

# A Child's Right to Legal Representation in Georgia Abuse and Neglect Proceedings

In Georgia there are nearly 14,000 children currently involved with the child welfare system,<sup>1</sup> and each of these children has been involved in at least one hearing in Georgia's juvenile courts. For the children and families involved, these hearing are of momentous importance. Whether it is a probable cause hearing, a termination of parental rights hearing or any of the possible steps in between, these hearings change children's lives forever. Despite the critical nature of these hearings, not all of Georgia's children receive legal representation in deprivation cases, leaving children's interests vulnerable to an overburdened and frequently inattentive system.

To fulfill its responsibility to protect the state's children, Georgia must ensure that each child receives competent legal representation in deprivation proceedings. Before additional resources are invested in this effort, however, the specific barriers inhibiting attorneys representing children from doing the best possible job must be explored. This article analyzes the federal and state statutory and constitutional sources of the right to representation for children, and identifies inconsistencies in Georgia law that contribute to systemic confusion about a child's right to representation in Georgia's juvenile courts.

## A CHILD'S RIGHT TO LEGAL REPRESENTATION

### Historically

The field of children's law is relatively new in comparison to the U.S. legal system. As the legal system in the United States developed, there was no notion of children's law. Parental authority was viewed as near absolute and there was no real governmental recognition of abuse, neglect or even molestation. The state had some involvement in caring for abandoned and orphaned children but even this was minimal, limited basically to providing funds to private agencies for the care of those in need. Throughout most of the 19th century, there were no laws designed to protect children. The first state child protection agency was not

founded until the late 1870s<sup>2</sup> and it was the 1935 passage of the Social Security Act that marked the first meaningful federal involvement in the issue.<sup>3</sup> Even this initial state and federal involvement was severely limited, following a history of deference to parental rights and lack of recognition of any rights belonging to the child.<sup>4</sup>

Only in the 1960s with the publication of "The Battered-Child Syndrome" by C.H. Kempe in the *Journal of the American Medical Association*<sup>5</sup> did widespread awareness come to the issue of child abuse. Over the next decade, interest across the nation increased as evidenced by the spread of mandatory reporting laws and an increase in federal funding.

On a parallel track, the recognition of the rights of youth was expanding in the area of delinquency. In 1967 the U.S. Supreme Court in *In re Gault* wrote: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>6</sup> Regarding the right to counsel, the court held, "[t]he child 'requires the guiding hand of counsel at every step in the proceedings against him.'"<sup>7</sup> In *Gault* the ruling was explicitly limited to the delinquency context, but dicta in the case clearly affirmed an expanding judicial recognition of children's rights.<sup>8</sup>

Despite the court's perception of such a need in the juvenile delinquency context, the "guiding hand of counsel"<sup>9</sup> has not been similarly extended to every child in deprivation proceedings. While the courts have found no constitutional basis for a child's right to counsel in this context, many state statutes specifically provide for such representation.

## Federal Law – Child Abuse Prevention and Treatment Act (1974)

The advent of representation of children in deprivation matters largely began with passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.<sup>10</sup> CAPTA followed extensive congressional findings on the prevalence and severity of child abuse in the United States<sup>11</sup> and was passed with the intention of funding demonstration programs for the prevention, identification and treatment of child abuse and neglect.<sup>12</sup> Such funding would be provided only to states meeting certain standards for addressing child abuse and neglect. One requirement was that the "state shall...provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings."<sup>13</sup> In 1974, this was the

extent of the commentary on a child's right to counsel. There are no definitions of guardian ad litem or representation nor is there any language in the legislative history that helps illuminate the congressional intent.

Over the last three decades, CAPTA has been reauthorized and amended multiple times, most recently on June 25, 2003, by the Keeping Children and Families Safe Act.<sup>14</sup> As of 2003, nearly all states, including Georgia, accept CAPTA funds and thus are bound by its mandates.<sup>15</sup> Largely because of CAPTA, nearly all states have laws mandating the appointment of a guardian ad litem for all children involved in abuse/neglect court proceedings. In the absence of a definition of guardian ad litem to guide them, states have employed

vastly different approaches to implement the requirement of representation for children.

In the 1996 reauthorization, Congress amended the CAPTA provision requiring appointment of a guardian ad litem; with that amendment, Congress seemed to step back and leave the definition of a guardian ad litem, and by extension the requirement of counsel for children entirely up to the states. The 1996 reauthorization requires states to have "provisions and procedures requiring that in



every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings....<sup>16</sup> The 1996 amendment failed to clarify the requirements for legal representation of children in deprivation matters, and instead, left each state to determine what model of representation would be best for its children.

## CHILD'S RIGHT TO LEGAL REPRESENTATION UNDER GEORGIA STATE LAW

As discussed above, CAPTA, in part, provides federal financial assistance to state child protective services agencies so long as the state enacts legislation ensuring every child involved in a child welfare proceeding has a court appointed guardian ad litem.<sup>17</sup> A variety of Georgia state laws address the representation of children and the appointment of guardians ad litem, however, the statutes are conflicting.<sup>18</sup> Thus practitioners representing children in Georgia struggle to understand their roles and responsibilities to the children and to the courts in deprivation cases.

### Explicit Right to Attorney in Termination of Parental Rights Cases

Proceedings to terminate parental rights offer an instance of clarity for child representatives in Georgia. Termination is the legal

process by which all parent-child ties are permanently severed. The parent and child become legal strangers, no longer possessing rights of inheritance, obligations of support, rights to sue for wrongful death or any of the other panoply of legal relationships normally inherent in a parent-child relationship.<sup>19</sup> In such proceedings, a child is unequivocally entitled to traditional legal representation by statute.

In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court shall appoint an attorney to represent the child as the child's counsel and may appoint a separate guardian ad litem or a guardian ad litem who may be the same person as the child's counsel. (emphasis added).<sup>20</sup>

Children in Georgia, therefore, clearly have a right to legal counsel in standard termination of parental rights hearings, and other provisions of Georgia law suggest that this right is in fact even broader.

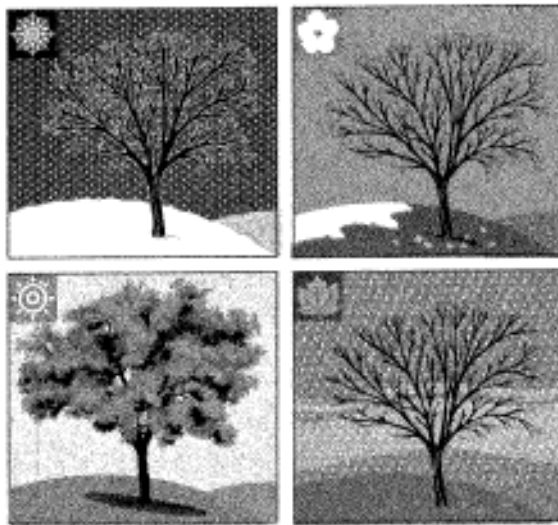
### "Party's" Right to an Attorney

The general right to legal representation in juvenile court proceedings is established by Georgia statute. "A party is entitled to legal representation by counsel at all stages of any proceeding alleging delinquency, unruliness, incorrigibility, or deprivation... (emphasis added)."<sup>21</sup> The language of this section expressly directs the provision of legal counsel for "parties" to the named actions. Thus, whether the right to traditional legal representation is guaranteed to children by a literal reading of the text of this section depends on whether children are included within the definition of a party to the deprivation action. Unfortunately, a definition of "party" for purposes of this sec-

tion is not statutorily provided in the code.<sup>22</sup> Nor is there any case law addressing whether a child is to be considered a party in a deprivation hearing in Georgia.

The statute further provides that: "[c]ounsel must be provided for a child not represented by the child's parent, guardian or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them."<sup>23</sup> Again, the statutory language alone is not entirely clear. Can a neglected or abused child ever be adequately represented by his or her parent, guardian or custodian? In deprivation proceedings, is there not a high likelihood of conflict between the child and responsible adult? Can the existence of such a conflict ever be established prior to the deprivation proceedings?

In 1976, the attorney general of Georgia was asked by the commissioner of the Georgia Department of Human Resources to address this exact dilemma. In response, the attorney general relayed the position of the Georgia General Assembly that "the Juvenile Court Code is to be liberally construed toward the protection of the child whose well-being is threatened"<sup>24</sup> and that there is an "inherent conflict of interests in parental termination proceedings between the child and the parent charged with the child's continued abuse, neglect or deprivation..."<sup>25</sup> More pointedly to the commissioner's question, the attorney general wrote "I cannot see that the inherent conflict of interests between the child and his alleged abuser would differ in a deprivation proceeding [as opposed to a parental termination proceeding]...[D]eprivation proceedings arising from child abuse



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and neglect by a parent or caretaker do present a conflict of interest..."<sup>26</sup>

Taking into account the attorney general's finding that in abuse and neglect proceedings, the interests of children and their parents necessarily conflict, it no longer matters if children qualify as parties. Their interests by definition conflict with those of their parents and thus they are entitled to counsel at all deprivation proceedings under § 15-11-6(b).

## Attorney Roles and Additional Legislative Support

Generally speaking, advocacy of a child's position may assume three possible forms:

- Lawyer—providing traditional legal representation;
- Guardian ad litem—providing representation of a child's "best interests"; and
- Split-role lawyer/guardian ad litem—providing some combination of the services of the first two possible roles.

Georgia does not specify what role the child's attorney is to play.<sup>27</sup> The duties of both lawyer and lawyer/guardian ad litem must be performed by an attorney; but, the duties of a child's representative under a strict guardian ad litem approach may be performed by a person who is not legally trained. Section 15-11-9 of the Georgia Code, addressing the appointment of guardians ad litem, can be read together with O.C.G.A. § 15-11-6(b) (addressing a "party's" right to counsel) and with the federal CAPTA requirements to provide context useful for elucidating the scope of a child's right to counsel. Addressing when appointment of a guardian ad litem is appropriate, Section 15-11-9 reads:

The court at any stage of a proceeding under this article, on application of a party or on its own motion, shall appoint a guardian ad litem for a child who is a party to the proceeding if the child has no parent, guardian, or custodian appearing on the child's behalf or if the interests of the parent, guardian, or custodian appearing on the child's behalf conflict with the child's interests or in any other case in which the interests of the child require a guardian...In deprivation cases, an attorney or court appointed special advocate, or both, may be appointed as the child's guardian ad litem. (emphasis added)<sup>28</sup>

The syntax of this directive suggests the child is a party to a deprivation proceeding. In Georgia, appointment of a guardian ad litem is required "for a child who is a party to the proceeding."<sup>29</sup> CAPTA requires a guardian ad litem be appointed "in every case involving an abused or neglected child which results in a judicial proceeding."<sup>30</sup> To be in compliance with CAPTA, Georgia courts must appoint a guardian ad litem for every child involved in a judicial abuse or neglect proceeding. Under Georgia law, the only way for all children to be appointed a guardian ad litem is for all children to be considered parties and then under §15-11-6(b), as parties, the children are entitled to an attorney.

## Georgia Indigent Defense Law Supports Legal Representation of Children

Indigent parties are entitled to appointed counsel to represent them in deprivation matters. An "indigent person" is one who, at

the time of requesting counsel, is unable without undue financial hardship to provide for full payment of legal counsel and all other necessary expenses for representation.<sup>31</sup> The relevant code section, O.C.G.A. § 17-12-38.1, states:

State funded local indigent defense programs and local indigent defense programs shall provide legal representation for indigents in...all actions and proceedings within the juvenile courts of this state in which a person is entitled to legal representation under the Constitution of the United States or the Constitution and laws of the state of Georgia, including but not limited to actions involving...deprivation, and termination of parental rights. Nothing in this code section shall be interpreted as applying to guardians ad litem.<sup>32</sup>

House Bill 1254, the bill creating this section of the Georgia code, was proposed to clarify that money given to counties for indigent defense may also be used for legal representation of indigent juveniles.<sup>33</sup> Specifically, the act provides that funds may be used for legal representation under the U.S. Constitution or the constitution or laws of Georgia.<sup>34</sup> Neither the U.S. Constitution, federal law, nor the constitution of the state of Georgia create a right to legal representation in deprivation matters, and yet, representation "including...actions involving...deprivation"<sup>35</sup> are covered by the Georgia indigent defense statute. The only remaining source of such a right would be Georgia statutory law.

Together, these sections comprise the entirety of statutory guidance available to children's representatives in Georgia. Analysis of these provisions demonstrates the confusion that manifests itself in

practice about the role and responsibility of advocates for children in deprivation cases.

## CONCLUSION

Children deserve a competent attorney to represent their interests during abuse and neglect proceedings. The unique interests at stake, the complexity of the issues involved, the multidisciplinary nature of the evidence and remedies and the particular vulnerabilities possessed by children necessitate legal advocacy by representatives capable of effectively navigating the intricacies of the child welfare system. Child representatives are an essential component to juvenile court proceedings in Georgia, but their effectiveness as advocates and the strength of the system overall is diluted by a lack of clarity as to their precise role and responsibil-

ities. Without clear decisional or statutory guidance informing expectations for legal advocacy for children, uncertainties and inconsistencies inhere in representation and children's interests cannot uniformly be adequately protected. Children's voices are not being heard at the time when the future of their families is being determined.

An adversarial court process dependent on competing individual advocacy for information will not produce good outcomes for participants without competent legal representation. Children need zealous and effective legal advocacy if the child welfare system is to succeed at protecting children. Child welfare cases are complex matters with far-reaching issues that affect the lives of individual families, the well being of the larger community and the life of a child forever.

National standards recommend that children be represented at every stage of every child protection case.<sup>36</sup> In Georgia, however, representation is inconsistent, varying according to the type of hearing, the availability of court resources and the county of the child's residence at the time the state first removed the child. As a result, continuity, consistency and uniformity are sacrificed, arguably at the child's expense. Improvement of the representation now afforded children in deprivation cases is hampered by unclear and inconsistent statutory guidance for the practice.

Congress left the responsibility of establishing the scope of child representation to the states, and Georgia has responded with confusing mandates concerning when an advocate should be appointed and conflicting guidance as to whether

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legal representation is required at all. The ambiguities at the fundamental levels of the legal framework inhibit children's attorneys from being able to optimally contribute to the child protection effort.

## POSSIBLE SOLUTIONS

The American Bar Association (ABA) and the National Association of Counsel for Children (NACC) recommend the model of the "child's attorney" in their jointly published "Standards for Lawyers Who Represent Children in Abuse and Neglect Cases."<sup>37</sup> This model calls for a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due an adult client. While the model emphasizes independent legal representation for every child, it in no way precludes the additional appointment of a lay guardian ad litem.

Still, this model recognizes there will be occasions when the client directed model cannot serve the client and exceptions must be made (i.e. the child is pre-verbal, very young or for some other reason incapable of judgment and meaningful communication). In such cases, the attorney may rely upon a substituted judgment process similar to the role played by a lawyer/guardian ad litem designed to serve the best interests of the child, or may call for the appointment of a separate guardian ad litem.

This model provides that if the child's attorney determines the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the



lawyer shall, after unsuccessful use of the attorney's counseling role, request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. Child advocates in Georgia must engage in a conversation to determine how this model can be adapted to meet the specific needs for representation of children in the state.

Before such a conversation can have real effect, however, Georgia's Legislature must clarify the right to legal counsel for children. There are many ways to clarify such a right. These include but are not limited to adding a statement to O.C.G.A. §15-11-98 stating that in all deprivation proceedings, the child who is the

subject of the action has the right to legal counsel and such legal representation shall continue as long as the court jurisdiction continues or to expressly define the child who is the subject of a deprivation proceeding as a party to the matter. ●

*Authors' Note: The authors are grateful to the staff of the Barton Child Law & Policy Clinic for their ongoing support and to the many student-interns who contributed to the research and editing for this final article. Contributors include Laurie-Ann Fallon, Elizabeth Tasto, Melanie Mendenhall and Clinic Director Karen Worthington.*

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## ENDNOTES

1. On October 1, 2003 there were 13,942 children in care in the state of Georgia. See Georgia's statewide data submission from the DFCS Evaluation and Reporting Section to the Adoption and Foster Care Analysis and Reporting System (AFCARS), Federal DHHS ACF.
2. Most child law scholars attribute the beginnings of U.S. children's law to Etta Wheeler, a New York City tenement nurse and a nine-year-old girl named Mary Ellen. In December of 1873, Ms. Wheeler is reported to have first discovered Mary Ellen in an apartment where she was regularly being beaten by her foster parents. Over the next several months, Ms. Wheeler reported Mary Ellen's plight to police and to charities but to no avail. Finally, out of desperation, Ms. Wheeler turned to Henry Bergh of the Society for the Prevention of Cruelty to Animals. Using the laws banning animal cruelty, Mr. Bergh was able to get a judge to intervene and remove Mary Ellen from her foster home. This was the beginning of court intervention to protect children from abuse. Several years later, the state of New York responded by establishing the nation's first child protective agency and passing the first state child abuse law. See, e.g., Robert W. Ten Benschel et al., *Children in a World of Violence: The Roots of Child Maltreatment in The Battered Child 3* (Mary Edna Helfer et al., eds., 5th ed. 1997).
3. The Social Security Act of 1935 created Aid to Dependent Children, offering financial assistance to single mothers. Title IV-B of same Act provided funds to encourage prevention and protective services for children in need and these funds were largely used to pay for foster care. Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8(1) *The Future of Children*, 23, 27 (Spring 1998).
4. 48 A.B.A.J. 719, 720 (1962).
5. C.H. Kempe, et al., Silverman, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).
6. *In re Gault*, 387 U.S. 1, 13 (1967).
7. *Id.* at 36 citing *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932).
8. *Id.* at FN25. Citing "the late Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, in a foreword to *Virtue*, Basic Structure for Children's Services in Michigan (1953), p. x: 'In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provision as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as chattel.'"
9. *In re Gault* at 36.
10. Child Abuse Prevention and Treatment Act (CAPTA), P.L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§5101-5107 (1988)).
11. H.R. Rep. No. 93-685; S. Rep. No. 93-308 (1974).
12. CAPTA, P.L. 93-247, S. Rep. No. 1191 (1974).
13. CAPTA at Sec. 4 (b) (2)(G).
14. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (2003).
15. The exceptions are Indiana, Pennsylvania and California. Jennifer Walter, *Averting Revictimization of Children*, 1 J. Ctr. for Children & Cts, 45 (1999).
16. CAPTA, P.L. 104-235, S. Rep. 919 at Sec 107(b)(2)(A)(ix) (1996).
17. *Id.*
18. See O.C.G.A. 15-11-98 and Compare O.C.G.A. 15-11-9 with O.C.G.A. 15-11-6(b).
19. Statutory requirements for the termination of parental rights under Georgia law can be found at O.C.G.A. § 15-11-94.
20. O.C.G.A. § 15-11-98(a) (2002).
21. O.C.G.A. § 15-11-6 (2002)
22. See O.C.G.A. § 15-11-2 (2002) Definitions.
23. O.C.G.A. § 15-11-6(b) (2002).
24. 76 Op. Ga. Att'y Gen. 131 (1976).
25. *Id.*
26. *Id.*
27. The Georgia Supreme Court Child Placement Project has compiled "Guidelines for Georgia's Attorney Guardians Ad Litem in Child Deprivation Cases." These guidelines, while extremely useful for their intended purpose of assisting attorney guardians ad litem throughout Georgia in improving the quality of representation in juvenile court, are merely aspirational. Further, they do not address the advantages or disadvantages of the various attorney roles, let alone come to a conclusion on the preferred model of representation. The guidelines are available at [http://www.childwelfare.net/mrb/projects/gal\\_guide.html](http://www.childwelfare.net/mrb/projects/gal_guide.html).
28. O.C.G.A. § 15-11-9(b) (2002).
29. *Id.*
30. CAPTA at Sec. 4 (b) (2)(G).
31. O.C.G.A. § 15-11-6(a) (2002).
32. O.C.G.A. § 17-12-38.1 (2002).
33. See Karin L. Allen, "Legal Defense of Indigents: Provide Indigent Defense Funds to Defend Indigent Juveniles," 11 Ga. St. U.L. Rev. 135 (1994) (relying on telephone interview with Rep. Charles Thomas, House District No. 100 (Mar. 25, 1994).
34. *Id.* at 136.
35. O.C.G.A. § 17-12-38.1 (2002).
36. Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model - The ABA (NACC Revised) Standards of Practice*, NACC Children's Law Manual Series, 167 (1999).
37. *Id.* at 173.