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Article

***53 THE CHILD ABUSE PREVENTION AND TREATMENT ACT--PROMOTING THE UNAUTHORIZED PRACTICE OF LAW**

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I. INTRODUCTION

Children who have been victims of abuse and neglect need effective advocacy to protect their interests in a dependency proceeding. [\[FN1\]](#) While every state's law provides for the appointment of child advocates in these proceedings, [\[FN2\]](#) there is an ongoing debate over who should serve as the advocate--lawyer or layman--and whether the advocate's role is to represent the child or the advocate's view of the child's best interests. [\[FN3\]](#) Congress has weighed in on this debate and stated that each child in dependency proceedings must have an advocate and that the advocate must "make recommendations to the court concerning the best interests of the child." [\[FN4\]](#)

This article makes the argument that permitting non-lawyers to provide the type of advocacy mandated by federal legislation and necessary to achieve good outcomes for children promotes the unauthorized practice of law. The article concludes with a recommendation that the language of the Child Abuse Prevention and Treatment Act (CAPTA) be changed to require the appointment of an attorney ***54** for every child in a dependency proceeding, and that the attorney represent the child in a traditional attorney-client capacity.

This article will refocus the debate regarding a basic question about how to best represent children's interests in dependency proceedings: if our judicial system is premised on the concept that all parties should be zealously represented when appearing before a judge who makes the ultimate decisions after reviewing all the facts and law presented, why treat children differently? [\[FN5\]](#)

Following this introduction, the second section discusses CAPTA and its mandates for the states. The third section of the article reviews how states are doing in their efforts to comply with CAPTA. The fourth section reviews the philosophical debate that underlies most discussions about children's advocacy in dependency proceedings. The fifth section discusses the value of a traditional attorney-client relationship to a child in the midst of a dependency proceeding. The sixth section reviews the restrictions on the unauthorized practice of law and their implications for children's non-lawyer advocates in dependency proceedings. The seventh section reviews children's rights in dependency proceedings and the need to provide attorneys to protect these rights. The eighth section reviews the value non-lawyer advocates can provide even if attorneys are appointed to represent all children in these proceedings.

II. CHILD ABUSE PREVENTION AND TREATMENT ACT

CAPTA, first passed in 1974, was the first major federal legislation to address child abuse. [\[FN6\]](#) CAPTA encourages states to reform their juvenile courts and foster-care systems through the enticement of federal money. [\[FN7\]](#)

To obtain additional federal dollars, the states have to agree to the following reforms: a child abuse and neglect reporting system; sufficient resources to promptly investigate and effectively deal with allegations of abuse and neglect; methods to preserve the confidentiality of child abuse and neglect records; and the cooperation of law enforcement, courts and human service agencies. Additionally, CAPTA requires 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.” [\[FN8\]](#) This article focuses on this last mandate, that every state accepting federal funds for child abuse prevention efforts provide every abused or neglected child an advocate.

Since the passage of CAPTA, the federal government has encouraged additional child welfare reforms through other legislation. [\[FN9\]](#) However, CAPTA remains a key source of funding for the states. [\[FN10\]](#) Although virtually every state receives this CAPTA money, there is no evidence that the states are complying with the mandate to provide every child an advocate. [\[FN11\]](#) Unlike subsequent federal foster care legislation, CAPTA has neither a detailed monitoring system nor an effective enforcement mechanism. [\[FN12\]](#)

Although the language of CAPTA initially mandated the appointment of a guardian ad litem to represent the child, the language of CAPTA was changed in 1996. [\[FN13\]](#) It now mandates that each state submit a plan that will:

[C]ontain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this subchapter, including ...

(xiii) 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 who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings--

(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and

***56** (II) to make recommendations to the court concerning the best interests of the child. [\[FN14\]](#)

When Congress first passed this legislation, the term “guardian ad litem” was not defined. However, in 1974 the term was generally used to refer to attorneys appointed to represent children, or persons with a disability, who were unable to direct their own litigation, and did not have a parent or custodian in a position to provide the guidance needed for litigation. [\[FN15\]](#)

The 1996 amendments made it clear that Congress would allow a non-lawyer advocate to represent the “best interests of the child.” [\[FN16\]](#) A new term used in this legislation is “court appointed special advocate” (CASA). [\[FN17\]](#) This term refers to a court appointed volunteer who advocates for abused and neglected children so that they can thrive in safe, permanent homes. [\[FN18\]](#) The effort to recruit these non-lawyer advocates for children was pioneered in 1977 by a judge in Seattle, Washington. [\[FN19\]](#) The program focuses on training citizen volunteers to gather information and represent the best interests of children in court proceedings. [\[FN20\]](#) This expansion of the definition of a guardian ad litem has led to further confusion over the role of lawyers in these proceedings. If a non-lawyer can do this work, is it the practice of law? Or is Congress encouraging non-lawyers to practice law? [\[FN21\]](#)

The U.S. Department of Health and Human Services, the agency which carries out the mandates of CAPTA, has recommended that states appoint only ***57** attorneys. [\[FN22\]](#) The Department recognizes that this recommendation goes further than the federal law requirement. [\[FN23\]](#)

III. HOW STATES MEET CAPTA'S ADVOCACY REQUIREMENT

Although states are required to report their compliance with CAPTA's representation requirement, many do not report whether they are providing every child a representative. [\[FN24\]](#) States have varying provisions designed to comply with the CAPTA requirement. Twenty-eight states have laws providing for lawyers as guardians ad litem,

[FN25] some states have laws that provide court appointed special *58 advocates (CASAs), [FN26] and others have a statutory scheme that provides for a combination of both. [FN27]

In addition to the concerns about compliance with the federal mandate to appoint advocates, there are serious concerns about the quality of the advocacy that is provided. The concerns have focused on the lack of resources needed to support competent representation and the confusion over the role to be played by the advocates. [FN28]

Attorney advocates, in particular, have been criticized for providing poor representation. [FN29] This poor representation is often caused by high caseloads and inadequate financial compensation for the lawyers. [FN30] These factors lead to high turnover, with the best qualified advocates finding more lucrative jobs with lower job stress. [FN31] To overcome these problems, states need to provide the children and *59 their lawyers the resources they need to ensure that the children have the services, protection and stability they need. [FN32] However, the solution more often advocated has been to replace the attorneys with lay advocates, who are often volunteers and have more time to spend on the one or two cases they are assigned. [FN33]

Only a few cases have discussed the intent of CAPTA's representation mandate. In two California cases, the court concluded that the purpose of these advocates was to "investigate and make recommendations to the court." [FN34] The California Court of Appeals further concluded:

Congress, in enacting the requirement for appointment of a guardian ad litem in cases of abused and neglected children intended only that an individual, independent of the other parties in the dependency, who has the legal knowledge and experience to be found in an attorney or who is a trained CASA volunteer, be appointed to represent and protect the minor's interests. [FN35]

*60 The California court further explained:

Minor's counsel advocates for the protection and safety of the child, investigates, participates in presenting evidence to the court, advises the court of the child's wishes, and investigates interests of the child beyond the dependency. These functions are both more and less than a traditional guardian ad litem in an adversarial proceeding, but are precisely those necessary to provide an independent voice for the child. [FN36]

Thus, the court found that an attorney appointed to "represent the child" meets the requirements of CAPTA. [FN37]

Another California appellate court explained how an attorney, appointed in a traditional attorney-client capacity, [FN38] fulfills CAPTA's requirements in this way:

[T]he role of the guardian ad litem in dependency proceedings [is] that of an advocate, whose duties include investigation, presentation of the facts and options for disposition, and protection of the child's interests. This role is more than the neutral expert [It] is closer to the role of minor's counsel as described in [other California Statutes], which includes advocating for the protection and safety of the child, investigating, participating in presenting evidence to the court, advising the court of the child's wishes, and investigating interests of the child beyond the dependency [proceeding] [L]egal counsel, who is also an advocate, fulfills the same functions as a guardian ad litem in dependency proceedings and provides an independent voice for the child. [FN39]

IV. THE DEBATE: BEST INTERESTS VERSUS ARTICULATED WISHES

Intertwined in the debate about whether children should have lawyers, or are better served with non-lawyer advocates, is the debate about whether children should have their "best interests" or their "articulated wishes" advocated in the proceedings. This debate is further intertwined in debates about children's capacity to direct advocacy, the importance of empowering youth, and the potential for the positive therapeutic impact of empowerment.

The debate over whether an advocate should represent a child or a child's best interests is often an unnecessary debate. In most cases, there is no conflict between *61 these two standards. Furthermore, as the Department of Health and Human Services guidelines state:

To some extent, these differences in approach, as stark as they may appear when presented side by side, are more apparent than real. Under either standard, the child's wishes are to be elicited and taken seriously, and under either standard the lawyer is expected to play a counseling role--advising the client of the risks and benefits of various options and, particularly, the likely consequences of the client's expressed choices. This discussion and counseling will, in many cases, produce agreement between client and lawyers about what they perceive to be in the client's best interest. [FN40]

Experience shows that this conflict arises in very few cases. [FN41] The crux of the debate centers on how one starts to analyze the goals of representation and how one ultimately resolves conflicts if they persist. With a best interests role, advocates usually start from a perspective of what the advocate thinks is best. The more traditional client-centered advocacy, with which most lawyers are familiar, starts with the client's wishes. Neither analysis should end where it begins. Advocates with a best-interests role should consider the child's wishes, while lawyers with a client-centered role have an obligation to counsel the child client regarding options that may be in the client's best interests. [FN42] Through this process, most conflicts are resolved. [FN43]

*62 There is only a very small percentage of cases in which the conflict persists after counseling with a client. [FN44] When there is a conflict between what the client wishes and the advocate's perception of "best interests," an advocate assigned the role of best interests advocacy will act on the advocate's perception, but the traditional attorney-client relationship demands a resolution in favor of the child's perception of what is in his or her best interests. [FN45]

The 1996 amendments to CAPTA mandate that states provide children an advocate to represent their "best interests" but does not define "best interests" or state how the advocate comes to the conclusion of what is in the child's best interests. [FN46] The issue becomes who ultimately decides what is in the child's best interests. Does the advocate only consider the child's wishes or is the advocate bound to work with the client to develop a mutual understanding of "best interests"? Lawyers who provide advocacy are not trained to independently analyze a child's best interests or to substitute their own judgment for that of a client. [FN47]

Sometimes one's position on this debate turns on the age of the child in question. [FN48] Some commentators argue that young children should not have lawyers, or if they do have lawyers, the lawyers should represent the child's best interests without regard to the child's wishes. [FN49] Others indicate a clear preference for older foster youth to have advocates who pursue the wishes of the youth. This distinction is supported by some state laws. [FN50] However, even preverbal children have been appointed attorneys to function in traditional roles. As the Rules of *63 Professional Conduct recognize, while these lawyers may not be able to function completely in a traditional role, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." [FN51]

The use of the term "best interests" and lack of clarity in what is expected to comply with CAPTA has only led to confusion. [FN52] The states each define the role of advocates differently. [FN53] Even when a state assigns a lawyer to fill the traditional role of advocacy for the child, that role may be defined in a variety of ways depending on the state. [FN54] There have been numerous efforts to clarify the roles. [FN55] There is a growing scholarly consensus that children need, at a minimum, a lawyer in these proceedings; [FN56] confusing the roles of these lawyers only leads to ethical *64 problems. [FN57] This is part of the reason scholars argue that attorneys appointed in dependency proceeding should function in a traditional role. [FN58]

While this debate continues in dependency proceedings, lawyers continue to perform their traditional roles for children in other legal proceedings every day. One of the anomalies of children's law practice has been the distinction

between dependency proceedings and delinquency proceedings. Very young children charged with delinquent or criminal acts have been represented by attorneys in traditional roles ever since the U.S. Supreme Court ruled that a child facing a delinquent act has the right to representation by an attorney. [\[FN59\]](#) However, on the dependency side, there continues to be a debate about the proper role of attorneys, even though these children also face a potential loss of liberty and the possibility of state custody. In other proceedings, including divorce proceedings, [\[FN60\]](#) children are appointed, or have retained, attorneys to represent them in a traditional attorney-client role. [\[FN61\]](#)

V. The Attorney as Counselor and Advisor

In the debate about best interests versus articulated wishes, the value of legal counseling and advice is often lost. [\[FN62\]](#) Attorneys listen to their clients' desires, research the law, evaluate whether there is a way to accomplish the clients' desires through the legal process, and present options for clients on the legal remedies, as well as the collateral consequences of pursuing the legal process. Clients need to know their legal options, what will happen next in their case and, based on the lawyer's legal research, experience and analysis, what the clients' realistic chances are of prevailing. [\[FN63\]](#) This advice and counseling is an integral part of the practice of ***65** law. A non-attorney attempting to provide these services is violating the unauthorized practice of law statutes. [\[FN64\]](#)

CASAs and other non-lawyer advocates are trained to avoid providing legal advice to the children involved in dependency proceedings. [\[FN65\]](#) It appears that the CASA programs perceive that the only limitation on the CASA's role, imposed by the unauthorized practice of law statutes, is a limitation on some actions in court. [\[FN66\]](#) However, this recommendation that court functions be handled by staff attorneys is often not feasible, because many programs do not have sufficient staff attorneys, and is ignored by many in the court process who permit non-licensed CASAs to participate in court proceedings as if they were licensed attorneys.

Some commentators argue that there is a value to designing a judicial system that provides a therapeutic experience for the participants. [\[FN67\]](#) Applied to children, this would suggest juvenile court should provide a process that minimizes the stress of the situation and gives the children a voice in the decisions that affect them. [\[FN68\]](#) Through the counseling and advice process of the attorney-client relationship, children are told what to expect, given a chance to talk confidentially with someone about their legal needs and desired outcome, given honest advice about the chances of obtaining their desired outcome, and provided options for expressing those desires to the decision-makers. This process can be therapeutic, regardless of whether the child ultimately obtains his or her desired outcome.

***66** The U.S. Department of Health and Human Services has issued guidelines for dependency proceedings that recognize the value of the children's voice in the proceeding and recommend that "[e]ven if a child is not competent to direct the attorney and even if the role of the attorney is defined as other than purely client directed, the wishes and preferences are always relevant and should be communicated to the court unless limited by privilege." [\[FN69\]](#)

VI. NON-LAWYER ADVOCATES AND THE UNAUTHORIZED PRACTICE OF LAW

CAPTA requires advocates who "represent the child in [dependency] proceedings (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child." [\[FN70\]](#) Although not the traditional way of explaining what a lawyer does, this description covers typical acts of an attorney providing legal counsel and advice.

Attorneys are licensed to represent persons in legal proceedings, [\[FN71\]](#) because they are uniquely trained and equipped to identify legal issues and to protect their clients' interests in court proceedings. [\[FN72\]](#) Attorneys offer unique skills in legal research and analysis of the relevant law, including statutes, regulations, agency and court rules, and case law. [\[FN73\]](#) Attorneys investigate both the law and the facts of their cases, to ensure that the attorney understands the situation and can effectively advocate for the client. [\[FN74\]](#) As part of this investigation, attorneys often file formal discovery requests, including interrogatories and requests for depositions, ***67** admissions and review of

places and things. Attorneys can draft pleadings throughout the proceedings and request timely hearings on the matters. Attorneys can demand strict compliance with the federal and statutory timelines for permanence. [FN75] Attorneys can identify and bring collateral proceedings including social security benefits, [FN76] educational issues, [FN77] immigration proceedings [FN78] tort claims [FN79] and developmental disabilities claims. [FN80] Attorneys provide information and counsel their clients regarding legal proceedings. Attorneys present and advocate their clients' interests before the court through the issuance of subpoenas and through presentation of evidence, including witnesses, direct and cross examinations, evidentiary objections, written briefs and oral arguments. [FN81] *68 Attorneys request and ensure that court orders meet the needs of the children and are sufficient for a later contempt proceeding, if such a proceeding is necessary, to protect the children's rights. Finally, attorneys evaluate appellate claims, advise clients on those claims, and bring or defend appeals. [FN82]

Who may practice law in state court proceedings is regulated by each state's highest court. [FN83] Congress and the federal courts may regulate who practices in federal courts or federal proceedings, [FN84] but each state has the power to regulate who practices in its own courts. [FN85]

Some states that rely on non-lawyer advocates to fulfill the CAPTA requirements have attempted to avoid the fact that many of the acts required to effectively represent children constitute the unauthorized practice of law, by merely stating in their statutes or rules that the advocates are not permitted to practice law. [FN86] However, the unauthorized practice of law is defined by the actions of the advocates and cannot be negated by a legislative declaration that these actions do not constitute the practice of law. For example, in the State of Washington, a non-lawyer guardian ad litem is permitted to:

(1) File documents and respond to discovery. A guardian ad litem shall have the right to file pleadings, motions, notices memoranda, briefs, and other documents, and may, subject to the trial court's discretion engage in and respond to discovery.

*69 (2) Note motions and request hearings. A guardian ad litem shall have the right to note motions and request hearings before the court as appropriate to the best interests of the person(s) for whom a guardian ad litem was appointed.

(3) Introduce exhibits and examine witnesses. A guardian ad litem shall have the right, subject to the trial court's discretion, to introduce exhibits, subpoena witnesses, and conduct direct and cross examination of witnesses.

(4) Oral argument and submission of reports. A guardian ad litem shall have the right to fully participate in the proceedings through submission of written reports, and, may with the consent of the trial court present oral argument. [FN87]

Delaware allows CASAs to “participate in all depositions, negotiations, discovery, pretrial conferences, hearings and appeals,” [FN88] and request any appropriate relief from the court. [FN89] Maine permits CASAs to “subpoena, examine and cross-examine witnesses.” [FN90] In Oregon CASAs may “file pleadings, and request hearings and may subpoena, examine and cross-examine witnesses.” [FN91]

These are actions reserved for licensed attorneys. When social workers have taken such action on behalf of state agencies in dependency proceedings, the Florida courts have found these workers to be in violation of statutes prohibiting the unauthorized practice of law. [FN92]

In California, where attorneys are appointed to fulfill CAPTA's requirements, [FN93] non-lawyer advocates fulfill more limited “independent *70 investigative and informational functions.” [FN94] This is the appropriate role of a non-lawyer advocate; a role that does not lead to the unauthorized practice of law. [FN95]

VII. A CHILD'S STATUS AND CONSTITUTIONAL RIGHTS

A. A Child as a Party

The status of children in dependency proceedings is not clear to the participants. The title of the proceedings is usually in the name of the children, [\[FN96\]](#) yet an observer of dependency proceedings would assume the cases are a battle between the parents and the state, where the child has a minimal role, if any. [\[FN97\]](#) Although forty-four states and the District of Columbia have clearly defined a child's status as that of a party to the litigation, [\[FN98\]](#) in practice, children are treated *71 like witnesses or other interested persons, [\[FN99\]](#) rather than statutorily defined parties with important interests at stake.

As parties, children should be permitted to be represented throughout the proceedings, receive all papers and communications with the court, attend all hearings, participate in formal discovery, including depositions, participate in settlement agreements, present evidence, including the calling of witnesses, and make arguments to the court. [\[FN100\]](#) In other types of civil proceedings in which a child is a party, a parent may be able to guide and protect the interests of the child. [\[FN101\]](#) It is precisely because the parent is unavailable, due to the charges of abuse, neglect or abandonment, that courts began appointing guardians ad litem for the children. [\[FN102\]](#)

B. A Child's Constitutional Right to Representation

A federal district court in Georgia ruled recently that foster children have a federal constitutional right to representation by an attorney in dependency proceedings. [\[FN103\]](#) This opinion concludes what several scholars had previously written and two state courts had previously held. [\[FN104\]](#) The court in this decision *72 explained the need for representation by detailing the potential constitutional liberty interests at stake for children in dependency proceedings:

The Court finds that children have fundamental liberty interests at stake in [dependency] proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. On the one hand, an erroneous decision that a child is not deprived or that parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships.

Furthermore, a child's liberty interests continue to be at stake even after the child is placed in state custody. At that point, a "special relationship" is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm. Thus, a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of hearings and review proceedings that occur as part of a deprivation case once a child comes into state custody. [\[FN105\]](#)

While both parents and children face a potential temporary and permanent loss of familial relationship in a dependency proceeding, children also face a loss of liberty, which may include being subjected to state custody. [\[FN106\]](#) For the child, the loss of familial relationships goes beyond the parent-child relationship and includes sibling relationships that are often lost in these proceedings. [\[FN107\]](#) As implied by this excerpt, children in foster care can be subjected to physical abuse while in care, and lose other important rights including protection against invasion of private records. [\[FN108\]](#) Thus, children should be recognized as having greater constitutional interests at stake in dependency proceedings than do parents.

*73 Children's constitutional right to representation cannot be met with a non-lawyer advocate. [\[FN109\]](#) There is no other context in which a court has found that a person has a constitutional right to representation, and permitted that

constitutional requirement to be met with a non-lawyer advocate, [\[FN110\]](#) or permitted someone else to direct the litigation. [\[FN111\]](#)

VIII. WHAT IS THE PROPER ROLE OF CASAS AND OTHER NON-ATTORNEY ADVOCATES?

A. *Court Appointed Special Advocates*

After the first CASA program was deemed a success in the Seattle Washington Superior Court, the model was endorsed by the National Council of Juvenile and Family Court Judges. [\[FN112\]](#) In 1990, the CASA program was given a boost through legislation authorizing the use of federal funds to expand the CASA program. [\[FN113\]](#) Although it is not clear that the original intent was to replace attorneys, CASAs have clearly been appointed as guardians ad litem, a role which had previously been almost exclusively filled by attorneys. [\[FN114\]](#)

CASAs often perform valuable services in dependency proceedings. [\[FN115\]](#) These volunteers have donated numerous hours investigating and providing collateral resources to the cases. One study has shown that these volunteers have been especially effective at expanding community resources for the child clients. [\[FN116\]](#) *74 These non-lawyer volunteers are also much more likely to observe parent-child interactions and visit the custodial homes of the children, critical steps in the investigation of these cases. [\[FN117\]](#)

As the CASA programs have proliferated, three basic models have emerged: (1) an attorney-centered approach, in which an attorney acts as the representative either alone or with volunteer assistance; (2) a volunteer-centered approach, in which the volunteer is an independent participant in the case; and (3) an attorney-volunteer team approach, in which attorneys and volunteers act as equal partners, each with a unique and clearly understood role. [\[FN118\]](#)

The approach that is most likely to lead to the unauthorized practice of law is the volunteer centered approach. These volunteers often come to court and present evidence and make arguments without the assistance of counsel. In addition to the question of effectively using lay volunteer advocates, such a system of representation still leaves the child voiceless and without representation if the non-lawyer CASA is not obligated to inform the court of the child's position, much less present evidence and argue for the child's position. [\[FN119\]](#)

A promising model promoted by many is the teaming of attorneys and volunteers, [\[FN120\]](#) in which each advocate brings complementary skills that can rarely be duplicated by the other. [\[FN121\]](#) The non-lawyer advocate can provide the investigation, monitoring and follow-up that lawyers do not have the time or receive adequate pay to do, while the attorney provides the legal analysis, counseling and advice needed to effectively represent the child. [\[FN122\]](#) A debate often arises in the design of this team approach, over who has the ultimate authority to make a decision regarding what is "best" for the child, where the team is expected to represent the best interests of the child. Under the attorney-centered approach, the attorney clearly has the decision-making role. Under the volunteer-centered approach, the volunteer makes the ultimate decision. [\[FN123\]](#) However, all of these CASA models assume the child does not have the ultimate decision-making authority and, therefore, see no role for a child-centered approach.

*75 B. *Non-lawyer Parties*

A non-lawyer advocate can avoid the unauthorized practice of law if he or she is a party to the proceeding and appears *pro se*. [\[FN124\]](#) Eighteen states have some provision that recognizes the guardian ad litem as a party distinct from the party status of the child. [\[FN125\]](#) In twelve of those states, the guardian ad litem is required to be an attorney. [\[FN126\]](#) Four of these states explicitly recognize the attorney advocate as a party but not the non-attorney advocate. [\[FN127\]](#) This leaves thirteen states recognizing the CASA or other non-lawyer advocate as a separate party to the proceeding. [\[FN128\]](#)

Parties can represent themselves *pro se*. [\[FN129\]](#) Oregon appears to recognize this in its statute when it states:

“The court appointed special advocate is deemed a party in these proceedings, and in the furtherance thereof, may be represented by *76 counsel, file pleadings and request hearings and may subpoena, examine and cross-examine witnesses.” [\[FN130\]](#)

The traditional *pro se* rules assume that the party is representing her or his own interests. In a dependency proceeding, non-lawyers are not advocating for themselves even if they are recognized by statute as a party. Thus, in the child dependency proceedings, the non-lawyer advocate is still, in effect, acting as a representative for the child who is the true party. This is precisely what the unauthorized practice of law statutes are designed to avoid.

IX. CONCLUSION

Congress has made it clear that every child in an abuse and neglect proceeding should have an advocate who obtains “first-hand, a clear understanding of the situation and the needs of the child.” [\[FN131\]](#) In a legal proceeding with significant constitutional interests at stake for the child, this advocate should be an attorney appointed to represent the children in a traditional attorney-client relationship. [\[FN132\]](#) Attorney representation is the most effective means to address the myriad of difficulties in representing children in dependency proceedings. [\[FN133\]](#) If the court or legislature would like an additional independent party to research and present testimony about the best interests of the child, or provide additional resources for the attorney and child, the court can appoint a special advocate, or other independent investigator or expert witness, to work alongside or independent of the attorney. The child's attorney should present evidence and argue along with any other parties and their advocates. [\[FN134\]](#) With the evidence presented by all, the court should have sufficient information to make a decision, based on the law and the facts, which will protect the children's interests and legal rights. [\[FN135\]](#)

*77 It is ultimately the judge who must decide what is in the best interests of the child. All parties should present their evidence and arguments in support of their interpretation of how the court should apply this standard, [\[FN136\]](#) but no one party should duplicate the judge's role of determining what is in the best interests of the child. All parties present and the judge decides.

CAPTA's language should be addressed by amending CAPTA to require traditional attorney representation for dependent children. [\[FN137\]](#) Where feasible, these *78 lawyers should be supplemented with CASAs, but at a minimum each child deserves a well-trained lawyer with sufficient resources to provide quality advocacy. [\[FN138\]](#) Thus, the relevant section of CAPTA should read:

- (ix) provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, an attorney shall be appointed to represent the child in such proceedings--
 - (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and
 - (II) to advocate the child's interest before the court in accordance with applicable rules of professional conduct.

[\[FN1\]](#). Associate Professor, Barry University Andreas School of Law. This article would not have been possible without the incredible work of my research assistant, Lynda Neuhausen. I wish to also thank Justine Dunlap for her persistent encouragement and review of drafts. Several colleagues whom I highly respect were kind enough to review a draft of the article: Howard Davidson, Marsha Freeman, Joanna Markman, Bernard Perlmutter, Jean Koh Peters, Frank Schiavo, and Marvin Ventrell. I greatly appreciate these reviewers' time and guidance. My assistant, Sandy Porche, provided technical assistance and editing. Finally, I thank my wife, Angela Halladay, for her support, encouragement and excellent editing skills.

[\[FN1\]](#). Randi Mandelbaum has written a useful description of dependency proceedings, which she refers to as “child protection proceedings.” Randi Mandelbaum, [Revisiting the Question of Whether Young Children in Child Protection](#)

[Proceedings Should Be Represented by Lawyers](#), 32 LOY. U. CHI. L.J. 1, 1 n.2 (2000) (“[C]hild protection proceedings’ refer to the entire set of hearings that occur in juvenile court pursuant to the filing of a petition, usually by a child welfare agency, alleging child abuse and/or neglect.”).

[FN2]. Throughout this article, I use the term “child advocate” to mean a person who represents a child in a dependency proceeding. I argue that this should be an attorney but it can also be a Court Appointed Special Advocate (CASA) under some states’ laws. The Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a guardian ad litem (GAL). As the states have shown in their varied efforts to comply with CAPTA, the term “guardian ad litem” is now so confusing that it should be eliminated. See Raven C. Lidman & Betsy R. Hollingsworth, [The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition](#), 6 GEO. MASON L. REV. 255, 303-04 (1998) (detailing the procedural problems with GALs acting as lawyers, expert witnesses, investigators, or mediators; or functioning in other roles in dissolution matters). Thus, I have chosen to use a more generic term, “child advocate,” in some portions of the article. However, I also talk about attorneys for the child, GAL, and CASA when it is appropriate. The term “child advocate,” refers to all of these potential types of child advocates.

[FN3]. See *infra* Part II.

[FN4]. [42 U.S.C.A. § 5106a\(b\)\(2\)\(A\)\(ix\)](#) (West 2002). See *infra* Part II.

[FN5]. Throughout the article there is reference to the attorneys or advocates promoting what is in the “best interests” of the child. However, this is the legal standard applied by the judge in rendering decisions concerning the child. All parties will be arguing what is in the best interests of the child because that is the legal standard the court must apply to the facts presented. See, e.g., CONN. GEN. STAT. ANN. § 35a-14(d) (West 2005) (requiring court to evaluate permanency plans based on the best interests of the child); [FLA. STAT. ANN. § 39.521](#) (West 2005) (requiring court to consider the best interests of the child when issuing a disposition order).

[FN6]. See Sara J. Klein, Note, [Protecting the Rights of Foster Children: Suing Under § 1983 To Enforce Federal Child Welfare Law](#), 26 CARDOZO L. REV. 2611, 2618-19 (2005) (explaining that although the federal government’s involvement in child welfare began in 1909, CAPTA was the federal government’s first major effort “to lay the foundation for the modern child welfare system”).

[FN7]. See [42 U.S.C.A. §§ 5101-5107](#) (West 2005). The concerns that led Congress to take action included: recognition that children increasingly were being neglected, maimed and killed; “an urgent desire to prevent these tragic events”; concerns that professionals were not reporting suspected child abuse despite state mandated reporting statutes; the fact that many incidents of abuse were not being brought to the attention of medical professionals; and the awareness of the lack of resources in the social service community to address these concerns. Child Abuse Prevention and Treatment Act, [H.R. REP. NO. 93-685 \(1973\)](#), reprinted in 1974 U.S.C.C.A.N. 2763, 2764-66.

[FN8]. [42 U.S.C. §§ 5101-5107 \(2005\)](#).

[FN9]. See, e.g., Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89, 111 Stat 2115](#) (codified in scattered sections of 42 U.S.C.) (promoting the adoption of children in foster care); Foster Care Independence Act of 1999, [Pub. L. No. 106-169, 113 Stat 1822](#) (codified in scattered sections of 42 U.S.C.) (amending part E of title IV of the Social Security Act to provide states with more funding and greater flexibility in carrying out programs designed to help children make the transition from foster care to self-sufficiency); Keeping Children and Families Safe Act of 2003, [Pub. L. No. 108-36, 117 Stat 800 \(2003\)](#) (codified at [42 U.S.C.A. §§ 5101-5116](#) (West 2005)) (amending the Child Abuse Prevention and Treatment Act to make improvements and reauthorize programs under that Act).

[FN10]. Administration for Children & Families, U.S. Dep’t of Health & Human Services, Child Abuse Prevention

and Treatment Act (CAPTA) State Grants,
http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/capta.htm (last visited Jan. 29, 2007) (stating that the administration has \$27,280,000 in funding for the 2006 fiscal year, and that forty-eight states, the District of Columbia, and Puerto Rico currently receive the grant).

[FN11]. See Gerard Glynn, *The Child's Representation under CAPTA: It Is Time for Enforcement*, 6 NEV. L. J. 1250, 1253-57 (2006).

[FN12]. *Id.* at 1257.

[FN13]. See Child Abuse Prevention and Treatment Act Amendments of 1996, [Pub. L. 104-35, § 107, 110 Stat. 3063](#), 3074.

[FN14]. [42 U.S.C.A. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (West 2005). The legislative history indicates that these changes were motivated by concerns over the quality of representation provided to children. “Under the current system, there are more and more cases where an appointed guardian has made virtually no contact with the child, while proceeding to make unfounded recommendations to the courts. This legislation strengthens the requirement that these representatives know and actively advocate the best interests of the children they are representing.” 142 CONG. REC. H11140, 11149 (Sept. 25, 1996) (statement of Rep. Goodling).

[FN15]. See, e.g., [KAN. STAT. ANN. § 38-821 \(1973\)](#) (defining a guardian ad litem as “an attorney at law” appointed to represent and defend the child.); Lidman & Hollingsworth, *supra* note 2, at 291-95; see also Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 27-28 (1976) (“A child is entitled to independent representation through a Guardian ad Litem where his independent interests are in a legal proceeding.”). *But see Ex parte Echols*, 17 So. 2d 449, 451 (Ala. 1944) (reprimanding lower court for failing to appoint a “probation officer or some other discreet person” as guardian ad litem, but finding “the infant was represented throughout by his attorney, rendering all the services for his client which a guardian ad litem could probably have rendered”).

[FN16]. See Child Abuse Prevention and Treatment Act Amendments of 1996, [Pub. L. 104-35, § 107, 110 Stat. 3063](#), 3074.

[FN17]. *Id.*

[FN18]. See National CASA, http://www.nationalcasa.org/about_us/index.html (last visited Jan. 29, 2007).

[FN19]. *Id.*

[FN20]. *Id.*

[FN21]. Although Congress says these advocates can be court appointed special advocates, such appointments may violate state laws regulating the unauthorized practice of law if the advocates are not attorneys. See *infra* Part VI.

[FN22]. DONALD N. DUQUETTE & MARK HARDIN, U.S. DEPT OF HEALTH AND HUMAN SERVICES, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN 12 (1999).

[FN23]. *Id.*

[FN24]. CAPTA requires each state to report “[t]he number of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out of court contacts between such individuals and children.” 42 U.S.C. §5106a(d)(12) (2000). Only half the states provide this information. ADMIN. ON CHILD., YOUTH AND FAM., U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2002, at 78 (2004). Those states that do report indicate that only 25% of the victims of abuse and neglect receive representation. *Id.*; see also Glynn, *supra* note 11, at 1254-56.

Much has been written about the failure to provide adequate representation for children in dependency proceedings. See, e.g., Mandelbaum, *supra* note 1, at 22-24. These articles highlight some of the practical limitations to implementing the CAPTA requirements. However, the states have accepted CAPTA money knowing they are to meet the under-funded mandates of CAPTA. Having accepted the CAPTA funds, the states should not be permitted to ignore their obligations. Unfortunately, there is no meaningful enforcement mechanism.

[FN25]. ALA. CODE § 26-14-11 (2005); ARK. CODE ANN. § 9-27-316 (2004); CAL. WELF. & INST. CODE § 317(c) (West 2005); COLO. REV. STAT. § 19-1-103(59) (2004); CONN. GEN. STAT. ANN. § 33a-4 (2006); D.C. CODE ANN. §4-1301.02 (13) (2006); IOWA CODE § 232.89 (2005); KAN. STAT. ANN. § 38-1505(a) (2005); KY. REV. STAT. ANN. § 620.100 (2004); LA. CHILD. CODE ANN. art. 607 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 3-813(d-e) (West Supp. 2005); MASS GEN. LAWS ch. 119, § 29 (2004); MICH. COMP. LAWS ANN. § 712A.17c (West 2005); NEB. REV. STAT. § 43-272 (2006); N.J. STAT. ANN. §§ 9:6-8.21, -8.23 (West 2006); N.M. STAT. §§ 32A-1-4(H), -7(D) (2006); N.Y. SOC. SERV. LAW § 358-a(6) (McKinney 2005); N.C. GEN. STAT. § 7B-601(a) (2005); OKLA. STAT. tit. 10, § 7003-3.7 (2005); 42 PA. CONS. STAT. ANN. § 6311 (West 2006); S.C. CODE ANN. § 20-7-110(1) (2004); S. D. CODIFIED LAWS § 26-8A-9 (2005); UTAH CODE ANN. § 78-3a-912 (2005); VA. CODE ANN. § 16.1-266 (2005); W. VA. CODE § 49-6-2 (2005); WIS. STAT. § 48.23 (2004); WYO. STAT. ANN. § 14-3-211 (2005); VT. R. FAM. P. 6 (2005). Moreover, though not explicit in the statutes, Tennessee also provides for lawyers as guardians ad litem. In Tennessee, while the statutory language is not clear, the distinction in the statutory provision between a GAL and a CASA (being a non-lawyer) shows the legislative intent to have GALs as attorneys. See TENN. CODE ANN. § 37-1-149(a)(1), (b)(1) (2005); see also TENN. SUP. CT. R. 40 (making it clear that attorneys are appointed as GALs).

These attorneys perform a variety of roles. Some function in a traditional attorney-client role. See, e.g., CAL. WELF. & INST. CODE § 317(c) (West 2005); KY. REV. STAT. ANN. § 620.100 (2004); MASS GEN. LAWS ch. 119, § 29 (2004); VT. R. FAM. P. 6 (2005). Some function as “best interest” advocates. See, e.g., MICH. COMP. LAWS ANN. § 712A.17c (West 2005); UTAH CODE ANN. § 78-3a-912 (2005). Other states have the attorneys fulfill both roles. See, e.g., MISS. CODE ANN. § 43-21-121(4) (West 2005); W.VA. CODE § 49-6-2 (2005); WYO. STAT. ANN. § 14-3-211 (2005). If a conflict arises between best interest and the child's wishes, some states provide the opportunity or mandate to appoint an additional advocate to carry out one of the conflicting roles. See, e.g., CONN. GEN. STAT. ANN. § 46b-129a(2) (2006); MICH. COMP. LAWS ANN. § 712A.17d(2) (West 2005); WYO. STAT. ANN. § 14-3-211 (2005); D.C. SUPER. CT. R. GOV. NEGLECT & ABUSE PROC. 42 (2005); D.C. SUP. CT.-NEGLECT R. 42 (2005); TENN. SUP. CT. R. 40(e)(2) (2006).

[FN26]. Three states imply that they only appoint a CASA or non-lawyers as GAL. HAW. REV. STAT. §§ 587-2 (amended 2006), 587-34 (2004) (referencing a GAL as a person appointed by the court); IDAHO CODE ANN. §§ 16-1602(19) & (20), 16-1614 (2005); OR. REV. STAT. §§ 419A.170, 419B.195 (2006). In North Dakota it is not clear whether a guardian ad litem needs to be an attorney. See N.D. CENT. CODE § 27-20-48 (2005).

[FN27]. ALASKA STAT. §§ 47.10.050, 25.24.310 (2005); ARIZ. REV. STAT. ANN. § 8-221(1) (2006); DEL. CODE ANN. tit. 13 § 701(c) (2006); FLA. STAT. ANN. §§ 39.820, 39.822 (2005); GA. CODE ANN. § 15-11-9 (2005); 705 ILL. COMP. STAT. 405/2-17 (2005); IND. CODE §§ 31-32-3-1, -3 (2004); ME. REV. STAT. ANN. tit. 22, § 4005 (2005); MINN. STAT. ANN. § 260C.163(5)(a) (West 2004); MISS. CODE ANN. § 43-21-121(4) (West 2005); MO. REV. STAT. § 210.160 (2005); MONT. CODE ANN. § 41-3-112 (2004); NEV. REV. STAT. 432B.420, .500, .505 (2004); N.H. REV. STAT. § 169-C:10(I) & (II) (2004); OHIO REV. CODE ANN. § 2151.281 (West 2006); R.I. GEN. LAWS § 40-11-14 (2005); TEX. FAM. CODE ANN. §107.001 (Vernon 2004); WASH. REV. CODE § 13.34.100 (2005). Although Florida's statute suggests that an attorney or non-attorney volunteer can be appointed, in

the overwhelming majority of cases, the advocate is not an attorney. See FLORIDA STATEWIDE OFFICE OF THE GUARDIAN AD LITEM, THE VOICE FOR FLORIDA'S ABUSED AND NEGLECTED CHILDREN 2004 PROGRESS REPORT, 7-9 (2004) [hereinafter 2004 FLORIDA PROGRESS REPORT] (reporting that while there are "4,670 volunteers who serve as guardians ad litem in Florida," only "102 lawyers [currently] work in or with" the program).

[FN28]. Mandelbaum, *supra* note 1, at 22; SUSAN A. SNYDER, JUVENILE LAW CENTER, PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS IN PENNSYLVANIA 38 (2001), available at <http://www.jlc.org/File/publications/pkpd.pdf> ("[M]any attorneys do not understand the important differences between being a child's GAL appointed to advocate for his *best interests*, as compared to being a child's attorney appointed to advocate for his *expressed interests*.")

[FN29]. DUQUETTE & HARDIN, *supra* note 22, at 1-5; SNYDER, *supra* note 28 (asserting that most of the Pennsylvania attorneys who represent children fail to meet either the American Bar Association (ABA) Standards of Practice for Lawyers who Represent Children in Abuse and Neglect cases or the state Juvenile Act's new requirements).

[FN30]. DUQUETTE & HARDIN, *supra* note 22, at 4.

[FN31]. See Katheryn D. Katz, *2002-2003 Survey of New York Law: Family Law*, 54 SYRACUSE L. REV. 1127, 1128 (2004) (discussing the legislature's pay increase for attorneys appointed to represent children, after dangerously low pay rates made it difficult to find lawyers who would, or were even financially able to, accept the assignments); see also Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 381-82 (1995) (pointing out that children in juvenile dependency proceedings may be victimized by the child welfare, law enforcement, and justice systems, because these systems are notoriously understaffed and underfunded, resulting in poor training, low salaries and a high turnover rate).

[FN32]. It is not sufficient for the states to provide warm bodies with a license to practice law. States need to provide sufficient resources for lawyers to provide effective assistance of counsel. See [Kenny A. v. Perdue](#), 356 F. Supp. 2d 1353, 1361-63 (N.D. Ga. 2005) (concluding that requiring attorneys to carry a caseload of 200 to 450 clients raises a legitimate question about systemic ineffective assistance of counsel); In the [Matter of Jamie T.T.](#), 191 A.D.2d 132, 136-141 (N.Y. App. Div. 1993) (finding that a child's constitutional right to representation was denied when provided ineffective assistance of counsel); see also [Matter of Colleen C.C.](#), 232 A.D. 2d 787, 788-89 (N.Y. App. Div. 1996) (finding ineffective assistance of counsel).

To address the work overload and low pay provided children's attorneys, the U.S. Department of Health and Human Services recommend the following resources to attorneys for children to achieve permanency for dependent children:

- a. provide reasonable compensation for child welfare attorneys;
- b. require development of reasonable caseload standards for attorneys based on the number of hours required per case and then fund positions in accordance with those caseloads;
- c. provide legal counsel through specialty offices or agencies so there is ongoing supervision and support for representatives;
- d. assure a structure that guarantees supervision and professional support for attorneys, including pro bono attorneys and attorneys for the child, whether they work in an office or independently;
- e. assure that suitable and adequate working conditions are maintained, including access to desks, telephones, copying equipment, etc.;
- f. provide private space to meet with clients;
- g. ensure continuity of representation for all parties.

DUQUETTE & HARDIN, *supra* note 22, at 5.

[FN33]. See Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER CHILDREN & CTS.

63, 67-68 (1999) (summarizing national studies on GAL representation).

[FN34]. [Charles T. v. Temiga B.](#), 125 Cal. Rptr. 2d 868, 878 (Cal. Ct. App. 2002); *Barry B. v. Gillian S.*, No. C039835, 2002 Cal. App. LEXIS 9716, *19 (Cal. Ct. App. Oct. 18, 2002). In both of these cases, mothers appealed lower court orders, partially due to the courts' failure to appoint guardians ad litem in addition to the children's attorneys.

[FN35]. *Barry B.*, 2002 Cal. App. LEXIS at *26-27; *see also Charles T.*, 125 Cal. Rptr. 2d at 877.

[FN36]. *Barry B.*, 2002 Cal. App. LEXIS at *29 (citations omitted).

[FN37]. *Id.*

[FN38]. Although these cases discuss a difference between an attorney appointed for a child and a GAL, there are cases in California ruling that the role of an attorney is to pursue whatever is in the minor's best interests, which is not necessarily what the minor wants. [Miguel N. v. Antonio N.](#), No. F041053, 2003 WL 1533798, *4 (Cal. App. Mar. 25, 2003); [Candida S. v. Shelby S.](#), 9 Cal. Reprtr. 2d 521, 529 (Cal. Ct. App. 1992). Thus, the roles of the attorneys are not always clear in California.

[FN39]. [Miguel N.](#), 2003 WL at *4 (quotations and citations omitted).

[FN40]. DUQUETTE & HARDIN, *supra* note 22, at 23.

[FN41]. For example, in a project I supervised in the Ninth Judicial Circuit of Florida, we represented 240 clients over a three-year period. We had conflicts between "best interests" and "articulated wishes" arise with only two clients.

[FN42]. *See Lidman & Hollingsworth*, *supra* note 2, at 264 (describing a lawyer's counseling role as an interactive exchange between the lawyer and client).

[FN43]. From my experience, almost always representing children in a traditional attorney-client method, I find two things happen in the client counseling experience with children. If I am concerned about a client's expressed wishes conflicting with my perception of what is in his or her best interests, I counsel my clients and either develop a better understanding of the client's wishes and the motivation behind them, or the client comes to understand that the court is unlikely to follow the client's request. In the former situation, through counseling, we are able to develop a mutually agreed-upon strategy to accomplish the client's underlying objectives. In the latter situation, the client either permits me to argue a more realistic request, or is not surprised when the court denies the request, as being against his or her best interests.

For example, if I represented a sixteen-year-old who had been sexually abused by her step-father and she wanted to return to her family home with her mother and step-father, I would have a counseling session with my client about the chosen goal of the advocacy. One result might be that she explains that her reason for returning is that her step-father is abusive to her and her mother. If she doesn't return home, she is worried about her mother's safety. In such a situation, my client really wants to protect her mother. The client is likely to agree to a strategy that gets the step-father out of the home (either through criminal prosecution or restraining order) and allows my client to be reunited safely with her mother, which is her true underlying goal.

In the previous example, if the client's reasons for wanting reunification are that she is in love with her step-father and does not find anything wrong with their relationship, I would explain to my client that it is unlikely that the court will agree with her and we can discuss options other than reuniting with her step-father. I may have to argue for reunification, but when the court rejects that argument, my client is likely to understand her more acceptable options. Having her "day in court" and receiving her second choice for placement, she is hopefully less likely to rebel against the system, run away and face a series of deteriorating options in the future.

[FN44]. DUQUETTE & HARDIN, *supra* note 22, at 23.

[FN45]. *Id.* at 20-21.

[FN46]. See Child Abuse Prevention and Treatment Act Amendments of 1996, [Pub. L. No. 104-235, § 107, 110 Stat. 3063](#), 3071-78 (1996) (codified as amended at [42 U.S.C.A. § 5106a](#) (West 2006)).

[FN47]. DUQUETTE & HARDIN, *supra* note 22, at 18 (“Lawyers are ill-trained to make best interests decisions and well-trained to serve as zealous advocates for their clients’ positions.”); see also Sarah H. Ramsey, [Representation of the Child in Protection Proceedings: The Determination of Decision-making Capacity](#), 17 *FAM. L.Q.* 287, 302 (1983) (“Instead of being an advocate for his or her client, the lawyer becomes an extension of the judicial-social welfare system and complies with the needs of that system.”).

[FN48]. See DUQUETTE & HARDIN, *supra* note 22, at 20-21 (“The vast majority of scholars who have addressed this issue recommend that a lawyer should take direction from her or his child client (only) if the child is determined to have developed the cognitive capacity to engage in reasoned decision-making.”).

[FN49]. Mandelbaum, *supra* note 1, at 37-38. In this article, Professor Mandelbaum provides a detailed analysis of two other scholars, Professors Martin Guggenheim and Emily Buss. See *id.*

[FN50]. See, e.g., [WIS. STAT. § 48.23 \(1m\)\(b\)\(2\) \(2006\)](#) (declaring that every child over twelve shall be appointed counsel to function in an adversarial role, while the court is given discretion to appoint a guardian ad litem rather than counsel for younger children); [WASH. REV. CODE § 13.34.100\(6\) \(2006\)](#) (stating that if a child over twelve requests legal counsel, the court may appoint an attorney).

[FN51]. MODEL RULES OF PROF'L CONDUCT R. 1.14 (1983). The 2002 amendment to the Model Rule 1.14 has the same language quoted here from the old rule, but provides additional guidance to attorneys in other ways:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Id., available at http://www.abanet.org/cpr/mrpc/rule_1_14.html. Moreover, Professor Jean Koh Peters provides a detailed guide for providing this type of representation, which focuses on understanding the child in context. See generally JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001).

[FN52]. Although attorneys who are appointed as guardians ad litem in Wisconsin represent the concept of “best interests,” and not the children themselves, it is a violation of the rule of Professional Conduct related to communication with a represented party for a lawyer representing a parent to communicate with the children without seeking the permission of the attorney guardian ad litem. See *In re Disciplinary Proceedings Against Kinast*, 530 N.W.2d 387, 390 (Wis. 1995); [Wiederholt v. Fischer](#), 485 N.W.2d 442, 446 (Wis. Ct. App. 1992).

[FN53]. Professor Jean Koh Peters has done the most comprehensive fifty-state survey on the status of representation. Her research revealed fifty-six distinct jurisdictional systems for representing children in child-protective proceedings. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS, app. B (1st ed. 1997).

[FN54]. *See supra* note 25.

[FN55]. *See* Mandelbaum, *supra* note 1, at 3, nn.7-10. The U.S. Department of Health and Human Services recommends that “States articulate clear standards regarding the role of the child’s lawyer and communicate those standards to the lawyers, the courts and the clients.” DUQUETTE & HARDIN, *supra* note 22, at 17.

[FN56]. ABA, Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases, Preface (1996), <http://www.abanet.org/child/repstandwhole.pdf> (“All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues.”); DUQUETTE & HARDIN, *supra* note 22, at 20 (“[C]hildren who are subjects of child protection proceedings be represented by an independent attorney at all stages and at all hearings in the child protection process. The attorney owes the same duties of competent representation and zealous advocacy to the child as are due an adult client.”); National Association of Counsel for Children, *NCAA Recommendations for Representation of Children in Abuse and Neglect Cases* (2001), available at <http://www.naccchildlaw.org/documents/naccrecommendations.doc>.

[FN57]. *See* Tania M. Culley, *What does It Mean to Represent Delaware’s Abused, Neglected, and Dependent Children?*, 4 DEL. L. REV. 77, 87 (2001), (summarizing the three primary conflicts that arise between the Rules of Professional Conduct and the GAL’s role in representing the best interests of a child).

[FN58]. Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 16-18 (2005).

[FN59]. *In re Gault*, 387 U.S. 1, 41 (1967).

[FN60]. *See* Lidman & Hollingsworth, *supra* note 2, at 264-67 (describing the traditional role of attorneys representing children in marriage dissolution proceedings).

[FN61]. *See, e.g.*, ALASKA STAT. § 09.55.590(e) (2005) (stating that an attorney may be appointed for a child in an emancipation proceeding); FLA. STAT. ANN. § 743.015(3) (West 2005) (stating that an attorney must be appointed for a child in an emancipation proceeding filed by a custodian).

[FN62]. In the debate about the proper role attorneys should play in the dependency process, there is much said about the counseling process in resolving the quandary lawyers may feel about their clients’ wishes. However, from the client’s perspective, there is much more value to the counseling and advice role than resolving the attorney’s internal conflicts. *See supra* notes 42-45 and accompanying text.

[FN63]. When teaching client interviewing, I remind law students and attorneys that clients and attorneys view these interviews through different paradigms. Clients come to an interview to get information from the attorney. Attorneys view the interview as an opportunity to collect factual information to begin their legal analysis.

[FN64]. *See generally* *In re Bercu*, 78 N.Y.S.2d 209, 216 (1948); Derek Denchla, *Nonlawyers and the Unauthorized Practice of Law: An Overview fo the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2589-90 (1999).

[FN65]. Piraino, *supra* note 33.

[FN66]. The National CASA Volunteer Training Curriculum describes the CASA’s job to include investigation, facilitation, advocacy and monitoring. Advocacy is described as: “You speak up for and plead the case of the child for whom you are appointed.” NATIONAL CASA ASSOCIATION, VOLUNTEER MANUAL, 1-17 (2002), available at <http://www.casanet.org/training/volunteer-manual/index.htm>. There is no warning to the CASA volunteers in this

training manual about the unauthorized practice of law. *Id. passim*. However, the National CASA Volunteer Manual does recommend that many of the courtroom functions be handled by the attorney for the program or the child. *See id.* at 9-16. This assumes there is such an attorney available. The National CASA training material further suggests that the CASA will function more as a witness when it comes to the courtroom proceedings. *Id.* at 9-33 to -38.

[FN67]. This is known as therapeutic jurisprudence. *See generally* Christina A. Zawisza & Adela Beckerman, [*Two Heads Are Better Than One: The Case-based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*](#), 7 *FLA. COASTAL L. REV.* 631 (2006).

[FN68]. Two common mental health diagnoses for children in foster care are anxiety and depression. Michael T. Dolce, [*A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*](#), 25 *NOVA L. REV.* 547, 571 (2001). These diagnoses are understandable when the framework of a child's life, his or her family, has been removed, and this trauma is often deepened by a physical move and attendant loss of friends and school, only to be replaced with disruptions and living with strangers. The anxiety is heightened by the lack of information provided to the child about the process and what to expect next. *See* Jennifer Rodriguez, *Empowering Foster Youth: Inclusion in Court Hearings and Decision-Making*, THE GUARDIAN (NACC, Denver, Colo.), Spring 2005, at 11, 11. Research shows that children as young as first grade have an understanding of justice, including what is fair in the process. Laura J. Gold et al., *Children's Perceptions of Procedural Justice*, 55 *CHILD DEV.* 1752, 1758 (1984).

[FN69]. DUQUETTE & HARDIN, *supra* note 22, at 13.

[FN70]. [42 U.S.C.A. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#)

[FN71]. Much of this list of tasks unique to attorneys was generated through an exchange of emails on the National Association of Counsel for Children's membership listserv in July 2005. This discussion was prompted by an inquiry by Howard Davidson on the unique skills lawyers bring to representation in a dependency proceeding. (on file with the author.)

[FN72]. CASAs are usually required to participate in a minimal number of hours of training to be qualified for a court appointment during which the CASAs are exposed to: the CASA/GAL roles; an introduction to the law; the child protection system and the courts; cultural awareness; understanding families; understanding children; communication skills; gathering information; reporting to the court; monitoring; and the importance of permanency and childhood development theories amongst other topics. NATIONAL CASA ASSOCIATION, VOLUNTEER MANUAL 1-7 (2002) *available at* <http://www.casanet.org/training/volunteer-manual/index.htm>. This training cannot replicate the three years of formal law school training and years of experience attorneys bring to these cases. *See also* Mandelbaum, *supra* note 1, at 86-87 (questioning "whether lay advocates will be able to master the legal knowledge, advocacy skills, and expertise necessary to adequately protect the interests of young children.").

[FN73]. Scholars recognized the value lawyers bring to juvenile court even before the passage of CAPTA. *See* Eugene N. Kaplan, *Domestic Relations--Appointment of Counsel for the Abused Child--Statutory Schemes and the New York Approach*, 58 *CORNELL L. REV.* 177, 179 n.12 (1972); *see also* Fraser, *supra* note 15, at 30 (noting that because of an increased sensitivity to due process safeguards among juvenile courts, the appointee under CAPTA "should be an attorney").

[FN74]. Due to the legal nature of the proceedings, attorneys are equipped to research the legal aspects of the case as well as the factual aspects of the case. Non-attorney advocates are ill-equipped to provide the legal research children need to be adequately represented.

[FN75]. "In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent

22 months, ... the State shall file a petition to terminate the parental rights of the child's parents ... and, concurrently to identify, recruit, process, and approve a qualified family” [42 U.S.C. § 675\(5\)](#) (2000).

[FN76]. Foster children with disabilities may be eligible for Supplemental Security Income benefits payable to disabled children under age eighteen. See [42 U.S.C.A. § 1382](#) (West 2006). Additionally, some foster children may be eligible for Social Security Dependents' Benefits, payable to children under the age of eighteen on the record of a parent who is collecting retirement or disability benefits from Social Security, or survivors' benefits payable to children under the age of eighteen on the record of a parent who has died. See [42 U.S.C.A. § 402\(d\)](#) (West 2006).

[FN77]. About 30% to 40% of foster care students may be eligible for special education services because of a disability. CASEY FAMILY PROGRAMS, A ROAD MAP FOR LEARNING: IMPROVING EDUCATIONAL OUTCOMES IN FOSTER CARE 34 (2004). These educational services are mandated under the federal law, see [20 U.S.C. § 1400](#) (West 2005), and guarantee all children with disabilities a free, appropriate public education.

[FN78]. Special immigrant status can be extended to an immigrant in the United States who has been declared dependent on a juvenile court, and who has been found eligible for long-term foster care because of abuse, neglect, or abandonment, and in whose case the Attorney General agrees to the dependency order being a precondition to the grant of special immigrant juvenile status. [8 U.S.C. § 1101\(a\)\(27\)\(J\)](#) (2006).

[FN79]. Unfortunately, children are too often hurt while in foster care due to the negligence of the state or one of its agents. Advocates need to understand the potential for recovery of damages to help those children recover from their injuries. See Austen L. Parrish, [*Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*](#), 15 STAN. L. & POL'Y REV. 267, 319 (2004) (suggesting that child welfare statutes impart in social workers a general duty to protect foster children in their control from foster-parent abuse, and warning that if they ignore signs of potential danger to a child, tort liability may be imposed); Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-care and Adoption Agencies*, 6 J. L. & FAM. STUD. 59, 60 (2004) (warning that public and private agencies responsible for placing children in foster care must not neglect any risk indicators relating to potential abuse of minors, because when an agency does not fulfill its duty to investigate and respond, and as a foreseeable result a child is abused, the agency may be held liable for damages).

[FN80]. See Developmental Disabilities Assistance and Bill of Rights Act of 2000, [Pub. L. No. 106-402, 114 Stat. 1677 \(2000\)](#) (codified at [42 U.S.C.A. § 15001](#) (West 2005)) (ensuring that people with developmental disabilities receive the support and services they need and that they participate in the planning and implementation of those services).

[FN81]. Lidman & Hollingsworth, *supra* note 2, at 264 (arguing that a lawyer is not an advisor, witness or one who provides an opinion about the evidence, but stands as an advocate who presents evidence and argues the evidence and the law); see also *supra* Part IV. In describing their client representation of adult or corporate clients, lawyers do not often use the term “best interests,” when advocating the client's interests. As discussed earlier, the issue within the child representation debate is who ultimately gets to decide what is “best” for the child.

[FN82]. Courts have made it clear that non-attorneys cannot represent parties in appeals. [Myers v. Loudon County Pub. Schs.](#), 418 F.3d 395, 401 (4th Cir. 2005) (finding that non-attorney parents may not litigate their minor children's claims in federal court and that remand for further proceedings would be the only acceptable course of action on appeal); *In re LFG*, 104 Fed. Appx. 571, 573 (7th Cir. 2004) (finding that a non-attorney individual assisted appellant in preparation of appeal and appellate brief after being fined in bankruptcy court for trying to represent appellant, and sanctioning the individual as well as holding him in civil contempt for failure to pay previous sanctions); see [Nowicki v. Ullsvik](#), 69 F.3d 1320, 1324 (7th Cir. 1995) (finding circuit court judge acted in his judicial capacity when he issued an order to prevent a non-attorney from representing a party or be found in contempt).

[FN83]. Under the constitutional principle of separation of powers, the legislature must not encroach upon the judiciary's power to regulate its own affairs which includes the judiciary's power to regulate the practice of law. *See* [7 C.J.S. Attorney & Client § 5 \(2005\)](#); *see also* [State v. Wis. S., 454 N.W.2d 770, 771 \(Wis. 1990\)](#) (finding that a statute requiring continuing legal education for attorneys before their appointment as guardians ad litem intruded on the courts' exclusive authority to regulate the practice of law and, therefore, violated the separation of powers).

[FN84]. Federal courts are authorized to regulate the admission and practice of attorneys that will come before them. *See* [28 U.S.C. § 1654 \(2000\)](#) (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”); [28 U.S.C. § 2071\(a\) \(2000\)](#) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business [which] shall be consistent with Acts of Congress.”).

[FN85]. [7 C.J.S. Attorney & Client § 5 \(2005\)](#).

[FN86]. *See* [MO. ANN. STAT. § 210.160\(5\) \(West 2004\)](#); [MONT. CODE ANN. § 41-3-112\(3\)\(g\) \(2005\)](#) (stating that non-attorney GAL cannot file motions); [FLA. R. JUV. P. 8.215\(f\)](#).

[FN87]. WASH. SUP. CT. G.A.L.R. 4(h) (2001); *cf.* [WASH. REV. CODE §§ 13.34.100-13.34.108 \(2004\)](#). Whether this more specific statute would overrule a more general law prohibiting non-attorneys from practicing law gets complicated in some states where the courts have exclusive authority to regulate the practice of law. If a statute conflicts with a state Supreme Court order that regulates and controls the practice of law, the statute yields to the Supreme Court's actions. [7 C.J.S. Attorney & Client § 5 \(2005\)](#); *cf.* [Banales v. Jackson, 601 S.W.2d 508 \(Tex. Civ. App. 1980\)](#) (finding that because the Supreme Court has inherent power to regulate the practice of law, it could prohibit practice by lawyers who had not paid a building fee assessment); [State v. Minter, 37 P.3d 763, 768-69 \(Okla. 2001\)](#) (finding that the state Supreme Court may approve a bar trial panel's findings, make its own findings, impose discipline, dismiss the proceedings, or take other appropriate action).

[FN88]. [DEL. CODE ANN. tit. 31, § 3606\(5\) \(2006\)](#).

[FN89]. *Id.* [§ 3606\(11\) \(2006\)](#). This sounds like the filing of motions, which are explicitly prohibited to be done by CASAs by some other states. *See, e.g.,* [TEX. FAM. CODE ANN. § 107.002\(c\)\(4\) \(Vernon 2004\)](#) (explaining that a GAL may attend legal proceedings, “but may not call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney”).

[FN90]. [ME. REV. STAT. ANN. tit. 22, § 4005\(1\)\(C\) \(2005\)](#).

[FN91]. [OR. REV. STAT. § 419A.170\(1\) \(West 2006\)](#).

[FN92]. *See* [Florida Bar, 547 So.2d 909, 911 \(Fla. 1989\)](#); [Florida Bar re Advisory Opinion HRS Nonlawyer Counselor, 518 So.2d 1270, 1271-72 \(Fla. 1988\)](#).

[FN93]. [Charles T. v. Temiga B., 125 Cal. Rptr. 2d 868, 873](#); [Barry B. v. Gillian S., No. C039835, 2002 Cal. App. LEXIS 9716, *26-29 \(Cal. Ct. App. Oct. 18, 2002\)](#).

[FN94]. [Charles T.](#), 125 Cal. Rptr. 2d at 878.

[FN95]. *See infra* Part VII.

[FN96]. Most states title juvenile dependency proceedings “*In re* (child’s name)” or “In the interest of (child’s name).” *See, e.g.*, [MONT. CODE ANN. § 41-5-1402 \(2005\)](#) (providing that all dependency proceedings “must be entitled ‘In the Matter of ..., a youth,’ and must set forth with specificity”); [TEX. FAM. CODE ANN. § 102.008\(a\)](#) (Vernon 2002) (stating that all documents filed in dependency proceedings “shall be entitled, ‘In the interest of _____, a child,’” unless in case of adoption in which case “the style shall be ‘In the interest of a child’”); [WIS. STAT. § 48.255](#) (West 2005) (requiring all dependency proceedings to “be entitled, ‘In the interest of (child’s name), a person under the age of 18’”).

[FN97]. *See* Rodriguez, *supra* note 68, at 11.

[FN98]. ALA. CODE § 12-15-1(3) (2005); ARIZ. REV. STAT. ANN. § 8-522(A) (2004); CAL. WELFARE & INST. CODE § 317.5(b) (West 2005); [DEL. CODE ANN. tit. 13, § 732 \(2006\)](#) (making reference to the child as a party, although not clearly defining parties); [FLA. STAT. ANN. § 39.01\(50\)](#) (West 2005); HAW. REV. STAT. § 587-2 (2004); IDAHO CODE ANN. § 16-2002(14) (2005); [705 ILL. COMP. STAT. ANN. 405/1-5\(1\)](#) (West 2005); [IND. CODE ANN. § 31-34-9-7](#) (West 2004); IOWA CODE § 232.89(2) (2005); [KAN. STAT. ANN. § 38-1502\(e\) \(2005\)](#); [KY. REV. STAT. ANN. § 620.155](#) (West 2004); [ME. REV. STAT. ANN. tit. 22, § 4005\(1\)\(A\) \(2005\)](#); [MD. CODE ANN., CTS & JUD. PROC. § 3-801\(u\) \(West Supp. 2005\)](#); [MICH. COMP. LAWS Ann. § 712A.17c](#) (West 2005); [MINN. STAT. ANN. § 260C.163\(8\)](#) (West 2004); [MISS. CODE ANN. § 13-1-405\(2\)](#) (West 2006); [MO. ANN. STAT. § 211.211\(1\)](#) (West 2005); MONT. CODE ANN. § 41-5-103(30) (2005); NEB. REV. STAT. § 43-245(12) (2006); NEV. REV. STAT. § 432B.420 (2005); [N.H. REV. STAT. ANN. § 169-C:3\(XXI-a\) \(2004\)](#); [N.M. STAT. ANN. § 32A-1-12\(E\)](#) (West 2005); [N.C. GEN. STAT. ANN. § 7B-601\(a\)](#) (West 2005); [N.D. CENT. CODE § 27-20-48 \(2005\)](#); [OHIO REV. CODE ANN. § 2151.314](#) (West 2006); [OKLA. STAT. ANN. tit. 10, § 7003-3.4\(3\)](#) (West 2005); [42 PA. CONS. STAT. ANN. § 6335\(e\)](#) (West 2006); [S.C. CODE ANN. § 20-7-490\(22\) \(2004\)](#); S.D. CODIFIED LAWS § 26-7A-30 (2005); [TENN. CODE ANN. § 37-1-149\(a\)\(1\)](#) (West 2005); [TEX. FAM. CODE ANN. § 102.003\(a\)\(2\)](#) (Vernon 2002); [VT. STAT. ANN. tit. 33, § 5502\(a\)\(13\) \(2005\)](#); [VA. CODE ANN. § 16.1-263\(A\)](#) (West 2005); [WASH. REV. CODE ANN. § 13.34.100\(1\)](#) (West 2005); [W. VA. CODE § 49-6-2\(A\) \(2005\)](#); [WIS. STAT. ANN. § 48.23\(19\)](#) (West 2004); WYO. STAT. ANN. § 14-3-211 (2005); ALASKA CT. R., CHILD IN NEED OF AID R. 7 (2006); CONN. SUPER. CT. § 23-1(h) (2005); D.C. SUPER. CT. R. GOV. NEGLECT & ABUSE P. 10 (2005); MASS. JUV. CT. R., R. FOR THE CARE AND PROTECTION OF CHILDREN 7(A) (2004). Even those states that do not define children as parties require that children be given a summons at the initiation of the litigation. *See* [GA. CODE ANN. § 15-11-39](#) (West 2005) (requiring issuance of summons if child is over fourteen); LA. CHILD. CODE ANN. art. 636 (2005); OR. REV. STAT. ANN. § 419B.839(1)(f) (West 2006) (requiring issuance of summons to child twelve or older); [R.I. R. JUV. P. 6, 15 \(2005\)](#).

[FN99]. The Adoption and Safe Families Act recognizes the special role foster parents or temporary custodians have in dependency proceedings. *See id.*, [PUB. L. NO. 105-89](#), §104(3), 111 Stat. 2115, 2120 (1997) (codified as amended at [42 U.S.C.A. 675\(5\)\(G\)](#)) (West 2006) (providing foster parents, any pre-adoptive parent, or any relative who provides care for the child with “notice of, and an opportunity to be heard in, any review or hearing to be held with respect to the child,” but not requiring that the child’s foster parent, pre-adoptive parent, or relative providing care “be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard”).

[FN100]. As Oregon explained, in declaring a CASA a party, a party may be “represented by counsel, file pleadings and request hearings and may subpoena, examine and cross-examine witnesses.” OR. REV. STAT. ANN. [§ 419A.170\(1\)](#) (West 2006). The National CASA Volunteer Manual also clearly recognizes that parties should have the right to fully participate in the proceedings including the right to be represented by an attorney. *See* NATIONAL CASA ASSOCIATION, *supra* 66, 2-22. Although this manual recognizes the child as a party, *see id.* at 2-21, it also suggests that a non-lawyer volunteer can legally represent the party including being a voice for the child’s expressed wishes. *Id.* at 2-22, 23. And, generally, it is inappropriate for a non-party to be given the authority to decide when a party attends a hearing.

[FN101]. For example, in a tort case in which the child is the injured party, the parent often files the proceedings as

next friend of the child. *See, e.g., Grindell v. Huber*, 275 N.E.2d 614 (Ohio 1971); *see also* 42 AM. JUR. 2d *Infants* § 176 (2006).

[FN102]. Lidman & Hollingsworth, *supra* note 2, at 291-94.

[FN103]. *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1357 (N.D. Ga. 2005) (denying defendants' motion for summary judgment in a class action suit against two Georgia counties alleging failure to provide adequate and effective legal representation).

[FN104]. New Jersey and New York state courts have found that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as their respective state constitutions, require that children in dependency proceedings have attorney representation. *See N.J. Div. of Youth & Fam. Serv. v. Wandell*, 382 A.2d 711, 713-714 (N.J. Cumberland County Ct. 1978); *In re Jamie TT.*, 191 A.D.2d 132, 135-136 (N.Y. App. Div. 1993); *see also Winbigler v. Torres*, 856 P.2d 286, 289 (Okla. 1993) (“If a parent has a right to be represented in a case involving termination of parental rights, the child, whose own rights are in jeopardy of being terminated, has equal interests at stake and must also be represented.”).

[FN105]. *See Kenny A.*, 356 F. Supp. 2d at 1360.

[FN106]. The United States Supreme Court has rejected an argument that parents have a right to counsel in dependency proceedings. *See Lassiter v. Dep't. of Soc. Serv. of Durham County, North Carolina*, 452 U.S. 18, 31-32 (1981) (concluding that courts must determine on a case by case basis whether due process requires appointing an attorney for a parent facing a termination of parental rights); *cf. Winbigler*, 856 P.2d at 288-89 (holding that in termination proceedings, counsel must be appointed for indigent parents).

[FN107]. *See Winbigler*, 856 P.2d at 288.

[FN108]. *See, e.g., S.C. v. GAL*, 845 So. 2d 953, 955-56 (Fla. Dist. Ct. App. 2003) (describing attempt to prevent non-lawyer GAL from gaining access to the child's psychotherapy records against the child's wishes).

[FN109]. *Kenny A.*, 356 F. Supp. 2d at 1361 (rejecting the suggestion that appointing CASAs adequately provides due process protection for children in dependency proceedings).

[FN110]. *See In re Frazer*, 721 A.2d 920, 923-24 (Del. 1998) (concluding that a child was denied an advocate for her wishes in a termination proceeding for which she was appointed a CASA, and suggesting that the child's constitutional rights were violated). In mental health commitment proceedings, some states have tried to substitute guardians ad litem for legal counsel, but courts have found these substitutions to be unconstitutional. *See, e.g., Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) (finding that appointment of a guardian ad litem is not a substitute for legal counsel). *See generally* 26 AM. JUR. *Trials* 97 § 90 (2005).

[FN111]. *See In re McMahon*, 581 N.E.2d 1208, 1210 (Ill. App. Ct. 1991) (holding that respondent did not suffer prejudice as a result of a late appointment of counsel at involuntary commitment proceedings because counsel was able to discuss petition and options with respondent who directed counsel to proceed with bench trial); *In re Lee*, 754 A.2d 426, 439 (Md. 2000) (finding that a disabled man was not provided adequate legal representation in guardianship proceedings because his court appointed attorney waived the man's presence at trial even though he had a right and desire to be there, submitted a report to court with recommendations that directly contradicted the man's wishes, and declined to request a hearing on the issue of the man's disability); *In re Richard A.*, 771 A.2d 572 (N.H. 2001) (holding that indigent patient lacked the proper due process right to pursue an appeal of his involuntary civil commitment because his appointed counsel believed the patient's appeal was frivolous).

[FN112]. Piraino, *supra* note 33, at 64.

[FN113]. Crime Control Act of 1990, [Pub. L. No. 101-647, § 217, 104 Stat. 4789](#), 4794 (codified at [42 U.S.C.A. § 13013](#) (West 2006)).

[FN114]. *See supra* note 14.

[FN115]. Piraino, *supra* note 33, at 68 tbl.2 (summarizing the research on the activities performed by CASAs versus attorneys); *see also* DUQUETTE & HARDIN, *supra* note 22, at 22-23.

[FN116]. Piraino, *supra* note 33, at 67.

[FN117]. NAT'L CENTER ON CHILDREN ABUSE AND NEGLECT, U.S. DEPT OF HEALTH AND HUMAN SERVICES, FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM, 6-6, 6-7 (1993).

[FN118]. Piraino, *supra* note 33, at 65.

[FN119]. Although most statutes permitting the appointment of best interests advocates require a reporting of the child's wishes, there is a difference between reporting a child's wishes and zealously advocating those wishes. *See e.g.*, [ARK. CODE ANN. § 9-27-316\(5\) \(2006\)](#); [FLA. R. JUV. P. 8.215\(c\)\(1\) \(2006\)](#);

[FN120]. Piraino, *supra* note 33, at 65. Some states encourage the teaming of attorneys and lay volunteers in practice or by statute. In Florida, the statutes permit the appointment of a CASA as a guardian ad litem without an attorney, but in practice the Statewide Office of the Guardian ad Litem has an attorney representing the lay volunteer or staff advocate in all proceedings. *See* 2004 FLORIDA PROGRESS REPORT, *supra* note 27, at 15. Illinois requires an attorney to represent a non-attorney guardian ad litem. *See* [705 ILL. COMP. STAT. ANN. 405/2-17](#) (West 2005).

[FN121]. Piraino, *supra* note 33, at 63.

[FN122]. *Id.* at 65.

[FN123]. This is the dominant model followed in Florida through its Statewide Office of the Guardian ad Litem. STATE OF FLA. GAL STANDARDS OF OPERATION 1.4 (2003).

[FN124]. *Cf.* Lidman & Hollingsworth, *supra* note 2, at 285 (comparing role of GAL *as a party* to that of attorney *for a party*). “In their capacity as guardian ad litem pro se parties, they would be held to the same basic standards as attorneys. They could call witnesses on their own behalf and cross-examine all other witnesses. They would not give recommendations to the court, but could make arguments to the court. Like other lawyers, they could not express their personal opinion as to the veracity of witnesses nor the justness of a claim. They could conduct depositions, but would not have a right to interview other parties without those parties' lawyers present. They would be given notice of all proceedings and would have to sign all agreed orders.” Lidman & Hollingsworth, *supra* note 2.

[FN125]. ALASKA CINA R. P. 7(c) (2005); [ARK. CODE ANN. § 9-27-316\(g\)\(5\) \(2004\)](#); COLO. REV. STAT. § 19-1-111(3) (2006); DEL. CODE ANN. Tit. 13 § 3602(10) (2006); FLA. STAT. ANN. § 39.01(51) (2005); GA. CODE ANN. § 15-11-39 (2005); MASS. GEN. LAWS [Juv. Ct. R. 7 \(2004\)](#); [MICH. COMP. LAWS ANN. § 712A.17d](#) (West 2005); [N.H. REV. STAT. ANN. § 169-C:3\(XXI-a\) \(2004\)](#); [N.C. GEN. STAT. § 7B-601\(a\) \(2005\)](#); [OHIO REV. CODE ANN. § 2151.281\(D\) \(West 2006\)](#); OR. REV. STAT. § 419A.170 (2006); [42 PA. CONS. STAT. ANN. § 6311\(a\) \(West 2006\)](#); [S.C. CODE ANN. § 20-7-490\(22\) \(2004\)](#); [TENN. CODE ANN. § 37-1-117\(c\) \(2005\)](#);

VA. CODE ANN. § 16.1-253 (2005); WASH. REV. CODE § 13.34.100(5) (2005); [WYO. R. CIV. P. 17\(c\) \(2005\)](#).

[FN126]. [ARK. CODE ANN. § 9-27-316 \(2004\)](#); [COLO. REV. STAT. § 19-1-111\(6\) \(2006\)](#); [IOWA CODE ANN. § 232.89 \(2005\)](#); [KY. REV. STAT. ANN. § 620.100 \(2004\)](#); [MASS. GEN. LAWS ch. 119 § 29 \(2004\)](#); [MICH. COMP. LAWS ANN. § 712A.17d \(West 2005\)](#); [NEB. REV. STAT. § 43-272 \(2006\)](#); [N.C. GEN. STAT. § 7B-601\(a\) \(2005\)](#); [42 PA. CONS. STAT. ANN. § 6311 \(West 2006\)](#); [S.C. CODE ANN. § 20-7-490\(22\) \(2004\)](#); [TENN. CODE ANN. § 37-1-149 \(2005\)](#); [VA. CODE ANN. § 16.1-266 \(2005\)](#); [WYO. STAT. ANN. § 14-3-211 \(2005\)](#).

[FN127]. [ARK. CODE ANN. § 9-27-316\(g\)\(5\) \(2004\)](#); [KY. REV. STAT. ANN. § 620.180 \(2004\)](#); [MICH. COMP. LAWS ANN. § 712A.17d \(West 2005\)](#); [VA. CODE ANN. §§ 16.1-253, 9.1-153\(B\) \(2005\)](#).

[FN128]. [ALASKA CINA R. P. 7\(C\)\(2005\)](#); [DEL. CODE ANN. Tit. 13 § 3602\(10\) \(2006\)](#); [FLA. STAT. ANN. § 39.01\(51\) \(2005\)](#); [GA. CODE ANN. § 15-11-39 \(2005\)](#); [IDAHO CODE ANN. § 16-1634\(1\) \(2005\)](#); [MISS. CODE ANN. § 43-21-121\(4\) \(West 2005\)](#); [N.H. REV. STAT. ANN. § 169-C:3\(XXI-a\) \(2004\)](#); [OHIO REV. CODE ANN. § 2151.281\(1\) \(West 2006\)](#); [OR. REV. STAT. § 419A.170 \(2006\)](#); [WASH. REV. CODE § 13.34.100\(5\) \(2005\)](#). Montana and Idaho allow volunteer advocates to be appointed as guardians ad litem, but prohibit them from filing motions unless represented by counsel. See [MONT. CODE ANN. § 41-3-112\(3\)\(g\) \(2005\)](#); [IDAHO CODE ANN. § 16-1634\(1\) \(2005\)](#).

[FN129]. Presumably, there would be no unauthorized practice of law with an attorney GAL representing himself or herself in the proceeding. Florida prohibits a GAL, whether an attorney or non-attorney, from filing any motions or calling witnesses in a divorce proceeding, see [FLA. STAT. ANN. § 61.403 \(West 2004\)](#), but permits a non-licensed advocate to represent herself or himself in a dependency proceeding, see [FLA. STAT. ANN. § 39.01\(51\) \(West 2004\)](#).

[FN130]. [OR. REV. STAT. § 419A.170\(1\) \(2006\)](#).

[FN131]. [42 U.S.C.A. § 5106a\(b\)\(2\)\(A\)\(xiii\)\(I\)](#).

[FN132]. This position was recently endorsed by the National Conference of Commissioners on Uniform State Laws. While supporting the spread of CASA, the Commissioners found that the fundamental importance of the interests at stake requires the appointment of an attorney. National Conference of Commissioners on Uniform State Laws, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT, § 4 (2006), available at http://www.law.upenn.edu/bll/ulc/rarccda/2006_finalact.htm.

[FN133]. See Lidman & Hollingsworth, *supra* note 2, at 287 (detailing the procedural problems with guardians ad litem as lawyers, expert witnesses, investigators, or mediators, or functioning in other roles in dissolution matters).

[FN134]. As the Oklahoma Supreme Court has recognized:

In a termination proceeding, if a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client, with the child caught in the middle. Beneath each side's argument in terms of the best interests of the child, lies the desire to prevail for a client, who is not the child. When the court appoints an attorney for the child, testimony is presented and cross-examination done by an advocate who is only interested in the welfare of the child.

In re [T.M.H., 613 P.2d 468, 470 \(Okla. 1980\)](#).

[FN135]. Although there has been much debate about which model of advocacy, attorney or CASA, provides the best benefit for the children, there is little empirical evidence to support either model. One study evaluated representation by CASA programs and found there was no significant difference between CASA advocates and non-CASA advocates in the percent of children's needs met or in the children's well-being. However, those children with CASA ad-

vocates who had open cases were more likely to be placed in out-of-home care (63% vs. 18%), less likely to be reunified with their family (13% vs. 50%), and less likely to be placed in kin care (8% vs. 27%). CALIBER ASSOC., NAT'L CASA, EVALUATION OF CASA REPRESENTATION 41 exhibit 24 (2004), available at http://www.casenet.org/download/casa-surveys/caliber_casa_report_presentation.pdf.

Another study evaluated three types of representation for abused children, including private attorneys with special training, law students with the same training working under interdisciplinary faculty, and trained lay volunteers working under the supervision of an experienced, specially trained attorney. All groups performed substantially alike as child advocates and on the whole, improved the quality of existing representation by rotating general attorneys. Better outcomes were achieved through training, careful selection of volunteers, and the supervision or direct services of an attorney. These models substantially benefited the child and the court system by reducing the number of hearings and the time necessary to bring the case to a conclusion. Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 341-42, 389 (1987).

A major national study evaluated the impact of different types of GALs on serving children's best interests. The models studied included: Law School Clinic Model; Staff Attorney Model; Paid Private Attorney Model; Lay Volunteer/Paid Attorney Model (CASA/Attorney Model); and Lay Volunteer Model (Unassisted CASA Model); see CSR, INC., U.S. DEPT OF HEALTH AND HUMAN SERVICES, NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS 1-2 (1988). The private attorney model was found to be least effective due to lack of training and inadequate compensation. The CASA models were most effective on best interest outcome measures, due to personal motivation and small caseloads. However, the staff attorney model provided excellent legal skills to effectively move the case through the court system and obtain needed services for the family. Although attorneys were weaker than CASAs in child contact and follow-up, because of high caseloads, they performed as well or better on placement and case goal measures. *Id.* at 15-21.

Another national study evaluated three types of legal representation for abused and neglected children: 1) the private attorney model; 2) the staff attorney model; and 3) the CASA model. See CSR, INC., U.S. DEPT OF HEALTH & HUMAN SERV., FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM xiii, xvi, xviii (1990). This study addressed the involvement level of private attorneys, and found strength in the quality of their legal representation in the courtroom as well as in negotiation and mediation, although they were less forceful in the cases, and they were involved in fewer non-courtroom activities. *Id.* The staff attorneys were highly involved in legal representation and in negotiations, but had limited contact with the children and were not active in monitoring services for the children or accessing new services or resources for the children. *Id.* CASAs had high activity levels and involvement in investigations and monitoring, but had problems with legal representation and negotiation because they did not attend all hearings in their cases, and if not accompanied by an attorney, were limited in their participation in the courtroom proceedings. *Id.*

[\[FN136\]](#). DUQUETTE & HARDIN, *supra* note 22, at 21 (“The adversary system produces its best results when all positions are argued forcefully before the court.”).

[\[FN137\]](#). There is such an effort underway. See Ventrell, *supra* note 58, at 18 n.127. First Star (a nonprofit based in Washington, D.C., dedicated to improving life for child victims of abuse and neglect by providing research, education, public policy advocacy, and public awareness campaigns) and other national groups have proposed a change to CAPTA to require improved advocacy including mandating an attorney for every child. First Star promotes the following changes to CAPTA: requiring any state receiving federal funds to guarantee trained attorneys for all children in child abuse/neglect/dependency cases; requiring any state receiving federal funds to adopt standards of practice for such attorneys; creating a new federal grant program to support establishment of a multidisciplinary curricula to elevate the quality of legal representation in child abuse/neglect/dependency proceeding; requiring that states using federal money maintain reasonable limits on the number of children each attorney is assigned to represent; provide a program of federal matching funds to support adequate and appropriate compensation for attorneys in child abuse/neglect/dependency cases, conditioned on compliance with mandated standards of practice, caseload controls, and representation at all hearings; and, providing new federal support for longitudinal studies of cost and benefits of legal representation for children, including the relationship between effective representation in cases of

abuse/neglect/dependency and in prevention of delinquency. First Star's Statement of Public Policy Regarding Legal Representation of Children, [http:// www.firststar.org/policy/representation.asp](http://www.firststar.org/policy/representation.asp) (last visited July 19, 2005).

[FN138]. As Professor Mandelbaum has argued, “[t]he legal interests of all abused and neglected children will best be protected and advanced by well-supported and well-trained lawyers for all children--lawyers who have the time, understanding, and commitment to provide representation that is faithful to the lives of their child clients.” Mandelbaum, *supra* note 1, at 90.

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