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SYMPOSIUM ON BANKRUPTCY LAW

HEARING CHILDREN'S VOICES AND INTERESTS IN ADOPTION AND GUARDIANSHIP PROCEEDINGS

American Bar Association Child Custody and Adoption Pro Bono Project *

* The American Bar Association Child Custody and Adoption Pro Bono Project was established in 2001 to design and implement programs and policies that foster children's well-being, development and safety, and provide children meaningful participation in divorce, adoption, unmarried parent, guardianship, and protective order cases. The Project provides technical assistance to developing programs, awards grants to local initiatives, manages libraries and list services for child advocates, develops multidisciplinary training programs, and assisted in the development of national and statewide standards for representing children in custody cases. The authors from the Project were Linda Rio Reichmann, the Project's original director; Barbara A. Chasnoff, the Project's former assistant staff counsel; Kristin Zipple, then a third-year student at Loyola Law School; Jeffrey Blank and Jayne Westendorf-Holland, recent graduates of Loyola Law School; and Lisa Schmitz, a second-year law student at Loyola Law School. Judge Nancy Sidote Salyers, co-director of Fostering Results and former presiding judge of the Cook County Juvenile Court Child Protection Division, reviewed the article for them.

Thoughts to the Judge

Childhood is: learning to jump as high as you can. . .
But, judge, childhood is also letting your voice be heard. . .
But, how can I do that if you don't even want to hear what I, one insignificant twelve-year old, have to say. . .
All I want for my birthday is a voice.
And as I mature toward that teenage sisterness of mine,
I want to know one thing: How old do I have to be?
Sixteen? Eighteen? Twenty-one? Elementary school? Junior high?
High School? College?

Krystin, age 12 n1

n1 *My Voice, My Life, My Future, HOME AT LAST*, 2006 available at www.fostercarehomeatlast.org/reports/MyVoice.pdf.

TEXT:

[*366] I. Introduction

More than 120,000 children are adopted annually in the United States, n2 and approximately 700,000 are the subject of a proceeding to determine who will be their guardian. These life-altering decisions have an enormous impact on children. n3 Yet more often than not the concerns and voices of the children themselves are neither elicited nor obtained. In some instances, it may be impossible to hear from a child or her advocate. n4 In many situations, however, hearing from the child or his legal representative will be essential to making the best decisions for the child, to respecting the child, and to recognizing that it is the child who is at the center of an otherwise disempowering process. n5

n2 Child Welfare League of America, Adoption Fact Sheet, www.cwla.org/programs/adoption/adoptionfactsheet.htm.

n3 Child Welfare League of America, Standards of Excellence for Adoption Services Preparation of Children for Adoption, § 3.19. (2000).

...The move to an adoptive family represents a profound change in the life of a child. A child may well perceive the move as yet another traumatic life experience, especially if the child has been abused or neglected, has been with the same foster family for an extended period, or has experienced multiple placements prior to adoption. Active participation by the child in planning for the placement and exercising choices in the process where possible increase the child's sense of control and lessens his or her sense of helplessness. *Id.* at 47.

n4 The terms advocate, representative, and attorney will be used interchangeably here. There are many different terms and variations on the responsibilities used throughout the country for this person. *See* American Bar Association Standards of Practice for Lawyers Representing Children in Custody, www.abachildcustodyproject.org (hereinafter ABA Custody Standards); Uniform Representation of Children in Abuse and Neglect and Custody Cases, www.nccusl.org (hereinafter NCCUSL Uniform Act.)

n5 For a thoughtful and indepth consideration of the child's voice in divorce proceedings, *See* Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 *ARIZ. L. REV.* 629 (2003).

This article will look at how children's voices currently are heard by presenting the results of a fifty-one jurisdiction analysis of the laws on (1) appointing advocates for children and (2) hearing and considering children's preferences in adoption and guardianship cases. We will look at whether these laws result in the child's voice being heard and discuss the different ways that children's voices can be considered in the adoption or guardianship process. We then will discuss why and how to enhance the system for hearing children's voices and interests.

Our ultimate goal is to develop and implement recommendations for hearing the voices and interests of children in adoption and guardianship cases so that better, more sustainable decisions are made for children, and so that children are more respected and, where appropriate, empowered throughout the process.

[*367] II. Background

In 2003, the Pew Commission on Children in Foster Care, a national, nonpartisan panel funded by The Pew Charitable Trusts, conducted a comprehensive assessment of the federal financing system as well as the court structure responsible for oversight of cases involving abuse, neglect, and dependency. While the Commission was seated and conducted its deliberations, *Fostering Results* n6 began its work both at the national level and in selected states to highlight the need to address the role of federal financing as well as the role of the courts in foster cases.

n6 Fostering Results an independent, nonpartisan national education and outreach organization, also funded by the Pew Charitable Trusts, engages influential national and local leaders, including judges, child welfare directors and caseworkers, and advocates for youth and for foster, birth and adoptive families; and uses media, reports, and meetings to call attention to financing and court issues. *See* www.fosteringresults.org.

In May of 2004, the Pew Commission released its recommendations and for the first time, a national study and report placed equal weight on the role of the court and the role of the agency in handling child welfare cases. Half of the Pew Commission recommendations came under the goal of "Strengthening Courts." In the prefatory comments, the Commission stated that "no child. . . should face the partial or permanent severance of familial ties without a fully informed voice in the legal process." n7 The Commission also recognized that courts have enormous responsibility in the dependency area and are making decisions without children having a strong and effective voice. n8 Formal Recommendation 3 states:

To safeguard children's best interests in dependency court proceedings, children . . . must have a direct voice in court, effective representation, and the timely input of those who care about them. n9

n7 PEW COMMISSION ON CHILDREN IN FOSTER CARE (2003), *available at* <http://pewfostercare.org/>

n8 *Id.* at 14.

n9 *Id.* at 41.

The Pew recommendations concern dependency court cases and involve decisions regarding the movement of a child from his biological family temporarily or permanently. Although private adoption and guardianship generally take place in a different proceeding, n10 these decisions have an equally important impact on children. These decisions are at a slightly different point in the story of the child; the creation of a new, [*368] not dissolution of an existing, parent/child or guardian/child relationship. Clearly, the same reasoning applies to all adoption and guardianship cases, regardless of whether they occur in a dependency proceeding. Both processes require an informed child and a court with knowledge of the child's voice. The ABA Child Custody and Adoption Pro Bono Project and Fostering Results joined forces in early 2005 to look at their mutual interest in advocating that the voice of the child be heard in adoption and guardianship cases. This article is the result of their common effort to improve decision making on behalf of, and participation by, children in these proceedings.

n10 Adoptions are filed in the following types of courts: circuit court (eleven states), district court (eight states), superior court (seven states and DC), probate court (eight states), family court (five states), and juvenile court (three states). National Adoption Information Clearinghouse, State Statute Series, 2004 Court Jurisdiction and Venue for Adoption Petitions.

III. Scope

Given the enormous diversity of cases falling under the category of "adoption" or "guardianship," it is important to define the scope of cases addressed in this article. Adoption and guardianship proceedings happen both during and at the end of foster care proceedings as well as in circumstances where there has been no foster care involvement. Our focus in setting forth and discussing the current law will attempt to give as clear a picture as possible of the applicable state statutory law concerning a child's representation and voice in adoption and guardianship. However we do not include statutory law that refers only to dependency cases. Further, because federal law governs in those cases, and the Child Abuse Prevention and Treatment Act (CAPTA) n11 requires a child representative, and because the Pew Commission has made extensive recommendations concerning improvements for the foster care system, our

recommendations concerning adoption and guardianship go to those adoption and guardianship proceedings that are not covered by CAPTA and the Pew Commission recommendations. Our recommendations concern those adoption cases heard in private adoption courts where there was never state involvement; cases where an adoption happens as part of a juvenile court termination proceeding but where the adoption is a separate issue addressed by the court; and independent adoption cases heard following an abuse, neglect, or dependency proceeding where parental rights have been terminated by the state. Excluded from this definition are adoption proceedings involving the termination phase of an abuse, neglect, or dependency case where there is ongoing representation by a CAPTA-mandated advocate.

n11 Child Abuse Prevention and Treatment Act (CAPTA), § 42 U.S.C. § 5101 *et seq.*, conditions states' eligibility for grants to meeting certain requirements including the appointment of a guardian *ad litem* (GAL) for any child who is subject of an abuse or neglect proceedings.

[*369] Guardianship as used in this article means "a judicially-created relationship between child and caregiver intended to be permanent and self-sustaining. The following parental rights are transferred to the caretaker with respect to the child: protection, education, care and control, custody, and decision-making." n12 This includes cases heard in private guardianship courts where there was never state involvement, cases where a guardianship is established as part of a juvenile-court termination proceeding, but where the guardianship is a separate issue addressed by the court; and independent guardianship cases heard following an abuse, neglect, or dependency proceeding where parental rights have been terminated by the state. These include subsidized as well as nonsubsidized guardianships. Again, excluded from this definition are proceedings involving the termination phase of an abuse, neglect, or dependency case where there is ongoing representation by a CAPTA-mandated advocate.

n12 Sue Badeau & Sarah Gesiriech, *A Child's Journey Through the Child Welfare System*, THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *available at* <http://pewfostercare.org/docs/index.php?DocID=24>.

Finally, who are the children involved in these cases? General statistics on adoption and guardianship cases and specifically information on the age of the children in these cases are hard to obtain. The last year that national adoption totals were gathered was 1992. In that year, 126,951 children were adopted in the United States. n13 Currently there are two basic sources of information about state court cases. The National Center for State Courts (NCSC) Statistics Project collects information provided by different state courts about state court filings. n14 However information is not reported as to the number of adoption or guardianship filings. The second source of information about adoption and guardianship concerns only public agency adoptions and guardianships. Since 1995, state child welfare agencies have been mandated to report information semiannually to the Adoption and Foster Care Analysis and Reporting System (AFCARS). This reporting includes some information concerning the age of children.

n13 *Id.*

n14 The National Center for State Courts, *available at* http://www.ncsconline.org/D_research/CSP/CSP_Main_Page.html.

In 2004, the National Adoption Information Clearinghouse produced a report synthesizing the available information to estimate the number of children adopted in 2000/2001 and to use those numbers to estimate the composition and trends of all adoptions in the United States. n15 Adoptions are classified by the following types: intercountry/international, public, [*370] and private, which includes kinship and tribal. The total number of adoptions per year reported from each of these sources remains in the range of 118,000 to 127,630. However, the number of each type of adoption, which makes up the total number of adoptions, has changed for at least two reasons. First, as a result of the 1997 Adoption and Safe Families Act (AFSA), the number of children adopted from foster care increased seventy eight percent from 1996 to 2000. In 1996 there were 28,000 adoptions from foster care. In 2000 the number was almost

double; there were 50,000 adoptions from foster care. The number of children adopted who had foster care involvement has stayed between 50,000 and 53,000 from 2000-2004. n16 International adoptions also have increased in the last decade. The current number of international adoptions has been estimated to be approximately 20,000 to 21,000 a year. n17

n15 U.S. Dep't of Health & Human Serv., *How Many Children Were Adopted in 2000 and 2001*, NATIONAL ADOPTION INFORMATION CLEARINGHOUSE (2004), available at http://www.childwelfare.gov/pubs/s_adopted/index.cfm.

n16 Trends in Foster Care and Adoption from 2000-04, 4, 8/24/2006, available at <http://www.acf.dhhs.gov/index.html>.

n17 Evan B. Donaldson Adoption Institute, International Adoption Facts available at www.adoptioninstitute.org/research/adoptionfacts.php (last visited Feb. 20, 2007).

What, if any, trends do these changes in type of adoption indicate? Generally, children adopted from foster care tend to be older. The ages of children adopted from foster care in 2003 were as follows:

Less than 1 year	2%	932
1 thru 4 years	39%	19,675
5 thru 9 years	33%	16,414
10 thru 14 years	20%	10,278
15 or more	4%	2,481

Most children adopted internationally are less than four years old.

Less than 1 year	46%	9,200 +
1 thru 4 years	43%	8,600 +
5 thru 9 years	8%	1,600 +
Over 9 years	3%	600 +

Age at Adoption

Age	Foster Care - 2003		International	
	%	No.	% for 1998	Estimate for 2003
Under 1	2%	932	46%	9,200
1 thru 4	39%	19,675	43%	8,600
5 thru 9	33%	16,414	8%	1,600
10 thru 14	20%	10,278	9 and Up	
			3%	600
15 or Older	4%	2,481		

[*371] Thus, if the total number of adoptions has stayed fairly constant, it is likely that the age of the children involved in adoptions has risen over the last decade.

As to guardianship cases, the only statistic available is that approximately four percent (10,700) of children in foster care in 2003 were adopted through guardianship. n18 However, this clearly does not include the vast numbers of

children who go through guardianship proceedings outside of foster care. For example in Cook County Probate Court there were 2,876 Petitions for Guardianship of a Minor filed and 2,670 Orders for Guardianship of a Minor entered in 2004. n19 It seems likely that a significant [*372] number of children involved in these proceedings are not infants and are at least above the age of five. Although these various proceedings raise different issues and needs for the children involved, the reasoning and recommendations presented below apply to all of these adoption and guardianship cases.

n18 The AFCARS Report June 2006 (11),
http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report11.htm

n19 Robert Boyke, Cook County Circuit Court, Data Dissemination Manager, Re: Request 06:0082 Activity Report 11/16/2006, e-mail on file with Project.

IV. Current Status of the Law

The current adoption process and laws were developed during the middle of the twentieth century when the model of adoption in the United States was that of a secret event that resulted in a rebirth for the child into the adoptive family and an extinguishment of all that went before. "Proponents of anonymity argued that birth mothers and their children would be protected from stigmatization, bonding between adoptive parents and their children would be facilitated, and all parties would be permanently insulated from unwanted interference in their lives." n20 At the time this model came into being, most adoptions involved infants being adopted by middle-class families who were infertile. While the face of adoption and adoptees has changed greatly in the last thirty years and there is a greater understanding of the impact of adoption on the adoptee, current adoption laws still reflect the earlier view of adoption. n21

n20 D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Convention on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, MICH. J. INT'L L. 588, 596 (2001).

n21 Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, B.U. L. REV. 998, 1004-13 (1995).

A. Appointment of Representatives in Adoption Proceedings

Statutory provisions in forty states and the District of Columbia address the appointment of representatives for children in adoption proceedings. n22 The provisions differ in whether they require or give courts discretion to appoint a representative for a child, whom courts may appoint as the child representative, and the role of the child's representative. n23

n22 See Appendix A (California, Idaho, Indiana, Kansas, Michigan, Nevada, Oregon, South Dakota, Virginia, and West Virginia excluded). Appendices A and B list the relevant state statute citations regarding adoption and guardianship proceedings for the fifty states and the District of Columbia, *available at* www.abanet.org/family/flq/issue4004_summer2007.shtml. When describing a number of jurisdictions at the same time, the footnote will list the state abbreviations and direct the reader to the appendix for the statutory citations.

n23 *Id.*

Twenty jurisdictions require courts to appoint an advocate for a child in adoption proceedings in all or certain circumstances. Four require courts to appoint an advocate for a child in any adoption proceedings; n24 sixteen [*373] require courts to appoint advocates to represent an adoptee in certain circumstances, such as if an adoption is contested. n25 The statutory provisions of the other jurisdictions identify various circumstances in which courts are required to

appoint a child representative. For example, Tennessee requires courts to appoint a guardian *ad litem* for a child in an adoption proceeding if a child's consent is required for the adoption and the child is mentally disabled. n26 Florida mandates the appointment of a guardian *ad litem* if an adoptee is an abandoned infant. n27 Nebraska requires the appointment of a guardian *ad litem* before the approval of any postadoption agreement. n28

n24 IL, MO, ND, SC; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n25 AL, FL, KY, LA, MD, MA, MS, NE, NJ, NM, NY, OK, PA, TN, VT, WI; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n26 TENN. CODE ANN. § 36-1-117.

n27 FLA. STAT. ANN. § 63.0423.

n28 NEB. REV. STAT. § 93-163(1) (2005).

A majority of jurisdictions, thirty-one in all, either explicitly or implicitly make the appointment of a child representative in adoption proceedings discretionary. n29 Of the jurisdictions that explicitly make the appointment of an advocate discretionary, the statutes either give courts complete discretion to decide when to appoint a child representative, n30 establish specific circumstances in which it becomes discretionary for courts to appoint an advocate, n31 or guide courts to appoint a child representative if appointment furthers a child's best interests. n32

n29 AL, AK, AZ, AR, CO, CT, DE, DC, FL, GA, HI, IA, ME, MN, MS, MT, NE, NH, NM, NY, NC, OH, OK, PA, RI, TX, UT, VT, WA, WI, WY; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n30 *See, e.g.*, AK, MN, WA; Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n31 *See, e.g.*, CO, WY; Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n32 *See, e.g.*, HI; Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

A court's power to appoint a child representative in an adoption proceeding may also be implied within the statutory language or recognized in practice. For example, in Montana, a court's power to appoint a child representative is implied within the statute that enumerates the requirements of a petition for adoption. n33 Although the Indiana statute refers to the appointment of a child representative in adoption proceedings under the section on postadoption privileges, courts often appoint a child representative in adoption proceedings. n34 Likewise, although Texas's statutory language does not address the appointment of a child advocate in adoption [*374] proceedings, the notes explaining the adoption provisions indicate that courts have the power to appoint a child representative. n35

n33 MONT. CODE ANN. § 42-5-101.

n34 E-mail from Frances Hill, Consultant for the Indiana Supreme Court Family Court Project, to Kristin Zipple (Mar. 21, 2005) (on file with ABA Project).

n35 TEX. FAM. CODE ANN. § 107.001, construed in *Barfield v. White*, 647 S.W.2d 407 (Tex. Ct. App. 1983); *Finn v. Finn*, 658 S.W.2d 735 (Tex. Ct. App. 1983).

Jurisdictions also differ with regard to who can be appointed and the duties assigned. Some statutes specify that the person appointed should be a licensed attorney; n36 others provide for the appointment of an attorney or nonattorney or

both; n37 and still others do not specify any criteria. n38 Although a majority of jurisdictions do not clarify the role of the child representative within the adoption statutes, n39 some jurisdictions do provide direction to the child representative. Eleven charge a child representative with representing a child's best interests during adoption proceedings. n40 Alaska and Delaware allow the court discretion to appoint an attorney to represent the child's preference or wishes. n41

n36 *See, e.g.*, DC, Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n37 *See, e.g.*, AK, Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n38 *See, e.g.*, ND, Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n39 Thirty-four states make specific reference to appointing a Guardian *Ad Litem*. However, the duties of a guardian ad litem vary greatly and the term actually gives little direction as to the duties involved. *See* ABA Standards of Practice for Lawyers Representing Children in Custody Cases, Commentary to Section II.B, *supra* note 4.

n40 *See, e.g.*, AK, DC, HI, Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n41 ALASKA STAT. § 25.24.310; DEL. CODE ANN. tit. 13, § 701.

B. Appointment of Advocates in Guardianship Proceedings

While more variance exists in the statutory language governing the appointment of child representatives in guardianship proceedings than in adoption proceedings, forty-four states and the District of Columbia address the appointment of a child representative in guardianship proceedings. n42 [*375] Similar to the statutes about appointment of child representatives in adoption proceedings, the statutes about appointment in guardianship proceedings differ in whether the appointment is mandatory or discretionary; the qualifications required; and the role assigned. n43

n42 *See* Appendix B (FL, MS, NH, OR, PA, RI, SC excluded) at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n43 *Id.*

Eight jurisdictions require courts to appoint a child representative in guardianship proceedings in all or certain circumstances. n44 Two of these jurisdictions require courts to appoint a guardian or attorney *ad litem* for a child in any guardianship proceeding. n45 New Mexico and Wisconsin require courts to appoint a child representative if a parent who is participating objects to the requested appointment. n46 If an infant is the subject of a guardianship proceeding, New York requires that an advocate be appointed. n47 New Mexico requires representation in all proceedings to revoke a guardianship. n48 Tennessee gives courts discretion to waive representation if a child is fourteen or if waiver is in a child's best interests. n49

n44 ID, IN, NM, NY, OH, TN, TX, WI; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n45 ID, TX; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n46 N.M. STAT. ANN. § 40-10B-9; WIS. ADMIN. CODE § 54.40.

n47 N.Y. FAM. CT. ACT § 403-a.

n48 N.M. STAT. ANN. § 32A-4-32(J).

n49 TENN. CODE ANN. § 34-1-107.

Thirty-six jurisdictions make the appointment of a child representative in guardianship proceedings discretionary. n50 Some statutes direct courts to appoint a child representative if a child's interests would not otherwise be [*376] adequately represented. n51 The statutory provisions in Hawaii and Indiana require courts that appoint a child representative to include the reasons for appointment in the record. n52 Statutes in twelve jurisdictions direct courts to consider a child's preference about who should be appointed child representative if a child has reached a specified age, generally fourteen years old or older, n53 although Colorado uses age twelve. n54

n50 AL, AK, AZ, AR, CA, CO, CT, DE, DC, GA, HI, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NE, NV, NJ, NC, ND, OK, SC, SD, UT, VT, WA, WV, WY; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n51 *See, e.g.*, AK, NE, Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n52 HAW. REV. STAT. § 560:5-115; IND. CODE ANN. § 29-3-2-3.

n53 AL, AK, AZ, CO, HI, ME, MI, MT, NE, ND, SC, UT; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n54 COLO. REV. STAT. § 15-14-205.

Much like adoption appointment laws, guardianship laws differ with regard to who can be appointed as a child representative. Some jurisdictions provide for the appointment of a licensed attorney, n55 others allow for the appointment of an attorney or nonattorney, n56 and others do not specify any requirements for the child representative. n57 Hawaii does require courts to state the child representative's duties on the record. n58

n55 *See, e.g.*, CO, Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n56 *See, e.g.*, CT, Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n57 *See, e.g.*, NV, Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n58 HAW. REV. STAT. § 560:5-115.

C. Consideration of Child's Preference in Adoption Proceedings

Today fifty jurisdictions employ statutory language directing the court to consider in some capacity a child's preferences during adoption proceedings. n59 Forty-nine jurisdictions require courts to contemplate a child's preferences by requiring a child's consent for the adoption if a child has attained a certain age. n60 The jurisdictions that require a child's consent for adoption use the threshold age of ten, twelve, or fourteen. Twenty-five jurisdictions require consent if an adoptee is either fourteen or older; n61 eighteen jurisdictions use age twelve or older; n62 six jurisdictions use age ten or older. n63

n59 *See* Appendix A (Wisconsin excluded) at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n60 AL, AK, AR, AZ, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI,

MN, MS, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WY, WV; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n61 AL, DE, DC, GA, IL, IN, IA, KS, ME, MI, MN, MS, MO, NE, NV, NH, NY, OR, RI, SC, TN, VT, VA, WA, WY; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n62 AZ, CA, CO, CT, FL, ID, KY, LA, MA, MT, NC, OH, OK, PA, SD, TX, UT, WV; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n63 AK, AR, HI, MD, NM, ND; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

[*377] Even jurisdictions that require a child's consent to an adoption if the child is above a certain age allow courts the discretion to dispense with consent requirements. For example, many jurisdictions explicitly allow courts to dispense with the consent requirement if doing so is in a child's best interests, n64 or, as in West Virginia, for "extraordinary cause." n65 One legislature reasoned that the flexibility in allowing courts to eliminate the consent requirement might serve a child's best interests in certain types of cases, for example where a child who does not know of his or her status as a stepchild or of the pending adoption proceedings or where he or she is being adopted by a stepparent. n66

n64 *See, e.g.*, AK, AR, FL, OH; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n65 W. VA. CODE § 48-22-301.

n66 ARK. CODE ANN § 9-9-206, Uniform Law Comments.

Although a majority of jurisdictions direct courts to consider a child's preferences in adoption proceedings through consent requirements, seven jurisdictions guide courts to consider a child's preferences in other ways. n67 Colorado has a rebuttable presumption that relinquishment is not in an adoptee's best interests if a child is twelve or older and objects, and requires written consent to any adoption for a child twelve or older. n68 New Jersey requires the child to appear at the final adoption hearing and directs courts to solicit a child's wishes regarding the adoption, provided that a child has the capacity to form an intelligent preference with regard to the adoption, unless good cause is shown. n69 Alaska directs courts to consider a child's wishes even if an adoptee is under the age at which his or her consent is required, provided that a child has sufficient age and intelligence to state his or her preferences regarding the adoption. n70 Colorado and Oregon specifically provide the court may talk with the child. n71 Missouri and Oklahoma include ascertaining the child's wishes in the duties of the guardian *ad litem*. n72 Michigan, which makes no reference to the appointment of a representative for the child, does provide that the court shall consider the child's preference if the adoptee is fourteen or [*378] younger and the court considers the adoptee to be of sufficient age to express a preference. n73 Finally, in recent years, a number of states have added provisions in their adoption laws that deal with postadoption contact. n74 Provisions in nine states require consideration of the child's wishes on the issues of postadoption contact, either by requiring the child's consent or consideration of the child's wishes. n75

n67 *See, e.g.*, AK, CO, LA, MI, MO, NJ, OK, Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n68 COLO. REV. STAT § 19-5-103. Colorado provides a relinquishment procedure by which the birth parent makes the child available for adoption. COLO. REV. STAT. § 19-5-203(2). Generally, the relinquishment procedure and the adoption are one process. Phone conversation with Betsy Fordyce, Rocky Mountain Children's Law Center, to Barbara Chasnoff, (July 19, 2006).

n69 N.J. REV. STAT. § 9:3-49.

n70 ALASKA STAT. § 25.23.125.

n71 COLO. REV. STAT. § 19-5-103 & § 210(5)(a); OR. REV. STAT. § 109.307.

n72 Mo. ANN. STAT. § 453.025; OKLA. ADMIN. CODE tit. 10 § 750-1.2.

n73 MICH. COMP. LAWS § 710.22.

n74 *Cooperative Adoptions: Contact Between Adoptive and Birth Families After Finalization*, 2003 available at <http://naic.acf.hhs.gov/general/legal/statutes/cooperative.pdf>.

n75 AZ, CA, CT, IN, LA, NM, RI, VT, WV; *see* Appendix A at www.abanet.org/family/flq/issue4004_summer2007.shtml.

D. Consideration of Child's Preference in Guardianship Proceedings

The statutory language directing courts to consider a child's preferences during guardianship proceedings is less uniform than similar provisions within the adoption statutes. Forty-three jurisdictions employ statutory language directing courts to consider a child's preferences in guardianship proceedings. n76 A majority of jurisdictions establish a threshold age when courts are required to consider a child's preferences, but much variance exists in how courts are required to consider a child's wishes. n77 In addition, the courts have broad discretion to dispense with consent requirements. n78

n76 *See* Appendix B (LA, MD, NY, NC, OR, SC, TN, TX excluded) at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n77 *See* notes 60-63.

n78 *Id.*

Much as a majority of adoption statutes establish a threshold age at which an adoptee's consent is required, a majority of jurisdictions require courts to consider a child's wishes in guardianship proceedings if he or she has attained a certain age. n79 Thirty-eight jurisdictions direct courts to consider a child's preferences in some capacity if a child is either fourteen or older, n80 three jurisdictions set the age at twelve or older. n81 California and New Hampshire do not establish a threshold age. n82

n79 AL, AK, AZ, AR, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, ME, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, ND, OH, OK, RI, SD, UT, VT, VA, WA, WV, WI; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n80 AL, AK, AZ, AR, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, ME, MA, MI, MN, MS, MO, MT, NE, NV, NH, NM, ND, OH, OK, PA, RI, SD, UT, VT, VA, WA, WV, WI; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n81 CO, CT, NJ; *see* Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n82 CAL. PROB. CODE § 1514; N.H. REV. STAT. ANN. § 463:8.

Much variance exists in how statutory provisions direct courts to consider [*379] a child's preferences. n83 For example, some statutes direct courts to appoint a guardian nominated by the child. n84 Other statutes require courts to

give preference to or consider a child's nomination of a guardian and/or the child's wishes with regard to who is appointed guardian. n85 Others include provisions that allow a child to prevent an appointment or to terminate a previously made appointment. n86

n83 *See supra* note 59.

n84 *See, e.g.*, OH, OK in Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n85 *See, e.g.*, FL, NH in Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n86 *See, e.g.*, AZ, ID in Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

Much as the adoption statutes give courts broad discretion to dispense with consideration of a child's wishes, the guardianship statutes also give courts broad discretion when considering a child's preferences. n87 A majority of jurisdictions grant courts discretion to dispense with a child's preferences when following the child's preferences would be contrary to a child's best interests. n88 Delaware allows courts to dispense with the requirement for the child's consent in guardianship proceedings for "just cause shown." n89 New Hampshire, which does not establish a threshold age when courts should consider a child's preferences, directs courts to determine a child's preferences in all cases and give these preferences "such weight as under the circumstances may seem just." n90

n87 *See supra* note 60.

n88 *See, e.g.*, HI, IL, MN in Appendix B at www.abanet.org/family/flq/issue4004_summer2007.shtml.

n89 DEL. CODE ANN. tit. 13, § 2330.

n90 N.H. REV. STAT. ANN. § 463:8.

V. Current Practice

When I was adopted, I was four and a half, going on five,
not even in school yet so I didn't know how to write.
They told me to write my name on this line.
I didn't know what was going on and
there were all these new people and they're like,
okay, you're going to go home with this lady today. n91

n91 Reina M. Sanchez, *Youth Perspective on Permanency*, CALIFORNIA PERMANENCY FOR YOUTH PROJECT, at 18 (The data for the report came from phone interviews with twenty-five youth and a focus group with nine of the youth who had extensive personal experience with the child welfare system of California).

Despite the discretionary availability of advocates for children in adoption and guardianship cases, such appointments are rare and limited. Even where state statutes require appointment, the representation is often perfunctory. [*380] For example, Illinois requires appointment of a licensed attorney in every adoption case. n92 In Cook County, Illinois, where Chicago is located, for the last several years the circuit court has appointed five attorneys to act as guardian *ad litem* in all adoption cases. These attorneys work part-time while maintaining a separate private practice. In 2005, approximately 2,000 adoptions were filed in Cook County; each GAL handled approximately 400 cases. Unless the child is fourteen or the adoption is contested, the GALs generally do not interview the child. n93 Clearly it would be extremely difficult if not impossible for GALs to come to know all of the children they are

representing.

n92 750 ILL. COMP. STAT. 50/13.

n93 Telephone Interview with Genie Miller Gillespie, GAL for adoption in Cook County Circuit Court, June 15, 2006.

A second issue concerning the provision of advocates to children in adoption and guardianship proceedings concerns the lack of clarity as to the role of these advocates. Others have addressed the difficulties that occur due to the lack of clarity around the role and duties concerning child advocates. n94 These issues are exacerbated in adoption and guardianship cases because the representation takes place in a statutory model that was developed when the majority of adoptees were infants and when the interests of the adoptees were considered secondary to the interests of the adopters who were seen as doing the child a favor by taking him or her into their home. n95 Thus, the representation provided under the current system reflects the earlier view of adoption as a secret event between the biological parent and the adoptive parent with the child as an almost incidental third person, if considered individually at all.

n94 NCCUSL Uniform Act, *supra* note 4, at Prefatory Note. Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 *HAMLIN J. PUB. L. & POL'Y* 177 (2006).

n95 Lucy S. McGough & Annette Peltier-Falahahawazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, *LA L. REV.* 14, 39 (1999).

The current system appears to incorporate the child's voice through the requirement of consent to the adoption or guardianship. Although many states theoretically provide for the child's voice through this requirement for consent, this avenue for the child's voice may be more of a mirage than a reality. First, the majority of states provide broad discretion to waive the consent. Second, only two states provide for representation for the child. Thus, children in the vast majority of states do not have any representation in presenting their voices on the question of consent. Finally, the model of adoption, which focuses on the adopting parent, the information provided by the adoption agency, and the general benefit being conveyed on the child, does not consider the individual child's [*381] voice as a significant factor.

We attempted to gather input from attorneys and judges who handle adoptions. We asked the judges about when they appoint a child advocate; when they explain the process or proceeding to the child, how the child's wishes and concerns are brought to their attention; how the child's age impacts this; what weight is given to the child's preferences; what barriers prevent getting direct information; and whether the child's concerns, wishes, and interests are adequately voiced. Unfortunately, we did not get sufficient information to draw any conclusions. What we did learn is that there is a significant lack of uniformity or concrete direction to judges as to when and how to involve children and their voices and preferences.

Children's voices currently are heard through a variety of vehicles, including the child's representative, a social worker's report, an investigator's report, and the child directly. Although some judges thought that the child's wishes and concerns are adequately brought to their attention, judges in adoption and guardianship proceedings often find that there are barriers that prevent them from ascertaining the minor's wishes, interests and concerns.

While judges indicated that the judicial process as a whole works to allow minors' voices to be heard, they also thought certain improvements would be beneficial.

The most serious barrier is where no attorney advocate can be appointed due to cost considerations. If the judge does not interview the client on the record so that the judge knows the client's wishes, the minor's voice might not be heard. In these circumstances, situations where family conflicts are unknown to the judge might never be revealed.

Judges have found that lack of *adequate* counsel makes the minor an unequal player in proceedings set to determine his future. Inadequately trained or poorly qualified counsel has been a problem in adoption and guardianship proceedings.

Excessive attorney caseloads often are a barrier to minor's voices, interests, and concerns being heard. The minor is disadvantaged when his attorney advocate cannot and does not take the time to gain his trust so that he can be forthright with him about his wishes. By getting to know his client, the attorney advocate can then do any necessary investigation to fully understand his client's situation and then work with his client to present his client's wishes and the reasoning behind them to the court.

Judges expressed other factors that impede their ability to ensure the minor's wishes, concerns and interests are adequately heard in adoption and guardianship proceedings. In certain cases, there are inconveniences or delays in the judge's ability to see the children whose interests are at [*382] stake. Transportation barriers that inhibit the minor's ability to make it to court can compound these inconveniences. Even where minors can make it to court, the facilities at the court are often not conducive for the judge when he wishes to interview the minor or privately explain how the court proceedings will work. These are problems that judges wish to remedy, but which leave them wondering who will pay to make access to minors more conducive and at what cost.

Judges and attorneys are not the only major players in the adoption and guardianship proceedings. When other vital players cannot or do not perform their jobs with expertise, judicial proceedings and decisions fail to take place with well-developed facts. In some adoption and guardianship courts, there is always a court investigator or social worker to provide information to the court. When the quality and quantity of the information varies in accuracy and scope, it prevents the judge from having a complete and accurate record from which to make an informed permanency decision.

VI. Why Change Is Needed

One thing that is widely overlooked is
the voice and the feelings of the child.
I really believe that the child has an opinion from a very early age.
I think children know what's right and
what feels good and what feels bad and
if they're happy or not happy.
I think that's often overlooked.
I see that as very sad. n96

n96 Sanchez, *supra* note 91, at 19.

The current status of state law and advocacy efforts is insufficient to meet the needs of children involved in adoption and guardianship proceedings. Currently, at least one third of the children subject to adoption, and substantially more than that in guardianship proceedings, are significantly beyond the age of infancy. The more recent understanding of adoption is of a triad involving three equal parties: the child, the biological parent(s) and the adoptive parent(s). n97 This understanding reflects the knowledge that a family created by adoption or guardianship is not the same as a family created by birth and that the child will need to, and will, go through a process of incorporating how his family came into being. This is not a bad thing; it just is. n98 Thus, a child's voice and feelings around adoption and guardianship are much more complicated than a [*383] mere consent or lack thereof. Their feelings and awareness around the issue of adoption or guardianship start much earlier than the ages of twelve, thirteen, or fourteen, which are most often used in statutes as the age of consent to adoption and guardianship. By the age of five a child has an awareness of and questions concerning adoption. n99 However, on the whole, the child's voice, if heard directly, is only heard in terms of whether or not he consents to the adoption or guardianship. Additionally, the requirement of consent is

almost always easily waived.

n97 Appell, *supra* note 21, at 997.

n98 See generally DAVID M. BRODZINSKY ET AL., BEING ADOPTED--THE LIFE LONG SEARCH FOR SELF (1992).

n99 Children's Understanding of Adoption: Adopted Children vs. Non-Adopted Children, The Center for Adoption Support and Education *available at* www.adoptionssupport.org/res (last visited Feb. 20, 2007); See generally BRODZINSKY, *supra* note 98.

The importance of the child's understanding of the process and voice in the process is a concept that has developed and come into its own in the last fifteen years. Significant thought has been given to the representation and needs of children in legal proceedings. The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect (1996) and the ABA Standards of Practice for Lawyers Representing Children in Custody Matters (2003) emphasize the need to hear the child's voice. In 2003, Pew Commission recommendations emphasized the need for a direct voice for children in decisions that impact their future. The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, adopted by National Conference of Commissioners on Uniform State Laws in July 2006 and amended in 2007, establishes the requirement that a child's voice and appropriate representation is necessary in legal proceedings that involve their custody interests. n100

n100 See generally Haralambie, *supra* note 94, for an excellent discussion of the development of the Standards and recommendations in this area.

The standard for action in adoption and guardianship proceedings, just as in dependency, is "best interest" of the child. In dependency and other types of custody proceedings in general, great strides have been made to focus on explaining the proceeding to the child and to offer the child a direct avenue to express their thoughts so that decisions are made with a detailed understanding of the child. Although a guardianship is not as permanent as an adoption, both are major decisions from a child's perspective. n101 However, because of the old view of adoption as a secret event, the adoption and guardianship laws still fail to provide for a full understanding of the child whose life is being significantly impacted by the proceeding.

n101 Badeau, *supra* note 12, at 2.

In an adoption or guardianship where the child is not an infant, the court needs to ensure that the process has been explained to the child by an appropriate party and that the child's views are reported to the court. [*384] We are not suggesting that the child's views should be the deciding factor, but that the court must know the child's views and that the child must know that her views are a part of the process. "The child's right to be heard in any proceedings in which her custody is at stake should not be construed as a right to decide but as a right to have her views seriously considered. Such a right to be heard recognizes the child's personhood and dignity, and ensures that information of potentially unique significance will reach the court." n102 In this way, the court will be able to hear the child's views, and better ascertain whether a child's advocate is necessary and, if so, what type of representation is necessary.

n102 Atwood, *supra* note 5, at 663-64.

VII. Recommendations

A. Research

1. BETTER STATISTICS ON CHILDREN IN ADOPTION AND PRIVATE GUARDIANSHIP

To understand the needs and experience of the children of adoption and private guardianship, clearer information is needed as to the children who are actually going through the adoption and guardianship proceedings. Private guardianship and adoption cases are filed as new proceedings. The court process responds as if nothing has gone before. However, the reality often is very different. Some children come to adoption or private guardianship as infants, but many come to these proceedings with a personal history. To truly understand these children and the issues presented, it is necessary to know how many children are adopted a year; how many private guardianships are established a year (and of these children how many were and were not part of the dependency process); the age of these children; whether an advocate is appointed and, if so, what kind of advocate. Information similar to that which is gathered on children in the dependency system needs to be gathered on children who are the subject of petitions for guardianship and adoption.

2. INFORMATION REGARDING THE CHILD'S EXPERIENCE AND ADJUSTMENT TO ADOPTION AND GUARDIANSHIP

A second area of research concerns children's experience regarding adoption and guardianship. Brodzinsky has put forth a premise that part of the development of self for a child who is adopted is the integration of that experience into his life. n103 However, as previously discussed, most state laws presume a very different process: first, the child as an individual is not [*385] the focus of the adoption process, and second, once the adoption occurs, the biological father, mother, and family cease to exist. The current legal process would seem to work against the adaptation process that Brodzinsky puts forth. Further research needs to be done to determine how to integrate Brodzinsky's model of adoption into the legal adoption process.

n103 BRODZINSKY, *supra* note 98.

Finally, social science findings that were the basis of the Pew Commission recommendations, and from other studies concerning children's experience of the divorce process, n104 indicate that children who are involved in court processes feel very powerless and frequently experience the process negatively. One would assume that given the current legal process of adoption and guardianship, a child's experience would be the same. If this is confirmed as the child's experience, consideration should be given as to how the process could be changed to improve the child's experience.

n104 Marsha Kline Pruett, *Divorce in Legal Context: Outcomes for Children*, 13(1) CONN. FAM. L. 1, 1-11 (1998).

B. Current Legislative Changes

Adoptions and private guardianships take place every year under the "best interest of the child" standard. Within the dependency system and other types of custody litigation, the "best interest of the child" standard is also used; however, the importance of the individual child and the child's voice in making decisions has gained recognition over the last decade. n105 This awareness was exemplified in the recommendations of the Pew Commission. However, because adoptions and private guardianships are separate proceedings from dependency and because of the manner in which adoption and guardianship laws developed, the importance of the individual child and his voice has not been recognized and incorporated into the proceedings in the same manner. It is now time to change this state of affairs.

n105 See, e.g., *In re Cody T. Wallings*, 2006 WL 445981 (Ohio Ct. App. 2006). In dependency petition, the child's GAL submitted a report that it was in his best interest to be committed to permanent custody of the state. There was no discussion of his wishes, and the court did not conduct an in-camera interview. The appellate court reversed and remanded because there was insufficient evidence to terminate the mother's parental rights. The

appellate court stated that before a court may terminate parental rights it must consider the wishes of the child. The GAL report was silent as to Cody's wishes. The GAL argued on appeal that Cody was too young to be able to express his wishes, that the mother had so stated and, thus, his wishes did not need to be considered. The court held that the child's wishes, may be expressed directly or through the GAL and that there was nothing at the hearing that fulfilled this requirement. As to the second issue, the appellate court stated that the Ohio Supreme Court held in *In re Williams 2004 Ohio 1500, 805 N.E.2d 1110*, that a child may be entitled to independent counsel when his wishes are in conflict with the GAL's recommendation. Because there was no information as to Cody's wishes, the court needed to determine what Cody's wishes were and whether independent counsel was appropriate.

[*386] Certain changes could improve the representation of children in adoption and guardianship proceedings and the hearing of their voices. Statutes provide courts with the discretion to appoint advocates, but provide little or no guidance as to when and whom to appoint. Since 2003, two significant bodies of guidance have been adopted regarding the representation of children in custody proceedings. The first were the ABA Standards for Representing Children in Custody Cases (ABA Standards) adopted in August of 2003. The second was the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July of 2006, amended 2007. The ABA Standards specifically apply to the appointment and performance of lawyers serving as advocates for children in any case where permanent legal custody is being adjudicated, including but not limited to "contested adoptions, and contested private guardianship cases." n106 The NCCUSL Act includes in its definition of custody, any court proceeding in which legal or physical custody of a child is at issue. n107 Thus, both of these are directly applicable to adoption and private guardianship proceedings.

n106 ABA STANDARDS, II.A. Scope.

n107 NCCUSL ACT, § 2 Definitions. (5) Custody Proceeding.

Both the ABA Standards and the NCCUSL Act provide guidance to a court in determining when to appoint a child advocate and direct the court to consider the following factors, which may be particularly relevant in adoption or guardianship proceedings:

- the child's concerns or view or desire for representation, n108
- the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize the harm to the child, n109
- any special physical or mental health needs of the child n110

n108 ABA STANDARDS, VI. Courts A. Appointment of Lawyers 2 Discretionary Appointment (c) the child's concerns or views. NCCUSL ACT, § 6. Discretionary Appointment (b)(1) any desire for a representative expressed by the child.

n109 *Id* at (b)(3).

n110 ABA STANDARDS, VI. Courts A. Appointment of Lawyers 2 (h) & (i). NCCUSL ACT, § 6. Discretionary Appointment (b)(8).

Courts should adopt rules that include these factors to guide the appointment of advocates for children in adoption and guardianship. Clearly this would not result in appointments in all cases but would likely have the following results: more appointments in cases where the state law provides for the child's consent and the court intends to waive that

consent, and [*387] increased focus by the court on ensuring that the child's wishes were at least known before the adoption or guardianship went forward.

A second area in which the ABA Standard and the NCCUSL Act can offer guidance is in the definition of roles for the advocate. The NCCUSL Act provides definitions for three roles: Child's Attorney, Best Interests Attorney, and Best Interests Advocate. n111 The ABA Standards do the same in the Scope and Definitions and Commentary. The Child's Attorney provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings, and owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. The Best Interests Attorney independently investigates, assesses, and advocates as a lawyer the child's best interests, as defined by any relevant state law. The Best Interests Attorney considers but is not bound by the child's directives or objections. Finally, the Best Interests Advocate acts as a friend of the court, a fact-finder, or an investigative reporter. Although the Best Interests Advocate role sometimes is needed in custody cases, it should be clear that the Best Interests Advocate is not acting in any way as an attorney or performing any type of legal services in the case. Neither a Child's Attorney nor a Best Interests Attorney can be called as a witness, be cross-examined, or make a written or oral report to the court, other than through traditional legal arguments, such as other lawyers. Although debate remains as to when each role is the most appropriate, what is consistent in all of these roles is the common duty of "meeting with the child and ascertaining, in a manner appropriate to the child's developmental level, the child's needs, circumstances and views." n112

n111 NCCUSL ACT § 2 (2), (3), & (4).

n112 § 11(b)(1) Common Duties of Child's Attorney and Best Interests Advocate and § 14(1) (A).

In determining whether to appoint a Child's Attorney or a Best Interests Attorney or a Best Interests Advocate in a given case, the Standards and NCCUSL Act state that the role and duties should be tailored to the reasons for the appointment, the needs of the child, and such factors as the child's age and maturity or developmental level. Whether the child has expressed any desire for an attorney or any objectives in the proceeding and the values of an independent advocate also are factors. The adoption of such guidelines would provide great clarity to a confusing area, and would give definition to these roles into which advocates currently are being appointed. Further, it would make clear that one significant responsibility of any of the advocates is to meet with the child, hear her voice, [*388] and make her voice known to the court if the child so desires. n113

n113 NCCUSL ACT § 11 Common Duties of Child's Attorney and Best Interests Advocate, § 14. *See also* ABA STANDARDS, § III.

Finally, a court should appoint a Child's Attorney anytime it is considering waiving the consent of the child to the adoption or guardianship that is required by statute. When there is a statutory requirement, the legislature has made a determination that the child's voice is of significance. If a court is considering waiving the consent requirement, it is important that the child have an attorney whose primary obligation is to represent and present evidence on his wishes. The court obviously will continue to have the discretion to waive the consent requirement, but the decision will be made with the fullest of information.

C. Training

To effectively represent children in adoption and guardianship matters, it is imperative that the child advocate be adequately trained and qualified. Currently only twenty-one states have some type of training or experience requirement for attorneys representing children. n114 The need for trained child advocates was one of the needs recognized by the judges who responded to questions for this article.

n114 AZ, AR, DE, GA, IL, KS, KY, ME, MN, MO, NH, NY, ND, OH, PA, SC, TN, UT, VA, WA, & WI.

The ABA Standards and the NCCUSL Act both provide that children's advocates should be appointed only if they have undergone training specifically designed for child representatives in custody cases. The ABA Standards provide that such training should deal with the relevant state and federal laws, agency regulations, court decisions, and court rules dealing with custody disputes. Moreover, the training should include the legal standards applicable to each kind of case in which the lawyer may be appointed, including child custody and visitation law and practice. In addition, training should focus on applicable representation guidelines and standards, and the court process and personnel in child-related litigation. Children's development, needs, and abilities at various stages of their growth, as well as how to communicate with children should be taught. The child representative must also be trained in presenting and defending a child witness, recognizing, evaluating and understanding evidence of child abuse and neglect and family dynamics, including domestic violence and substance abuse. The child advocate needs to understand the dynamics of a child's adjustment to adoption and guardianship. Finally, a competent and effective child advocate must be educated as to [*389] the multidisciplinary input required in child-related cases, including information on local experts for consultation and testimony, as well as child welfare, family preservation, medical, educational, and mental health resources available to families. The ABA Standards suggest that the courts should play a key role in establishing these training programs by actually sponsoring, funding, and participating in them.

Moreover, the ABA Standards call on the courts to provide mentors for lawyers who are new to child representation. These mentoring programs can pair attorneys and other advocates who understand and have had experience in the custody courts with child advocates who may not have had experience in the child custody judicial system. Mentoring programs can bridge the gap between experienced and inexperienced but interested representatives, thus creating a more capable and competent child representative in custody and visitation proceedings. In addition, not only should child representatives receive this training, but all judges, psychologists, social workers, mediators, and other persons interacting with children in custody cases should also receive training in these areas.

The limited resources of legal service and pro bono programs and courts have made it difficult to establish comprehensive training programs for child custody advocates. Even those states that mandate training often do not have model training programs available. But the thorough training of lawyers, judges, and others who touch the life of a child during a custody proceeding is one of the keys to better outcomes for children in these cases.

The ABA Child Custody and Adoption Project has produced a videotaped training series with an accompanying manual. n115 Programs and volunteers must also look to their own state's laws and procedures, as well as become familiar with the social service resources available to children and families in their area.

n115 The training is available at www.abachildcustodyproject.org. Topics in the training include (1) developing a case; (2) cultural competence; (3) ethical issues, (4) child development; (4) interviewing; (5) mental health experts; (6) domestic violence; (7) child abuse; and (8) alternative dispute resolution. The training is available free of charge to any legal service, pro bono, or law school program representing children in custody cases.

D. Collaboration

All of the preceding recommendations raise the overall need for collaboration between those who work on issues related to children. This type of information also raises the need for collaboration within a jurisdiction. Judges were asked in the judicial survey whether the jurisdiction in which they preside provides resources for noncase-specific collaboration among judges and child advocates in order to broadly assess how [*390] children's voices can effectively be heard in adoption and guardianship proceedings. Judges were asked to comment on what resources are available within their jurisdictions and what resources are missing. A majority stated that they do not collaborate with child advocates. No training or opportunity for dialogue is provided in order to open communication as to what information

judges seek out when making permanency decisions that affect the minor's interest. In smaller counties, judges provide explanations for the lack of formal collaboration based on the fact that judges and attorneys interact on an informal level. In one small county, court attorneys are on a first-name basis with the judge and cooperate as officers of the court. In another small county with a population of 10,000 with one judge and no magistrates, there is no problem getting information concerning the child or communicating with the child if the case and age of the child require it. In counties with larger populations, court dynamics do not allow the judge and child advocate to work closely together on an everyday basis.

When collaboration does occur, one of the more popular methods is through ongoing training for new parties and attorneys, and through coordination meetings. Additionally, states that have volunteer attorney programs or use Court-Appointed Special Advocates (CASAs) to represent children will receive training from judges to understand the adoption and guardianship process and how to make sure the minor's wishes can be effectively brought before the judge. In states such as Delaware, the Office of the Child Advocate has been created. This office oversees the safety of children throughout the state and can remedy problems within the judicial system when children's interests are not adequately being met. The Office of the Child Advocate works with judges to make sure minor's wishes, concerns, and interests are being adequately represented within the judicial process.

Time is a main obstacle expressed by judges as impeding their ability to collaborate with child advocates. The system fails to set times that allow for collaborative meetings to occur. One judge suggests that setting time for collaboration should be a mandatory part of the adoption and guardianship process.

Quite a few judges suggest that a lack of resources impede their ability to collaborate with child advocates. The need for more volunteer attorneys is a common concern. The lack of attorney advocates impedes their appointment to represent minors, brings excessive caseloads, and shortens the extent of their investigations. It also leaves little or no time for collaboration with judges. It has been suggested that more of an effort be made to market to the private bar to increase the number of volunteer attorneys.

[*391] VIII. Conclusion

The ultimate result of more numerous and more competent child advocates in adoption and guardianship cases will be a better understanding of the children in these cases. Children will end up with better decisions being made on their behalf and will be included in a process that currently often ignores them. Adoption and guardianship proceedings will become more understandable and compatible with the needs of the children when judges and court-appointed advocates better understand the key multidisciplinary issues. Families will have greater confidence in the justice system when decisionmakers and representatives display a greater understanding of family issues and children's needs. Finally, better decisions, which are more fully understood and accepted by the parties, will result in increased well-being for the very persons who should be at the center of adoption and guardianship proceedings--the children.

GRAPHIC:

Chart 1, Percentage of Adoptions in the US by Type; Chart 2, Appointment of Representative in Adoption; Chart 3, Appointment of Representation in Guardianship