SAFEGUARDING CHILDREN'S VOICES IN CHILD PROTECTIVE PROCEEDINGS

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> While [courts] are both statutorily mandated and morally constrained to act in the best interests of the child, to the extent possible children should have some voice. It is, after all, their futures [courts] decide, their destinies [courts] begin and their entire lives [courts] affect.[1]

ABSTRACT

In child protective proceedings, courts face the difficult task of determining the permanent placement of a child that promotes their well-being and safety, even if it means terminating their parents' rights. Every year, authorities wrongfully and forcibly remove thousands of children from their families and homes. It is imperative that courts and attorneys adopt steps to provide children a voice and to guarantee children's rights in these proceedings.

Courts hear children's preferences in child protective proceedings through four primary avenues: (1) appointment of a representative for the child, (2) direct in-court testimony, (3) in camera judicial interviews, and (4) admission of children's out-of-court statements. When these options are laid out in conjunction with accompanying federal legislation, observers often applaud them as providing a comprehensive solution for protecting children's voices. However, upon closer examination, the reality is that judges and attorneys have the final say as to whether any of the options are actually offered to children. Appellate courts routinely affirm proceedings where judges did not provide children any of these avenues, disincentivizing courts from deviating from their current practices. This means that courts will continue to regularly ignore and silence children's voices in child protective proceedings. Increasing accountability and oversight of

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1. *In re* Leo M., 24 Cal. Rptr. 2d 253, 259 (Cal. Ct. App. 1993).

the judiciary and children's attorneys can provide the necessary safeguards to protect children's right to be heard.

This Article adds to the existing literature on children's rights in child protective proceedings in two ways. First, it frames children's legal right to participate in child protective proceedings as inherent in their constitutional right to family integrity. The failure to provide children with a meaningful voice in these proceedings violates this right by stripping them of their ability to express their placement preferences. Second, utilizing an updated fifty-state survey of statutes governing child protective proceedings, this Article argues that states should adopt a multitiered framework of accountability and oversight measures to best protect children's rights.

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INTRODUCTION

Brigitte Jolliet entered the Florida foster care system when she was fifteen years old.[2] In the middle of her sophomore year, two child welfare officials took Brigitte out of school without notice and separated her from her older sister and parents.[3] Brigitte recalls the officials were "cold" and never explained why she was removed.[4] That initial lack of transparency continued over the next few years.[5] Despite relaying to her case manager that she would prefer to live with a foster family over a relative, her case manager ignored her preferences and placed her with a relative.[6] Over the next two years, Brigitte was bounced between three different relatives and three different high schools.[7] She went from being an honors student at an A-rated school to a student with poor grades who barely attended class at an underfunded school in a dangerous neighborhood.[8] On top of this, Brigitte frequently received suspensions for fighting.[9] At what Brigitte describes as her "lowest point," one of Brigitte's friends introduced her to a man who promised her wealth, shelter, and college tuition.[10] Brigitte immediately accepted his offer, dropped out of high school, and moved in with him—and soon found herself a victim of sex trafficking.[11] After officials removed Brigitte from her parents' home, a judge appointed a guardian *ad litem*[12] to represent her "best interest[s]," but Brigitte never met this person.[13] She never had an attorney to advocate for her expressed preferences, and despite her legal right to attend court hearings, she never

2. Brigitte Jolliet, *Youth Perspective: This Should Never Have Happened*, NACC: GUARDIAN, Nov.–Dec. 2019, at 1.
3. *See id.*
4. *See id.*
5. *See id.* at 1–2.
6. *See id.* at 2.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. A guardian *ad litem* is a court-appointed representative for a child. Jurisdictions are split as to whether guardians *ad litem* are required to consider a child's expressed preferences in child protective proceedings. *See infra* Section II.B.
13. *See* Jolliet, *supra* note 2, at 1.

exercised this right because she was never informed of it.[14] She never had the opportunity to testify on her own behalf in court or to speak to the judge in chambers.[15] Recounting her story years later, Brigitte explained this "traumatic experience" had a "devastating effect on [her] mental health, rendering [her] particularly vulnerable to the psychological manipulation of a sex trafficker."[16]

Across the country, the Washington State Department of Children, Youth, and Families removed E.H. and E.H.'s siblings from their home when E.H. was only six years old.[17] It took eight months to find E.H. a stable placement, during which time the Department transferred E.H. between three short-term placements.[18] The court appointed a Court-Appointed Special Advocate (CASA)[19] to serve as a guardian *ad litem* for E.H., representing E.H.'s "best interests" but not E.H.'s *expressed* wishes.[20] Throughout the proceedings, E.H. stated his preference to reunify with his mother to the guardian *ad litem*.[21] Instead, the guardian *ad litem* continually advocated for a primary plan of terminating E.H.'s mother's parental rights over possible reunification based on the guardian *ad litem*'s own assessment of E.H.'s best interests.[22] E.H.'s mother filed a motion for appointment of counsel to advocate for E.H.'s stated preferences of reunification, which the court denied.[23] In denying the motion, the court defined the guardian *ad litem*'s duty to report what actions were in E.H.'s best interests to mean that E.H. had a sufficient voice in the proceedings.[24] However, in reality, the proceedings effectively rendered E.H. voiceless because E.H.'s stated interests were misaligned with his guardian *ad litem*'s assessment.[25] Despite the fact that E.H. had no meaningful opportunity to express his preferences to the court either personally or through counsel, the Supreme Court of Washington affirmed the lower court's ruling, concluding that the lower court's refusal to appoint counsel for E.H. was within its discretion and that Washington's discretionary appointment of counsel afforded children sufficient due process.[26]

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14. *See id.* at 1, 3.
15. *See id.*
16. *See id.* at 1. *See generally* Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 769 (2001) (detailing the shortcomings of the Florida child welfare system generally).
17. *See In re* Dependency of E.H., 427 P.3d 587, 590 (Wash. 2018).
18. *See id.*
19. *See id.* A CASA is a volunteer who may or may not be an attorney and who is appointed to represent the best interests of a child in child protective proceedings.
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.* at 595–97 (setting forth a non-exhaustive list of factors courts should consider when determining when a child should be appointed counsel).

In 2021, over 200,000 children were removed from their families and placed in the foster care system.[27] Among these children, stories like Brigitte's and E.H.'s are the norm: children are rarely given the opportunity to express their preferences to the court when their case is brought before a judge.[28] Despite federal legislation mandating appointment of a representative for children in child protective proceedings as a condition for federal funding,[29] States reported only 19% of children involved in child protective proceedings were appointed a representative in 2022.[30] Federal data shows that one-third of states still do not impose this requirement and only one-third of states require counsel to provide "client-directed" representation.[31] Even in cases where a child has an appointed representative, children face an uphill battle if they wish to express their preferences either directly in court, to the judge in chambers, or through out-of-court statements.[32] Most states leave a child's attendance at a hearing up to the discretion of a judge or, if the child has one, the child's representative.[33] A Pew Research study found more than one in four children involved in child protective proceedings reported they never attended a court hearing.[34] Moreover, some social workers actively discourage children from attending court, and even if they attend, the court proceedings may be inaccessible due to highly technical legal jargon, inflexible timing, and rigid procedures.[35] This directly impacts the possibility of children attending court and, in turn, their ability to testify before a judge.[36]

When children do appear in court, they will either have to testify in an intimidating open-court setting that may compromise their

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27. CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf.

28. *See* Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968 (2006); Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362, 1367 (2006) (detailing the story of Natasha Santos who, despite having three lawyers appointed for her, was never told about what was happening in court and never appeared in court during her six years in the foster care system).

29. *See* 42 U.S.C. § 5106a(b)(2)(A)–(B).

30. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2022, at 79–80, 89 (2024) [hereinafter CHILD MALTREATMENT 2022], https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2022.pdf (recognizing 19% may be an undercount due to inaccurate reporting by states who do not have a centralized database or due to lack of records kept).

31. NOY DAVIS, AMY HARFELD, & ELISA WEICHEL, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 30 (4th ed. 2019). For purposes of this Article, "client-directed representation" means a representative who is appointed to advocate for the client's direct preferences rather than their best wishes, which may conflict with each other.

32. *See id.* at 89.

33. *See, e.g.*, IND. CODE ANN. § 31-32-6-8 (2024); MICH. COMP. LAWS ANN. § 712A.12 (2024); OHIO REV. CODE ANN. § 2151.35 (2023).

34. *See id.*

35. *See* Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 166 (2008).

36. *See generally* GLORIA HOCHMAN, ANNDEE HOCHMAN, & JENNIFER MILLER, THE PEW COMM'N ON CHILD. IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE (2004).

truthfulness,[37] or they will have to seek shielding measures or in-chambers testimony.[38] The decision of whether to allow shielding measures or in-chambers testimony often lies squarely with the judge.[39] As a final option, a child's attorney—if one is appointed—could seek to admit a child's out-of-court statements into court.[40] However, this avenue often requires overcoming substantial procedural and evidentiary burdens, and the decision is again left to a judge.[41]

Over the past few decades, some legal scholars and national child advocacy organizations have pushed to eliminate these hurdles to allow children easier access to voice their preferences in child protective proceedings.[42] The vast majority of this scholarship focuses on the need for states to adopt legislation or standards mandating appointment of client-directed counsel to represent children's expressed preferences, not only their "best interests."[43] Courts in related areas, including criminal law and child custody, have long recognized and mandated consideration of the child's preference.[44] Legal scholars in these related fields advocate for broadening

37. *See* Dorothy F. Marsil, Jean Montoya, David Ross, & Louise Graham, *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 214 (2002).

38. *See* Laureen A. D'Ambra, *The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, 19 ROGER WILLIAMS U. L. REV. 323, 344 (2014).

39. *See, e.g.*, CAL. WELF. & INST. CODE § 350 (West 2024) ("The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents."); FLA. R. JUV. P. 8.255(d)(2).

40. *See generally* Jean R. Montoya, *Child Hearsay Statutes: At Once Over-Inclusive and Under-Inclusive*, 5 PSYCH., PUB. POL'Y, & L. 304, 310 (1999).

41. *See id.*

42. *See* Rachel Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L.J. 911, 955 (2023); Peters, *supra* note 28, at 968–69; Ross, *supra* note 28, at 1367; HOCHMAN, HOCHMAN, & MILLER, *supra* note 36, at 4; 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, 61 (2000); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 305–06 (1998); STANDARDS FOR LAWS. REPRESENTING A CHILD IN ABUSE & NEGLECT CASES § D-5 cmt. at 11 (AM. BAR ASS'N 1996) [hereinafter ABA STANDARDS OF PRACTICE].

43. For example, if a child's appointed representative believes termination of a child's parents' rights is in the child's best interests, but a child wishes to remain with their parents, then a representative who is only appointed to represent the child's best interests may advocate for termination, disregarding the child's expressed preferences. Unlike statutes governing child custody proceedings, statutes governing child protective proceedings often do not direct courts to consider a child's wishes in child protective proceedings. *See, e.g.*, TEX. FAM. CODE ANN. § 263.307 (Vernon 2023); *see also* Kennedy, *supra* note 42, at 955; Peters, *supra* note 28, at 968–69; Ross, *supra* note 28, at 1367. *See generally* HOCHMAN, HOCHMAN, & MILLER, *supra* note 36, at 4; Mandelbaum, *supra* note 42, at 61; Guggenheim, *supra* note 42, at 299; ABA STANDARDS OF PRACTICE, *supra* note 42.

44. *See* PERMANENT JUD. COMM'N FOR CHILD., YOUTH & FAMILIES, SUP. CT. OF TEX., CHILD-FRIENDLY COURTROOMS: ITEMS FOR JUDICIAL CONSIDERATION 27–28 (2011) [hereinafter CHILD-FRIENDLY COURTROOMS]; Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 387 (2011). In child custody proceedings, thirty-five states have adopted legislation directing courts to consider a child's preference as part of its custody analysis. *See* ALASKA STAT. ANN. § 25.24.150 (West 2024); ARIZ. REV. STAT. ANN. § 25-403 (2024); COLO. REV. STAT. ANN. § 14-10-124 (West 2024); CONN. GEN. STAT. ANN. § 46b-56 (West 2024); D.C. CODE ANN. § 16-914 (West 2024); FLA. STAT. ANN. § 61.13 (West 2024); IDAHO CODE ANN. § 32-717 (West 2024); 750 ILL. COMP. STAT. ANN. 5/602.7 (West 2024); IND. CODE ANN. § 31-14-13-2 (West 2024); IOWA CODE ANN. § 598.41 (West 2024); KAN. STAT. ANN. § 23-3203 (West 2024); KY. REV. STAT. ANN. § 403.270 (West 2024); LA. CHILD.

the scope of children's rights, ensuring they have multiple avenues to articulate their preferences.[45] The shift toward client-directed proceedings optimally balances children's legal right to be heard and their desire to feel like their opinions matter with attorney's ethical obligations to maintain as close to a normal attorney–client relationship as possible with child clients.[46] However, even in states that adopt a client-directed representation model, attorneys may still fail to adequately represent a child's preferences without additional accountability measures.

Recent legal scholarship advocating for the Supreme Court to explicitly recognize a child's constitutional right to family integrity further underscores the importance of safeguarding children's right to express their preferences in court.[47] Scholars define this right as the "right to family relationships free from unwarranted state interference."[48] These scholars argue that this right is firmly rooted in Fourteenth Amendment due process jurisprudence and encourage children to assert this right in child protective proceedings.[49] Conferring party status on children and ensuring they are able to voice their preferences in these proceedings will protect this right.[50]

Empowering children to participate in these proceedings helps them gain autonomy and preserve their dignity through the court process.[51] Allowing children greater control and direction in these proceedings advances "therapeutic jurisprudence" by utilizing courts as a tool for "emotional well-being" and "protect[ing] families and children from present and future harms" in addition to adjudication.[52] In the child protective proceedings context, the therapeutic justice framework promotes giving

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CODE ANN art. 134 (2024); ME. REV. STAT. ANN. tit. 19-A, § 1653 (West 2024); MD CODE ANN., FAM. LAW § 9-204.1 (West 2024); MICH. COMP. LAWS ANN. § 722.23 (West 2024); MINN. STAT. ANN. § 518.17 (West 2024); MO. ANN. STAT. § 452.375 (West 2024); MONT. CODE. ANN. § 40-4-212 (West 2023); NEB. REV. STAT. ANN. § 43-2923 (West 2024); NEV. REV. STAT. ANN. § 125C.0035 (West 2023); N.J. STAT. ANN. § 9:2-4 (West 2024); N.M. STAT. ANN. § 40-4-9 (West 2024); N.D. CENT. CODE ANN. § 14-09-06.2 (West 2023); OHIO REV. CODE ANN. § 3109.04 (West 2023); OR. REV. STAT. ANN. § 107.137 (West 2024); 23 PA. STAT. AND CONS. STAT. § 5328 (West 2024); S.C. CODE ANN. § 63-15-240 (2024); TENN. CODE ANN. § 36-6-106 (West 2024); UTAH CODE ANN. § 81-9-204 (West 2024); VA. CODE ANN. § 20-124.3 (West 2024); W. VA. CODE ANN. § 48-9-102 (West 2024); WIS. STAT. ANN. § 767.41 (West 2023).

45. *See* Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUST. 12, 12 (2009); Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 IND. L.J. 909, 911 (2007); *see also* Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & C.R. L. REV. 663, 665 (2006).

46. *See* Kennedy, *supra* note 42, at 955; MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 1983).

47. *See, e.g.*, Kennedy, *supra* note 42, at 917; Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 287 (2021); Melissa D. Carter, *An Ounce of Prevention Is Worth a Pound of Cure: Why Children's Lawyers Must Champion Preventive Legal Advocacy*, 42 CHILD. LEGAL RTS. J. 1, 5 (2021).

48. *See* Kennedy, *supra* note 42, at 911.

49. *See* Trivedi, *supra* note 47, at 277.

50. *See* Kennedy, *supra* note 42, at 959.

51. *See* Atwood, *supra* note 44, at 385; Pitchal, *supra* note 45, at 665.

52. *See* Barbara A. Babb, *Family Courts Are Here to Stay, So Let's Improve Them*, 52 FAM. CT. REV. 642, 643 (2014); Bruce J. Winick, *Problem Solving Courts and Therapeutic Jurisprudence*, 30 FORDHAM URB. L.J. 1055, 1063 (2003).

children a voice in court and validating their voices by helping them feel that judges have listened to them and seriously considered their opinions.[53] Even if a judge ultimately does not follow a child's wishes, merely having the opportunity and control to express those wishes affords children the power to combat feelings of fear and helplessness that inevitably accompany these proceedings.[54]

This Article argues that courts and attorneys must take all reasonable steps to ensure children are able to express their preferences in court to safeguard their constitutional rights. Part I joins the legal scholars who support mandatory appointment of client-directed counsel for all children involved in child protective proceedings and assert courts should appoint this counsel during the investigatory phase rather than post-removal.[55] Then, Part I articulates why children have the right to express their wishes in child protective proceedings and describes how considering children's preferences benefits children, courts, and all parties involved. Next, Part II uses an updated fifty-state survey to summarize the current approaches to incorporating children's voices in child protective proceedings and discuss the shortcomings of each of these avenues.[56] Part III begins by arguing that as a threshold matter, children should be given legal status as a party in all child protective cases and should receive client-directed representation in all reasonable circumstances.[57] Part III then advances a proposed oversight and accountability framework that would safeguard children's legal right to be heard in child protective proceedings. Part III argues that judges and attorneys have a responsibility to provide children a voice in court utilizing (1) direct testimony in court, (2) in camera judicial interviews, and (3) admission of a child's out-of-court statements. While these avenues appear comprehensive, they are largely ineffective if they are underutilized in practice without consequence to judges or attorneys.[58]

I. CHILDREN'S RIGHT TO BE HEARD IN CHILD PROTECTIVE PROCEEDINGS

> My attorney never comes around, I don't know his name or her name. I don't even know if he knows me. He/she doesn't call me or nothing.

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53. *See* Winick, *supra* note 52, at 1068.

54. *See* Jenkins, *supra* note 35, at 168–69; Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302, 1307 (2006).

55. *See* Kennedy, *supra* note 42, at 956; Peters, *supra* note 28, at 968; Ross, *supra* note 28, at 1365; HOCHMAN, HOCHMAN, & MILLER, *supra* note 36, at 9–10; Mandelbaum, *supra* note 42, at 61; Guggenheim, *supra* note 42, at 303–04.

56. *See infra* Appendix A (summarizing state statutes as of January 1, 2024).

57. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2(d) (2024); TEX. FAM. CODE ANN. § 107.008 (West 2023).

58. *See generally* Ernestine Steward Gray & Brenda C. Robinson, *The Right for Children to Be Present, Be Heard, and Meaningfully Participate in Their Own Dependency Court Proceedings*, AM. BAR ASS'N (Oct. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/empowering-youth-at-risk/the-right-for-children/.

> I don't even go to my court hearings or anything. I have know [sic] idea if my attorney cares about what I say or how I feel.[59]

Before discussing the avenues for children to articulate their preferences in child protective proceedings, it is helpful to understand why children have the right to state their preferences in the first place. This Part begins by summarizing recent legal scholarship that defines the parameters of recognized constitutional rights of children. Then, this Part shifts to discussing how giving a voice to children benefits children and courts.

A. The Constitutional Rights of Children in Child Protective Proceedings

Over the past few decades, legal scholars have pushed for recognition of the constitutional rights of children independent from those of their parents.[60] This scholarship is rooted in the seminal case *In re Gault*,[61] in which the Supreme Court explicitly recognized the constitutional rights of children.[62] The Supreme Court expanded the constitutional rights of children in *Planned Parenthood of Central Missouri v. Danforth*,[63] stating: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[64] In the child protective proceedings context, the Supreme Court has opened the door for recognition of two separate rights of children by lower courts: the child's right to family integrity and the child's right to effective assistance of counsel.[65]

1. Children's Constitutional Right to Family Integrity

Several legal scholars have argued for the Supreme Court to recognize that children have a constitutional right to family integrity.[66] In the family regulation system context,[67] recognition of this right would

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59. CHILD.'S COMM'N, SUP. CT. OF TEX., 2018 STUDY OF LEGAL REPRESENTATION IN CHILD PROTECTIVE SERVICES CASES 73 (2018) [hereinafter TEXAS STUDY OF LEGAL REPRESENTATION], https://texaschildrenscommission.gov/media/83923/2018-legal-representation-report-final-online.pdf (quoting survey response from Texas youth in foster care regarding their court-appointed attorney).

60. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1532 (2018); *see* Martha Minow, *Children's Rights Debates, Revisited*, 75 FLA. L. REV. 195, 212–14 (2023); Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 428 (2023); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 884 (2007); Catherine E. Smith, *The Rights of the Child*, 88 DENV. U. L. REV. ONLINE 2–3 (2011).

61. 387 U.S. 1 (1967).

62. *Id.* at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

63. 428 U.S. 52 (1976).

64. *Id.* at 74.

65. *See* Barbara J. Elias-Perciful, *Protecting Texas Children: The Constitutional Rights of Children*, 73 TEX. B.J. 750, 750 (2010).

66. *See, e.g.*, Kennedy, *supra* note 42, at 917; Trivedi, *supra* note 47, at 287; Carter, *supra* note 47, at 5.

67. This Article follows the lead of other legal scholars who argue the "child welfare system" can more accurately be described as the "family regulation system." *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020, 5:26 AM),

guarantee children the ability to be heard, empower children who are otherwise in extremely vulnerable positions, and acknowledge the significant emotional burden placed on children when states interfere with their families.[68] A child's right to family integrity supports child-directed representation balanced against parents' rights to direct the care, custody, and control of their children[69] and the state's role as *parens patriae*.[70] When a child desires to reunify with their parents (in other words, to maintain their family integrity), they should hold an absolute right to express that desire, even if the court ultimately does not honor it.[71]

Scholars find support for a right to family integrity within longstanding Fourteenth Amendment due process jurisprudence, spanning back to the 1923 case *Meyer v. Nebraska*.[72] *Meyer* was the first case wherein the Supreme Court held a fit parent has a right to "establish a home and bring up children" free from government interference.[73] Following *Meyer*, the Supreme Court issued its ruling in *Pierce v. Society of Sisters*[74] in 1925. In *Pierce*, the Court held a state law requiring public schooling unconstitutionally interfered with "the liberty of parents and guardians to direct the upbringing and education of children."[75] *Prince v. Massachusetts*[76] finishes off the trio of cases from the early twentieth century. In *Prince*, the Court articulated: "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[77]

Almost thirty years later, the Court reaffirmed the right to family integrity in *Stanley v. Illinois*.[78] In *Stanley*, the Court held a statute that placed children of unwed mothers into foster care upon their mothers' death without a hearing on the father's fitness was unconstitutional.[79] In

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https://perma.cc/B2TJ-W3XA; Emma Ruth, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing Our Language*, THE IMPRINT (July 28, 2020, 11:45 PM), https://perma.cc/3FAJ-P5PB.

68. *See* Trivedi, *supra* note 47, at 276.

69. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

70. *See* Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. POVERTY L. & POL'Y 137, 148–49 (2004). *Parens patriae* is Latin for "parent of the country." It refers to the power of the state to assume its parental role and intervene against a negligent or abusive parent to protect vulnerable children. *See* Daniel L. Hatcher, *Purpose vs. Power:* Parens Patriae *and Agency Self-Interest*, 42 N.M. L. REV. 159, 159 (2012).

71. *See* Trivedi, *supra* note 47, at 289; *see also* Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 79 (1984).

72. 262 U.S. 390 (1923); *see* Trivedi, *supra* note 47, at 277; *see also* Cheryl M. Browning & Michael L. Weiner, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 213 (1979).

73. *See Meyer*, 262 U.S. at 399.

74. 268 U.S. 510 (1925).

75. *Id.* at 534–36.

76. 321 U.S. 158 (1944).

77. *See id.* at 166.

78. 405 U.S. 645, 658–59 (1972).

79. *Id.* at 658.

striking down the statute, the court recognized that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."[80]

Following *Stanley*, the Court reaffirmed *Meyer*[81] and *Pierce*[82] in *Smith v. Organization of Foster Families for Equality and Reform*,[83], recognizing the rights of families as a whole.[84] Specifically, the Court emphasized the "importance of the familial relationship, to the individuals involved . . . stems from the emotional attachments that derive from the intimacy of daily association."[85] In his concurrence, Justice Stewart (joined by Justices Burger and Rehnquist), further pointed to the rights of all members of a family by advancing:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents *and their children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."[86]

The following year, the Court pointed to the rights of children in maintaining a family unit again in *Quilloin v. Walcott*.[87] In *Quilloin*, the Court found the State had not acted improperly when it found adoption was in the child's best interests without notice to the child's biological father, who never sought custody or participated in the child's life.[88] The Court went on, in *dicta*, to articulate that it had "little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents *and their children*.'"[89] A few years later, the Court reiterated its reasoning in *Santosky v. Kramer*,[90] stating, "until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship."[91] Through *Smith*, *Quilloin*, and *Santosky*, the Supreme Court seemingly reaffirmed that the right to family integrity was "reciprocal, running both from the child to the parent and the

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80. *Id.* at 651 (internal citations omitted).
81. 262 U.S. 390 (1923).
82. 268 U.S. 510 (1925).
83. 431 U.S. 816 (1977).
84. *Id.* at 844.
85. *Id.*
86. *Id.* at 862–63 (emphasis added) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
87. *See* 434 U.S. 246, 255 (1978).
88. *See id.*
89. *Id.* (emphasis added) (quoting *Smith*, 431 U.S. at 862–63).
90. 455 U.S. 745 (1982).
91. *Id.* at 760 (emphasis added); *see also* Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 DUKE J. CONST. L. & PUB. POL'Y 179, 206 (2017).

parent to the child . . . suggest[ing] that either party could invoke the right, not just the parent."[92]

Dicta in Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*[93] provides the only contradictory blip in the longstanding precedent supporting the Court's recognition of a child's constitutional right to family integrity.[94] Justice Scalia indicated in his opinion that the Court had "never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."[95] This one sentence cast doubt on the Supreme Court's recognition of a child's constitutional right—equal to that of their parents—to family integrity.[96] However, legal scholars Shanta Trivedi and Susan Hazeldean argue that *Michael H.* is distinguishable from other similar cases and point to more recent precedent that revitalizes the Court's recognition of children's constitutional right to family integrity.[97] First, Justice Scalia's statement in *Michael H.* specifically commented on whether the Supreme Court ever decided if a child has a liberty interest in a relationship with a non-legal parental figure with no parental claim. This leaves open the possibility that a child does have a constitutional right to a relationship with their legal parent.[98] Second, Trivedi and Hazeldean point out that Justice Stevens' dissent in *Troxel v. Granville*[99] and the Court's opinion in *Obergefell v. Hodges*[100] seemingly support children's rights to preserve the parent–child relationship separate from their parents' rights.[101] In *Troxel*, Justice Stevens opined, "[T]o the extent parents and families have fundamental liberty interests in preserving [established familial or family-like bonds], so, too, do children have these interests, and so, too, must their interests be balanced in the equation."[102] The *Obergefell* majority seconded Justice Stevens' perspective, noting that when LGBTQ+ people are excluded from legally recognized marriages, "their children suffer the stigma of knowing their families are somehow lesser."[103] Hazeldean argues this language suggests that "a child's most important right is to live with [their] parents in families that are legally protected and secure."[104]

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92. Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319 (2007).
93. 491 U.S. 110 (1989).
94. *See id.* at 130.
95. *Id.*
96. *See id.*
97. *See* Trivedi, *supra* note 47, at 281; Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397, 1411 (2017).
98. *See* Trivedi, *supra* note 47, at 281; Kennedy, *supra* note 42, at 926.
99. 530 U.S. 57 (2000).
100. 576 U.S. 644 (2015).
101. *See* Trivedi, *supra* note 47, at 281; Kennedy, *supra* note 42, at 926.
102. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).
103. *Obergefell*, 576 U.S. at 668.
104. *See* Hazeldean, *supra* note 97, at 1407.

Beyond Supreme Court precedent, scholars find support for a child's constitutional right to family integrity in other federal case law.[105] No federal court of appeals has explicitly held the right does not exist, and six circuits explicitly recognize it.[106] In *Duchesne v. Sugarman*,[107] the first case where a federal court recognized a child's constitutional right to family integrity, the Second Circuit concluded children hold a liberty interest in "not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent."[108] The Second Circuit stressed that the "reciprocal rights of both parent and children" to "remain together without the coercive interference of the awesome power of the state" was the "most essential" component of family privacy.[109] Based on this reasoning, the court held that family whose mother was separated from the children for months was "deprived of their right to live together as a family by the refusal to return the children to the custody of the mother."[110]

Similarly, in *Wallis ex rel. Wallis v. Spencer*,[111] the Ninth Circuit recognized a child's right to family integrity in a case where authorities removed a two-year-old and five-year-old child from their home based on reports by a relative despite the fact that "[t]he children appeared well cared for" and "there was no sign of anything suspicious."[112] Relying on the Supreme Court cases articulated earlier in this section, the Ninth Circuit found "[p]arents *and children* have a well-elaborated constitutional right to live together without governmental interference" under the Fourteenth Amendment.[113]

Beyond *Duchesne* and *Wallis*,[114] multiple federal circuits have similarly recognized a child's right to family integrity that must be protected in child protective proceedings.[115] These courts have mirrored the Second and Ninth Circuits in finding "a child's right to family integrity is concomitant to that of a parent"[116] and "children enjoy the . . . familial right to be raised and nurtured by their parents."[117] In the limited case law addressing

105. *See* Trivedi, *supra* note 47, at 282; Kennedy, *supra* note 42, at 926. Though less extensively than federal courts, state courts have also recognized a constitutional right to family integrity in termination of parental rights proceedings. *See* J.B. v. DeKalb Cnty. Dep't of Hum. Res., 12 So. 3d 100, 115 (Ala. Civ. App. 2008); Pamela B. v. Ment, 709 A.2d 1089, 1098 (Conn. 1998).

106. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); Jordan by Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994); Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000); Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002); Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999); J.B. v. Wash. Cnty., 127 F.3d 919, 925 (10th Cir. 1997).

107. *Duchesne*, 566 F.2d at 825.

108. *Id.*

109. *Id.*

110. *Id.*

111. 202 F.3d 1126 (9th Cir. 2000).

112. *Id.* at 1134.

113. *Id.* at 1136 (emphasis added).

114. *Duchesne*, 566 F.2d at 825.

115. *Id.*; Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000); Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002).

116. *Wooley*, 211 F.3d at 923.

117. *Berman*, 291 F.3d at 983.

the appropriate level of scrutiny, federal circuit courts have subjected violations of this right to rational basis review.[118] That is, examining whether the state's actions rationally furthered a legitimate state interest. In *Jordan ex rel. Jordan v. Jackson*,[119] the Fourth Circuit analyzed a child and his parents' claim alleging the state violated their constitutional right to family integrity when it removed a child from his home and placed him in a foster home for a weekend.[120] The court stressed that a delay "even for a short time . . . implicates the child's interests in his family's integrity and in the nurture and companionship of his parents."[121] Applying rational basis review, the court held the state's sixty-five-hour over the weekend delay before a hearing on the removal "did not unconstitutionally infringe upon the [family's] substantial private interests in their family's integrity."[122] Together with the Supreme Court precedent, these cases set the stage for future advocacy efforts in support of children's independent right to family integrity.[123]

2. Child's Constitutional Right to Effective Assistance of Counsel

Although the Supreme Court has not explicitly addressed whether children have a constitutional right to effective assistance of counsel in child protective proceedings, it has held that the Constitution does not require an absolute right to court-appointed counsel for parents in termination cases.[124] Rather, appointment of counsel should be determined on a case-by-case basis.[125] Specifically, the court found courts should weigh the factors it articulated in *Mathews v. Eldridge*[126] when appointing counsel.[127] However, the court included a caveat in its opinion, noting that the majority of states provide a statutory right to appointment of counsel and lauded appointment of counsel for indigent parents as "enlightened and wise."[128] As for appointed counsel for children, several courts have held under their state constitutions that children have a constitutional right to effective

118. *See* J.B. v. Wash. Cnty., 127 F.3d 919, 928 (10th Cir. 1997) (finding that although there may have been faster ways to accomplish the state's objective of investigating a report of abuse, the officials acted in good faith and thus, "did not impermissibly interfere with plaintiffs' right of familial association"); Jordan by Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994).

119. *Jackson*, 15 F.3d at 346.

120. *Id.*

121. *Id.*

122. *Id.* at 351; *see also J.B.*, 127 F.3d at 932 ("[T]he County had an important interest in investigating the report of child abuse, and the means used to effect a private interview with [the parent] rationally furthered that interest and were not unduly intrusive under these circumstances.").

123. *See* Brief for Office of the Child's Representatives as Amici Curiae Supporting Guardian Ad Litem's Opening Brief, People v. R.B., 521 P.3d 637 (2022) (No. 22SC213).

124. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 34 (1981).

125. *Id.*

126. 424 U.S. 319, 335 (1976).

127. *Id.* ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

128. *Lassiter*, 452 U.S. at 34.

assistance of counsel in termination proceedings.[129] In *In re Jamie TT.*,[130] the court held a child had both a constitutional and statutory right to legal representation of her interests.[131] The court stressed that this right was "not satisfied merely by the State supplying a lawyer's physical presence in the courtroom; [the child] was entitled to 'adequate' or 'effective' legal assistance."[132]

Conversely, at least one state court has held children do not hold a constitutional right to appointed counsel under its state constitution.[133] In *In re S.K-P.*,[134] the Washington Court of Appeals followed the analytical approach of the Supreme Court in *Lassiter v. Department of Social Services of Durham County*.[135] Rejecting an absolute right to court-appointed counsel for children under the Washington constitution, the court instead found *Lassiter*'s case-by-case approach was sufficient.[136] The court reasoned: "each child's ability to benefit from appointed counsel is different. Indeed, an infant's need for, and ability to benefit from, appointed counsel is significantly different from a fifteen-year-old's."[137] Like the Supreme Court, the Washington Court of Appeals directed courts to apply the *Mathews* factors in determining whether to appoint counsel, but generally "recognize[d] the potential benefits of court-appointed counsel."[138]

B. Therapeutic Jurisprudence in Child Protective Proceedings

Safeguarding children's ability to express their placement preferences allows the therapeutic jurisprudential paradigm to operate in child protective proceedings.[139] Family law professor and scholar Barbara A. Babb argues that family law decision-makers have a responsibility to "look beyond the individual litigants involved in any family law matter, to holistically examine the larger social environments in which the participants live, and to fashion legal remedies that strengthen a family's supportive relationships."[140] Most children enter the family regulation system

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129. *See, e.g.*, *In re* N.L., 347 P.3d 301, 304 (Okla. Civ. App. 2014) ("[T]his Court holds that a child in a parental rights termination proceeding has a constitutional right to effective assistance of counsel."); Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1359–60 (N.D. Ga. 2005).

130. 191 A.D.2d 132 (N.Y. 1993).

131. *Id.* at 136.

132. *Id.*

133. *See In re* Dependency of S.K-P., 401 P.3d 442, 454 (Wash. Ct. App. 2017).

134. *Id.*

135. *Id.* at 457–58; *see also* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18 (1981).

136. *In re Dependency of S.KP.*, 401 P.3d at 459.

137. *Id.*

138. *Id.*

139. *See generally* Barbara A. Babb, *Family Law and Therapeutic Jurisprudence: A Caring Combination—Introduction to the July 2021 Special Issue of* Family Court Review, 59 FAM. CT. REV. 409, 409 (2021); Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 777 n.11 (1997) [hereinafter Babb, *An Interdisciplinary Approach*] (quoting David Wexler's definition of "therapeutic jurisprudence": "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers or judges).").

140. *See* Babb, *An Interdisciplinary Approach*, *supra* note 139, at 803.

following exposure to trauma.[141] Courts should mitigate, not exacerbate, that trauma through their practices and procedures.

Even if a judge ultimately does not believe a child's preference is in their best interests, it is still important for children to feel like they have a voice in child protective proceedings.[142] Social science research in family and juvenile law demonstrates that children have better long-term outcomes when they feel they have a voice in court proceedings.[143] Promoting this involvement early can prepare children for emancipation, and may help mitigate against their high risk of future criminal or gang activity or potential exploitation.[144] A 2011 study found a positive correlation between children's court hearing attendance and their reported belief that they trusted the judge to do what was best for them.[145] In contrast, children who did not attend their hearings felt the judges did not have enough information to make the "right decision" for them.[146] In a 2006 survey, less than a fifth of children reported they always attended hearings regarding permanency placement.[147] Unfortunately, studies indicate that most children report feeling ignored when courts make decisions concerning their well-being and livelihood.[148] The judicial system that is meant to protect children often discourages children from meaningfully participating in these proceedings by subjecting them to a constant rotation of caseworkers and judges who are reluctant to speak to them at times that respect the children's school schedule.[149]

A 2022 Texas Children's Commission panel highlighted the impact of feeling heard (or not) had on three former foster youths.[150] The first panelist and former foster youth, Betty Bajika, expressed that she felt it was important for youth to attend court so they know "what discussion is being had about their futures and can witness this firsthand."[151] Attending court, she explained, "helped [her] understand the role of the judge" and allowed her to "witness [her] lawyer advocating for her rights."[152] Betty's two co-panelists shared stories of how a negative courtroom experience

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141. *See* Sarah Katz, *Trauma-Informed Practice: The Future of Child Welfare?*, 28 WIDENER COMMONWEALTH L. REV. 51, 62 (2019).

142. *See id.*

143. *See* Nicholas Bala, Rachel Birnbaum, Francine Cyr, & Denise McColley, *Children's Voices in Family Court: Guidelines for Judges Meeting Children*, 47 FAM. L.Q. 379, 380 (2013).

144. Farrah Champagne, *Providing Proper Preparation: Achieving Economic Self-Sufficiency for Foster Youth*, 4 AM. U. LAB & EMP. L.F. 2, 4 (2014).

145. *See* Vicky Weisz, Twila Wingrove, Sarah J. Beal, & April Faith-Slaker, *Children's Participation in Foster Care Hearings*, 35 CHILD ABUSE & NEGLECT 267, 270 (2011).

146. *See id.*

147. *See id.*

148. *See* Bala, Birnbaum, Cyr, & McColley, *supra* note 143, at 381–82.

149. *See* Heidi Bruegel Cox, *Giving Voice to Children: The Older Waiting Child*, GLADNEY BLOG (Sept. 21, 2021, 12:15 AM), https://blog.adoptionsbygladney.com/giving-voice-to-children#gsc.tab=0.

150. *See* Texas Children's Comm'n, *CC On-Demand MCLE: Enhancing the Experience of Children & Youth in Court*, YOUTUBE (Oct. 20, 2022), https://www.youtube.com/watch?v=7ks2lUCT6XM.

151. *Id.* at 01:53 (phrasing summarized).

152. *Id.* at 03:10, 03:29 (phrasing summarized).

adversely impacted their experience.[153] First, Leroy Berrones Soto explained the judge who was first assigned to his case was "traumatizing" because he "always scream[ed] at people," "insult[ed Soto's] parents," did not understand his "family dynamics," and was not culturally competent.[154] Similarly, panelist Ryan Harris expressed he had no memory of even meeting his attorney and as a result, he walked into court not knowing "what was ahead" or "what to expect."[155] He further opined that not having someone to hear his voice likely led to a missed diagnosis of his Attention-Deficit Hyperactivity Disorder, which adversely impacted his ability to succeed after the court proceedings ended.[156]

These statistics and anecdotes raise questions about what avenues are available for children to express their preferences to the court and how courts can ensure they hear these preferences. These avenues fall into two main categories: indirect—where children convey their wishes through a representative—or direct—where children testify in court, in chambers, or through sworn statements. In either scenario, children experience several benefits from increased participation in the proceedings.[157] First, they gain a better sense of control over the outcome of the proceedings, which in turn makes them more invested in the process.[158] When children feel more invested, they are better able to understand the outcome and reasoning and are able to heal and move on after the case concludes.[159] Second, children who actively participate in proceedings may gain a sense that the court cares about and respects them and their autonomous decisions.[160] Over one-third of children in foster care are ten years old or older and are largely able to articulate well-considered reasoning in favor of their preferred permanent placements.[161] Scholars argue that when children are not afforded the opportunity to express themselves, they "never reach their full potential as contributing members of our society."[162]

Given these benefits, why do courts still exclude children from child protective proceedings? First, critics argue that attending hearings and testifying are too traumatic for children. Social science research is split on whether children should testify generally.[163] A few studies have reported that children experience an increased sense of self-worth and personal safety after testifying against their abuser and that providing this testimony

153. *Id.* at 14:35, 36:11.
154. *Id.* at 35:48 (phrasing summarized).
155. *Id.* at 6:08, 14:31.
156. *Id.* at 27:40.
157. *See generally* Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (1999); Jenkins, *supra* note 35, at 169.
158. *See* Jenkins, *supra* note 35, at 169.
159. *See* Krinsky & Rodriguez, *supra* note 54, at 1307.
160. *See* Chaifetz, *supra* note 157, at 10; Suparna Malempati, *Ethics, Advocacy, and the Child Client*, 12 CARDOZO PUB. L., POL'Y & ETHICS J. 633, 658 (2014).
161. *See* Chaifetz, *supra* note 157, at 10.
162. *Id.*
163. *See* American Academy of Pediatrics, *The Child in Court: A Subject Review*, 104 PEDIATRICS 1145, 1146 (1999).

assists with their recovery.[164] Other studies find that the pressures of testifying in court may cause children to experience significant distress that not only affects the reliability of their testimony but also "exacerbate[s] their feelings of victimization and stigmatization."[165] Studies have also found that children experience significant stress when they are subjected to multiple interviews and examinations during the course of legal proceedings.[166] To combat these concerns, courts have implemented mitigating "shielding" measures that allow children to testify behind a screen or via closed-circuit television.[167]

Second, critics argue that children are already adequately represented by other stakeholders including judges, social workers, and appointed representatives.[168] However, the children themselves are the only people who are able to articulate firsthand their perspective of relevant relationships and events.[169] Studies have found that children as young as six years old are capable of reasoning and making considered judgments.[170] Courts should empower children to do so, not hinder them.

C. Benefits to Courts

In addition to providing benefits to individual children, recognizing a child's right to be heard in child protective proceedings also benefits the courts adjudicating these cases.[171] Allowing children to testify in open court or in chambers and appointing independent, client-directed counsel to represent children's expressed preferences provide several benefits to the courts.

The primary benefit to the court is the ability to make more informed decisions based on the ability to observe children in the courtroom.[172] Regardless of a child's age, judges can gather significant information merely from observing a child's behavior, emotions, and physical responses while in the presence of their parents.[173] Organizations like the American Bar Association publish judicial bench cards to assist judges in engaging and observing children as young as two months old to determine whether they

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164. *See id.*

165. *See id.*; Marsil, Montoya, Ross, & Graham, *supra* note 37, at 213–14.

166. *See* Susan S. Asquith & Philip Lichtenstein, *Evaluations and Examinations of the Child During the Legal Process*, 6-SPG KY. CHILD. RTS. J. 22, 28 (1998).

167. *See, e.g.*, *In re* Jam.J., 825 A.2d 902, 916 (D.C. Cir. 2003) (citing Maryland v. Craig, 497 U.S. 836, 855 (1990)).

168. *See* Jenkins, *supra* note 35, at 172.

169. *See id.*

170. *See* Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 361 (1994).

171. *See* Jenkins, *supra* note 35, at 170.

172. *See id.*

173. *See id.* The author uses the terms "parents" throughout this Article while recognizing child protective proceedings may be initiated against biological parents, adoptive parents, or relatives with whom children are placed.

are meeting age-appropriate milestones.[174] These observations assist judges in learning about each individual child before making life-altering decisions about the child's placement.[175] Observing and speaking with the child also ensures that courts make determinations based on what is usually the best direct evidence of a child's relationship with their parent and prior relevant incidents.[176] A secondary related benefit is that when children attend hearings, judges see how the children are physically growing and how they are emotionally impacted by the proceedings.[177] This can help motivate judges to reach permanent solutions for children to get them out of a clogged court system.[178]

Appointing independent, client-directed counsel to represent a child's expressed preferences is another benefit to courts.[179] First, independent counsel can help a child formulate a position that balances the child's desires with the circumstances of a given case. For example, a five-year-old child may express that they wish to live with their aunt, but their aunt has not been certified as an available placement. Appointed counsel can assist the child in identifying and exploring alternative placement options. Second, independent counsel can engage in the requisite motion practice to address children's concerns as they arise.[180] A recent Florida study found that the number of motions filed in cases where the child had an attorney was 46.5% higher than in cases where the child had no attorney.[181] Moreover, children with attorneys also had nearly 50% more status checks than children without attorneys, which provided judges access to more information when deciding cases.[182] These two advantages promote the efficient flow of complete information to the judge, without which judges' decisions might be "ill informed or even tragically mistaken."[183]

Some critics assert that the administrative burdens of making the recommended adjustments for child-friendly courtrooms outweigh any benefits courts derive from children's truthful participation in proceedings.[184]

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174. *See* AM. BAR ASS'N CTR. ON CHILD. & THE LAW, ENGAGING YOUNG CHILDREN (AGES 0–12 MO) IN THE COURTROOM 1 (2008), https://www.ncjfcj.org/bench-cards/engaging-youth-in-the-courtroom/#section-2.

175. *See* Jenkins, *supra* note 35, at 170.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See* Andrea Khoury, *Why A Lawyer?—The Importance of Client-Directed Legal Representation for Youth*, 48 FAM. CT. REV. 277, 279 (2010); Elrod, *supra* note 60, at 902.

180. *See* ANDREW E. ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 9 (2008).

181. *See id.*

182. *See id.* at 9–10.

183. *See* LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 609 (2009).

184. *See id.* at 173 (outlining necessary adjustments such as refraining from using highly technical legal jargon or acronyms, allowing support persons, and scheduling hearings after school); CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 7–10, 15–26 (recommending allowing support persons and comfort items during testimony, prioritizing dockets, allowing testimonial aids, using

As set forth above, the stress of appearing in court may impact the reliability, truthfulness, and completeness of a child's testimony.[185] Many of the recommendations for how to adjust courtrooms and procedures to be "child-friendly" require shifts in both the individuals involved in the case and the physical courtrooms themselves.[186] For example, the recommendations may call for acquiring a screen to shield children's testimony, setting up closed-circuit television, or reprioritizing dockets.[187] However, other recommendations—like asking participants not to wear formal attire, taking age-appropriate breaks, providing anatomically correct dolls to aid courtroom testimony,[188] and refraining from the use of legal jargon—are comparatively minor and less labor-intensive changes. Given that children's fundamental legal rights are at stake, courts should prioritize these modifications to the greatest extent possible.[189]

II. EXISTING AVENUES TO PROVIDE CHILDREN A VOICE IN CHILD PROTECTIVE PROCEEDINGS

> "Parents are represented in these proceedings, but the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases."[190]

Scholarship and empirical evidence have increasingly called for the abolition of the family regulation system altogether.[191] These scholars call for "dismantl[ing]" the system, passing legislation to limit the authority of child protective services, and increasing "mutual aid" to provide child care and necessities such as medicine, groceries, and rent money, to struggling residents to meet their needs rather than "tearing families apart" under the current system.[192] However, such a glacial shift, even if undertaken, would not occur overnight.[193] In the interim, it is imperative that courts take immediate steps to safeguard children's rights and ensure they have a voice in child protective proceedings.

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child-friendly language, taking age-appropriate breaks, closing the courtroom, reducing formal attire, and allowing leading questions and close-circuit testimony).

185. *See* CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 1–2; Marsil, Montoya, Ross, & Graham, *supra* note 37, at 214.

186. *See* Jenkins, *supra* note 35, at 173 (outlining necessary adjustments such as refraining from using highly technical legal jargon or acronyms, allowing support persons, and scheduling hearings after school). *See generally* CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 5–39.

187. *See* Marsil, Montoya, Ross, & Graham, *supra* note 37, at 209–10.

188. 42 PA. STAT. AND CONS. STAT. § 5987 (West 2024).

189. *See* CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 3 (providing that adoption of these "[s]mall but significant changes . . . will increase a child's comfort level and his ability to testify accurately, effectively promoting justice in the courts while preserving the integrity of the process").

190. Dep't of Child. & Fam. Servs. v. I.C., 742 So. 2d 401, 406 (Fla. Dist. Ct. App. 1999).

191. *See* Dorothy Roberts, *Why Abolition*, 61 FAM. CT. REV. 229, 238 (2023).

192. *See* Michael Fitzgerald & Madison Hunt, *Dorothy Roberts' New Book Expands Call for Foster Care 'Abolition,' Prompting Praise and Debate*, THE IMPRINT (Apr. 28, 2022, 4:03 PM), https://perma.cc/M97T-FR5C.

193. *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at viii (2002) (first arguing for the abolition of the child welfare system over twenty years ago).

Children's need for a voice exists at every stage of child protective proceedings, from surveillance and investigation to removal, adjudication, and even after final judgment.[194] The typical stages of a child protective proceeding are department investigation, removal, adversary hearing, status hearing, permanency hearings, and final trial.[195] While this Article discusses protections for children's voices in those stages once the court is already involved, future scholarship should also address avenues for children to express their preferences prior to removal or following a final trial.

There are four primary ways a child can articulate their preferences to the court in a child protective proceeding: (1) through an appointed representative; (2) through in-court testimony; (3) through an in camera interview with a judge; and (4) under limited circumstances, through admitting a child's out-of-court statement into evidence. These options are challenging because they rely on judges to implement them, and judges must also be held accountable if they do not consider the child's preferences. This Part explores each of these available avenues and the shortcomings of each in guaranteeing the child's preference. Before considering each of these options in turn, this Part first addresses an initial threshold matter: whether children should be considered a party to child protective proceedings.[196] To best illustrate the disparities in state approaches to each of these avenues, including whether states consider children to be a party in child protective proceedings, this Article contains a fifty-state survey of existing statutes governing child participation in child protective proceedings.[197] The results of this survey can be found in Appendix A and are incorporated in this analysis.[198]

A. The Child as a Party

A threshold question in determining children's rights in child protective proceedings is whether children are considered a party to the proceeding. *Black's Law Dictionary* defines "party" as "anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment."[199] A child seemingly falls squarely in the legal definition of a party.[200] Child protective proceedings directly affect a child's interests, and failure to grant party status to a child restricts those interests.[201] However, while parents are always considered parties to these proceedings and frequently are entitled to

194. *See* Kennedy, *supra* note 42, at 943.
195. Commonly, these stages are adversary hearing, status hearing, permanency hearings, and final trial in a child protective proceeding.
196. *See infra* Section III.A.
197. Special thanks to my research assistants from Baylor University School of Law.
198. *See infra* Appendix A.
199. *Id.*
200. *See Party*, BLACK'S LAW DICTIONARY (12th ed. 2024).
201. *See* Kennedy, *supra* note 42, at 959.

representation, children historically had not been conferred party status or appointed independent representation.[202]

Being a party to child protective proceedings entitles children to receive notice of all proceedings, present evidence, file pleadings, participate in discovery and settlement agreements, and attend and make arguments in court hearings.[203] As of January 1, 2024, thirty-nine states and the District of Columbia confer party status on children subject to child protective proceedings.[204] The remaining states either are silent as to the child's status as a party or impliedly grant the child certain rights that parties would otherwise receive.[205] In practice, states vary as to what privileges and protections they actually afford to children as parties.[206] More importantly for this Article's analysis, if a child is a party to the proceeding, this should afford them access to the four avenues for making their voices heard discussed in the remainder of this Part: (1) the right to counsel, (2) the ability to testify in court, (3) the ability to speak to a judge, and (4) the ability to admit into evidence out-of-court statements as allowed under the applicable rules of evidence.

B. Appointed Representatives

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), requiring states applying for federal funding[207] to prove that they mandate the appointment of a trained guardian *ad litem*, lawyer, or special advocate in every court case involving a victim of child abuse or neglect.[208] Following CAPTA, appointment of guardians *ad litem* started gaining traction, with all states starting to provide some form of representation to children.[209] However, CAPTA does not require that these representatives be attorneys,[210] nor does it require that these

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202. *See* Anne Elizabeth Goodgame, *Best to Be Seen and Heard: A Child's Right to Appeal Termination of Parental Rights*, 50 GA. L. REV. 1269, 1305 (2016).

203. *See* DAVIS, HARFELD, & WEICHEL, *supra* note 31, at 13; DONALD N. DUQUETTE, BRITANY ORLEBEKE, ANDREW ZINN, ROBBIN POTT, ADA SKYLES, & XIAOMENG ZHOU, CHILDREN'S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM 28 (2021).

204. *See infra* Appendix A. A few states provide that a child of a specified age is entitled to some rights as a party. *See, e.g.*, TENN. R. JUV. P. 103, 106 (2024) (requiring delivery of notice and pleadings to a child who is age 14 or older, but not under 14); WASH. REV. CODE § 13.34.070 (West 2024) (providing children have a right to service of summons "if the child is twelve or more years of age").

205. *See infra* Appendix A.

206. *Compare* Goodgame, *supra* note 202, at 1291 (discussing Georgia courts' history of denying children the right to appeal termination of parental rights orders despite having party status), *with* S.D. CODIFIED LAWS § 26-7A-30 (2024) ("[A] court shall advise the child[ren] . . . of . . . the right to appeal . . . .").

207. *See* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2019), https://perma.cc/XE4H-DKMQ ("CAPTA provides Federal funding and guidance to States in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations, including Indian Tribes and Tribal organizations, for demonstration programs and projects.").

208. *See* 42 U.S.C. § 5106a.

209. *See id.*

210. *See* Malempati, *supra* note 160, at 639.

representatives advocate for the child's preferences.[211] Congress has reauthorized CAPTA several times since its enactment and CAPTA has been amended through subsequent legislation, most recently through the Trafficking Victims Prevention and Protection Reauthorization Act of 2022.[212] Congress repeatedly rejected proposed amendments that would have mandated states to appoint an attorney as "designated legal counsel" for every child in an abuse and neglect proceeding.[213] Congress largely cited financial reasons for rejecting these proposed amendments, pointing to states' concerns about the high costs of implementation.[214] Therefore, CAPTA's only representation-related requirement remains that states must appoint any representative (either layperson or attorney) for a child to make recommendations about the best interests of the child.[215]

Further, CAPTA only requires states to appoint a representative for children in child protective proceedings after a petition for removal has been filed, rather than when the state child welfare agency is initially investigating the case prior to removal.[216] This means children do not meet or talk with their appointed representative until after the case is filed at the initial removal hearing. This effectively places children several steps behind other parties to the case, who meet their counsel prior to the initial removal hearing.

The remainder of this Section frames three key debates facing states in determining whether to mandate appointment of a lay representative or attorney for children in child protective proceedings. First, Subsection One discusses the lack of accountability measures for courts and the lack of funding and compensation available for court-appointed representatives. Next, Subsection Two provides an overview of the divide between states as to whether appointed representatives should advocate for children's preferred outcomes or for children's best interests as determined by the representative. Finally, Subsection Three reviews the ethical issues surrounding the appointment of "dual-status" representatives charged with representing both a child's best interests and their preferred outcomes.

1. Lack of Accountability and Funding for Court-Appointed Representatives

A preliminary hurdle to children voicing their preferences in court is the lack of accountability measures to ensure courts appoint a representative for children. Despite CAPTA's mandate, not every child has an

211. *See* 42 U.S.C. § 5106a; *see* David Meschke, *A Colorado Child's Best Interests: Examining the* Gabriesheski *Decision and Future Policy Implications*, 85 U. COLO. L. REV. 537, 553 (2014).

212. *See* Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 117–348, 136 Stat. 6211 (2023).

213. *See* Howard A. Davidson, *The CAPTA Reauthorization Act of 2010: What Advocates Should Know*, ABA (Jan. 3, 2011), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/capta-reauthorization-act-of-2010-what-advocates-should-know1/.

214. *See id.*

215. *See* Malempati, *supra* note 160, at 658.

216. *See id.* at 639–40.

appointed representative to voice their preferences.[217] In a 2022 study of abuse and neglect proceedings, twenty-five states reported that only 19% of children had a court-appointed representative in child protective proceedings, a slight decrease from the year before.[218] Among the reporting states, nine states reported that children have a court-appointed representative in less than 15% of cases.[219]

One barrier leading to low numbers of appointments is that several states still leave it up to a court's discretion to determine whether a guardian *ad litem* should be appointed.[220] States like Alaska, Arizona, and Indiana provide that a court "may" in its discretion appoint a guardian *ad litem* to protect a child's best interests.[221] This statutory language gives courts an out to not appoint a representative for children at all, especially when states have limited funding. Some states also require that guardians *ad litem* be licensed attorneys, which limits the pool of potential guardians *ad litem*.[222]

Even in states that mandate appointment of a representative, children can still be forced to proceed without one.[223] Courts are split on whether failure to appoint a representative constitutes reversible error on appeal.[224] The principal roadblocks are a lack of consequences when courts fail to appoint a representative for children and a lack of funding to compensate representatives appropriately.[225] A line of cases from Florida exemplifies this issue.[226] In *E.F. v. Department of Health and Rehabilitative Services*,[227] the court held that there was no fundamental error warranting reversal where a trial court attempted to appoint a guardian *ad litem* in a termination of parental rights case but was unsuccessful in finding a volunteer.[228] The court reasoned that it did not want a child stuck in limbo until the court could find a volunteer and suggested such representation

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217. *See* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, COURT HEARINGS FOR THE PERMANENT PLACEMENT OF CHILDREN 4 (2020), https://www.childwelfare.gov/resources/court-hearings-permanent-placement-children/; Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 754–55 (2006).

218. *See* CHILD MALTREATMENT 2022, *supra* note 30, at 89; *see also* Robert H. Pantell, *The Child Witness in the Courtroom*, 139 PEDIATRICS 2 (2017) ("The percentage of children with court-appointed representation also is highly variable, with a national average of 17.0% . . . .").

219. These states include: Alabama, Delaware, Iowa, Maine, Mississippi, Nevada, New Mexico, North Dakota, and Oklahoma. CHILD MALTREATMENT 2022, *supra* note 30, at 89.

220. *See infra* Appendix A; Mandelbaum, *supra* note 42, at 23.

221. *See* ALASKA STAT. ANN. § 47.10.050(a) (West 2024); ARIZ. REV. STAT. ANN. § 8-221(G) (2024); IND. CODE ANN. § 31-32-4-2(b) (West 2024).

222. *See, e.g.*, ALA. CODE § 12-15-102 (2024); COLO. REV. STAT. ANN. § 19-3-203 (West 2024) ("The guardian ad litem must be an attorney-at-law . . . ."); KAN. STAT. ANN. § 38-2205 (West 2024).

223. Mandelbaum, *supra* note 42, at 23; *see, e.g.*, *In re* J.E., 655 S.E.2d 831, 832 (N.C. 2008).

224. Newsome v. Porter, No. M2011-02226-COA-R3-PT, 2012 WL 760792, at *5–6 (Tenn. Ct. App. Mar. 7, 2012); Heffner v. Rensink, 938 So. 2d 917, 920 (Miss. Ct. App. 2006); Nichols v. Nichols, 803 S.W.2d 484, 485 (Tex. Ct. App. 1991); *In re* Adoption of Doe, 677 P.2d 643, 644 (N.M. Ct. App. 1984); E.F. v. Dep't of Health & Rehab. Servs., 639 So. 2d 639, 640 (Fla. Dist. Ct. App. 1994); A.G. v. Grey, 968 P.2d 424, 430 (Wash. Ct. App. 1998).

225. *See generally* Peters, *supra* note 28, at 1026.

226. *See generally E.F.*, 639 So. 2d at 640.

227. *Id.*

228. *See id.* at 643.

was not required as the court had operated well for many years without appointing guardians *ad litem*.[229] Two years later, in *Fisher v. Department of Health & Rehabilitative Services*,[230] a Florida court again found there was no fundamental error when the trial court entered an order terminating a father's parental rights after the guardian *ad litem* resigned and the court failed to appoint a new one.[231] Two subsequent cases in which the trial court made no attempt to appoint a guardian *ad litem* drew a distinction from *E.F.* and *Fisher*.[232] In *G.S. v. Department of Children & Family Services*[233] and *Vestal v. Vestal*,[234] the appellate court found the trial court committed reversible error when it made no attempt to locate a representative for the child.[235] However, the appellate court provided no guidance as to how long a trial court must search for a volunteer representative or what alternative measures a court could take to safeguard a child's interests in the absence of a representative.[236] To affirmatively prevent courts from relying on the excuse of a lack of volunteers, states like Idaho, New Hampshire, and Washington build in a fallback provision that provides the court may appoint a "suitable person" or an attorney[237] to serve as a guardian *ad litem* if it lacks sufficient volunteers in its guardian *ad litem* program.[238] But even in these states, courts have found that failure to appoint a guardian *ad litem* merely renders an order voidable, not void, and failure to appoint a representative is not reversible error.[239]

The lack of funding for child representatives further exacerbates this first hurdle.[240] There is a common perception that allocating additional monies to the appointment of representatives will unjustifiably drain the state's financial resources.[241] However, in an Indiana class action lawsuit, one expert witness estimated that a single appointed attorney representing one hundred children could save the state $693,000 in funds that would otherwise be spent on out-of-home foster care placements.[242] This study reaffirmed prior findings that states could save money if they appointed

229. *See id.* at 644–45.
230. 674 So. 2d 207 (Fla. Dist. Ct. App. 1996).
231. *See id.* at 208.
232. *See* G.S. v. Dep't of Child. & Fam. Servs., 838 So. 2d 1221, 1222 (Fla. Dist. Ct. App. 2003); Vestal v. Vestal, 731 So. 2d 828, 829 (Fla. Dist. Ct. App. 1999).
233. 838 So. 2d 1221 (Fla. Dist. Ct. App. 2003).
234. 731 So. 2d 828 (Fla. Dist. Ct. App. 1999).
235. *See G.S.*, 838 So. 2d at 1222; *Vestal*, 731 So. 2d at 829.
236. *See G.S.*, 838 So. 2d at 1222; *Vestal*, 731 So. 2d at 829.
237. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.100(2) (West 2024).
238. *Id.*
239. A.G. v. Grey, 968 P.2d 424, 430 (Wash. Ct. App. 1998); *see In re* Dependency of M.S.R., 174 Wash. 2d 1, 23 (Wash. 2012) ("[A child's] right to appointment of counsel is not universal. [A statute permitting, but not requiring appointment of a guardian ad litem] is constitutionally adequate to protect the right of counsel for such children.").
240. *See* Peters, *supra* note 28, at 1026.
241. *See* Kennedy, *supra* note 42, at 955.
242. *See* Taylor Needham, *Catch Up CAPTA: Amending CAPTA to Guarantee Children Legal Counsel in Dependency Proceedings*, 58 SAN DIEGO L. REV. 715, 750 (2021).

representatives because children with attorneys spend less time in foster care and are more likely to achieve permanency.[243]

Without adequate funding, many guardians *ad litem* volunteer to serve and receive minimal pay, which is often capped at a certain amount or per case.[244] For example, an attorney surveyed in a 2018 Texas Children's Commission study reported "the hourly rate [in my jurisdiction] is less than one third of [what an attorney can charge in] private cases, and the rate has not increased in more than fifteen years."[245] Moreover, some state compensation systems do not pay representatives for actions taken outside of court, including traveling, meeting with children in their homes, or even statutorily mandated forms of case involvement.[246] States have not yet resolved outstanding questions about compensation, including whether courts have jurisdiction to augment statutory rates and what legal services qualify for compensation.[247] Inadequate and unclear parameters for compensation disincentivize lawyers from completing tasks above and beyond the bare minimum requirements.[248] Additionally, even for attorneys who are willing to work at the reduced rate, oftentimes courts do not cap attorneys' caseloads, meaning attorneys may not have the time to appropriately investigate cases or to develop the requisite relationships with children to advocate for them.[249]

Getting a representative appointed is only the first hurdle for children wishing to make their voices heard in child protective proceedings. Even in cases where a child has a court-appointed representative, that representative may be tasked with representing only the child's best interests, which may diverge from the child's expressed preferences and objectives.[250]

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243. *See id.* at 747.

244. *See* TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 43.

245. *See id.* at 48.

246. *See, e.g.*, *id.* at 43, 102 (quoting a court-appointed attorney's response: "all other matters outside of hearings are uncompensated. Family Code mandated ad-litem involvement in medical care: uncompensated. Family Code mandated ad-litem involvement in educational decision making: uncompensated. Family Code mandated placement review meetings: uncompensated. Family Code mandated ad-litem involvement in circle of support meetings: uncompensated. The list goes on.").

247. *See* Needham, *supra* note 242, at 749–52.

248. *See id.* at 747 n.199; TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 50 (92% of court-appointed attorneys reporting increased pay would have a "somewhat positive effect" or "strong positive effect" on the quality of representation).

249. *See* Howard Davidson & Erik S. Pitchal, *Caseloads Must Be Controlled So All Child Clients Can Receive Competent Lawyering* 7 (2006), https://ssrn.com/abstract=943059 (finding one fifth of attorneys for children surveyed had caseloads of 300–499 cases); Mandelbaum, *supra* note 42, at 25.

250. *See* Mikayla Shearer, *A Child's Best Interests Are Not the Same As What a Child Wants*, COLO. NEWSLINE (Jan. 11, 2022, 11:02 AM), https://coloradonewsline.com/2022/01/11/a-childs-best-interests-are-not-the-same-as-what-a-child-wants; *see, e.g.*, TEX. FAM. CODE ANN. § 263.307 (West 2023) (omitting the child's preference from its "best interest[s]" factors); MD. CTS., MARYLAND GUIDELINES FOR PRACTICE FOR COURT-APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS § 1.1 (2011) ("[A] lawyer appointed by a court for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.").

2. Best Interests Advocacy Versus "Legal Interests" Client-Directed Counsel

When drafting legislation regarding appointment of representatives for children, states face a core consideration of whether to adopt a best interests or client-directed model.[251] Under a best interests model, advocates are charged with representing what they perceive are a child's best interests, whereas under a legal interests "client-directed" model, the advocate represents a child's expressed wishes.[252] A closer look at state approaches underscores the lack of consensus regarding which model is most appropriate. More than half of all states require the guardian *ad litem* to ascertain and express the child's views before the court, while seventeen states have no such requirement.[253] Some states expressly require guardians *ad litem* to consider a child's preferences when analyzing best interests.[254] In other states, guardians *ad litem* are expected to assume a bifurcated role, where they represent both the child's preferences and the child's best interests.[255] Generally, states that separate the two roles find that appointment of a guardian *ad litem* is generally preferable for younger, less mature children who would not benefit as much from attorney–client privilege, while appointment of an attorney is preferable for older, more mature children who are able to make considered judgments.[256]

In addition to practice guidance promulgated by the National Association of Counsel for Children (NACC)[257] and the National Council of Juvenile and Family Court Judges (NCJFCJ),[258] the Uniform Law

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251. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 17.

252. *See id.*

253. *See infra* Appendix A; *see also* Peters, *supra* note 28, at 1074–81 app. C (2006 survey of all 50 states finding that states can be categorized under six different models based on whether they require appointment of a best interests representative or attorney who has to express the child's preferences: (1) child's attorney required, best interests representative optional; (2) requires both child's attorney and best interests representative; (3) best interests representative required and required to express child's views, child's attorney optional; (4) best interests representative required and required to express child's views, no child's attorney; (5) best interests representative required, no provision to express views, child's attorney optional; and (6) best interests representative required, no provision to express views, no child's attorney).

254. *See infra* Appendix A.

255. *See* Peters, *supra* note 28, at 1020.

256. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 4, at 15 (2007); Dependency of M.S.R. v. Luak, 271 P.3d 234, 244 (Wash. 2012).

257. *See* NAT'L ASS'N OF COUNS. FOR CHILD., RECOMMENDATIONS FOR LEGAL REPRESENTATION OF CHILDREN AND YOUTH IN NEGLECT AND ABUSE PROCEEDINGS 7 (2022) [hereinafter NACC GUIDELINES]. The NACC recommendations mandate legal representation for child clients and recommending "regular and meaningful engagement with child clients, full and independent investigations, and 'competent, independent, and zealous representation.'" Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 MITCHELL HAMLINE L. REV. 728, 736 (2021).

258. *See* SOPHIE I. GATOWSKI, NANCY B. MILLER, STEPHEN M. RUBIN, PATRICIA ESCHER, & CANDICE MAZE, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 43 (2016) [hereinafter NCJFCJ GUIDELINES] (recognizing that "fundamental rights of the child [and parent] are at stake in these proceedings, [so] best practice calls for the appointment of an attorney who will advocate the child's position from the very beginning of the case").

Commission (ULC),[259] the National Quality Improvement Center on the Representation of Children in Child Welfare (QIC-ChildRep),[260] and the American Bar Association (ABA)[261] have drafted practice models to promote uniformity in state definitions of the roles and responsibilities of child advocates. In 2007, the ULC approved the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act.[262] The Act was designed to introduce uniformity to the disparate state statutes pertaining to representation of children.[263] Seventeen years later, no state legislator has even attempted to introduce the Act in legislative session.[264] In 2016, QIC-ChildRep developed a Best Practice Model.[265] This model, divided into "six core skills," centers on advocating for a child's needs and wishes.[266] In 2011, the ABA House of Delegates adopted the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings.[267] The Model Act advocates for a client-directed model and specifies that a child's lawyer owes the same duties to a child client as to an adult client.[268] Despite these national efforts, states are still inconsistent when defining duties of guardians *ad litem* and children's attorneys.[269]

The divide in state approaches reflects the overall lack of consensus among scholars, legislators, and attorneys. These groups are divided into three primary positions: (1) best interests model advocates, (2) client-directed model advocates, and (3) advocates for a "bright-line" age test.

Best interests model advocates assert that children in child protective proceedings lack the maturity and decision-making capacity to articulate their preferences.[270] Advocates of this model argue that states should not expend resources on attorneys who display a "robotic allegiance" to a child's directives because the child's articulated position may in fact seriously harm the child.[271] Particularly when it comes to young children, best

259. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 256, at 4–5.

260. DONALD N. DUQUETTE & ROBBIN POTT, QIC CHILDREP, NATIONAL QUALITY IMPROVEMENT CENTER ON THE REPRESENTATION OF CHILDREN IN CHILD WELFARE (QIC-CHILDREP): 2009–2016 ACTIVITIES REPORT 2, 4 (2016), www.improvechildrep.org/Portals/0/PDF/QIC-ChildRep%20Brochure%20wWEB%20Language.pdf.

261. *See* ABA STANDARDS OF PRACTICE, *supra* note 42, § B-1.

262. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *supra* note 256.

263. *See* Barbara Ann Atwood, *The New Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 80–81 (2007).

264. *Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Legislative Bill Tracking*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=1de8829e-e723-4d1b-97b9-94622cf68269#LegBillTrackingAnchor (last visited Dec. 11, 2024).

265. DUQUETTE & POTT, *supra* note 260, at 2–3.

266. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 181.

267. *See* Andrea Khoury, *ABA Adopts Model Act on Child Representation*, ABA (Sept. 1, 2011), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/september_2011/aba_adopts_modelactonchildrepresentation/.

268. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 51.

269. *See* Mandelbaum, *supra* note 42, at 27.

270. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 18.

271. *See id.* (quoting Atwood, *supra* note 263, at 79).

interests model advocates argue the client-directed model provides little to no guidance on representing the preferences of a non-verbal or infant child.[272]

Client-directed model advocates advance three primary reasons supporting the model's adoption. First, they argue that this model best protects children's constitutional rights to family integrity and to counsel.[273] Allowing a child to express their preference through counsel most directly protects their fundamental right to remain with their parent.[274] Moreover, relying on *Mathews*,[275] scholars argue that appointing counsel is consistent with the state's interests and reduces the likelihood of error.[276] Distinguishing *Lassiter*,[277] scholars argue that even though the Supreme Court has held parents do not have a constitutional right to counsel, that does not preclude this right for children because, unlike parents, children cannot call or cross-examine witnesses absent counsel.[278] Second, advocates argue that client-directed representation provides the best avenue to allow children to feel in control of the direction of their case and feel heard in proceedings.[279] Additionally, client-directed representation improves the quality of decisions.[280] As set forth above,[281] providing a child with effective advocacy for their positions, in this case through counsel, helps inform better decision-making by judges and helps children accept the outcomes of their case.[282] Without appointed counsel, scholars argue, "none of the other parties . . . [are] necessarily going to make motions to the court to order the provision of services, hold the other parties accountable to prove their assertions, and double check the collection of factual information to prove or disprove claims or defenses."[283] Finally, client-directed model advocates argue this approach is more in line with the ABA Model Rules of Professional Conduct.[284] Specifically, ABA Model Rule 1.14 suggests that, to maintain as close to an attorney–client relationship as possible, attorneys should follow a child client's directives as long as they determine

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272. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 18.

273. *See* Taylor, *supra* note 183, at 623; Trivedi, *supra* note 47, at 289; Kennedy, *supra* note 42, at 957–58.

274. *See* Trivedi, *supra* note 47, at 304; Kennedy, *supra* note 42, at 955.

275. *See* Kennedy, *supra* note 42, at 956–57 (citing Mathews v. Eldridge, 424 U.S. 319, 321 (1976)).

276. *See* Taylor, *supra* note 183, at 609.

277. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33–34 (1981).

278. *See* Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 67 (2007); *see also supra* Section I.A.2.

279. *See supra* Sections II.A–B; DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 21.

280. *See* COLO. OFF. OF THE CHILD'S REPRESENTATIVE, CLIENT-DIRECTED REPRESENTATION MEMORANDUM & CONSIDERATIONS 1 (2021), https://coloradochildrep.org/wp-content/uploads/2021/11/Client-Directed-Representation-Memo-September-2021-FINAL.pdf.

281. *See supra* Sections I.B–C.

282. *See* COLO. OFF. OF THE CHILD'S REPRESENTATIVE, *supra* note 280, at 2; *see supra* Section I.B.

283. *See* Dale, *supra* note 16, at 808.

284. MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 6 (AM. BAR ASS'N 1983).

the child "[has] developed the cognitive capacity to engage in reasoned decision making."[285]

Legal scholars led by Professor Donald Duquette advocate for a hybrid "two distinct [lawyer] roles" model.[286] This approach addresses the criticisms that best interests advocates assert regarding representation of nonverbal or infant children under the client-directed model.[287] Under this approach, scholars argue that states should adopt a "bright-line" age limit.[288] Children who are above the age limit would be appointed a client-directed attorney and children below the age limit would be appointed a best interests advocate who would also consider a child's wishes when determining the goals for each case.[289] Several states incorporate specific age markers in alignment with this approach.[290] For example, Washington requires courts to appoint a guardian *ad litem* unless good cause is shown,[291] but requires that for all children age twelve or older, "the department or supervising agency and the child's guardian *ad litem* shall each notify a child of [their] right to request an attorney and shall ask the child whether [they] wish[] to have an attorney" on an annual basis.[292] Similarly, Wisconsin mandates its courts to appoint client-directed counsel for a child unless the child is less than twelve years of age.[293]

A final group of scholars falls somewhere between the other three groups. Jean Koh Peters asserts that child competency is a "dimmer switch," and accordingly, a child client should be able to participate in particular parts of their representation despite not being competent to participate fully.[294] Emily Buss argues that most attorneys do not actually take a best interests or client-directed approach at all.[295] Rather, she reveals how best interests advocates largely concede that older children should be able to direct their representation and client-directed advocates generally

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285. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 25 (analyzing the comments of the MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 1983)).

286. *See* Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1246 (2006).

287. *See id.*

288. *See id.* at 1240.

289. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 13.

290. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.105 (LexisNexis 2024); WIS. STAT. § 48.23 (2023).

291. *See, e.g.*, *In re* Dependency of O.J., 947 P.2d 252, 254 (Wash. Ct. App. 1997) (opining that the fact that the children's therapists testified it was in the children's best interests that their mother's parental rights be terminated based may constitute "good cause" to excuse appointment of a guardian *ad* litem on their behalf). *But see* A.G. v. Grey, 968 P.2d 424, 430 (Wash. Ct. App. 1998) (finding no reversible error where neither party challenged the court's failure to appoint a guardian *ad litem* despite lack of good cause determination).

292. *See* WASH. REV. CODE § 13.34.100(7)(c) (2014) (current version at WASH. REV. CODE § 13.34.100 (2024)) (emphasis added).

293. *See* WIS. STAT. § 48.23 (2023).

294. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 3-2[b][2], at 126 (3d int'l ed. 2007).

295. *See* Emily Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1705 (1996).

exclude nonverbal or infant children from being able to direct their representation.[296]

3. Ethical Issues with Dual Representation

Several states permit one individual to serve dual roles as both guardian *ad litem* (best interests advocate) and the child's attorney (client-directed counsel).[297] Alternatively, other states direct guardians *ad litem* to represent both a child's best interests and their expressed preferences.[298] Individuals serving in this capacity[299] face potential ethical problems inherent within this dual role.[300] Attorneys who serve as guardians *ad litem* (attorney–guardians) hold the same ethical responsibilities as any other attorney.[301] This means they must advocate for the child's expressed preferences, even if those preferences conflict with the advocate's belief as to what is in the best interests of the child.[302] Unlike lay guardians *ad litem*, attorneys are required to maintain confidential communications with their client pursuant to attorney−client privilege unless the client waives confidentiality.[303] Therefore, a problem arises when states require guardians *ad litem* to orally inform the court of all relevant information or to prepare written reports on a child's needs and preferences.[304] This would presumably require attorney–guardians to make a continuous record of their child−client's waivers of attorney−client privilege whenever the attorney–guardian needed to disclose information in their capacity as a guardian *ad litem*.[305] Further, a guardian *ad litem* may be called as a witness in a child's case to discuss their recommendations at a hearing or trial.[306] This directly conflicts with Model Rule of Professional Conduct 3.7, adopted by all fifty states, that bars an attorney from participating as an advocate in a case where they will likely be called to testify regarding a contested issue.[307]

Although these ethical problems would likely arise in the majority of dual-representation cases, states still promote adoption of a dual role, arguably because requiring both a guardian *ad litem* and an attorney may prove cost-prohibitive and nearly impossible given the already small number of volunteers.[308] To address the ethical conflicts, courts have adopted

296. *See id.*
297. *See infra* Appendix A.
298. *Id.*
299. *See generally id.*; WILLIAM WESLEY PATTON, LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY PROCEEDINGS: A GUIDE FOR JUDGES AND LAWYERS 16–18 (2006).
300. *See* Malempati, *supra* note 160, at 667; JERRY BRUCE & ANGELA TYNER, THE GUARDIAN AD LITEM IN DEPENDENCY PROCEEDINGS: A GUIDE TO BEST INTEREST ADVOCACY 23 (2d ed. 2022); MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).
301. *See* Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998).
302. *See id.*
303. *See* Dependency of M.S.R. v. Luak., 271 P.3d 234, 244 (Wash. 2012). *See generally* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983); Meschke, *supra* note 211, at 559.
304. *See Dependency of M.S.R.*, 271 P.3d at 244. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983); Meschke, *supra* note 211, at 559.
305. *See* BRUCE & TYNER, *supra* note 300, at 22.
306. *See generally* Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998).
307. *See* MODEL RULES OF PRO. CONDUCT r. 3.7 (AM. BAR ASS'N 1983).
308. *See generally* Davidson, *supra* note 213; *Clark*, 953 P.2d at 153.

a more lenient interpretation of the Model Rules of Professional Conduct.[309] First, when an attorney–guardian finds the child's preferences are not in the best interests of the child, courts have required the attorney–guardian to present both the child's wishes and the best interests analysis to the court, rather than binding the attorney–guardian to solely represent the child's wishes.[310] Additionally, courts have modified confidentiality requirements so that an attorney–guardian may present relevant information from their communications with the child to the court without seeking a waiver each time.[311] Courts reason that a guardian *ad litem* must disclose relevant information to the court to protect a child's best interests in instances where maintaining a duty of confidentiality would otherwise expose a child to a high risk of probable harm.[312] Finally, courts permit an attorney–guardian to actively participate in court proceedings, including providing evidence at trial and making closing arguments.[313] This leniency helps maximize court resources without compromising an attorney's ethical responsibilities.

C. In-Court Testimony

For children to personally testify about their preferences in open court, the court must first notify them of the proceedings and give them the right to attend. Several states afford all children—even children who are incarcerated or institutionalized—a presumptive right to be present at child protective proceedings.[314] However, in practice, department investigators or social workers appointed to a case often encourage children to sign waiver forms that excuse them from appearing in court. Courts may also, of their own accord, sign orders excusing children from attending court.[315] Further, some courts do not expressly give children the right to attend court proceedings, and children are often forced to choose between school and activities or attending court—if they are even informed about the proceedings at all.[316] If children do attend court, requiring them to testify before their parents in open court can be ineffective and, even worse, harmful to the child.[317] This Section surveys state approaches to granting children the right to appear and testify in child protective proceedings and to implementing protective measures to reduce the trauma children experience in court.

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309. *See Clark*, 953 P.2d at 153; *In re* Christina W., 639 S.E.2d 770, 778 (W. Va. 2006).

310. *See Clark*, 953 P.2d at 153–54; *In re Christina W.*, 639 S.E.2d at 778.

311. *See Clark*, 953 P.2d at 154; *In re Christina W.*, 639 S.E.2d at 778.

312. *See In re Christina W.*, 639 S.E.2d at 778.

313. *See Clark*, 953 P.2d at 153.

314. *See, e.g.*, *Noticing Process for Juvenile Court Proceedings*, L.A. CNTY. DCFS POL'Y INST. WEBSITE (Apr. 2, 2018), https://policy.dcfs.lacounty.gov/Policy?id=5863#.

315. *See, e.g.*, OKLA. R. 14TH JUD. DIST. pt. 5, § 1(C)(3) (2024).

316. *See* N.Y. STATE BAR ASS'N, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN § D-5 (2015), https://nysba.org/app/uploads/2020/02/Standards-for-Attorneys-Representing-Children.pdf ("New York State has not yet enacted legislation nor recognized a constitutional right for children to be present during court proceedings.").

317. *See* Donald G. Tye, *The Preferences and Voices of Children in Massachusetts and Beyond*, 50 FAM. L.Q. 471, 472 (2016).

1. Right to Appear in Court

The majority of states do not give children the presumptive right to attend child protective proceedings.[318] Rather, most states leave the child's level of involvement open to the judge's discretion.[319] States that grant children a presumptive right to be present in court, to address the court, and to participate in the proceeding if the child desires are in the minority.[320] California falls under this category and even provides additional protections for children ten years of age or older, requiring that a court shall postpone ("continue") the hearing to another date if a child is not properly notified of the hearing or wishes to be present and is not given the opportunity to do so.[321] Even among states that do provide children a right to attend, this right is not absolute because a judge or a child's attorney can still excuse the child's attendance.[322] Several states have adopted a broad standard that allows courts to exclude children from proceedings when it is in their "best interests."[323]

2. Limiting or Excluding a Child's Testimony

As outlined above, there are often circumstances under which it would be traumatic for children to testify in open court before their parents, particularly regarding allegations of parental abuse and neglect.[324] To address this concern, courts follow two distinct approaches when determining what circumstances must exist before a trial court can exclude or otherwise limit a child's in-court testimony.[325]

The first approach considers only whether or not a child is competent to testify.[326] Under this "absolutist" approach, the trial court should only consider whether a child has the ability to understand their obligation to tell the truth under oath and to testify as to "events they may have seen, heard[,] or experienced."[327] This shifts the focus away from any consideration of the impact testifying would have on a child's mental health.[328] As long as the child is competent to testify, courts in these states have held

318. *See, e.g.*, N.Y. STATE BAR ASS'N, *supra* note 316.

319. ELIZABETH WHITNEY BARNES, ANDREA KOURY, & KRISTIN KELLY, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, SEEN, HEARD, AND ENGAGED: CHILDREN IN DEPENDENCY COURT HEARINGS 5 (2012) [hereinafter SEEN, HEARD, AND ENGAGED], https://www.ncjfcj.org/wp-content/uploads/2012/08/Seen-Heard-Children-Dependency.pdf.

320. *See* Gray & Robinson, *supra* note 58.

321. *See* CAL. WELF. & INST. CODE § 349 (Deering 2024).

322. *See* GA. CODE ANN. § 15-11-19 (2024); IND. CODE ANN. § 31-32-3-6 (LexisNexis 2022).

323. *See, e.g.*, GA. CODE ANN. § 15-11-19 (2024); IND. CODE ANN. § 31-32-3-6 (LexisNexis 2024).

324. *See* L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCH. REV. 439, 440 (1994).

325. *Compare In re* Faircloth, 527 S.E.2d 679, 683 (N.C. Ct. App. 2000), *with* Jennifer J. v. Gerald J., 10 Cal. Rptr. 2d 813, 819 (Cal. Ct. App. 1992).

326. *See In re* Jam.J., 825 A.2d 902, 912 (D.C. 2003); *In re Faircloth*, 527 S.E.2d at 683; White v. White, 655 N.E.2d 523, 529 (Ind. Ct. App. 1995); Bebee v. Hargrove, 607 So. 2d 1270, 1272 (Ala. Civ. App. 1992); Callicott v. Callicott, 364 S.W.2d 455, 458 (Tex. Civ. App. 1963).

327. *See In re Faircloth*, 527 S.E.2d at 683.

328. *See id.*

that trial courts are required to allow children to testify in court.[329] However, even when a child testifies under this standard, the trial court retains discretion to take "appropriate measures" to protect children during their testimony.[330]

The second approach courts take is a balancing test that considers whether the risk of severe emotional or psychological harm from testifying in court substantially outweighs the probative value of the child's testimony.[331] Courts analyze four factors when assessing the risk of harm to the child: "(1) the probability of severe emotional or psychological injury to the child as a result of testifying; (2) the degree of anticipated injury; (3) the expected duration of injury; and (4) whether the expected psychological injury is substantially greater than the reaction of an average child who testifies."[332] In its analysis of these factors, the court often considers the solicited opinions of mental health experts, which may warrant a limited in camera interview by a judge.[333] If the probative value of the testimony outweighs the risk of harm, courts employing this second approach have concluded judges have no discretion to exclude the child's testimony.[334]

3. Shielding Child Testimony

Courts should consider implementing protective measures to "shield" children and reduce potential trauma to children who are called to testify.[335] Although the right to confrontation is limited to criminal proceedings, courts have extended a similar right in civil abuse and neglect proceedings to afford parties a due process right to confront witnesses.[336] Even in the criminal context, the Supreme Court has held this right is not absolute.[337] The Supreme Court first weighed in on the constitutionality of shielding a child's testimony in *Coy v. Iowa*.[338] In *Coy*, the Court concluded that allowing children to testify from behind a screen blocking their view of the defendant violated the defendant's right to confrontation.[339] The Court rejected the state's argument that the relevant Iowa statute implied a blanket legislative finding that child witnesses suffer trauma from

329. *See id.*; *White*, 655 N.E.2d at 528–29; *Bebee*, 607 So. 2d at 1272.
330. *In re Faircloth*, 527 S.E.2d at 684 (applying the *Mathews v. Eldridge* factors).
331. *See* Beasley v. Beasley, 840 P.2d 78, 84 (Or. 1992); Jennifer J. v. Gerald J., 10 Cal. Rptr. 2d 813, 819 (Cal. Ct. App. 1992).
332. *Beasley*, 840 P.2d at 84.
333. *See id.* at 84–85; R.S.M. v. J.D.M., 542 S.W.2d 361, 363 (Mo. Ct. App. 1976).
334. *See Beasley*, 840 P.2d at 84; *R.S.M.*, 542 S.W.2d at 363.
335. CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 27.
336. *See* Pamela A.G. v. Pamela R.D.G., 134 P.3d 746, 750 (N.M. 2006) (applying the *Mathews v. Eldridge* factors); *In re* C.W.D., 501 S.E.2d 232, 240 (Ga. Ct. App. 1998) (same); M.L.L. v. Wessman, 532 N.W.2d 653, 660 (N.D. 1995); Dep't of Soc. Servs. v. Brock, 499 N.W.2d 752, 756–59 (Mich. 1993); Sacramento Cnty. Dep't of Soc. Servs. v. Michael T., 12 Cal. Rptr. 2d 10, 12–13 (Cal. Ct. App. 1992).
337. *See* Maryland v. Craig, 497 U.S. 836, 855 (1990).
338. *See* Coy v. Iowa, 487 U.S. 1012, 1014 (1988).
339. *See id.* at 1022.

testifying before their assailant.[340] Rather, the Court held that trial courts must make individualized findings as to whether the child witness in a particular case needs special protection during their testimony.[341]

Two years later, in *Maryland v. Craig*,[342] the Supreme Court upheld the use of closed-circuit television to allow a child to testify after the judge found the child would suffer "serious emotional distress such that the child [could not] reasonably communicate" at trial.[343] The child testified before counsel outside the courtroom, while the judge, jury, and defendant remained in the courtroom and watched the child testify on a television.[344] Unlike the Iowa procedure at issue in *Coy*, the Maryland procedure required an individualized showing of necessity.[345] Justice O'Connor, penning the majority opinion, concluded that the state's interest in protecting child witnesses was sufficiently important to outweigh the defendant's right to a face-to-face meeting.[346]

Since *Craig*, lower courts have continued to uphold procedures to shield children during court testimony.[347] However, as with states' reluctance to adopt the Uniform Representation of Children in Abuse, Neglect, and Custody Act, the majority of states have not taken steps to adopt uniform recommendations regarding alternative methods of testimony.[348] The ULC approved the Uniform Child Witness by Alternative Methods Act in 2002, encouraging states to allow child witnesses under thirteen years old to testify via alternative methods, including closed-circuit television.[349] However, despite all states having adopted some laws geared towards minimizing the emotional impact of testifying on child witnesses, only four states have enacted the Act in the past twenty years.[350]

Although some courts have upheld the use of screens to shield child witnesses, courts appear to draw the line at putting up the screen and do not allow courts to exclude a parent from the courtroom altogether.[351] Courts reason that parents must still have an opportunity to consult with

340. *See id.* at 1021.
341. *See id.*
342. 497 U.S. 836 (1990).
343. *See id.* at 855–56.
344. *See id.* at 841.
345. *See id.* at 844–45.
346. *See id.* at 853.
347. *See In re* C.W.D., 501 S.E.2d 232, 241 (Ga. Ct. App. 1998) (upholding the use of closed-circuit television); TEX. FAM. CODE ANN. § 104.004 (West 2023) (providing that the court may order testimony to be taken outside the courtroom and televised by closed-circuit equipment where a child witness is age 12 or younger or under alleges abuse).
348. *See Child Witness Testimony by Alternative Methods Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=fa810ffb-3194-417c-a79b-bf4100f02f2d (last visited Oct. 24, 2024); Atwood, *supra* note 263, at 16–18.
349. *See* UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2, cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2023).
350. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Westlaw References & Annotations 2023).
351. *See In re* N.P., 872 S.E.2d 501, 508–09 (Ga. Ct. App. 2022); *In re* B.G., 484 S.E.2d 293, 295 (Ga. Ct. App. 1997).

their lawyer contemporaneously to assist them in countering allegations made against them.[352] This places a burden on the court to design a procedure that allows parents to simultaneously hear the child's testimony and interact with their attorney.[353]

In assessing the fairness of implementing child witness shielding procedures on a state level in jury trials, social science studies find shielding measures do not increase mock jurors' bias against defendants, affect mock jurors' perception of trial fairness, or affect mock jurors' ability to assess deception.[354] However, mock jurors did believe child witnesses were less credible when they were shielded compared to when they appeared before the jury.[355]

D. In Camera Judicial Interviews

In camera interviews of a child occur when a judge interviews a child outside of the courtroom, typically in the judge's chambers or office.[356] Having the interviews occur in chambers instead of in open court minimizes the traumatic impact testifying can have on children and allows greater freedom for children to express their preferences outside of their parents' presence.[357] The majority of states provide no statutory guidance regarding in camera testimony during child protective proceedings.[358] Of the twenty states that have adopted statutes relating to in camera interviews generally, the majority only define legal parameters and procedures for criminal, not civil, cases.[359] Only eight states include statutory procedures for in camera interviews in civil cases.[360] This avenue fails to guarantee children a voice in child protective proceedings because it relies on judges using their discretion to find when an in camera interview is appropriate in any given case.[361] Although judges have the option to conduct in camera interviews, there are no consequences if a judge does not do so.

1. Procedural Protections

Similar to shielded in-court testimony, in camera interviews are often criticized as violative of parents' due process rights.[362] Accordingly, courts adopt several measures to address these concerns. Some of these measures

352. *See In re N.P.*, 872 S.E.2d at 509; *In re* T.S., 732 S.E.2d 541, 542 (Ga. Ct. App. 2012).
353. *See In re B.G.*, 484 S.E.2d at 295.
354. *See* Marsil, Montoya, Ross, & Graham, *supra* note 37, at 218, 224 (summarizing research findings from studies where researchers showed participants a videotaped recreation of a child sexual abuse trial).
355. *See id.* at 219–20.
356. *See id.*
357. *See* Gennarini v. Gennarini, 477 A.2d 674, 676 (Conn. App. Ct. 1984); Lesauskis v. Lesauskis, 314 N.W.2d 767, 768 (Mich. Ct. App. 1981).
358. *See* D'Ambra, *supra* note 38, at 348.
359. *See id.* at 348–49.
360. *See id.* at 349.
361. *See In re* Beresh, No. 2003CA00089, 2003 WL 22128799, at *5–6 (Ohio Ct. App. Sept. 15, 2003); *In re* Sherman, 832 N.E.2d 797, 801 (Ohio Ct. App. 2005).
362. *See* D'Ambra, *supra* note 38, at 337.

mirror the protective measures proposed above for in-court testimony.[363] All states appear to require that the interview occur before a court reporter so there is a record that the parties can review and criticize.[364] However, appellate courts in at least one state have held that courts are not always required to disclose the transcript from an in camera interview to parties who request it.[365]

In states that allow judges to exclude parents and parents' attorneys from in camera interviews, several courts allow the parents' attorneys to submit questions in advance for the judge to ask the child.[366] Permitting attorneys to submit questions protects parents' due process rights by not granting unfettered control of the process to judges.

2. Excluding Individuals from the Interview

States are split as to whether parents and their counsel should be present during in camera interviews to safeguard their due process rights.[367] States like Alabama and Oregon specifically require parties and their attorneys to be present at any in camera interview.[368] Other states like Florida and Rhode Island employ a balancing test to assess the circumstances of each case to determine whether parents or their counsel should be excluded when the court conducts an in camera interview.[369] These balancing tests require courts to weigh several factors, such as the child's direct knowledge of the facts, the child's age, whether testifying would result in psychological trauma to the child, and to what extent the best interests of the child overlap with the interests of the parents.[370]

Another caveat courts face is what to do when a parent does not have counsel. Generally, even when parents are not represented by counsel, courts should not permit parents to be present during in camera interviews.[371] Scholars argue that the potential damage caused by forcing a child to speak negatively about a parent in front of them may be irreparable.[372] Further, if a parent is present, then the child may not be upfront and truthful, particularly in cases of prior abuse.[373]

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363. As with the Sections above, this Article focuses on proceedings where the court has determined the child to be competent to testify. These intricacies of the competency determination should be the subject of future scholarship.

364. *See* Monteiro v. Monteiro, 55 So. 3d 686, 688 (Fla. Dist. Ct. App. 2011); *In re* James A., 505 A.2d 1386, 1391 (R.I. 1986).

365. *See In re* T.N.-S., 347 P.3d 1263, 1271 (Mont. 2015) (finding that the plain language of the relevant Montana statute did not require the court to disclose the transcript from the in camera interview of the child to the parties).

366. *See, e.g.*, *In re James A.*, 505 A.2d at 1389.

367. *Compare In re James A.*, 505 A.2d at 1389, *with* ALA. R. CIV. P. 43, *and* OR. REV. STAT. ANN. § 419B.310 (West 2024).

368. *See* ALA. R. CIV. P. 43; OR. REV. STAT. ANN. § 419B.310 (West 2024).

369. *See, e.g.*, *Monteiro*, 55 So. 3d at 688–89; *In re* Diana P., 656 A.2d 620, 622 (R.I. 1995); *James A.*, 505 A.2d at 1391.

370. *See In re James A.*, 505 A.2d at 1391.

371. *See* D'Ambra, *supra* note 38, at 340.

372. *See id.*

373. *See id.*

E. An Out-of-Court Alternative: Admission of Children's Hearsay Statements

Hearsay statements are out-of-court statements offered to prove the truth of the matter asserted and are generally not admissible in court.[374] As an alternative to live, in-court testimony or an in camera interview, several states allow admission of hearsay statements or nonverbal conduct by a minor regarding acts of abuse or neglect in a civil dependency or termination of parental rights proceeding, provided the statements provide a "sufficient indication of [their] reliability."[375] Courts allow this alternative only in cases where testimony is introduced explaining that forcing children to testify would cause them undue trauma.[376]

Some states have adopted hearsay exceptions for the testimony of children in civil abuse and neglect proceedings.[377] States have declared children to be "unavailable" to testify when experts advise it would be extremely detrimental to the child to appear in court.[378] Several states do not require a party to establish the child is unavailable first but still require courts to solicit testimony or written evidence explaining why the child will not testify in court and to explore alternative testimony options.[379] Other states restrict admission of hearsay statements based on the child's age.[380]

Courts consider a variety of factors to determine whether a child's out-of-court statement has sufficient indicia of reliability. These factors include whether the statement was both audio and video recorded, whether the parents had the opportunity to point out any impropriety in questioning techniques, whether the parents were allowed to cross-examine any hearsay witnesses, and whether the parents were able to challenge the reliability of methods used to obtain the statements from the child.[381] If a

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374. *See generally* FED. R. EVID. 801–02.

375. *See* ARIZ. REV. STAT. ANN. § 8-237 (2024); ARIZ. R.P. JUV. CT. 104(c). This is in addition to the generally adopted hearsay exceptions for "excited utterances" and "statements made for purpose of medical diagnosis or treatment" that can also serve as vehicles for introducing children's hearsay statements.

376. *See In re* Jam.J., 825 A.2d 902, 916 (D.C. 2003).

377. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-237 (2024); LA. STAT. ANN. § 15:440.5 (2024); MINN. STAT. ANN. § 595.02 (West 2023); MO. ANN. STAT. § 492.304 (West 2024); N.M. R. EVID. 11-803; VA. CODE ANN. § 63.2-1523 (2024). *But see* Crawford v. Washington, 541 U.S. 36, 51–52 (2004); Orenstein, *supra* note 45, at 909 ("*Crawford v. Washington* held that if a statement used at trial is testimonial, the declarant/witness must be made available for cross-examination. In defining the pivotal term 'testimonial,' the Court emphasized the intentions of the declarant/witness and whether the speaker could reasonably expect the statement he was making to be used in a future legal proceeding against the person implicated. In the case of children, who are unfamiliar with the legal system, and hence may not realize the potential or even obvious uses of their statements at future trials, such a focus on the expectations of the declarant/witness is problematic.").

378. *See In re* Faircloth, 527 S.E.2d 679, 681 (N.C. Ct. App. 2000).

379. *See* Pamela A.G. v. Pamela R.D.G., 134 P.3d 746, 752 (N.M. 2006).

380. *See, e.g.*, ARK. R. EVID. 804 (only applies under age 10); IND. CODE ANN. § 35-37-4-6 (West 2024) (under age 14 or developmentally disabled); KAN. STAT. ANN. § 38-2249 (West 2024) (under age 13); MD. CODE ANN., CRIM. PROC. § 11-304 (West 2024) (under age 13); MO. ANN. STAT. § 491.075 (West 2024) (under age 14); OHIO R. EVID. 803 (under age 12).

381. *See Pamela A.G.*, 134 P.3d at 750–52.

statement is insufficiently reliable, the statement may still be admitted if reliability concerns can be cured through an in camera interview with the child who made the statement or through other means.[382]

Out-of-court statements are rarely admitted because it requires specific procedural safeguards to protect the rights of parents.[383] Courts generally must enact these safeguards in obtaining the hearsay statements themselves.[384] This may take the form of having the child take an oath swearing to tell the truth, allowing the parents' counsel to observe and submit questions to the examiner, or having the statement audio and video recorded.[385] Additionally, similar to in camera interviews, courts have required testimony or a finding from the court that the child would experience significant trauma if subjected to cross-examination by their parents' counsel.[386]

III. RECOMMENDATION

> [T]he district court could have conducted the interview in chambers with counsel, recorded the interview, required the child to testify in court, appointed a neutral third party to speak with the child and report back to the parties and the court, or fashioned another suitable procedure for presenting the evidence. By not fashioning any procedure, not obtaining the evidence and consequently not considering the child's preference, the district court abused its discretion.[387]

Courts should take all reasonable steps to ensure children, if they so choose, have the maximum possible involvement in their court proceedings. This Part discusses a multitiered framework to advance three objectives: (1) providing children with opportunities to be heard in child protective proceedings; (2) promoting uniformity within each state as to how those opportunities are afforded to children; and (3) measuring the efficacy of those opportunities through the eyes of children and other key stakeholders. To meet these objectives, this Part first argues that children must be recognized as parties to child protective proceedings. It then outlines "best practices" for each of the four avenues discussed in Part II to provide children with a voice in child protective proceedings and advocates for

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382. *See In re* Tamara G., 745 N.Y.S.2d 6, 10–11 (N.Y. App. Div. 2002) (finding that the 11-year-old child should be examined, at least in camera, where her statements contained multiple unexplained inconsistencies).

383. *See* Brock v. Brock, 499 N.W.2d 752, 758 (Mich. 1993); Ashley Fansher & Rolando V. del Carmen, *"The Child as Witness": Evaluating State Statutes on the Court's Most Vulnerable Population*, 36 CHILD.'S LEGAL RTS. J. 1, 9 (2016).

384. *See* S.C. CODE ANN. § 17-23-175 (2024); TENN. CODE ANN. § 24-7-123 (2024); *Pamela A.G.*, 134 P.3d at 751–52.

385. *See Brock*, 499 N.W.2d at 758 (describing sworn video deposition where parents counsel observed through a one-way window and were allowed to submit questions); *Pamela A.G.*, 134 P.3d at 749, 752 (describing that the interview with trained clinic forensic interview at "Children's Safe House" was audio and video recorded and parents had opportunity to point out impropriety in questioning).

386. *See Brock*, 499 N.W.2d at 755.

387. Holiday v. Holiday, 247 P.3d 29, 33 (Wyo. 2011).

mandating a written finding by courts as to a child's preference in each proceeding. It concludes by recommending that states adopt standards of practice for child and parent attorneys in child protective proceedings and employ survey methodology to promote accountability and oversight of these practices. Implementing this framework will best safeguard children's constitutional rights in child protective proceedings.

A. Party Status and Attendant Rights for All Children

To meet the first identified objective of providing children with the opportunity to participate in proceedings, the state should first confer party status on all children subject to said proceedings. Because any determination in a child protective proceeding directly impacts a child's interests, it follows that children are a necessary party to the case.[388] As discussed above, the majority of states already consider children to be parties in child protective proceedings.[389] All remaining states should adopt statutes expressly conferring party status on children in child protective proceedings.[390] States should explicitly adopt legislation that clarifies that adding children as parties to proceedings will automatically guarantee their right to counsel, their right to notice of all proceedings, and their right to attend and participate in court hearings.[391]

1. Right to Counsel

Statutes conferring party status on children should attach an attendant right to counsel.[392] States should prioritize appointment of client-directed counsel for all children in child protective proceedings to ensure children have an advocate for their expressed preferences. Currently, thirty-four states and the District of Columbia require courts to appoint counsel for children in child protective proceedings in some circumstances, but only fifteen of those states require client-directed counsel under all reasonable circumstances.[393] States shifting to the client-directed counsel model should still be careful to carve out circumstances under which client-directed counsel would not be feasible.[394] For example, Texas provides that an appointed attorney *ad litem* may present to the court its determination of what is in the child's best interests in lieu of a child's expressed objectives when a child:

> (1) lacks sufficient maturity to understand and form an attorney–client relationship with the attorney;

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388. *See id.* at 32.
389. *See supra* Section II.A.
390. *See infra* Appendix A.
391. *See* Kennedy, *supra* note 42, at 960.
392. *See* Kennedy, *supra* note 42, at 960; Ross, *supra* note 28, at 1365; Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005).
393. DAVIS, HARFELD, & WEICHEL, *supra* note 31, at 7.
394. *E.g.*, TEX. FAM. CODE ANN. § 107.008(a) (West 2023).

> (2) despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child; or
>
> (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication.[395]

These carveouts afford an appropriate amount of discretion to allow the attorney to substitute judgment on behalf of a child on a case-by-case basis. If none of these limited exceptions are met, states should require the attorney to put the child's preference on the record.[396] Even when a state adopts such exceptions to advocating for a child's expressed objectives, the pertinent statute and standards should require attorneys to inform a court when they are substituting their judgment for that of the child.

Counsel may serve a dual role as both a client-directed representative and a best interests advocate so long as there is no conflict of interest between a child client's expressed objectives and their best interests.[397] However, if an attorney determines that there is a conflict of interest, then the burden should be on the attorney to withdraw as guardian *ad litem* and request appointment of separate counsel to represent the child's best interests.[398] State supreme courts have upheld this approach, holding that under these circumstances, an attorney can continue to serve as the child's client-directed attorney unless the conflict is so severe that it warrants complete withdrawal from the case.[399]

In terms of timing for the appointment of such representatives, states should allow the option of appointing a representative in the prepetition investigatory phase to advocate and seek relief on behalf of a child. Cases like *DeShaney v. Winnebago County Department of Social Services*[400] demonstrate how the current system is failing prior to the initiation of a child protective proceeding.[401] In *DeShaney*, a Department of Social Services worker visited four-year-old Joshua DeShaney and recorded her suspicion of child abuse and her concern that Joshua's father was not complying with the agreement reached between him and the Department.[402] No action was taken, even after the social worker was told at one visit that

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395. *Id.*

396. *See In re* Adoption of D.M.B., No. 1732 WDA 2018, 2019 WL 1960057, at *3 (Pa. Super. Ct. 2019); *In re* Adoption of T.M.L.M., 184 A.3d 585, 590 (Pa. Super. Ct. 2018).

397. *See, e.g.*, PA. R. JUV. CT. P. 1154(9) cmt. (defining "legal interests" as requiring the attorney to "express the child's wishes to the court regardless of whether the attorney agrees with the child's recommendation" whereas "best interests" represents what "the guardian *ad litem* believes is best for the child's care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.").

398. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).

399. SUP. CT. OF GA., FORMAL ADVISORY OPINION 10-2 (2011) (upholding Ga. S. Ct. Docket No. S11U0730).

400. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 203 (1989).

401. *Id.* at 203.

402. *Id.* at 192–93.

Joshua was "too ill" to see her.[403] Unfortunately, Joshua's father ultimately beat the boy "so severely that he fell into a life-threatening coma," resulting in severe brain damage.[404] Despite the social worker's concerns, the Department never filed a case in court, so an attorney was never appointed for Joshua. Appointing prepetition representation for children would provide them with an individual who is ethically obligated to meet with them on a regular basis and serve as an additional check if the state fails to intervene or overexerts its removal powers.[405] Moreover, unlike a Department of Social Services worker, a child's appointed representative can counsel the child regarding their wishes and suggest avenues to serve their best interests.

Arguably the largest barrier to the appointment of counsel for every child is the lack of funds to compensate appointed attorneys. In 2018, the U.S. Children's Bureau opened up Title IV-E entitlement funding[406] to reimburse states for up to half their costs of legal representation for children, financially incentivizing states to provide attorneys to children to avoid leaving federal funds unspent.[407] As additional motivation, the studies detailed above[408] in conjunction with other recent state reports estimate high-quality representation for children reduces time to permanency and increases rates of reunification, thereby reducing federal and state spending on foster care, adoption, and permanency care assistance (PCA) subsidies.[409] The QIC-ChildRep empirical findings similarly concluded that increasing the quality of attorney representation significantly reduces the time needed for a child to reach permanency.[410] The current costs of foster care, adoption, and PCA subsidies are estimated to significantly exceed the costs of improving access to legal representation.[411] These studies suggest states should invest funds on the front end to potentially substantially reduce costs on the back end.

2. Right to Notice and Right to Appear

States should adopt the NCJFCJ's position that children of any age should have a presumptive right to attend court unless the judge specifically finds that attending would traumatize the child or put the child in

403. *Id.* at 193.
404. *Id.*
405. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.4(a)–(b) (AM. BAR ASS'N 1983).
406. *See generally Title IV-E—Federal Payments for Foster Care and Adoption Assistance*, STATE JUST. INST., https://fundingtoolkit.sji.gov/title-iv-e-federal-payments-for-foster-care-and-adoption-assistance/ (last visited Sept. 6, 2024).
407. Amy Harfeld, *Twenty Years of Progress in Advocating for a Child's Right to Counsel*, ABA (Mar. 22, 2019), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/twenty-years-of-progress-in-advocating-for-a-childs-right-to-counsel/.
408. *See supra* Section II.B.1.
409. *See* SUP. CT. OF TEX. CHILD. COMM'N, TASK FORCE ON COURT-APPOINTED LEGAL REPRESENTATION FINAL REPORT 40 (2021) [hereinafter TEXAS TASK FORCE FINAL REPORT], https://texaschildrenscommission.gov/media/zqbpshby/tfcalr-final-report.pdf.
410. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 177.
411. *See* TEXAS TASK FORCE FINAL REPORT, *supra* note 409, at 41.

danger.[412] The NCJFCJ cites social science research findings regarding the benefits children derive from appearing and participating in court.[413] Namely, the NCJFCJ highlights research findings that children appreciated feeling involved in their cases and that children who participated were more likely to trust judges to make good decisions about their cases.[414] Even for preverbal children, observing the children's interactions with their parents can help judges make decisions about placement, visitation, and therapeutic services.[415] Establishing a presumptive right for children to attend court tips the scales in favor of children while still maintaining judicial discretion to limit children's attendance when necessary to protect their well-being.[416] If a judge excuses a child's absence, then the judge should still seek avenues to make a finding as to the child's preference through the other avenues discussed in this Article.

As an alternative, California codifies the right for children to attend hearings within the California Welfare and Institutions Code.[417] California provides the most comprehensive defaults for children to appear.[418] Unlike other state laws, California directs courts to consider the "wishes of the child" in child protective proceedings.[419] Adopting this explicit directive codifies the legislature's intent that a child's preferences should be considered to the extent possible when determining whether to terminate a parent's rights.[420] To aid courts in ascertaining a child's best interests, Section 349 of the California Welfare and Institutions Code sets forth as a default that a child subject to a juvenile court hearing is entitled to be present at all hearings.[421] Further, if the child chooses to attend the hearing, the court is required to inform the child that they have the right to address the court and participate in the hearing, and the court must allow children to do so if they desire.[422] The Code provides for an additional layer of protection for children who are ten years of age or older.[423] Specifically, if

412. *See* SEEN, HEARD, AND ENGAGED, *supra* note 319, at 8–9; *In re* Juan H., 13 Cal. Rptr. 2d 716, 718 (Cal. Ct. App. 1992) ("Where, however, the child's desires and wishes can be directly presented without live testimony, where the issues to be resolved would not be materially affected by the child's testimony, and where it is shown that the child would be psychologically damaged by being required to testify, we hold the juvenile court judge has the power to exclude such testimony.").

413. *See* SEEN, HEARD, AND ENGAGED, *supra* note 319, at 5, 8.

414. *See id.* at 5.

415. *See id.* at 8.

416. *See id.* at 11 (NCJFCJ guidance provides that this burden should be high and that courts should affirmatively "ask how the child was notified of the hearing, by whom and when, whether she was encouraged to attend, whether the hearing process was explained to her, whether transportation was made available, and whether there was a school or extracurricular activity conflict.").

417. *See, e.g.*, FLA. R. JUV. P. 8.255(b)(1); 705 ILL. COMP. STAT. ANN. § 405/1-5(1) (LexisNexis 2024); KAN. STAT. ANN. § 38-2247(a) (2024); LA. CHILD CODE ANN. art. 661(A) (2024); MD. CODE ANN. CTS. & JUD. PROC. § 3-801 (West 2024); MISS. CODE. ANN. § 43-21 203(6) (2024); MO. SUP. CT. R. 124.03(a); OR. REV. STAT. ANN. § 419B.875(2)(b) (West 2024); TEX. FAM. CODE ANN. § 263.302 (West 2023).

418. CAL. WELF. & INST. CODE § 366.26 (Deering 2024).

419. *See id.* § 366.26(h)(1).

420. *See In re* Laura H., 11 Cal. Rptr. 2d 285, 288 (Cal. Ct. App. 1992).

421. CAL. WELF. & INST. CODE § 349(a) (Deering 2024).

422. *See id.* § 349(c).

423. *See id.* § 349(d).

a child is at least ten years old and is not present at a hearing, then the court is required to determine whether the child was properly notified of their right to attend and whether they were given the opportunity to attend.[424] If the court finds the child was not properly notified or was not given the opportunity to attend, then the court must postpone the hearing to allow the child to be present unless it finds "it is in the best interest of the minor not to [postpone] the hearing."[425]

Unlike states that do not afford children any rights to attend child protective hearings, California requires courts to provide children with the option of attending and with proper notice of their rights should they choose to attend.[426] This self-imposed regulation that requires courts to determine whether a child's lack of participation is due to lack of awareness, lack of opportunity, or lack of desire means that courts are actively ensuring children who want to be present at hearings are given the opportunity to do so.[427] States should supplement these statewide measures with individual judicial mandates that all children appear at substantive hearings unless doing so would harm the child.

B. Providing Multiple Avenues for Child Testimony

Courts should ensure that children have access to multiple avenues for presenting testimony to best balance the court's interest in informed decision-making with the potential trauma children face when testifying in open court. Although courts do not face a Confrontation Clause concern in civil proceedings, procedures should favor soliciting testimony that maximizes the credibility and reliability of the child's statements.

1. In-Court Testimony

When children clear the initial hurdle of being permitted to appear in court, courts should follow the lead of states whose only requirement for a child to testify if they desire to do so is that they be competent to testify. In all instances involving in-court testimony, courts should consider implementing all measures their respective state statutes and budgetary constraints allow to create a "child-friendly courtroom."[428] Many of these measures would not be financially burdensome to courts, including allowing children to take an abbreviated oath; encouraging attorneys to dress less formally; allowing children to identify a support person, pet, or item to accompany them to the witness stand; or following national or state judicial bench cards to assist in streamlining the proceedings.[429]

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424. *Id.*; OR. REV. STAT. § 419B.839(1)(f) (2024) (providing children age twelve or older must receive notice of hearings but lacking provisions ensuring they attend).

425. CAL. WELF. & INST. CODE § 349(d) (Deering 2024).

426. *Id.*

427. *See* Jenkins, *supra* note 35, at 164.

428. *See* CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 24–26; Pantell, *supra* note 218, at 2.

429. *See* CHILD-FRIENDLY COURTROOMS, *supra* note 44, at 8–11; Pantell, *supra* note 218, at 2; SEEN, HEARD, AND ENGAGED, *supra* note 319, at 11.

In cases where a party introduces evidence indicating a child would suffer psychological trauma if they testified, courts should make an appropriate finding as to this potential harm and tailor an appropriate procedure to allow children to express their preferences in a way that minimizes trauma. This may be through employing the shielding measures discussed above or through an in camera interview.

2. In Camera Interviews

The in camera interview process must sufficiently protect the due process interests of parents while also protecting children from undue trauma. Again, the California Welfare and Institutions Code provides a level of detail in articulating procedures for in camera interviews that is absent in the majority of state statutes governing child protective proceedings.[430] Section 366.26 of the Code identifies several prerequisites that must be met before a child can be subject to an in camera interview.[431] First, the statute implies that a court reporter must be present and if the parties are represented by counsel, their counsel must be present.[432] However, the child's guardian *ad litem* is not required to be present.[433] Courts should only be permitted to exclude counsel for parents if they all agree, with the caveat that mere acquiescence to the interview does not constitute a waiver of the parents' counsel's right to attend.[434] Whether the parents' counsel will be present or not, the court should allow attorneys to submit questions in advance for the judge to ask the child.[435]

Next, one of three circumstances should exist: "(i) [t]he court determines that testimony in chambers is necessary to ensure truthful testimony; (ii) [t]he child is likely to be intimidated by a formal courtroom setting; [or] (iii) [t]he child is afraid to testify in front of their parent or parents."[436] These circumstances track federal statutes that govern circumstances under which a child may testify via closed-circuit television.[437] Once the judge finishes conducting the interview, the child's parents may ask the court reporter to read back or summarize the testimony.[438] Judges should retain discretion to grant these requests.

For the interview itself, states should adopt a forensic interview protocol following the lead of states like Michigan, which utilizes empirically tested methodology.[439] This will help mitigate issues with interviewer bias and with unreliability or suggestibility of child testimony.[440] This protocol

430. *See* CAL. WELF. & INST. CODE § 366.26 (Deering 2024).
431. *Id.*
432. *Id.*
433. *Id.*
434. *See In re* Laura H., 11 Cal. Rptr. 2d 285, 288.
435. *See* D'Ambra, *supra* note 38, at 344.
436. CAL. WELF. & INST. CODE § 366.26(h)(3)(A) (Deering 2024).
437. *See* 18 U.S.C. § 3509(b)(1).
438. CAL. WELF. & INST. CODE § 366.26(h)(3)(B) (Deering 2024).
439. *See* Tara Urs, *Can the Child Welfare System Protect Children Without Believing What They Say?*, 38 N.Y.U. REV. L. & SOC. CHANGE 305, 334 (2014).
440. *See id.*

should also provide tools for identifying if a child is being "coached" or intentionally lying.[441] Training regarding questioning should follow internationally agreed upon "optimal interview practices," including encouraging narrative responses by using open-ended prompts.[442] Training should also include consideration of where the interview takes place, including whether parents could have access via a one-way mirror.[443] Further, judges should employ both verbal and nonverbal means to communicate to the child that they can safely discuss sensitive or private issues.[444]

3. Out-of-Court Statements

As a final option, courts should adopt a specific procedure through which children's out-of-court statements may be entered into the court's record. This Part suggests two possible options for such a procedure. The first is modeled off a recent Arizona case which held that the state child welfare agency or child's attorney holds the initial burden to seek a protective order to excuse a child from being called as a witness by their parents' attorneys.[445] The agency or child's attorney then must make an offer of proof describing the hearsay statements and demonstrating a reasonable likelihood the hearsay statements would be admissible under the state's relevant hearsay exception rule.[446] If they are able to meet this threshold, then the burden shifts to the parents to show they will be denied due process if they are not allowed to cross-examine the child about statements contained in the offer of proof.[447] If parents meet their burden, then the trial court should then consider alternatives to in-court testimony, such as shielding measures or in camera interviews.[448]

Alternatively, a state may establish a separate hearsay exception for a child's out-of-court statements made to a forensic interviewer that specifies that the child's statements will be admitted as an exception to the state's hearsay rule unless another attorney objects. In weighing admissibility and probative value of the statement, courts should emulate states like Montana and Tennessee that have adopted factors for courts to consider when admitting children's hearsay statements, including the child's mental and physical maturity, ability to distinguish the truth from a lie, ability to communicate verbally, comprehension level, and motives to falsify or distort testimony, as well as the timing of the statement, the nature

441. *See* Thomas D. Lyon, Lindsay C. Malloy, Jodi A. Quas, & Victoria A. Talwar, *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEV. 914, 925 (2008).

442. *See* Michael E. Lamb, Kathleen J. Sternberg, Yael Orbach, Phillip W. Esplin, & Susanne Mitchell, *Is Ongoing Feedback Necessary to Maintain the Quality of Investigative Interviews with Allegedly Abused Children?*, 6 APPLIED DEVELOPMENTAL SCI. 35, 35 (2002).

443. *See* Fansher & del Carmen, *supra* note 383, at 14.

444. *Id.*; *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 596 (2006).

445. *See generally* Dep't of Child Safety v. Beene, 332 P.3d 47, 55 (Ariz. Ct. App. 2014).

446. *See generally id.* at 53.

447. *See generally id.*

448. *See generally id.* at 54.

of the alleged abuse, and the reliability of the interviewing technique used to solicit the statements.[449]

C. Mandated Written Court Finding as to Child's Preference

As a final step to guaranteeing a court's explicit consideration of a child's expressed preference, states should adopt a requirement within the relevant state statute or juvenile court rules that requires courts to make a written finding as to the child's preference when adjudicating final placement decisions. Requiring a court to make such a finding does not obligate judges to follow the child's preference but rather holds judges accountable for allowing a child to feel their preferences were considered. In states that have adopted a similar requirement for child custody disputes, appellate courts have reversed and remanded decisions where the lower court failed to craft a procedure to obtain evidence as to the child's preference.[450] Adopting this requirement advances a state policy that considers a child's preference an integral part of determining what is in the child's best interests.[451]

Critics may argue that requiring a court to ascertain a child's preference is overly burdensome in an already clogged court system. A potential way to address this concern is to follow states like California that do not require an explicit in-court statement from the child as to their preference, particularly where it would be contrary to a child's best interest.[452] Rather, courts can rely on reasonable inferences drawn from the child's statements or conduct, informal direct communication off the record, letters, calls, electronic recordings, or reports prepared for the case.[453] In *In re Leo M.*,[454] the appellate court held that it was reasonable for the trial court to infer the child would prefer to live with the only mother and father he recognized and acknowledged rather than his biological parents, whom he did not recognize.[455]

Additionally, courts should follow the California Fourth District Court of Appeals in not imposing a requirement that the child must be aware that termination of parental rights is at issue when expressing their wishes.[456] California courts are split as to whether California's statutory mandate that courts consider a child's wishes necessarily requires the child to understand the nature of the termination proceeding.[457] In rejecting this awareness requirement, the California Fourth District Court of Appeals

449. *See* MONT. CODE ANN. § 46-16-220(3)(a) (2023); TENN. CODE ANN. § 24-7-123(b)(2) (2024).
450. *See* Holiday v. Holiday, 247 P.3d 29, 33 (Wyo. 2011).
451. *See id.*
452. *See In re* Amber M., 127 Cal. Rptr. 2d 19, 23 (Cal. Ct. App. 2002); *In re* Diana G., 13 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 1992); *In re* Leo M., 24 Cal. Rptr. 2d 253, 258 (Cal. Ct. App. 1993).
453. *See In re Amber M.*, 127 Cal. Rptr. 2d at 23–24; *In re Leo M.*, 24 Cal. Rptr. 2d at 258; *In re* Amanda D., 64 Cal. Rptr. 2d 108, 112 (Cal. Ct. App. 1997).
454. *In re Leo M.*, 24 Cal. Rptr. 2d at 258.
455. *See id.* at 259–60.
456. *See id.* at 258.
457. *See In re Amber M.*, 127 Cal. Rptr. 2d at 23.

advanced that this requirement is contrary to the plain language of the statute and "fails to take into account the tremendous diversity that exists among children."[458] The court has provided two common examples in which this requirement would preclude effective implementation of the statute.[459] The first occurs when children are not of sufficient age or maturity to understand termination of parental rights or express their feelings about it.[460] Even where a child is not able to expressly state their preference for terminating parental rights, the judge or appointed representative may still observe the child's behavior around their parents. The second occurs when children would experience permanent and severe trauma if asked about the prospect of severing ties with their biological parents.[461] Courts need to be cautious about ascertaining a child's preference while minimizing trauma to the child. Further, courts should be cognizant that the alternative of telling a child after the fact that their parents' rights have been terminated may be even more traumatizing than helping them understand a pending reality. Finally, even in the event a child is asked to express their preferences and explicitly chooses not to, a court can still write in its order that the child chose not to express a preference. Alternatively, if a child is unable to express their preferences, a court may still make a finding that the child is not of sufficient age, maturity, or mental capacity to express a preference.

D. Adoption of Statewide Standards of Practice

The NACC,[462] the ABA,[463] and the NCJFCJ[464] have each promulgated national standards of practice. While they serve as valuable resources, they lack legal enforceability in individual states and therefore are merely advisory.[465] Moreover, the lackluster response to the adoption of a national uniform act regarding representation of children in abuse and neglect proceedings[466] suggests that the best approach may be to promote uniformity within states if it cannot be achieved nationwide. On the state level, twenty-three states and the District of Columbia have adopted standards of representation for children's lawyers.[467] States have adopted these

458. *See In re Leo M.*, 24 Cal. Rptr. 2d at 258.
459. *See id.*
460. *See id.* at 258–59.
461. *See id.*
462. *See* NACC GUIDELINES, *supra* note 257.
463. *See* ABA STANDARDS OF PRACTICE, *supra* note 42.
464. *See* NCJFCJ GUIDELINES, *supra* note 258.
465. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 3.
466. *See Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, UNIF. L. COMM'N, https://perma.cc/54CF-QYGC (last visited Oct. 26, 2024) (showing enactment history).
467. *See generally* GUIDELINES WITH COMMENTS FOR GUARDIANS AD LITEM IN DEPENDENCY AND TERMINATION-OF-PARENTAL RTS. CASES IN JUV. CTS. (ALA. DEP'T OF FIN.); QUALIFICATIONS AND STANDARDS FOR ATT'YS APPOINTED TO REPRESENT CHILD. AND PARENTS (SUP. CT. OF ARK. 2016); PERFORMANCE GUIDELINES FOR COUNS. IN CHILD PROT. MATTERS (CONN. DIV. OF PUB. DEF. SERVS.); CHILD ABUSE AND NEGLECT ATT'Y PRAC. STANDARDS (D.C. SUPER. CT. 2003); FLA. GUIDELINES OF PRAC. FOR ATT'YS WHO REPRESENT CHILD. IN DELINQ. PROC. (FLA. BAR STANDING COMM. ON THE LEGAL NEEDS OF CHILD. 2009), https://www.modelsforchange.net/publications/433/;

standards with the goal of increasing accountability and consistency for both attorneys and judges in child protective proceedings and providing guidance and best practices for child and parent attorneys.[468]

QIC-ChildRep conducted the most recent empirical analysis measuring the impact a "best practices" model could have on attorney representation in child protective proceedings.[469] QIC-ChildRep conducted a national needs assessment resulting in the development of the QIC-ChildRep Best Practice Model (the Model), which updates and expands the ABA Standards of Practice.[470] QIC-ChildRep also developed a two-day training for attorneys to learn the Model, which is distilled into "six core skills" including "[e]nter[ing] the child's world."[471] The Model encourages attorneys to accommodate the voice of the child as much as possible, meaning that even if they are just appointed as a best interests advocate, they should still advocate for a child's position.[472] To promote this skill, the two-day training includes sessions on interviewing and counseling child clients to identify their advocacy goals.[473] QIC-ChildRep's empirical findings illustrated that training on this core skill "[led] both the client-directed lawyer and [the] best interests lawyer to better accommodate the child['s] wishes and enhance procedural justice for the child."[474] More broadly, the

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THE GUARDIAN AD LITEM IN DEPENDENCY PROC.: A GUIDE TO BEST INT. ADVOC. (GA. OFF. OF THE CHILD ADVOC. 2d ed. 2022); IOWA CT. R. ch. 62 (providing the standards of practice for lawyers representing children in custody cases); KAN. SUP. CT. R. 110A (providing the standards for guardians *ad litem*); KY. FAM. CT. R. OF PROC. & PRAC. app. D (2023) (providing the standards of expected conduct for court-appointed counsel); LA. PUB. DEF. BD. TRIAL CT. PERFORMANCE STANDARDS FOR ATT'YS REPRESENTING PARENTS IN CHILD IN NEED OF CARE AND TERMINATION OF PARENTAL RTS. CASES (LA. PUB. DEF. BD. 2011); MD. GUIDELINES FOR PRAC. FOR CT.-APPOINTED LAWS. REPRESENTING CHILD. IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS app. (MD. CTS. 2011) [hereinafter MD. GUIDELINES]; PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES (MASS. COMM. FOR PUB. COUNS. SERVS. 2006), www.publiccounsel.net/wp-content/uploads/2023/11/Assigned-Counsel-Manual.pdf; MO. SUP. CT. R. 129 app. C (providing the standards with comments for guardians *ad litem* in juvenile and family court division matters); PRAC. STANDARDS: REPRESENTATION OF CHILD. IN DEPENDENT/NEGLECT CASES § XXII (MONT. OFF. OF PUB. DEF. 2018); NEB. CT. R. § 6-1705 (providing the practice standards for guardians *ad litem* for juveniles in separate juvenile court proceedings); GUARDIAN AD LITEM PERFORMANCE STANDARDS attach. A (N.M. CORINNE WOLFE CTR. FOR CHILD & FAM. JUST. 2018); STANDARDS FOR ATT'YS REPRESENTING CHILD. (N.Y. STATE BAR ASS'N COMM. ON CHILD. & THE L. 2015); SPECIFIC STANDARDS FOR REPRESENTATION IN JUV. DEPENDENCY CASES (OR. STATE BAR 2017); STANDARDS OF PRAC. FOR PARENTS' LAWS., GUARDIANS AD LITEM & LEGAL COUNS. PRACTICING CHILD WELFARE DEPENDENCY CASES IN PA. (PA. OFF. OF CHILD. & FAMS. IN THE CT. 2014) [hereinafter PA. STANDARDS]; CT. APPOINTED ATT'Y GUIDELINES (S.D. UNIFIED JUD. SYS. 2023); TENN. SUP. CT. R. 40 (providing the guidelines for guardians *ad litem* for children in juvenile court neglect, abuse, and dependency proceedings); STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILD. (VA. SUP. CT. amended 2018); REPRESENTATION OF CHILD. & YOUTH IN DEPENDENCY CASES PRAC., CASELOAD, & TRAINING STANDARDS (WASH. SUP. CT.—COMM. ON CHILD. IN FOSTER CARE 2022); GUARDIANS AD LITEM SKILLS-BASED HANDBOOK (WYO. GUARDIANS AD LITEM PROGRAM 2014).

468. *E.g.*, PA. STANDARDS, *supra* note 467; MD. GUIDELINES, *supra* note 467.

469. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 181.

470. *See id.* at 66.

471. *See id.* at 67 ("Engage with the child, learn their needs, guide them, counsel them and advocate for their needs while accommodating their stated interests consistent with state law.").

472. *See id.*

473. *See id.* at 73.

474. *See id.* at 181.

findings showed attorneys trained in the Model changed how they represented children and were significantly more likely to engage in behaviors considered best practices.[475] In turn, these behaviors led to improvement in case outcomes for children, with children whose representative followed the Model more likely to experience permanency within six months and to exit care.[476]

QIC-ChildRep's study suggests that adoption of statewide standards of practice coupled with mandatory training for attorneys and judges will improve quality of representation and engagement with children while promoting accountability and consistency among attorneys for children and parents across the state. States should pair this training with trauma-informed practices training and cultural competency training for all attorneys as a condition for certification to be eligible for appointment as counsel.[477] Moreover, states should consider adopting enforcement or other assessment measures if attorneys fail to meet these practice guidelines.

E. Adoption of a Statewide Routine Oversight Procedure

Oversight and accountability are necessary to measure the success of any proposed recommendations.[478] Without such measures, states cannot hold attorneys and judges accountable if they fail to comply with statutory requirements or standards of practice.[479] Given the significant variation in state statutes and practices, states should adopt procedures whereby they routinely survey key stakeholders regarding the actual practices implemented by the judiciary and attorneys.[480] Recent surveys in Oregon, Colorado, and Texas exemplify possible survey methodologies, the types of feedback states receive, and the ways states may use results to frame future initiatives to improve child protective proceedings.[481] The Oregon and Texas surveys solicited feedback from multiple stakeholder groups including state child welfare agency caseworkers, CASAs, court-appointed

475. *See* DUQUETTE, ORLEBEKE, ZINN, POTT, SKYLES, & ZHOU, *supra* note 203, at 163.

476. *See id.* at 185.

477. Peters, *supra* note 28, at 1028; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38–39 (2001).

478. CASEY FAM. PROGRAMS, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: KEEPING CHILDREN SAFE AND STRENGTHENING FAMILIES IN COMMUNITIES 21 (2019).

479. TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 99.

480. *See, e.g.*, CARA L. NORD, SHERI DANZ, & REBECCA K. GARRISON, THE OFF. OF THE CHILD'S REPRESENTATIVE, ENGAGING & EMPOWERING YOUTH: YOUTH FEEDBACK ABOUT THEIR GAL AND COURT EXPERIENCES, AS WELL AS OTHER YOUTH PARTICIPATION DATA (2020) [hereinafter COLORADO YOUTH FEEDBACK], https://coloradochildrep.org/wp-content/uploads/2020/11/Engaging-and-Empowering-Youth-Paper.pdf; TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 8; OR. JUD. DEP'T, STRATEGIES TO IMPROVE THE EFFECTIVENESS AND EFFICIENCY OF OREGON'S JUVENILE DEPENDENCY SYSTEM SURVEY RESULTS (2017) [hereinafter OREGON DEPENDENCY SYSTEM SURVEY], https://www.courts.oregon.gov/programs/jcip/Committee/Documents/DStrategiestoImprovetheEffectivenessandEfficiencyofOregon%27sJuvenileDependencySystem-StatewideResults.pdf.

481. *See, e.g.*, TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 8; OREGON DEPENDENCY SYSTEM SURVEY, *supra* note 480, at 1.

attorneys, judges, court administrators, and coordinators.[482] The Texas survey also surveyed youth in care[483] and foster parents.[484] In contrast, the Colorado survey employed a focus group approach to survey ninety-three youths.[485] These three survey methods highlight the benefits of increased oversight to follow up on existing rules and procedures.

The Oregon Judicial Department (OJD) constructed an online survey pursuant to a 2017 state statutory directive to "solicit input on, develop, and implement strategies to improve the effectiveness and efficiency of Oregon's juvenile dependency systems and to determine the appropriate level of legal services."[486] The Oregon study asked respondents to rate their respective courts' performance on sixteen primary functions and then sought open-ended comments for general feedback.[487] Two specifically identified functions were "[e]nsuring that all parties who wish to be heard have an opportunity to be heard" and allowing attorneys, parties, and witnesses to appear telephonically or via video conference if it does not "compromis[e] the rights of parents or child."[488] Coupled with Oregon's explicit designation of a child as a "party" to child protective proceedings, OJD's survey emphasized to stakeholders that it prioritized rights of children in court.[489] The survey garnered over four hundred responses from stakeholders including Department supervisors, district attorneys, parent and child attorneys, judges, and court staff.[490] The survey results helped OJD prioritize functions that are not being met by the current court procedures and identify statewide concerns regarding large caseloads and overbooked dockets.[491]

The Colorado Office of the Child's Representative (OCR), created by the Colorado General Assembly in 2000 to improve consistency of representation of children in Colorado, conducts focus group surveys in Colorado.[492] Colorado's 2020 focus group survey was the most recent in a long line of studies regarding youth voice and participation in child protective proceedings to advance the OCR's mission.[493] Part of the most recent survey assessed the effectiveness of Colorado Chief Justice Directive (CJD) 04-06, which includes in its commentary that guardians *ad litem* should "endeavor to maximize the child's involvement in the court proceedings" and requires them to "[s]tate the child's position, when

482. *See* TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 11; OREGON DEPENDENCY SYSTEM SURVEY, *supra* note 480, at 1.
483. TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 11 (defining "youth in care" as "children over the age of 12 in DFPS conservatorship . . . .").
484. *See id.*
485. *See* COLORADO YOUTH FEEDBACK, *supra* note 480, at 8.
486. OREGON DEPENDENCY SYSTEM SURVEY, *supra* note 480, at 1.
487. *Id.* at 4.
488. *Id.* at 2–3.
489. *See* OR. REV. STAT. § 419B.875 (2024).
490. OREGON DEPENDENCY SYSTEM SURVEY, *supra* note 480, at 1.
491. *See id.* at 6.
492. *See* TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 113.
493. COLORADO YOUTH FEEDBACK, *supra* note 480, at 4.

ascertainable."[494] The survey results indicated that guardians *ad litem* were still falling short in advising children of their right to attend court and in "advocating for the elimination of barriers to the [child's attendance at court]."[495] OCR's report on the survey findings made recommendations to address those shortcomings.[496]

To follow up on these and other survey results, the OCR conducts an in-depth review process wherein agency representatives complete in-court observations of attorneys.[497] In these observations, one of the assessment measures is whether the attorney explicitly informs the court of the child's preference.[498] The OCR also provides a formal complaint process wherein anyone can file a complaint against a guardian *ad litem* or appointed legal representative to trigger an OCR investigation.[499] These processes serve as a check on children's attorneys both in and after the court process because the OCR will not renew the contracts of representatives who fail to comply with the CJD.

Finally, the Texas Children's Commission's 2018 Study on Legal Representation surveyed stakeholders on the effectiveness of the Child Protective Services (CPS) court-appointment system and how its functioning impacted quality of legal representation.[500] Based on the survey results, the Texas Children's Commission recommended and secured the creation of a Legal Representation Task Force, which was in part be charged with "[e]stablishing standards of practice for attorneys who accept appointments."[501] In its 2021 final report, the Task Force identified creation of a Standards of Representation committee as a priority recommendation.[502] This committee, formed in 2022, is currently working on developing standards of practice as another measure of accountability for children's attorneys.[503]

CONCLUSION

Although at first glance it appears that children have multiple avenues to voice their preferences in child protective proceedings, a closer look at the underlying statutes and case law shows these avenues are significantly underutilized. This Article examined the four primary avenues through which children are potentially able to voice their wishes and participate in

494. COLORADO YOUTH FEEDBACK, *supra* note 480, at 41. CJD 04-06 provides for an exception where a child informs the guardian *ad litem* that "s/he does not want the [guardian ad litem] to report his or her position to the court at a specific hearing." CHIEF JUST. DIRECTIVE 04-06 (COLO. SUP. CT. Jan. 9, 2023).

495. COLORADO YOUTH FEEDBACK, *supra* note 480, at 24.

496. *Id.* at 38.

497. *Id.* at 9.

498. *Id.*

499. *Feedback & Input*, CO. OFF. OF THE CHILD'S REPRESENTATIVE, https://coloradochildrep.org/youth/feedback/ (last visited Oct. 27, 2024).

500. *See* TEXAS STUDY OF LEGAL REPRESENTATION, *supra* note 59, at 10.

501. *See id.* at 107.

502. TEXAS TASK FORCE FINAL REPORT, *supra* note 409, at 2.

503. *Id.* at 7.

proceedings: through a representative, through in-court testimony, through in camera testimony, and through admission of out-of-court statements. However, these avenues are still wholly insufficient to protect children's constitutional rights without additional oversight and accountability measures. To address this gap, states should implement several affirmative measures to protect children's rights. First, from a judicial proceedings standpoint, courts should recognize children as parties, provide children with alternative avenues to express their legal interests (preferences), and mandate that courts make a written finding as to each child's preference in every child protective proceeding. Second, states should work to promote uniformity between attorneys who represent parents and children by adopting statewide practice standards establishing minimum standards and best practices. Finally, to promote compliance and assess the efficacy of these practices, states should promulgate surveys to key stakeholders in child protective proceedings on a regular basis requesting both specific and open-ended feedback. Taken together, these measures can best protect children and will assist children in making their voices heard and courts in meeting their objectives of fairness and justice.

APPENDIX A

APPOINTMENT OF REPRESENTATIVES/CHILD STATUS AS A PARTY

State	Does state law mandate that an attorney/counsel be appointed for children in child protective proceedings?	Does a guardian *ad litem* represent the child's best interests or legal interests?[504]	Is the child a party to a child protective proceeding?
Alabama	Yes[505]	Best interests only[506]	Yes[507]
Alaska	No[508]	Best interests only[509]	Yes[510]
Arizona	No[511]	Best interests and legal interests[512]	Yes[513]
Arkansas	Yes[514]	Best interests and legal interests (ascertain/relay only, not advocate for)[515]	No[516]

504. For purposes of this Article, "legal interests" are defined as the expressed preferences of the child.

505. ALA. CODE § 12-15-304(a) (2024) (court shall appoint a guardian *ad litem* for a child in all dependency and termination of parental rights proceedings). ALA. CODE § 26-14-11 (LexisNexis 2024).

506. ALA. CODE § 12-15-102 (2024) (A guardian *ad litem* is appointed "to protect the best interests of an individual without being bound by the expressed wishes of that individual."); ALA. CODE § 12-15-304(a) (2024) (The guardian *ad litem* is responsible for "protect[ing] the best interests of the child.").

507. *See* ALA. CODE § 12-15-304(a) (2024); ALA. R. JUV. P. 13(C) (The child has a right as a party to "written notice of all hearings and hearings on the merits of the petition.").

508. ALASKA STAT. ANN. § 47.10.050(a) (West 2024) ("If it appears to the court that the welfare of a child in the proceeding will be promoted by the appointment of a guardian *ad litem*, the court shall make the appointment."); ALASKA STAT. ANN. § 47.10.010 (West 2024) (The court "may appoint an attorney to represent the legal interests of the child.").

509. ALASKA CHILD IN NEED OF AID R. 12.1 (2023).

510. ALASKA CHILD IN NEED OF AID R. 2(l) (2023).

511. ARIZ. REV. STAT. ANN. § 8-221(G) (2023) ("[T]he court may appoint a guardian *ad litem* to protect the juvenile's best interests.").

512. ARIZ. R. JUV. P. 306 ("The child's GAL must assist the court in determining what is in the child's best interests and is not bound by the child's expressed preferences."); Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 86-13 (1986) ("[T]he attorney should follow the wishes of the child as much as possible. If the guardian *ad litem* believes that what the child wants is not in the child's best interests, then the matter should be taken up with the court.").

513. ARIZ. R. JUV. P. 302(b) ("'Party' means a child . . . ."); ARIZ. R. JUV. P. 310 ("A child . . . has the right to attend court hearings and to speak to the judge.").

514. ARK. CODE ANN. § 9-27-316(f)(1) (West 2024) ("The court shall appoint an attorney *ad litem* . . . to represent the . . . juvenile[.]").

515. ARK. CODE ANN. § 9-27-316(f)(5)(A)–(B) (West 2024) ("An attorney *ad litem* shall represent the best interests of the juvenile. (B) If the juvenile's wishes differ from the attorney's determination of the juvenile's best interest, the attorney *ad litem* shall communicate the juvenile's wishes to the court in addition to presenting his or her determination of the juvenile's best interest."); ARK. CODE ANN. § 9-27-355 (West 2024) (a court may consider the child's preferences if the child is of sufficient age and capacity, regardless of "chronological age").

516. ARK. CODE ANN. § 9-27-325(c) (West 2024) (providing the child has a right to be present at the hearing unless good cause is shown, but not conferring party status).

California	No[517]	Best interests and legal interests (ascertain/relay only, not advocate for)[518]	Yes[519]
Colorado	Yes[520]	Best interests under 12 (state child's preference) and legal interests 12 or older[521]	No[522]
Connecticut	Yes[523]	Best interests and legal interests[524]	Yes[525]
Delaware	Yes[526]	Best interests and legal interests (ascertain/relay only, not advocate for)[527]	Yes[528]
District of Columbia	Yes[529]	Best interests and legal interests	Yes[531]

517. CAL. WELF. & INST. CODE § 317(c)(1) (West 2024) (The court shall appoint counsel unless it determines the child "would not benefit from the appointment of counsel.").

518. CAL. WELF. & INST. CODE § 317(e)(1)–(2) (West 2024) ("Counsel shall be charged in general with the representation of the child's interests . . . If the child is four years of age or older, counsel shall interview the child to determine the child's wishes and assess the child's well-being, and shall advise the court of the child's wishes.").

519. CAL. WELF. & INST. CODE § 317.5 (West 2024).

520. COLO. REV. STAT. ANN. § 19-3-203(1) (West 2024) ("[T]he court shall appoint a guardian ad litem."); COLO. REV. STAT. ANN. § 19-1-105 (West 2024) ("If the court finds that it is in the best interest and welfare of the child, the court may appoint both counsel and a guardian *ad litem*.").

521. COLO. REV. STAT. ANN. § 19-3-203 (West 2024); CHIEF JUST. DIRECTIVE 04-06 (COLO. SUP. CT. Jan. 9, 2023) (The guardian *ad litem* is required to "[s]tate the child's position, when ascertainable.").

522. COLO. REV. STAT. ANN. § 19-3-502(4.5) (West 2024) ("The child's guardian *ad litem* or counsel for youth shall provide developmentally appropriate notice to the child of all hearings related to the child's case.").

523. CONN. GEN. STAT. ANN. § 46b-129a(2)(A) (West 2024) ("A child shall be represented by counsel . . . .").

524. CONN. GEN. STAT. ANN. § 46b-129a(2)(C) (West 2024) ("[I]f the child is incapable of expressing the child's wishes to the child's counsel because of age or other incapacity, the counsel for the child shall advocate for the best interests of the child").

525. CONN. GEN. STAT. ANN. § 46b-129a (West 2024) (child is entitled to notice); CONN. PRAC. BOOK § 30a-1 (CONN. JUD. BRANCH 2023) (child has rights of confrontation and cross-examination).

526. DEL. CODE ANN. tit. 13, § 2504(f) (West 2024) ("[T]he court shall appoint an attorney . . . to represent the child. When appointing an attorney, the Court may also appoint a Court Appointed Special Advocate volunteer to work in conjunction with the attorney.").

527. DEL. CODE ANN. tit. 29, § 9007A(c) (West 2024) ("The scope of the representation of the child is the child's best interests."); DEL. CODE ANN. tit. 29, § 9007A(c)(15) (West 2024) ("The attorney should "[a]scertain the wishes of the child" and if they determine there is a conflict between the child's wishes and the attorney's position of the best interest of the child, then the attorney should present this conflict to the court for its decision.).

528. DEL. CODE ANN. tit. 29, § 9007A(b)(3) (West 2024).

529. D.C. CODE ANN. § 16-2304(a) (West 2024); D.C. Super. Ct. R. 42(a) ("An attorney shall be appointed to serve as guardian *ad litem* for a child . . . .").

531. D.C. CODE ANN. § 16-2356 (West 2024).

		(ascertain/relay only, not advocate for)[530]	
Florida	No[532]	Best interests only[533]	Yes[534]
Georgia	Yes[535]	Best interests and legal interests, unless conflict exists[536]	Yes[537]
Hawaii	No[538]	Best interests only[539]	Yes[540]
Idaho	Yes, if 12 or older[541]	Best interests and legal interests (ascertain/relay only, not advocate for)[542]	No[543]
Illinois	No[544]	Best interests and legal interests (ascertain/relay only, not advocate for)[545]	Yes[546]

530. D.C. CODE ANN. § 16-2304 (West 2024) ("The guardian *ad litem* shall in general be charged with the representation of the child's best interest."); CHILD ABUSE AND NEGLECT ATT'Y PRAC. STANDARDS 14 (D.C. SUPER. CT. 2003) ("[I]f the guardian *ad litem*'s assessment of the child's best interests conflicts with the views of the child, the guardian *ad litem* shall notify the court [of the child's views] and [in some circumstances,] an attorney may be appointed [to represent the child's expressed interests.]").

532. FLA. STAT. ANN. § 39.822(1) (West 2024); FLA. R. JUV. P. 8.217 ("The court may appoint an attorney *ad litem* to represent the child . . . ."); FLA. STAT. ANN. § 39.01305 (West 2024) (providing mandatory appointment of counsel under limited circumstances).

533. *See* FLA. STAT. ANN. § 39.4085 (West 2024) ("an attorney *ad litem* appointed to represent their legal interests").

534. FLA. R. JUV. P. 8.210(a); FLA. R. JUV. P. 8.255(b) ("The child has a right to be present at all hearings.")

535. GA. CODE ANN. § 15-11-103 (West 2024); GA. CODE ANN. § 15-11-262 (West 2024) ("A child . . . shall have the right to an attorney at all stages" of a termination of parental rights proceeding.).

536. GA. CODE ANN. § 15-11-262 (West 2024) (The "guardian *ad litem* may be the same person as the child's attorney unless or until there is a conflict of interest between the attorney's duty to such child as such child's attorney and the attorney's considered opinion of such child's best interests . . . .").

537. GA. CODE ANN. § 15-11-2 (West 2024); *see* GA. CODE ANN. § 15-11-19 (West 2024).

538. HAW. REV. STAT. ANN. § 587A-16 (West 2024) (requiring appointment of a guardian *ad litem* who does not need to be an attorney).

539. *Id.* ("If the child's opinions and requests differ from those being advocated by the guardian *ad litem*, the court shall evaluate and determine whether it is in the child's best interests to appoint an attorney to serve as the child's legal advocate . . . .").

540. HAW. REV. STAT. ANN. § 587A-4 (West 2024).

541. IDAHO CODE ANN. § 16-1614 (West 2024) ("[F]or a child under the age of twelve (12) years, the court shall appoint a guardian *ad litem* . . . for a child twelve (12) years of age or older, the court [s]hall appoint counsel to represent the child and may, in addition, appoint a guardian *ad litem* . . . .").

542. IDAHO CODE ANN. § 16-1633 (West 2024) ("[T]he guardian ad litem shall advocate for the best interests of the child . . . .").

543. IDAHO CODE ANN. § 16-1634 (West 2024) (giving rights of a party to a guardian *ad litem*, but not a child).

544. 705 ILL. COMP. STAT. 405/1-5(1) (2024) (stating that the Court must appoint a guardian *ad litem* who is not required to be an attorney).

545. *Id.* (the court may appoint counsel to represent the minor's interests if what the guardian *ad litem* determines to be in the child's best interest conflicts with the child's interests).

546. *Id.*

Indiana	No[547]	Best interests only[548]	Yes[549]
Iowa	Yes[550]	Best interests and legal interests[551]	Yes[552]
Kansas	Yes[553]	Best interests and legal interests (ascertain/relay only, not advocate for)[554]	Yes[555]
Kentucky	Yes[556]	Best interests only[557]	Yes[558]
Louisiana	Yes[559]	Legal interests[560]	Yes[561]
Maine	No[562]	Best interests and legal interests (if child expresses wishes)[563]	Yes[564]
Maryland	Yes[565]	Best interests only[566]	Yes[567]
Massachusetts	Yes[568]	Best interest and legal interests[569]	Yes[570]

547. IND. CODE ANN. § 31-32-4-2(b) (West 2024) ("The court may appoint counsel to represent any child . . . .").
548. IND. CODE ANN. § 31-32-3-6 (West 2024).
549. IND. CODE ANN. § 31-34-9-7 (West 2024).
550. IOWA CODE ANN. § 232.89 (West 2024).
551. *Id.* ("The same person may serve both as the child's counsel and as guardian *ad litem*.").
552. *Id.*
553. KAN. STAT. ANN. § 38-2205 (West 2024) ("[T]he court shall appoint an attorney to serve as guardian *ad litem* . . . .").
554. *Id.* ("The guardian *ad litem* shall . . . represent the best interests of the child. When the child's position is not consistent with the determination of the guardian *ad litem* as to the child's best interests, the guardian *ad litem* shall inform the court of the disagreement.").
555. *Id.* § 38-2202 (West 2024).
556. KY. REV. STAT. ANN. § 620.100(1)(a) (West 2024).
557. *Id.* § 625.041(1).
558. *Id.* § 620.100(2).
559. LA. CHILD. CODE ANN. art. 551 (2024) (demonstrating entitlement to counsel).
560. LA. SUP. CT. R. 33, pt. 3, subpt. 2, standard 4 ("Counsel for a child should . . . [d]etermine the client's desires and preferences in a developmentally appropriate and culturally sensitive manner; [and a]dvocate for the desires and expressed preferences of the child . . . .").
561. LA. CHILD. CODE ANN. art. 607(B) (2024).
562. ME. REV. STAT. ANN. tit. 22, § 4005 (West 2024) (guardian ad litem can be either an attorney or CASA).
563. *Id.* (guardian *ad litem* acts in the best interest of the child but shall make the wishes of the child known).
564. *See In re* Nikolas E., 720 A.2d 562, 565 (Me. 1998).
565. MD. CODE ANN., FAM. LAW § 5-307(b)(1) (LexisNexis 2024).
566. MD. GUIDELINES, *supra* note 467, § 1.1, 2.2.
567. MD. CODE ANN., CTS. & JUD. PROC. § 3-801(u)(1)(i) (LexisNexis 2024).
568. MASS. ANN. LAWS ch. 119, § 29 (LexisNexis 2024).
569. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES (MASS. COMM. FOR PUB. COUNS. SERVS. 2006), www.publiccounsel.net/wp-content/uploads/2023/11/Assigned-Counsel-Manual.pdf ("[A]t a minimum, counsel's obligation includes informing the court of the child's expressed preferences.").
570. MASS. SUP. JUD. CT. R. 3:10(1)(c).

Michigan	Yes[571]	Best interests and legal interests[572]	Yes[573]
Minnesota	Yes, if 10 or older[574]	Best interests only[575]	Yes[576]
Mississippi	Yes, in abuse/neglect proceedings[577]	Best interests only[578]	Yes[579]
Missouri	Yes[580]	Best interests only[581]	Yes[582]
Montana	No[583]	Best interests only[584]	Yes[585]
Nebraska	Yes[586]	Best interests and legal interests[587]	Yes[588]
Nevada	Yes[589]	Best interests only[590]	Yes[591]
New Hampshire	No[592]	Best interests and legal interests (ascertain/relay only, not advocate for)[593]	Yes[594]

571. MICH. COMP. LAWS ANN. § 722.630 (West 2024).

572. *Id.* § 712A.17d(1) ("The lawyer-guardian *ad litem*'s powers and duties include . . . To make a determination regarding the child's best interests and advocate for those best interests . . . regardless of whether the lawyer-guardian *ad litem*'s determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian *ad litem*'s determination of the child's best interests, and the lawyer-guardian *ad litem* shall weigh the child's wishes according to the child's competence and maturity.").

573. MICH. CT. R. 3.903(A)(19).

574. MINN. STAT. ANN. § 260C.163 (West 2024).

575. *Id.* (appointment of guardian *ad litem* protects a child's best interests and an attorney represents a child's expressed wishes).

576. MINN. R. JUV. P. 32.01, 34.01 (explaining that child may intervene as a party).

577. MISS. CODE ANN. § 43-21-121 (West 2024).

578. MISS. R. YOUTH CT. PRAC. 13 ("If there is a conflict between the child's preference and the guardian *ad litem*'s recommendation, the court shall retain the guardian *ad litem* to represent the best interest of the child and appoint an attorney to represent the child's preferences.").

579. MISS. CODE ANN. § 43-21-203 (West 2024).

580. MISS. CODE ANN. § 210.160(1) (2024).

581. MO. SUP. CT. R. 129 app. C (Standards with Comments for Guardians *ad Litem* in Juvenile and Family Court Division Matters) (role of guardian *ad litem* is to advocate for best interests, and role of attorney is to represent the child's preferences).

582. MO. SUP. CT. R. 110.04(a)(20).

583. MONT. CODE ANN. § 41-3-425 (West 2023).

584. *See In re* R.M.T., 256 P.3d 935, 943 (Mont. 2011) (Nelson, J., concurring).

585. MONT. CODE ANN. § 41-3-115 (West 2023).

586. NEB. REV. STAT. ANN. § 43-272 (LexisNexis 2024).

587. *Id.*; J.K. v. Switzer, 656 N.W.2d 253, 259–60 (Neb. 2003).

588. NEB. REV. STAT. ANN. § 43-245 (West 2024).

589. *Id.* § 432B.420(2).

590. *Id.*; *Id.* § 432B.500(2).

591. NEV. REV. STAT. ANN. § 432B.420 (West 2023).

592. N.H. REV. STAT. ANN. § 169-C:10(1) (2024) (court may appoint attorney if no other guardian ad litem available).

593. *Id.* § 169-C:10(II)(a) (explaining that the court can appoint an attorney when there is a conflict between best interests and expressed interests, but a guardian *ad litem* shall consult with the child about the child's views of the proposed permanency plan and/or transition plan).

594. *Id.* § 169-C:3(XXI-a).

New Jersey	Yes[595]	Best interests and legal interests[596]	No[597]
New Mexico	Yes, guardian *ad litem* if child under 14, attorney if child over 14.[598]	Best interests only[599]	Yes[600]
New York	Yes[601]	Legal interests prioritized over best interests[602]	No[603]
North Carolina	Yes[604]	Best interests only[605]	Yes[606]
North Dakota	Only under limited circumstances[607]	Best interests only[608]	Yes[609]
Ohio	Yes[610]	Best interests and legal interests unless conflict exists[611]	Yes[612]

595. N.J. STAT. ANN. § 9:6-8.23(a) (West 2024); *id.* § 30:4C-15.4(b).

596. *Id.* § 9:6-8.23(a) (the guardian shall "protect [the minor's] interests" and "help him express his wishes to the court").

597. *Id.* § 30:4C-61.2 (child does have the right to notice and to appear at a permanency hearing, but not as a party).

598. N.M. STAT. ANN. § 32A-4-10(C) (West 2023) (guardian ad litem shall be an attorney).

599. *Id.* § 32A-1-7.1(A); *id.* § 32A-4-10 ("The court shall assure that the child's guardian *ad litem* zealously represents the child's best interest[s] and that the child's attorney zealously represents the child.").

600. N.M. CHILD.'S CT. R. 10-121(B).

601. N.Y. FAM. CT. ACT § 249(a) (McKinney 2024).

602. N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2024) ("If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.").

603. N.Y. C.L.S. Fam. Ct. Act. § 1016 (providing notices and reports shall be provided to the attorney for the child, not the child themselves).

604. N.C. GEN. STAT. § 7B-601(a) (2024).

605. GUARDIAN AD LITEM ADVOCACY: THE PROGRAM, ROLES, AND RESPONSIBILITIES § 8.6 (N.C. ADMIN. OFF. OF THE CTS. 2007) (the attorney advocate represents the "best interests of the child" not the child's wishes).

606. N.C. GEN. STAT. § 7B-601(a) (2024).

607. N.D. CENT. CODE § 27-20.1-09(1) (West 2023) (requiring the court to make findings supporting appointment of counsel).

608. WRAPAROUND CASE MGMT. MANUAL § 641-40-10 (N.D. DEP'T OF HUMAN SERVS. 2006) (distinguishing between a guardian *ad litem* representing the child's wishes and an attorney representing the child's wishes).

609. N.D. R. JUV. P. 3(b).

610. OHIO REV. CODE ANN. § 2151.352 (West 2023).

611. OHIO SUP. R. 48.03(A)(1) (stating that a guardian *ad litem* has the responsibility to provide the court recommendations of the best interest of the child); OHIO JUV. R. 4(C) ("If a person is serving as Guardian *ad litem* for a child or ward, and the court finds a conflict exists between the role of the Guardian *ad litem* and the interest or wishes of the child of the ward, the court shall appoint counsel for the child or ward.").

612. OHIO JUV. R. 2(BB).

Oklahoma	Yes, in deprived child proceedings[613]	Best interests and legal interests[614]	Yes, in deprived child proceedings[615]
Oregon	Yes, if requested[616]	Legal interests unless the child lacks capacity[617]	Yes[618]
Pennsylvania	Yes, in certain enumerated circumstances[619]	Best interests and legal interests unless a conflict exists[620]	No[621]
Rhode Island	Yes, in abuse/neglect cases[622]	Best interests only[623]	Yes[624]
South Carolina	Yes, in abuse/neglect proceedings[625]	Best interests and if appropriate, legal interests[626]	Yes[627]
South Dakota	Yes, in abuse/neglect proceedings[628]	Best interests only[629]	Yes[630]

613. OKLA. STAT. ANN. tit. 10a, § 1-4-306 (West 2024).

614. *Id.* § 1-4-306(A)(2)(c) (A child's "attorney shall represent the child and any expressed interests of the child."); *id.* § 1-4-306(B)(3) ("The guardian *ad litem* shall be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child.").

615. *Id.* § 1-4-306(A)(2)(c) ("A child is a party to all deprived proceedings and is therefore able to participate as fully as the parents and the district attorney in all aspects of the proceedings including, but not limited to, voir dire, cross-examination, the subpoena of witnesses, and opening and closing statements.").

616. OR. REV. STAT. ANN. § 419B.195(1) (West 2024) (stating that the court shall appoint counsel to represent the child or ward whenever requested to do so).

617. SPECIFIC STANDARDS FOR REPRESENTATION IN JUV. DEPENDENCY CASES 1(A) (OR. STATE BAR 2017) (stating that for a child client with full decision-making capacity, the child-client's lawyer must maintain a normal lawyer-client relationship with the child client, including taking direction from the child client on matters normally within the child client's control).

618. OR. REV. STAT. ANN. § 419B.875(1)(a)(A) (West 2024).

619. PA. R. JUV. P. 1151.

620. PA. R. JUV. P. 1154 ("If there is not a conflict of interest, the guardian *ad litem* represents the legal interests and best interests of the child at every stage of the proceedings."); PA. R. JUV. P. 1151(C) ("If a child has legal counsel and a guardian *ad litem*, counsel shall represent the legal interests of the child and the guardian *ad litem* shall represent the best interests of the child.").

621. Frank v. Frank, 833 A.2d 194, 197 (Pa. Super. Ct. 2003) ("It is apparent that while a child may not be a named party in a custody suit, he or she certainly has an interest in the outcome of a custody proceeding.").

622. 40 R.I. GEN. LAWS ANN. § 40-11-14(a) (West 2024) (stating that a young adult eligible for extended foster care and who has executed a voluntary agreement for extension of care may request the appointment of a guardian *ad litem* or court appointed counsel, which may be granted at the discretion of the court).

623. R.I. FAM. CT. ADMIN. ORD. 79-13(2) (stating that the attorney–guardian is to ensure that the best interests of the child are served where appropriate).

624. 40 R.I. GEN. LAWS ANN. § 40-11-12.2 (2024) (requiring permanency plan to outline the goals of the child).

625. S.C. CODE ANN. § 63-7-1620(1) (2024).

626. *Id.* § 63-11-510 (stating that a guardian *ad litem* is responsible for representing the best interests of the child and, when appropriate, preparing a written report outlining the wishes of the child).

627. *Id.* § 63-7-20(18) ("'Party in interest' includes the child . . . .").

628. S.D. CODIFIED LAWS § 26-8A-18 (2024).

629. *Id.* § 26-8A-18.

630. *Id.* § 26-7A-30 (requiring the court to advise the child of constitutional and statutory rights, including the right to be represented by an attorney).

Tennessee	Yes, unless uncontested[631]	Best interests and legal interests[632]	No[633]
Texas	Yes[634]	Best interests only[635]	No[636]
Utah	Yes, in abuse/neglect/dependency proceedings[637]	Best interests and legal interests [638]	Yes[639]
Vermont	Yes[640]	Best interests only [641]	Yes[642]
Virginia	Yes, in abuse/neglect proceedings[643]	Best interests and legal interests[644]	No[645]
Washington	No[646]	Best interests and legal interests [647]	No[648]
West Virginia	Yes[649]	Best interests and legal interests[650]	Yes[651]

631. TENN. CODE ANN. § 37-1-126(a)(1) (West 2024).

632. TENN. SUP. CT. R. 40(c)(1) (the guardian *ad litem* advocates for the child's best interests and ensures the child's concerns and preferences are effectively advocated).

633. TENN. R. JUV. P. R. 103, 106 (2024) (requiring delivery of notice and pleadings to a child who is age 14 or older, but not under 14).

634. TEX. FAM. CODE ANN. § 107.012 (West 2023).

635. *Id.* § 107.004 (distinguishing attorney *ad litem* role as considering child's preferences unlike guardian *ad litem*).

636. *Id.* § 107.003 (stating that children may participate "to the same extent as an attorney for a party").

637. UTAH CODE ANN. § 80-3-104(3)(a) (West 2024).

638. *Id.* § 78A-2-803(8) ("An attorney guardian *ad litem* shall represent the best interest of a minor. . . . If the minor's wishes differ from the attorney's determination of the minor's best interest, the attorney guardian *ad litem* shall communicate the minor's wishes to the court in addition to presenting the attorney's determination of the minor's best interest.").

639. UTAH CODE ANN. § 78A-6-317 (West 2024) (providing that a child subject to a juvenile court hearing is entitled to notice of and to be present at each hearing and proceeding held under this part).

640. VT. STAT. ANN. tit. 33, § 5112(a) (West 2023).

641. VT. FAM. PROC. R. 7 (stating that a guardian *ad litem* has the duty to represent the best interest of the child and may also state the child's position in pretrial proceedings).

642. VT. STAT. ANN. tit. 33, § 5102(22)(A) (West 2023).

643. VA. CODE ANN. § 16.1-266(A) (West 2024).

644. VA. SUP. CT. R. 8:6 ("The guardian *ad litem* must advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian *ad litem* as to what is in the child's interest and welfare.").

645. *See* VA. CODE ANN. § 16.1-282.1(c) (affording children right to be heard in permanency hearings); VA. CODE ANN. § 16.1-252 (providing that children over the age of 12 have the right to notice of specified hearings); VA. CODE ANN. § 16.1-266 (describing the right for children to be represented by an attorney guardian *ad litem*); STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILD. (VA. SUP. CT. amended 2018) (demonstrating that children have the right to participate on appeal).

646. WASH. REV. CODE ANN. § 13.34.100 (West 2024) ("The court shall appoint a guardian *ad litem* . . . unless a court for good cause finds the appointment unnecessary.").

647. *Id.* § 13.34.105 (stating that a guardian *ad litem* shall "report to the court any views or positions expressed by the child on issues pending before the court").

648. *See* WASH. REV. CODE § 13.34.070 (West 2024) (providing that children have a right to service of summons "if the child is twelve or more years of age").

649. W. VA. CODE ANN. § 49-4-601(f) (West 2024).

650. W. VA. CHILD ABUSE & NEGLECT R. P. app. A.

651. *Id.* at 3(m).

Wisconsin	Yes, guardian *ad litem* if child is under 12[652]	Best interests, but shall consider child's wishes[653]	No[654]
Wyoming	Yes[655]	Best interests and legal interests[656]	Yes[657]

652. WIS. STAT. ANN. § 48.23(1m)(b) (West 2023).

653. *Id.* § 48.235 (stating that a guardian *ad litem* shall consider, but not be bound by, the child's wishes).

654. *Id.* § 48.299(3) (explaining that children are entitled to attend hearings unless the court finds it is not in the child's best interests).

655. WYO. STAT. ANN. § 14-3-211 (West 2024).

656. OFF. OF THE STATE PUB. DEF., WYOMING RULES & REGULATIONS: GAL PROGRAM ch. 2, § 2 (describing that if guardian *ad litem* determines the child's wishes differs from the child's preference, then the guardian *ad litem* shall present the disagreement to the court).

657. *Id.* § 14-3-402(a)(xiv).