

The United Nations Convention on the Rights of the Child (UN Convention), adopted by the General Assembly of the United Nations in 1989, illuminates this point. Article 12 of the UN Convention guarantees a child the right to representation in all legal and administrative proceedings affecting the child so long as the child is capable of forming views.²³ Yet, this begs the

18. See Guggenheim, 59 NYU L Rev at 76 (cited in note 15); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Family L Q 287 (1983).

19. Comment, *Speaking for the Child: The Role of the Independent Counsel for Minors*, 75 Cal L Rev 681, 701-05 (1987).

20. American Bar Association, *Standards Relating to Counsel for Private Parties* 3 (1980).

21. *Id.* at 17-18.

22. American Bar Association, *Annotated Model Rules of Professional Conduct* 156 (1984).

23. Article 12 states the following:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law

United Nations Commission on Human Rights, *The United Nations Convention on the Rights of the Child* 20 (United Nations, 1991). See also *UN Convention*, reprinted in Cynthia Price Cohen and Howard A. Davidson, eds, *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* xi, xvi (ABA, 1990).

question—when is a child capable of forming her own views? Children can be verbal at two or three years old. Even a baby can be verbal if we understand crying to be a demand for food or comfort. It is unclear who is to determine whether a child is capable of expressing her own views. The legislature is in no position to declare that all children under a certain age are incapable of expressing their views.²⁴ Perhaps the matter is better left to judges to decide on a case-by-case basis.

Under the UN Convention, the views of the child are entitled to consideration in accordance with the age and maturity of the child. Like the ABA's Juvenile Justice Standards, this would seem to indicate that a teenager's views would be of greater weight than those of an infant. Yet each has an equal interest in the outcome of the case. If a child is incapable of forming her own views, the UN Convention appears not to guarantee the right to representation. This approach seems to give less attention to the younger child. We believe there should be a guarantee that someone is speaking on behalf of the child in every proceeding that significantly affects the child. Where the child is incapable of forming her own views, the representative would be similar to a GAL.

The role of the GAL is different from that of an attorney.²⁵ The GAL is a neutral investigator providing the court with information and assisting the court to make decisions that will best serve the child's interests. The GAL represents the best interests of the child as determined by the GAL, even if that position conflicts with the child's desires. Several jurisdictions have adopted written guidelines describing a GAL's duties.²⁶ The Hawaii Family Court has developed an excellent statement of the duties of a GAL in juvenile dependency cases:

The guardian *ad litem* is a full participant in the court proceeding and is the only party whose sole duty is to protect the child's needs and interests. The GAL assumes the role of an advocate for the child's interests and in no way represents the petitioner (usually an agency) or the respondents (usually the parents or custodians). A GAL is appointed because of the child's immaturity and lack of judgment. Therefore, the GAL stands in the child's shoes and exercises substitute judgment for the child.

24. There is individual variation in how children develop. A legislative standard that fails to incorporate the maturity level of an individual child risks denying that child his or her ability to exercise a fundamental right. See *Bellotti v Baird*, 443 US 622, 647 (1979) (rejecting an age-based legislated standard in favor of a case-by-case court determination of maturity for minors seeking abortions). See also Comment, 75 Cal L Rev at 698-701 (cited in note 19).

25. This is true at least in those situations in which the child is capable of forming his or her own views. As noted in notes 19-22 and the accompanying text, the attorney's role is similar to that of a GAL in those situations in which the child is not capable of considered judgment.

26. For a summary of the state statutes describing the roles and responsibilities of the GAL, see CSR, Inc., *Final Report* at 2.1-2.12 (cited in note 12).

In fulfilling this child-centered role, the GAL performs ten important and interrelated duties. The GAL:

1. Acts as an independent fact finder (or investigator) whose task it is to review all relevant records and interview the child, parents, social workers, teachers and other persons to ascertain the facts and circumstances of the child's situation
2. Ascertains the interests of the child, taking into account the child's age, maturity, culture and ethnicity, including maintaining a trusting, meaningful relationship with the child via face-to-face contact
3. Seeks cooperative resolutions of the child's situation within the scope of the child's interest and welfare
4. Provides written reports of findings and recommendations to the court at each hearing to assure that all the relevant facts are before the court
5. Appears at all hearings to represent the child's interest, providing testimony when required
6. Explains the court proceedings to the child in language and terms that the child can understand
7. Asks that clear and specific orders are entered for the evaluation, assessment, services, and treatment of the child and the child's family
8. Monitors implementation of service plans and dispositional orders to determine whether services ordered by the court are actually provided, are provided in a timely manner, and are accomplishing their desired goal
9. Informs the court promptly in writing or orally if the services are not being made available to the child and/or families, if the family fails to take advantage of such services, or if such services are not achieving their purpose and brings to the court's attention any violation of orders, new developments or changes
10. Advocates for the child's best interests in mental health, educational, family court, juvenile justice, criminal justice, and

other community systems²⁷

These guidelines make it clear that the GAL substitutes her judgment for that of the child. In addition, the guidelines specify the GAL's duties both in and out of the courtroom.

The CSR study outlines seven roles and responsibilities of the GAL. These include fact finder, interviewer and document reviewer, investigator, legal representative, case monitor, mediator, and information/resource broker.²⁸ The study indicates that whether any particular GAL will perform one or more of these roles will depend on the state statute and local practice.²⁹

For several reasons, we believe that a child advocate should always inform the court about the child's desires. Whether or not the advocate believes such desires deserve consideration, the court needs to be told. First, if the advocate does not tell the court what the child wants, no one else will. No other person in the courtroom has the advocate's access to and legal relationship with the child. Second, the court will be in the best position to decide what should happen with the child when it has the highest quality of information possible, including the perspective of each person. Third, if the advocate does not distinguish between her position and the child's, the court may mistakenly believe that the advocate is relating the child's wishes. Fourth, in some legal proceedings, a different party is required to report to the court about the best interests of the child.³⁰ Finally, by giving the court information about the child's desires, the advocate is empowering the child. While the child might not prevail at the hearing, she will know that her desires have been related to the court.

The extent to which a child advocate should insert her views about the best interests of the child depends on the type of legal proceeding, the stage of those proceedings, and the maturity of the child. For example, in a delinquency proceeding, the child should be represented by an attorney,³¹ not a GAL. The attorney should attempt to get permission from the child to offer alternative positions if the court is not inclined to follow the wishes of the child.³² With the child's permission the attorney might then be able to offer the court

27. Family Court, 1st Cir Ct of Hawaii, *Order Appointing Guardian Ad Litem* (1991) (on file with the *University of Chicago Law School Roundtable*). See also Hawaii Rev Stat §§ 587-34 (1994).

28. CSR, Inc., *Final Report* at 2.1-2.13 (cited in note 12).

29. *Id.*

30. In juvenile dependency cases, for example, a social worker may serve this function. See Redeker, 23 Vill L Rev at 529 (cited in note 6); Judith C. White, *The Role of the Social Worker*, in Bross and Michaels, eds, *Foundations of Child Advocacy* 61 (cited in note 17).

31. See American Bar Association, *Standards Relating to Counsel* at 17 (cited in note 20) (stating that a lawyer's principal duty is to represent client's legitimate interests); IJA-ABA Joint Commission on Juvenile Justice Standards, *Standards Relating to Counsel for Private Parties* § 2.3 (Ballinger, 1976).

32. See Leonard P. Edwards, *The Rights of Children*, 37 Fed Probation 34, 41 (1973).

alternatives along the lines of the GAL's substituted judgment.³³

Children in both child welfare and contested custody proceedings should be represented by a GAL.³⁴ The GAL must present to the court a position as to the child's best interests and should, in addition, inform the court as to the child's desires. Younger and less mature children need not have an attorney represent their views in this type of court proceeding. These children are not capable of making considered judgment, and an attorney representing them would perform duties similar to that of a GAL. For the older, more mature child, if the child's wishes are different from the GAL's position, the GAL should inform the court of that fact and ask that an attorney be appointed to represent the child's wishes.

In a criminal, child welfare, or custody case in which one of the parties asks the child to testify, the child advocate, whether an attorney or a GAL, should not only convey the child's views regarding giving testimony to the court, but also tell the court in what ways the child might be traumatized by such testimony. If the child must testify, the advocate should ensure that the child has access to all possible protections, including a support person or persons, a comfortable setting for testimony, the exclusion, where legally possible, of unnecessary persons who might frighten the child, frequent breaks, and careful attention to the developmental level of the questions that are asked the child.³⁵

In all legal proceedings the child advocate must be prepared to address the timeliness of the legal process. A child's sense of time differs from that of an adult. This is especially critical in adoption, child welfare, and custody proceedings since experts agree that a child needs to have speedy resolution of her placement status.³⁶ The child advocate must remind the adults in the legal system of the urgency of resolution from the child's perspective. For example, the child advocate should consider opposing motions for continuance and should be wary of delays brought about by court and attorney problems as well as failures by the legal system to provide permanency for the child in a

33. ABA, *Standards Relating to Counsel* § 3.1(b) (cited in note 20). For example, the attorney could give the following type of statement to the court: "If the court decides not to send my client home, we urge the court to consider placement with a group home instead of commitment to the state reform school."

34. See Judge William Gladstone, *Juvenile Justice: How to Make it Work*, Miami Herald C3 (June 3, 1990).

35. For a comprehensive study of procedures that have been utilized to support a child who may have to testify in legal proceedings as a victim or a witness, see Debra Whitcomb, *When the Victim Is a Child* (Nat'l Inst of Justice, 1992); Senate Task Force on Family Relations Court, *Final Report* at 15-18 (cited in note 13); Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* 113-15 (ABA, 1993).

36. Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interest of the Child* 40-49 (Free, 1979). See also Haralambie, *The Child's Attorney* at 145-69 (cited in note 35) (describing the importance of child development stages in child custody proceedings).

timely fashion.

Further, to ensure adequate representation, the child advocate must have party status in any litigation in which the child's significant legal interests are at stake. Such status entitles one to full participation in all legal proceedings. For example, a party is entitled to receive notice of the proceedings, to have legal representation, to call and examine witnesses, and to appeal any decision by the court.³⁷

The child advocate's effectiveness also depends on the scope of her duties. The advocate must be able to participate in all related legal and administrative proceedings. These might include educational, mental health, or parallel legal proceedings involving the same child and family but in which the child may not otherwise have representation. For example, the child advocate who represents a child in child welfare proceedings should be able to continue that representation in any termination of parental rights or delinquency action. An advocate in a domestic relations proceeding should be able to continue that representation in child welfare proceedings. A child advocate in any legal proceeding should be able to initiate or support the child in related legal or administrative actions regarding the child.³⁸

In addition, the advocate's role must include the ability to address issues that affect the entire system. So-called "impact" or "system's" litigation addresses issues that affect large numbers of children who come before the court or who are affected by court proceedings. The child advocate should have access to lawyers prepared to confront the legal, justice, or social service system. For example, the child advocate should be prepared to challenge the adequacy of housing, medical care, education, and other social services for children in the delinquency and dependency systems.³⁹

37. A child should have party status in child welfare, delinquency, termination of parental rights, adoption, guardianship, paternity, emancipation, mental health (involuntary commitment), health issues (including abortion rights), immigration, civil suits, and non-criminal status proceedings. Party status would not be appropriate, however, when the child is a witness in a case. In those situations, the child advocate needs only to have the ability to support the child and protect him or her against any secondary trauma that might be caused by the legal process.

38. See, for example, Cal Welf & Inst Code § 317(e) (West 1994) ("In addition, counsel shall investigate the interests of the minor beyond the scope of the juvenile proceeding and report to the court other interests of the minor that may need to be protected by the institution of other administrative or judicial proceedings. The court shall take whatever appropriate action is necessary to fully protect the interests of the minor.").

39. *R.C. v Hornsby*, No 88-D-1170-N (M D Ala, Apr 19, 1989) (confronting the failure of Alabama's child protective and foster care systems to preserve the families of and provide treatment to children who have emotional or behavioral disorders); *Winston v Children and Youth Services*, 748 F Supp 1128 (E D Pa 1990), aff'd 948 F2d 1280 (3d Cir 1991) (challenging the amount of visitation permitted to parents whose children had been involuntarily removed from their custody).

For a summary of and citations to over eighty cases involving legal claims addressing recurrent, systemic problems in state or local welfare and foster care systems, see National Center for Youth Law, *Foster Care Reform Litigation Docket* (Natl Ctr for

The effectiveness of any child advocate will depend on a number of factors, including interest, ability, training, compensation level, caseload, work environment, and support resources such as access to legal, investigative, mental health, and other services. Child advocates should be valued participants in the legal process. Thus, any organization that provides child advocacy should ensure that those representing children have the same status in the office hierarchy, the same opportunities for advancement, and the same salary.⁴⁰ Child advocates should be interested in children, trained in child development, and prepared to spend a substantial period of their professional career working with children and families.

Child advocates need training.⁴¹ Adequate training ensures that the child advocate will be exposed to the critical issues addressed in court proceedings. The training of child advocates should be comprehensive, and it should be mandatory.⁴²

Youth Law, 1993).

40. For example, the California Judicial Council has written a standard for judicial administration addressing this issue. Rule 24(c) basically provides that the presiding judge of the juvenile court should:

1. Encourage attorneys who practice in juvenile court, including all court-appointed and contract attorneys, to continue their practice in juvenile court for substantial periods of time. A substantial period of time is at least two years and preferably from three to five years
2. Confer with the county public defender, county district attorney, county counsel, and other public law office leaders and encourage them to raise the status of attorneys working in the juvenile courts as follows: hire attorneys who are interested in serving in the juvenile court for a substantial part of their career; permit and encourage attorneys, based on interest and ability, to remain in juvenile court assignments for significant periods of time; work to ensure that attorneys who have chosen to serve in the juvenile court have the same promotional and salary opportunities as attorneys practicing in other assignments within a law office
3. Establish minimum standards of practice to which all court appointed and public office attorneys will be expected to conform. These standards should delineate the responsibilities of attorneys relative to investigation and evaluation of the case, preparation for and conduct of hearings, and advocacy for their respective clients

California Judicial Council, *Standards of Judicial Administration Recommended by the Judicial Council*, Cal Ann Code, Pt 2, Rule 24(c) (West 1994). The Standards also delineate standards for the training and orientation of attorneys practicing in juvenile court. Id at 24(d).

41. "[A]ll professional participants in the judicial system should have mandatory, adequate and appropriate education and training. This education and training should be not only in their own fields but also interdisciplinary." Senate Task Force on Family Relations Court, *Final Report* at 32 (cited in note 13).

42. "Mandatory training should be established for domestic relations and juvenile law attorneys. Training may include some information in the following areas: child interviewing skills, domestic violence, abuse, developmental skills of children, community property,

Adequate representation also means a reasonable caseload. For example, child advocate attorneys should have caseloads comparable to those of attorneys representing adult clients. Child advocates must also have access to investigative resources.⁴³ With the help of investigators the child advocate will be able to present to the court an independent perspective. From a judge's perspective, this can be a critical contribution to judicial decisionmaking.

Finally, as noted previously, the UN Convention guarantees the child the right to a voice in any judicial or administrative proceeding affecting her.⁴⁴ If ratified by the United States, the UN Convention would help ensure that children are adequately represented in a much broader range of proceedings, including hearings addressing school expulsion, eligibility for benefits, and medical and mental health decisions. The UN Convention has been ratified by most of the countries in the world but not by the United States.⁴⁵ Many child advocates have urged the President to refer the UN Convention to the Senate for ratification, but, thus far, Presidents Bush and Clinton have taken no action.⁴⁶

III. Child Advocacy in Different Legal Proceedings

A. DELINQUENCY

Juvenile delinquency proceedings are legal actions in the juvenile court

support, custody, visitation, child abduction, mediation, and dysfunctional families. The training would be part of the continuing legal education required under existing law, and could be obtained through Continuing Education of the Bar or through private, accredited courses." Id at 35.

43. Id at 10-11.

44. UN Convention, Art 12 § 2 (cited in note 23). Specifically, Article 12 provides that the child should be allowed to participate directly or through a representative in any such legal proceedings. Id.

45. As of 1990, fifty-six countries had ratified the UN Convention. Cohen and Davidson, eds, *Children's Rights in America* at iv (cited in note 23). As recently as March, 1994, 171 countries have signed or ratified the UN Convention. The United States is the only industrialized nation that has not. *Rights of the Child*, Cong Press Releases, Mar 18, 1994, available in LEXIS, News Library, Curnws File.

46. American Bar Association, *Children's Rights in America: UN Convention on the Rights of the Child Compared with United States Law* (1990); Letter from U.S. Advisory Board in Child Abuse and Neglect (Aug 29, 1992) (on file with the *University of Chicago Law School Roundtable*); Resolution of the House of Delegates of the American Bar Association (Feb 12, 1991) (on file with the *University of Chicago Law School Roundtable*); Letter from James M. Farris, President, National Council of Juvenile and Family Court Judges, to William J. Clinton, President of the United States (Feb 22, 1994) (on file with the *University of Chicago Law School Roundtable*); Letter from Bernard Sanders, Member of the United States Congress (Feb 17, 1993) (on file with the *University of Chicago Law School Roundtable*); Letter from Huu D. Nguyen, Executive Director, AID To Refugee Children Without Parents, Inc., to Honorable Leonard P. Edwards, Chair, Juvenile Court Judges of California (Feb 5, 1993) (on file with the *University of Chicago Law School Roundtable*).

brought against children who allegedly have violated the criminal law. Until 1967, there was no guarantee that children accused of delinquent acts would have the right to an attorney.⁴⁷ In the case of *In re Gault*,⁴⁸ the United States Supreme Court guaranteed children facing delinquency actions the right to counsel, concluding that:

[T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.⁴⁹

More than twenty-five years after this decision, the right to counsel in juvenile delinquency proceedings remains elusive. In some jurisdictions a child's right to counsel in such proceedings is carefully protected. Some judges insist on representation for children and refuse to accept waiver of that right.⁵⁰

In many other jurisdictions, however, the ruling in *In re Gault* is not being followed.⁵¹ Numerous critics have pointed out that children often are not provided with counsel in delinquency proceedings and that if counsel is provided, it is often ineffective.⁵² Judges often claim that children choose to waive their right to counsel.⁵³ Some statistics reveal that more than half the children accused of delinquent behavior have no legal representation.⁵⁴ Even those with counsel may have the newest attorneys who are just learning their profession in juvenile court.⁵⁵ Attorneys for children may be the least experienced in the legal community, are likely to have had little training, and may not understand their role in juvenile court proceedings.⁵⁶

Funding problems, which plague child advocates in general, are particularly

47. The right to counsel in criminal proceedings guaranteed by the Supreme Court in *Gideon v Wainwright*, 372 US 335 (1983), did not extend to children in delinquency proceedings. The reasoning was that since children were before the juvenile court in order to be rehabilitated and not punished, they did not need such rights. In *In re Gault*, 387 US at 1, the Supreme Court reexamined this rationale and concluded that at least at the adjudicatory stage when the child was facing the possibility of commitment, she was entitled to counsel. See generally Edwards, 43 Juv & Family Ct J at 6-10 (cited in note 12).

48. 387 US at 1.

49. *Id.* at 41.

50. Santa Clara County, California, where Judge Edwards presides, is one such example.

51. Feld, 79 J Crim L & Criminol at 1185 (cited in note 12).

52. See, for example, Barry C. Feld, *The Right to Counsel in Juvenile Court: Fulfilling Gault's Promise* 6-8 (Michigan, 1989); Feld, 79 J Crim L & Criminol at 1188-89, 1330-31 (cited in note 12); Ainsworth, 69 NC L Rev at 1126-30 (cited in note 12).

53. Feld, *Fulfilling Gault's Promise* at 8 (cited in note 52).

54. Feld, 79 J Crim L & Criminol at 1189 (cited in note 12).

55. *Id.* at 1331.

56. *Id.*; Ainsworth, 69 NC L Rev at 1126-30 (cited in note 12).

acute in delinquency proceedings.⁵⁷ Many communities are unable or unwilling to provide attorneys for children accused of crimes, especially since political leaders often balk at using public monies to defend the accused, both young and old.⁵⁸ Nevertheless, it is both the law of the land and good policy to provide an accused child with legal counsel in delinquency proceedings. The attorney may be the person in the best position to get the child's attention, to turn her around, and to fashion a rehabilitative plan. She may even prevail before the judge, so that the child does not come within the jurisdiction of the court.

Section 241 of the New York Family Court Act recognizes the importance of an attorney for a child in family court proceedings such as those concerning delinquency:

[M]inors who are the subject of family court proceedings . . . should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.⁵⁹

If children are to be adequately protected from coercive state intervention, they must have adequate representation in delinquency proceedings. We believe that representation should be provided by an attorney, not a GAL.⁶⁰

B. STATUS OFFENSES

A second type of juvenile court case involves children who have allegedly violated laws that apply only to children. Children must go to school, may have curfew limits, must not run away from home, and must not drink alcohol. All state legislatures proscribe such behavior, and children who violate these laws may be brought before the juvenile court and held accountable.⁶¹

A child accused of a status offense has no constitutional guarantee to an attorney. *In re Gault* granted the right to counsel only in delinquency proceedings. Nevertheless, children accused of a status offense should have a child advocate representing them. In these proceedings the court has the power to detain children for the violation of a valid court order.⁶² Such an intervention

57. Howard Davidson, *The Child's Right to Be Heard and Represented in Juvenile Proceedings*, 18 Pepperdine L Rev 255, 260-61 (1991).

58. See Edwards, 43 Juv & Family Ct J at 26-27 (cited in note 12); Alex Kotlowitz, *There Are No Children Here: The Study of Two Boys Growing Up in the Other America* 274 (Doubleday, 1991).

59. New York Family Court Act § 241 (McKinney 1993 & Supp 1994).

60. A GAL may have a role in delinquency proceedings both as a fact finder and as one to recommend the proper disposition once jurisdiction is established. Such representation, however, would be in addition to that provided by the attorney.

61. Linda Szymanski, *Upper Age of Juvenile Court Jurisdiction Statute Analysis (1990 Update)* (Nat'l Ctr for Juv Justice, 1991).

62. Juvenile Justice and Delinquency Prevention Act, 42 USC §§ 5601-5751, as amended by 42 USC § 5633(a)(12)(A) (Supp 1981).

is sufficient to justify the provision of counsel for the child.⁶³ At a minimum, a child should have a GAL to provide guidance and support throughout the process. But if a child is represented by a GAL and there is a conflict between the GAL and the child's desires, a court-appointed attorney may also be needed to represent the child's wishes.⁶⁴

C. JUVENILE DEPENDENCY

Child abuse and neglect cases present special difficulties for the juvenile court. In these proceedings, the state brings an action on behalf of a child against her parents. The state, usually appearing through a local or state social service agency, asserts that parental behavior has fallen below the minimum level of societal acceptability and argues that intervention is necessary in order to protect the child from parental abuse or neglect. These cases pose difficulties for advocates since the purpose of the law includes both protection of the child and preservation of the family, and on occasion these goals can be in conflict with one another.⁶⁵

The court process begins with the filing of a legal petition, the formal charging document filed by the state alleging parental misconduct or inadequacy. After a petition is filed there are a number of hearings. There may be a shelter or detention hearing in which the temporary placement of the child is decided by the court. A jurisdictional hearing or trial focuses upon the truth of the assertions in the petition, while a dispositional hearing addresses a plan to ensure that the child is in a safe environment and that services are provided to the parents to assist them in modifying their behavior so that the family can be reunited. The goals of the proceedings are twofold: protect the child and preserve the family if possible. The dispositional hearing will also specify the social service that will enable the parents to reunite with the child. Review hearings scheduled after the dispositional hearing focus upon whether the child can return to the parents, whether the jurisdiction of the court can be terminated, and, if return or dismissal is not possible, what the permanent plan for the child will be.⁶⁶

The role of the advocate will change as the proceedings move from the shelter care and dispositional hearing toward permanent placement. While at the beginning of the case the advocate may be focusing upon child protection and services that will assist the child in reuniting with her family, after it is clear that the child cannot return to parental care, the advocate's role will be to ensure that a permanent plan is reached in a timely fashion.⁶⁷

63. See generally Davidson, 18 Pepperdine L Rev at 265-66 (cited in note 57).

64. See *In re Lisa G.*, 127 NH 585, 504 A2d 1, 5 (1986) (holding that defense counsel's duty to represent fully the juvenile's rights and interests as determined by the juvenile may conflict with the GAL's position).

65. See Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 Juv & Family Ct J 1, 4-5 (1994).

66. For an overview of these proceedings, see Bross, *An Introduction to Child Representation* at 89-98 (cited in note 17).

67. The three possible permanent plans under the federal act are adoption (preceded

We advocate that a child should have a GAL in all juvenile dependency actions. The GAL should be appointed immediately after state action has been initiated and should represent the child's interests throughout all legal proceedings until dismissal. This is the standard set out by CAPTA,⁶⁸ and we believe it to be a good one. If a mature child disagrees with the GAL, it should be the duty of the GAL to ask the court to appoint an attorney to represent the child's wishes.

Since CAPTA's passage, all states have enacted legislation requiring GAL representation for some or all children involved in legal proceedings arising from child abuse or neglect allegations.⁶⁹ States vary greatly, however, in how the representation should be provided, who can serve as a GAL, how that person should be trained, when the GAL becomes involved, and what role the GAL should play. Some states utilize lawyers as GALs⁷⁰ while others have turned to

by termination of parental rights), guardianship, and long-term care. Of the three, adoption is preferred as being the most permanent and therefore the best at serving the child's needs. See generally Edwards, 45 Juv & Family Ct J at 4-6 (cited in note 65).

68. 42 USC § 5103(b)(2)(G). CAPTA provides an incentive to appoint GALs in abuse proceedings in that states that fail to do so cannot receive certain federal funds for the prevention and treatment of child abuse. 42 USC § 5106a(b)(6).

69. See Ala Code § 26-14-11 (1992); Alaska Stat § 47.17.030, § 25.24.310 (1993); Ariz Rev Stat Ann § 8-535(D) (West 1989 & Supp 1993); Ark Stat Ann § 9-27-316 (1993); Cal Civ Proc §§ 372, 373.5 (West 1973 & Supp 1994); Colo Rev Stat Ann § 19-1-111 (West 1989 & Supp 1993); Conn Gen Stat Ann § 17a-101(f)(2) (West 1992); 31 Del Code Ann § 3603 et seq (1993); DC Code § 21-2033 (1989); Fla Stat Ann § 415.508 (West 1985 & Supp 1993); Ga Code Ann § 15-11-55 (Michie 1990); Hawaii Rev Stat § 587-33(c)-(f) (1985); Idaho Code § 16-1618 (1994); 705 ILCS 405/2-17 (West 1992 & Supp 1994); Ind Code Ann §§ 34-2-2-2, 34-2-3-1 (West 1983 & Supp 1994); Iowa Code Ann § 232.71.14 (West 1994); Kan Stat Ann §§ 38-1505, 38-1505a (1986); Ky Rev Stat Ann § 620.505 et seq (Baldwin 1990); La Children's Code § 424 (West 1994); 23 Me Rev Stat Ann § 4005 (West 1992); Md Cts & Jud Proc Code Ann § 3-834 (1989); Mass Ann Laws ch 201, § 34 (Law Co-op 1994); Mich Comp Laws Ann § 722.630 (West 1993); Minn Stat Ann § 260.155.4 (West 1993); Miss Code § 43-23-15 (1993); Mo Ann Stat § 452.423 (Vernon 1986 & Supp 1994); Mont Code Ann § 41-3-303 (1993); Neb Rev Stat § 43-292 (1984 & Supp 1992); Nev Rev Stat § 432B.420 (1991); NH Rev Stat Ann § 170-C:8 (Butterworth 1994); NJ Stat Ann § 9:6-8.23 (West 1993); NM Stat Ann § 32A-4-10(C) (1994); NY Family Ct Act § 249 (McKinney 1989 & Supp 1994); NC Gen Stat § 7A-586 et seq (1983 & Supp 1993); ND Cent Code § 50-25.1-08 (1989); Ohio Rev Code Ann § 2151.281(B) (Baldwin 1987); 21 Okla Stat Ann § 846(G)(2) (West 1983 & Supp 1994); Or Rev Stat § 419A.170 (1993); 23 Pa Cons Stat Ann § 6382 (Purdon 1994); RI Gen Laws § 40-11-14 (1990); SC Code Ann § 20-7-121 (Law Co-op 1985 & Supp 1993); SD Cod Laws § 26-8A-18 (1992); Tenn Code Ann § 37-1-149 (1991); Tex Family Code Ann § 51.11 (Vernon 1986); Utah Code Ann § 78-3a-44.5 (1992 & Supp 1994); 33 Vt Stat Ann § 5525 (Equity 1991); Va Code § 16.1-266 (1988 & Supp 1994); Wash Rev Code Ann § 26.44.053 et seq (West 1991 & Supp 1994); W Va Code § 49-6-2 (1992); Wis Stat Ann § 813.122(3)(b)(1) (West 1994); Wis Stat Ann § 48.235 (West 1987 & Supp 1993); Wyo Stat § 14-3-211 (1994). See also CSR, Inc., *Final Report* at 2.1 (cited in note 12). (Citations to each state statute are contained in Appendix 1, State Summaries of GAL Representation.)

70. See, for example, Va Code § 16.1-266 (1988 & Supp 1994); NJ Stat Ann § 9:6-8.23 (West 1993).

trained volunteers,⁷¹ and others utilize a combination of the two.⁷²

States vary in providing comprehensive GAL representation to children in juvenile court abuse and neglect cases, and some states are not in compliance with the law. According to a national study of GAL representation conducted by the Centre for Social Research, eight states have discretionary appointment of a GAL or require appointment in only some cases.⁷³ The study indicates that in twenty-six states, not all abused and neglected children have representation.⁷⁴ The states with the lowest compliance rates are Florida with forty-nine percent,⁷⁵ Nevada with thirty-two percent,⁷⁶ and Delaware with only twenty-two percent of its abused and neglected children represented by a GAL.⁷⁷ The study also indicates that most states do not have a sufficient number of trained volunteers or attorneys to be GALs.⁷⁸ Low compensation for attorneys is a primary reason for the shortage.⁷⁹

The type and quality of representation in child abuse and neglect proceedings vary from jurisdiction to jurisdiction across the country. Most provide a GAL for the child⁸⁰ while some provide an attorney;⁸¹ other states permit appointment of a trained volunteer or Court-Appointed Special Advocate (CASA) volunteer,⁸² and a few states provide a combination of two or more of these persons.⁸³ The result is that often there is one voice, sometimes there are several voices speaking on behalf of the child, and sometimes there is no voice at all.

Courts should not permit the representative for the social service agency to represent the interests of the child. The child's interests are often not the same as the agency's although the child is sometimes too immature to express an intelli-

71. See, for example, Ky Rev Stat Ann § 620.505 (Baldwin 1990); Or Rev Stat § 419A.170 (1993).

72. See, for example, Md Crts & Jud Proc Code Ann § 3-834 (1989); RI Gen Laws § 40-11-14 (1990).

73. CSR, Inc., *National Study* at 41 (cited in note 14).

74. *Id.*

75. *Id.* at 83.

76. *Id.* at 159.

77. *Id.* at 75.

78. *Id.* at 41. An attorney representing children in juvenile dependency proceedings wrote the following of her inability to meet the demands of increasing caseloads:

This afternoon I am in the midst of a paper mountain, trying to acquire information about the 120-plus children I will represent in over 55 hearings this Friday before my county's Juvenile Court. I have been a lawyer with Child Advocacy for over ten years, have seen caseloads triple and funding decrease, so that my four full-time colleagues and myself have responsibility for more than 1100 cases each.

Georgene Siroky, *Letters*, Youth L News 20 (July-Aug 1993).

79. CSR, Inc., *National Study* at 41 (cited in note 14).

80. See, for example, Minn Stat Ann § 260.155.4 (West 1993).

81. See, for example, NJ Stat Ann § 9:6-8.23 (West 1993).

82. See, for example, Ky Rev Stat Ann § 620.505 et seq (Baldwin 1990).

83. See, for example, RI Gen Laws § 40-11-14 (1990). CSR, Inc. reports five states utilize joint appointments (appointments of an attorney and a volunteer). These include Arizona, North Carolina, Rhode Island, Utah, and Vermont. CSR, Inc., *National Study* at 17 (cited in note 14).

gent viewpoint. Some jurisdictions might prefer such dual representation in part because it saves money. But the potential cost savings do not justify the threat of harm to the child from not having her interests independently represented.

A few appellate courts have addressed this issue and have recognized that attorneys representing two parties in such legal proceedings have a potential conflict of interest.⁸⁴ This conflict arises because an attorney representing both the state and the child might be forced to argue against one of the two parties.⁸⁵

In re Patricia E. offers an example of such a conflict of interest.⁸⁶ In that case, the county counsel (attorney for county agencies) represented both the social service agency and Patricia, a seven year old child. Because of some prior abuse, the social service agency recommended to the juvenile court that Patricia continue to be placed out of her father's home. Patricia wished to return home, but the county counsel never met with her and did not present her position to the juvenile court. The California Court of Appeals reversed the decision of the juvenile court and ordered that an independent counsel be appointed for Patricia.⁸⁷

It is clear that a conflict of interest may exist when a child takes one position and the social service agency takes another, such as in Patricia's case. But what of the situation in which the child is an infant and cannot articulate a position? We believe that the child should still have an independent GAL to represent her interests. This position is consistent with the federal law and is sound policy. The social service agency cannot adequately represent the child's interests. Only an independent voice for the child can ensure that proceedings take place in a timely fashion and can insist that adequate services are promptly provided by the agency to the family and the child. From a judicial perspective, the independent voice for the child can make critical contributions to the legal process.

D. TERMINATION OF PARENTAL RIGHTS AND ADOPTION

Termination of parental rights—sometimes following juvenile dependency proceedings—and adoption proceedings also raise special problems for representing children. The Adoption Assistance and Child Welfare Act of 1980 designates termination of parental rights and adoption as the preferred plan for a child who cannot be returned home.⁸⁸ It is a more permanent placement than either guardianship or long-term foster or institutional care.

The hearing to terminate parental rights usually takes place after juvenile court abuse or neglect proceedings and unsuccessful attempts at family reunification. A petition to terminate parental rights may be filed in the civil courts of the

84. See, for example, *In re Patricia E.*, 174 Cal App 3d 1, 218 Cal Rptr 783 (3d D 1985).

85. *Id.*, 218 Cal Rptr at 786-87.

86. *Id.*

87. *Id.* at 785-87.

88. Adoption Assistance and Child Welfare Act of 1980, Pub L No 96-272, 24 Stat 500, codified at 42 USC §§ 420 et seq., 673 (1988 & Supp 1993).

particular jurisdiction or in the juvenile or family court. In a parental rights termination proceeding, the court hears evidence of whether the legal ties between the child and the parents should be ended. It is the most serious type of legal proceeding concerning parents and children. Private parties might also bring legal actions to terminate the rights of a parent or parents. Often, the children in these cases may never have been the subject of juvenile court proceedings.⁸⁹

We think that the child should be represented by an advocate in all such proceedings. Child advocates have a critical role to play in termination of parental rights cases. First, the advocate must conduct an independent investigation of the circumstances surrounding the child's family.⁹⁰ Second, the advocate must interview the child and determine what the child's wishes are.⁹¹ If they are different from the advocate's position, the advocate should approach the court and request that an attorney be appointed to represent the child. Third, the advocate must ensure that the legal proceedings take place in a timely fashion. Delays in these proceedings have resulted in children waiting years for a permanent home.⁹² The child advocate must insist that the legal process address the needs of the child within the statutory time frame.⁹³ Finally, if termination of parental rights is granted by the court, the advocate must continue to represent the child through the adoption proceedings. Studies report significant delays between the termination of parental rights and adoption.⁹⁴ After parental rights have been terminated, the child advocate must work to ensure that the child reaches a permanent home and that legal proceedings are concluded as soon as possible.

89. Step-parent adoptions are an example of termination of parental rights proceedings that do not result from juvenile court dependency actions. The step-parent petitions the court to have one parent's rights terminated so that the step-parent can fill that parental role. See, for example, Cal Family Code § 9000 et seq (West 1994).

90. The proper role of the child advocate in these proceedings has been the subject of some litigation. See, for example, *In re J.V. and C.W., Jr.*, 1990 Iowa App 468, 464 NW2d 887, 892 (1990) (holding that efforts by a GAL to terminate parental rights were "at the barest minimum of adequacy" where the guardian was also the child's attorney).

91. State statutes often require that the court learn of the child's wishes in termination of parental rights proceedings. See, for example, Cal Family Code § 7890 (West 1994). Many state laws specify an age above which children must consent to an adoption (usually between ten and fourteen). See, for example, Cal Family Code § 8602 (West 1994) ("[T]he consent of a child, if over the age of 12 years, is necessary to his or her adoption."). Regardless of age, the wishes of the child in these types of legal proceedings are important information for the judge.

92. See Richard P. Kusserow, *Barriers to Freeing Children for Adoption* 15 (Dept of Health and Human Serv, 1991); Debra Ratterman, *Termination Barriers: Speeding Adoption in New York State through Reducing Delays in Termination of Parental Rights Cases* (NY Dept of Social Serv, ABA Center on Children & L, 1991).

93. Reducing delay in legal proceedings is a difficult task, yet one in which the advocate can play an important role. The judge has ultimate control over continuances and agency delay, but the advocate can be a consistent voice reminding the court that the child needs permanency in a timely fashion. See generally Edwards, 45 Juv & Family Ct J at 15 (cited in note 65).

94. Kusserow, *Barriers to Freeing Children for Adoption* at 15 (cited in note 92).

E. CRIMINAL COURT

A child is most likely to appear in the criminal courts either as a victim or a witness. Because the child is not a party to the legal action, the child advocate has a more limited role to play on the child's behalf. As a result, the child usually is not represented by an attorney, although some jurisdictions permit a support person or GAL to accompany a child through the criminal process.⁹⁵

Children who must appear in criminal prosecutions as witnesses should have access to a child advocate to protect their interests and ensure they are not abused by the criminal justice system. In this way, the child advocate insulates the child from any unnecessary trauma that the criminal justice system may inflict. Since the court has an interest in ensuring that the child will be able to offer truthful testimony and often recognizes this need for insulation, many courts provide or allow advocates who protect the interests of the child in a variety of ways.⁹⁶ Some courts permit a support person to sit with the child during testimony.⁹⁷ One appellate court affirmed the appointment of a GAL on behalf of three children in a murder prosecution of their father to determine whether interviews of the children by the state would be in their best interests.⁹⁸

The use of GALs in criminal cases is controversial. Criminal defense attorneys contend that GALs are an unnecessary addition to the criminal process.⁹⁹ They fear that the GALs will lend support to the prosecution.¹⁰⁰ Yet, GALs are

95. See Mark Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 J Family L 687 (1987); Debra Whitcomb, *Guardians Ad Litem in Criminal Courts 5-7* (Natl Inst of Justice, 1988); Whitcomb, *When the Victim is a Child* at 124, 129-31 (cited in note 35).

96. See *State v Walsh*, 126 NH 610, 495 A2d 1256, 1257-58 (1985) (holding that a GAL was allowed to sit at prosecution's table, witness testimony, and make objections to questions asked of the victim); *People v Wilson*, 77 AD2d 713, 430 NYS2d 715, 716 (3d Dept 1980) (holding that a child rape victim's mother was allowed to remain in grand jury room when the victim testified); *People v Disandra*, 193 Cal App 3d 1354, 239 Cal Rptr 9, 12 (3d D 1987) (holding that child rape victim's mother was allowed to remain in grand jury room with victim when she testified); *State v Dunbar*, 152 Vt 399, 566 A2d 970, 973-74 (1989) (holding that defendant's right to confront child accuser was not violated by a special seating arrangement during the victim's testimony whereby the child was allowed to face the jury, instead of the defendant).

97. *State v Johnson*, 38 Ohio App 3d 152, 528 NE2d 567, 568-69 (1986); *State v Rogers*, 213 Mont 302, 692 P2d 2, 5 (1984); *Mosby v State*, 703 SW2d 714, 717 (Tex App 1985).

98. *State v Freeman*, 203 NJ Super 351, 496 A2d 1140 (1985) (children were interviewed as potential witnesses to their mother's murder).

99. See Hardin, 25 J Family L at 691-712 (cited in note 95); Whitcomb, *When the Victim Is a Child* at 129-32 (cited in note 35) (counselor's accompaniment of victim during testimony violated defendant's right to fair and impartial trial). Contrast *State v Suka*, 70 Haw 472, 777 P2d 240 (Hawaii 1989).

100. See Hardin, 25 J Family L at 691-712 (cited in note 95); Whitcomb, *When the Victim Is a Child* at 129-32 (cited in note 35). Some defendants believe that the support person will influence the child's testimony and encourage the child to testify against the

essential because it is in the criminal courts that the child is likely to suffer the greatest trauma. The child may be interviewed numerous times by different parties and professionals.¹⁰¹ Giving testimony in court may be especially traumatic, particularly when a child has to face the person who allegedly inflicted the maltreatment.

The Supreme Court of North Carolina has developed a special procedure to address the unique needs of the child victims and witnesses who appear in criminal court.¹⁰² It provides for the appointment of a pro bono GAL-attorney to represent child victims and witnesses. The rules further state that if a GAL is appointed to represent a child victim in a criminal court, any attorney participating in the case will be obligated, as a matter of professional responsibility, to seek the consent of that GAL in order to interview the child.¹⁰³ The GAL also makes certain that the case progresses through the court at a speed appropriate to the child's needs, explains the court process to the child and family as appropriate, recognizes and communicates to the prosecutor any special needs the child may have, and coordinates the civil and criminal cases if there is a related juvenile dependency case.¹⁰⁴ The rule makes clear that the GAL is not a party to the case, does not participate in discovery, and cannot actively participate in the trial of the case.¹⁰⁵

This rule reflects sound policy. It recognizes that the court process was not created for children and that just as children need support when they go to the doctor's office, they should have support in the court process. A few other states have developed similar protections for children who appear as victims and witnesses in criminal courts.¹⁰⁶

F. DOMESTIC RELATIONS COURT

Children are also the subject of litigation in domestic relations proceedings. When parents separate or divorce, the care, custody, control, and support of their children is sometimes contested in court. While all states permit and encourage parents to resolve custody and visitation issues without state involve-

defendant. John E. B. Myers, *Child Witness Law and Practice* 422 (John Wiley & Sons, 1987).

101. California Child Victim Witness Judicial Advisory Committee, *Final Report* at 20-33 (cited in note 9); Whitcomb, *When the Victim Is a Child* at 135 (cited in note 35).

102. "When any person is charged with a crime where, the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian *ad litem* for such minor victim or witness." NC Sup & D Ct Rule 7.1 (1994).

103. *Id.*

104. *Id.*

105. *Id.*

106. For a list of the states with legislation regarding the appointment of support persons for child victim/witnesses in criminal child abuse cases, see National Center for Prosecution of Child Abuse, *Legislation Regarding the Appointment of Support Persons for Child Victims/Witnesses in Criminal Child Abuse Cases* (Natl Ctr for Prosecution of Child Abuse, 1992).

ment, if the parents cannot agree, some states identify an advocate to ensure that the child's interests are protected.¹⁰⁷

We believe that a child advocate should be appointed to represent a child's interests in some child custody and visitation cases.¹⁰⁸ In those situations in which the parents can resolve their differences amicably, there is no need for an advocate for the child.¹⁰⁹ But when the parents litigate child custody or visitation, when one parent accuses the other of abuse or neglect in custody litigation, or when the court finds that an advocate is necessary to protect the best interests of the child, the court should appoint a child advocate.¹¹⁰

Many states provide for representation of children in domestic relations custody litigation when there are special circumstances. In Wisconsin, for example, the state law requires that a GAL be appointed if:

1. The court has reason for special concern as to the welfare of a minor child
2. The legal custody or physical placement of the child is contested.¹¹¹

In Hawaii, the family court has described situations in which a child's representation may be particularly helpful or necessary. They include the following:

1. Where hostility and conflict between the parents substantially impedes their ability to recognize the child's needs
2. Where there is an indication the child suffers from serious emo-

107. See, for example, Wis Stat Ann, § 767.045 (West 1993).

108. Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 Family L Q 53 (1992); Leonard P. Edwards, *A Proposal for the Appointment of Counsel for Children in Marital Dissolution Actions*, 8 Family L News 34 (1985).

109. If the child expresses disagreement with the parental decision, the court should consider appointing a GAL or attorney to represent his or her interests. The difficulty is how the court will learn of the child's disagreement. The parents can file papers in the court without the child learning that legal proceedings are taking place. It may be necessary to have a court representative meet with each child involved in custody litigation but that would involve significant cost.

110. One commentator has explained this need:

The child finds his entire existence in turmoil. He recognizes that life will never be the same for him. An attorney of his own at this time, even if he cannot understand the legal ramifications of representation, enhances his self-esteem. The attorney can represent a calm and rational adult who is not on either parent's "side," but someone to whom he can express his opinions and fears—someone who may have a voice in the outcome and is specifically interested in his point of view.

Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 Family L Q 53, 57 (1985).

111. Wis Stat Ann § 767.045 (West 1993); *Riemer v Riemer*, 85 Wis2d 375, 270 NW2d 93, 96 (Wis App 1978). See also NH Rev Stat Ann § 458:17a (1983 & Supp 1991).

tional problems and those problems are not being treated

3. Where there is a serious allegation of child abuse or neglect
4. Where there are complex legal issues involving the child
5. Where a child of sufficient maturity is concerned about the outcome of the case or expresses an interest in participating in the proceeding
6. Where the custody issues have remained unresolved for a long time and no immediate resolution seems apparent
7. Where there is a juvenile proceeding pending
8. Where there are persons other than a parent requesting custody
9. Where either parent has a clinical history of significant psychological or emotional problems¹¹²

The California Standards of Judicial Administration offer similar guidelines for the appointment of counsel for minors when there is a dispute between parents in a domestic relations matter.¹¹³

Some appellate courts have held that in certain types of domestic relations cases, an advocate must be appointed for the child. In some cases involving allegations of child abuse, state appellate courts have reversed trial court custody decisions where the trial court failed to appoint counsel or a GAL for the child.¹¹⁴ In another case, the appellate court returned a custody case to the trial court so that a GAL could be appointed to ascertain the wishes of the children.¹¹⁵ Not all appellate courts follow the lead taken in these cases.¹¹⁶

112. 1st Cir Ct of Hawaii, *Order Appointing Guardian Ad Litem* (cited in note 27).

113. California Judicial Council, *Standards of Judicial Administration* § 20.5 (West 1993).

114. *G.S. v T.S.*, 23 Conn App 509, 582 A2d 467, 469-70 (1990); *C.J.(S.)R. v G.D.S. and L.S.*, 701 SW2d 165, 169-70 (Mo App 1985).

115. *Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 558 NYS2d 596, 599-600 (1990).

116. Some judges believe that parents' attorneys and "the independent investigative powers and duties of the court . . . adequately protect the children's interests and render unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children." *Chalupa v Chalupa*, 220 Neb 704, 371 NW2d 706, 707-08 (1985); see also *Sucher v Sucher*, 416 NW2d 182, 185 (Minn App 1987); *Yontef v Yontef*, 185 Conn 275, 440 A2d 899, 904 (1981).

IV. The Need for a Comprehensive Approach to the Representation of Children: Successful Models

Depending upon the type of legal proceeding, children may appear as victims, witnesses, or interested parties. While most commentators agree that their interests should be made known to the court through a representative,¹¹⁷ in some situations they have no voice in court. Moreover, children often lack information about resources outside the courtroom that may serve their non-legal needs. This is true for many reasons, including a legal tradition that has not been sensitive to the needs and desires of children, a lack of resources to support representation of children, and a lack of interest in providing such representation.

Several groups have begun to address the need for children to have adequate representation of their interests in all types of legal and administrative hearings. The ABA has started an ambitious program designed to increase representation for children in legal proceedings. The ABA Section on Litigation's Task Force on Children was created to (1) recruit and assist lawyers to represent children pro bono and match them with children in need and to (2) support and stimulate the formation and development of pro bono children's law programs.¹¹⁸ The Task Force has collected information about children's legal projects around the country and is offering technical assistance to any community wishing to increase representation for children.¹¹⁹

One of the most effective organizations providing child advocacy in the United States is the Court Appointed Special Advocate (CASA) program. Started in Seattle, Washington, by David Soukup, then a juvenile court judge, the CASA program provides volunteer child advocates for tens of thousands of children.¹²⁰ Recognizing that children needed greater representation in court, Judge Soukup asked for volunteers to assist the juvenile court by appearing on behalf of abused and neglected children. The response was immediate and overwhelming. Assisted by the National Council of Juvenile and Family Court Judges, the CASA program has grown dramatically, resulting in chapters in all fifty states and over 37,000 active volunteers today.¹²¹ Most CASA volunteers are non-lawyers. They provide a simple and relatively inexpensive way to meet the great need for more adequate representation for children.

117. See, for example, Davidson, 18 Pepperdine L Rev at 255 (cited in note 57).

118. American Bar Association Section on Litigation, *Task Force on Children* (ABA, 1993).

119. *Id.*

120. See Carmen Ray-Bittneski, *Court Appointed Special Advocate: Guardian ad Litem for Abused and Neglected Children*, 29 Juv & Family Ct J 65, 65-66 (1978). National Court-Appointed Special Advocate Association, *Report of the National CASA Association* 1 (1994).

121. As of 1994 there were 568 CASA programs including programs in every state, Washington, D.C., and the Virgin Islands. *Id.* There are more than 37,000 CASA volunteers representing approximately 128,000 children. *Id.*

CASA programs are known by many different names, including CASA, Guardian *ad Litem* programs, Pro-Kids, Child Advocates, Foster Child Advocate Services, and Voices for Children. The volunteers serve different roles in different programs across the country.¹²² In some the advocates are appointed to serve as a GAL for one child, while in others the advocates represent many dependent children. It is preferable to have one advocate for each child so that the child can receive a maximum amount of attention and support.

One study concluded that trained volunteers, such as CASA workers, are as effective as trained attorneys in representing their clients, and more effective than untrained attorneys.¹²³ This is understandable since trained volunteers may have fewer cases than the professionals and more time to devote to each child they represent. With only one or two cases, the CASA volunteer also has the extra time to investigate each child's case.¹²⁴ The National Council of Juvenile and Family Court Judges has supported the use of CASA volunteers to serve abused and neglected children:

Court-Appointed Special Advocates (CASA's) should be utilized by the court at the earliest stage of the court process, where necessary, to communicate the best interests of an abused or neglected child.¹²⁵

The private bar remains an essential source of representatives for children. One of the highest quality and most cost-effective law offices representing children in the United States is the firm of Harold LaFlamme, Esq. in Santa Ana, California. Pursuant to a contract with the Orange County Juvenile Court and the Orange County Board of Supervisors, the LaFlamme firm represents almost all abused and neglected children who appear in the county's juvenile court dependency system.¹²⁶

Several aspects of the LaFlamme firm are noteworthy. First, all the attorneys have spent years working in the juvenile court. They are committed to their work and they do it well. Second, the law firm has on staff 1.5 investigators for each lawyer.¹²⁷ Thus, the important out-of-court investigative work can be accomplished by an experienced social investigator who meets with each child client, visits where each child lives, and conducts an independent investigation focusing

122. Some states have passed legislation permitting non-lawyer volunteers to represent children in the place of attorneys or court-appointed counsel. See, for example, 23 Me Rev Stat Ann § 4005(1) (1988).

123. Donald N. Duquette and Sarah H. Ramsey, *Using Lay Volunteers to Represent Children in Child Protection Court Proceedings*, 10 Intl J 293, 307 (1986).

124. One drawback of CASA and other types of volunteer representation is that communications from the child to the advocate are not protected by the attorney-client privilege. See Davidson, 18 Pepperdine L Rev at 264 n 52 (cited in note 57).

125. National Council of Juvenile and Family Court Judges, *Deprived Children: A Judicial Response*, 73 Recommendations 15 (1986).

126. This representation is pursuant to a contract between the LaFlamme law firm and the Orange County Juvenile Court. A copy of the contract is on file with the authors.

127. See note 126.

on the best interests of the child. Third, the law firm represents its clients in any appeals that are taken.¹²⁸ Over the years, the firm has had a number of significant successful appeals.¹²⁹ Fourth, the firm has also been active in so-called impact litigation, lawsuits which address problems facing many or all the children in the dependency system.¹³⁰ Finally, the firm has been able to represent these children at a cost of approximately \$230 per child.¹³¹ This has been possible because the firm can take advantage of economies of scale when one attorney appears on several cases on each court calendar.

The firm must compete every third year in order to maintain the contract, and numerous other firms have bid for the right to represent Orange County's dependent children. LaFlamme has been able to maintain the contract because of intelligent business practices and outstanding service to its clients. Some jurisdictions are concerned that such a contract would be an incentive for the attorneys to cut corners and save time at the expense of their clients.¹³² Orange County addressed this problem by providing a contract escape clause that allows the firm to bill on an hourly basis for cases in which extensive litigation is contemplated. The Orange County Juvenile Court and the legal community agree that the LaFlamme lawyers are effective advocates for their clients.¹³³

The ABA, CASA, and LaFlamme approaches represent important attempts to ensure better representation for children. A more coordinated effort is needed to ensure that all children have a voice. In Santa Clara County, California, a Child Advocacy Coordinating Council brings together all advocates in the community to ensure that every child who appears in court as a party or a witness has adequate representation.¹³⁴ Members of the Council include juvenile and family court judges, law offices that represent children in juvenile court, private attorneys who specialize in representing children in domestic relations, probate, emancipation, and mental health proceedings, volunteers from the local CASA program, and representatives from the Victim Witness Program. The Council seeks to ensure that children within the legal system have access to a

128. See note 126.

129. See, for example, *Calvert v Johnson*, 5 Cal 4th 84 (1994); *In re Zacharia D.*, 6 Cal 4th 435 (1993); *In re Cristella C.*, 6 Cal App 4th 1363 (1992); *In re Riva M.*, 235 Cal App 3d 403 (1991); *In re Melinda J.* 234 Cal App 3d 1413 (1991).

130. In *John Doe, A Minor, et al, v Phillip L. Anthony, et al*, No 33-38-50 ([Cal] Superior Ct, Orange County, May 5, 1980), the LaFlamme law firm demanded that overcrowding and other deficiencies be remedied at a local juvenile detention facility for abused and neglected children. The petition resulted in immediate action by the Orange County Board of Supervisors and a resolution favorable to the children the LaFlamme law firm represented. *Id.*; see also *Sitten Home Projects Approved* Register B4 (May 8, 1980).

131. See note 126.

132. Several California juvenile court judges have made this observation to one of the authors.

133. For further information about the law firm, contact Harold LaFlamme, 2424 North Grand Avenue, Suite #A, Santa Ana, California 92701.

134. Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 Family L Q 417, 428-30 (1993).

wide range of advocacy and support services.

Because the government does not have the resources to provide representation for every child, Council members have developed several strategies to ensure that children appearing in court are adequately represented. The Council tries to make the most of existing resources. In each court system, persons have been selected to determine whether a child needs representation.¹³⁵ In juvenile delinquency and dependency cases, all children are represented; the only remaining question for those children is whether they need the extra support of a CASA volunteer or mental health therapy. In domestic relations, emancipation, and probate cases, only some of the children need representation, and the Council has identified a way to make that determination.¹³⁶ In criminal cases, the Victim Witness Program has been able to provide support services for all child victims and witnesses in the criminal justice system who need or request their services. Someone from the Victim Witness Program accompanies the child to court hearings and assists the child and family in filling out the paperwork necessary to qualify for state-provided mental health services.¹³⁷

Where the Council has detected gaps in the representation of children in the court system, it has coordinated efforts to provide adequate representation. One legal services office, for example, has been able to attract private attorneys to represent children who are the subject of probate court guardianship proceedings. The office trains the attorneys and assigns them one case to handle.¹³⁸ The support from the private bar has been strong. Similarly, the CASA program has been able to provide volunteer child advocates to children in domestic relations, guardianship, and delinquency cases. Traditionally, CASA volunteers have worked exclusively with abused and neglected children.¹³⁹ The Council

135. In domestic relations proceedings, Family Court Services, the court staff that provides mediation for all contested custody cases usually identifies the cases in which a child advocate is needed, although the attorneys for the parents sometimes will approach the court on that issue. In probate guardianships, the probate investigator, a member of the court staff, most frequently recommends to the court that an advocate be appointed, although again the attorneys may make that recommendation to the court.

In criminal proceedings, the district attorney's office refers all cases in which a child is a victim or witness to the Victim Witness Program, a statutorily funded victim support program for Santa Clara County. In emancipation and paternity proceedings, it is up to the court to identify advocacy needs when the matter comes before the court for hearing on the petition.

As the project grows, more members of the legal community become aware of the need for child advocacy. Rarely do children in legal proceedings fail to have an advocate.

136. In these types of cases, the determination is usually made by a judicial officer after the child's status has been brought to her attention by another person in the legal system.

137. The statutory scheme which creates this fund is outlined in Cal Penal Code §§ 13835 et seq (West 1994).

138. Another gap was the failure to have a child advocate represent children in school expulsion hearings. The same office that created a pro bono attorney volunteer program for children in guardianship cases helped to organize a similar program for these school hearings.

139. National Court-Appointed Special Advocate Association, *National Member Services*

has discovered that these volunteers can be equally effective in other court settings.

The key to a comprehensive system of child advocacy is organization. Once those who represent children can begin to work together, the problems can be identified and strategies can be developed.

V. Conclusion

Children need a voice in court proceedings whenever their significant interests are at stake. In addition, they need advocacy in related administrative and legal proceedings, and in matters involving the systems that provide services for them during court proceedings. Children need vigorous representation from interested, well-trained advocates who have reasonable caseloads and access to investigative and other resources.

Court systems across the United States have made remarkable strides toward providing representation for children in legal proceedings. The model programs and organizations described in this Article represent some of the best examples of what can be accomplished with good organization, dedication, and creative use of volunteers. There is, however, much more to be done. Judges, attorneys, political leaders, and community representatives must work together to ensure that children are adequately represented when their interests are at stake. It is a difficult and complex task, but one which will greatly benefit many of our nation's most needy children.