

## NOTE

### A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings

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#### INTRODUCTION

Shalita O'Neale spent nineteen years in the foster care system. She bounced from kinship to foster care to group homes, suffering terrible emotional and physical abuse, first at the hands of her grandmother and then her uncle. Initially, she lived with her abusive grandmother. At age five, she gained the attention of Child Protective Services ("CPS"), which determined that it was no longer in her best interest to live there. Bright and articulate, young Shalita knew she did not want to live with her uncle. And yet, CPS determined that it was in her best interest to do so. No one consulted Shalita. There was no attorney to advocate for her in court, and no one to argue before the judge that Shalita had an opinion about her future. As a result, at age five, Shalita moved in with her uncle and suffered eight years of physical, emotional, and sexual abuse under his "care." She was transferred to another abusive caretaker before eventually being placed in foster care. At sixteen, she moved to a group home. It was not until she turned seventeen, after more than a decade in the sys-

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tem, that she finally received an attorney who would listen to and encourage her.

But what would have happened if young Shalita, that bright, articulate five-year-old, had had an attorney who listened all those years ago? An attorney whose duty it was—as is required of all lawyers—to act in his client’s interest? Shalita could have avoided years of emotional, physical, and sexual abuse. That is what would have happened had Shalita had client-directed legal counsel at age five. Instead, she was a lonely little girl, living under the abuse of an uncle empowered by the very system claiming to protect her.

Shalita’s story is real.<sup>1</sup> Since becoming an adult, Shalita has blossomed and is now an advocate for foster children, fighting to get them access to the attorney that, as a five-year-old, Shalita wished she had.<sup>2</sup> Unfortunately, Shalita’s story is not unique. This story repeats itself over and over in different manifestations across the country. The rights of children in dependency proceedings—proceedings where protective services have already determined that there is enough risk of abuse and neglect to bring proceedings against the parents, and to potentially terminate their rights to be parents—are vastly different from state to state, and sometimes even county to county. While the alleged abusers have a guaranteed right to counsel of their choosing in these proceedings, and protective services has its own attorneys present, the children can have representation ranging from a full-fledged attorney to an uneducated volunteer, depending on nothing more than their location in the country.

This Note argues that Congress should amend the Child Abuse Prevention and Treatment Act (“CAPTA”)<sup>3</sup> to require that all children in dependency proceedings receive competent *legal* representation and that this representative be required to articulate the child’s expressed wishes. The Note proposes new language to amend CAPTA and explores some of the benefits and drawbacks of using alternative solutions.

Part I provides background on the current state of the law affecting children in dependency proceedings in all fifty states. Part II then discusses the rights children are afforded through the Fourteenth

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<sup>1</sup> See E-mail from Shalita O’Neale to author (Aug. 6, 2010) (on file with author).

<sup>2</sup> See Foster Care Alumni of America, FCAA Maryland Chapter Officers, [http://www.fostercarealumni.org/FCAA\\_chapters/MDChapter/MD\\_Chapter\\_Officers.htm](http://www.fostercarealumni.org/FCAA_chapters/MDChapter/MD_Chapter_Officers.htm) (last visited Mar. 4, 2010).

<sup>3</sup> Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended in scattered sections of 42 U.S.C.).

Amendment's Due Process Clause. This Part also compares the status of children in dependency proceedings to those in analogous situations, such as custody battles and juvenile delinquency cases, and explores the constitutional rights granted in each of those situations.

In Part III, this Note discusses alternative avenues for action and why Congress should act, as opposed to waiting for the Supreme Court to take up the issue or for individual states to act. In Part IV, this Note proposes new language to be adopted by Congress in amending CAPTA. This amendment would ensure that children are provided an opportunity to be heard in dependency proceedings, the outcomes of which could have potentially life-threatening consequences. Part V highlights the concrete outcomes that would result from the implementation of the proposed amendment. Part VI addresses counterarguments and other concerns, such as cost and lack of qualified attorneys.

Finally, the Note concludes by applying the proposed language to the situation described in this Introduction. It shows that Shalita would likely have had a better outcome under the proposed legislation because (1) she would have felt more connected to the proceedings and (2) she likely would not have been placed with her abusive uncle.

## I. CHILDREN'S RIGHTS: A BRIEF OVERVIEW OF THE LAW

The movement to protect the rights of children is relatively new in this nation's history. This Part provides a brief overview of the history of children's rights generally and their rights in dependency proceedings in particular. It focuses on the debate over which interests—the child's interest in having her voice heard or the so-called “best interests” of the child—are to be determinative in these proceedings and the current state of the law. It concludes with a discussion of current proposals to amend federal legislation.

### A. *Best Interests vs. Client-Directed Counsel*

Dating back to the 1980s,<sup>4</sup> and continuing through the 1990s,<sup>5</sup> academics focused scholarly debate on the rights of children and, specifically, the role that attorneys had in representing them. The debate centered on whether minors should be represented in terms of what

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<sup>4</sup> See, e.g., Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

<sup>5</sup> See, e.g., Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

the *attorney* believed to be in the child's best interest or whether attorneys had a fiduciary duty to advocate zealously for their *client's* wishes.<sup>6</sup> This debate over best interests versus client-directed counsel continues today.<sup>7</sup>

Although a particular side may be compelling to many, there are complicated questions that arise with each approach. Who determines the best interests of a given child? By what standard and what authority does an attorney assume this power? How can the various interests of a child be weighed in order to determine the overall best course of action for that child? For example, consider the case of a child who is an art prodigy. This child may have a higher interest in living with a relative who can provide schooling near an art magnet school, but the relative does not have room for the child's sibling. How does one best weigh these interests? There are infinite variations on this theme, but the underlying concern remains constant: not all interests will be prioritized in the same way by attorneys and clients. In fact, what constitutes the best interests of a child has and continues to evolve over time.<sup>8</sup>

On the other hand, many would argue that children are in a particularly vulnerable position and can be easily swayed by well-meaning adults or by misinformation from peers and others with whom the child has contact.<sup>9</sup> Before the state even recognizes such a person as able to fully care for herself, how can we as a society pressure these children to make life-altering decisions at such a tender age and under such adverse circumstances? Would the child's participation in such proceedings lead to greater trauma for the child? Moreover, particularly with younger children, many may not have the capacity to make such decisions.<sup>10</sup> By what standards would or should the attorney determine such capacity?

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<sup>6</sup> See, e.g., Guggenheim, *supra* note 4 (discussing whether attorneys should play a role in cases where children are very young and, if so, whether that role should entail that of client-directed counsel).

<sup>7</sup> See KATHLEEN K. REARDON & CHRISTOPHER T. NOBLET, *CHILDHOOD DENIED: ENDING THE NIGHTMARE OF CHILD ABUSE AND NEGLECT* 118–20 (2009).

<sup>8</sup> See *id.* at 106.

<sup>9</sup> Cf. Buss, *supra* note 5, at 915, 932–33 (indicating that children in these proceedings are “highly vulnerable to suggestion” and that their perceptions can sometimes be inadvertently distorted by the attorney); Eric S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 223, 249 (2008) (discussing the possibility that the child's voice will be “unwittingly distorted”).

<sup>10</sup> See Guggenheim, *supra* note 4, at 78–79. See generally Buss, *supra* note 5, at 915–19 (discussing how children do not have fully formed viewpoints that may be accessed by adults simply by asking questions).

In brief, the advocates for client-directed counsel argue that every child in a judicial proceeding should be represented by an attorney advocating for the child's wishes.<sup>11</sup> Some of those in this camp would prefer language in CAPTA that allows for exceptions where the child is deemed incompetent.<sup>12</sup> Others, relying on the Model Rules of Professional Conduct Rule 1.14<sup>13</sup> and its comments,<sup>14</sup> do not see a need for that exception.<sup>15</sup> This language instructs lawyers that, when working with an individual with diminished capacity, such as a minor, the lawyer is to maintain a normal client-directed relationship with that individual.<sup>16</sup> The Model Rules provide that, if necessary to protect a client with diminished capacities, the attorney may seek appointment of a guardian ad litem ("GAL") or consult with others for the protection of the client's interests.<sup>17</sup> Most notably, the comments to Rule 1.14 state clearly that diminished capacity does not necessarily mean that a client cannot formulate and articulate her own opinions as to her situation.<sup>18</sup> It states, "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."<sup>19</sup> The comments

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<sup>11</sup> See, e.g., LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 607–09, 617–20 (2009).

<sup>12</sup> Cf. NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 14–15 (2001) (discussing the ABA/NACC model, which advocates for a limited best interests exception in the case of attorneys representing very young children).

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2007) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, *the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship* with the client." (emphasis added)).

<sup>14</sup> *Id.* R. 1.14 cmt. 1 ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.").

<sup>15</sup> NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 12, at 14–15 (discussing the "traditional attorney" model, where attorneys in dependency proceedings advocate for their clients in the traditional way, with the state's ethics rules providing guidance on the counseling function of the attorney).

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2007).

<sup>17</sup> *Id.* R. 1.14(b)–(c) ("(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) . . . When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.").

<sup>18</sup> *Id.* R. 1.14 cmt. 1.

<sup>19</sup> *Id.*

go on to say that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”<sup>20</sup> Thus, according to the Model Rules, when a child is capable of formulating an opinion, her attorney should advocate zealously for the child’s wishes. Should the attorney determine that there is a perceived conflict between the client’s wishes and her best interests, either a second attorney should be appointed, or the attorney should maintain the position of zealous advocate and a second individual, such as a GAL, should be appointed to articulate the conflicting position. Several states have adopted language similar to that of Rule 1.14(a), requiring attorneys in dependency proceedings to advocate for the expressed interests of the child.<sup>21</sup>

An alternative to pursuing a client-directed model is to require that all children have a representative arguing for their best interests. This is what CAPTA requires in its current form. Some advocates argue that CAPTA should be amended to require that this representative be an attorney.<sup>22</sup> Still others believe that an attorney is often unnecessary and should be replaced by professionals sensitive to the children’s needs, such as social workers and psychologists.<sup>23</sup> Others counter that, although these individuals may benefit children in certain ways, only attorneys can make motions, seek discovery, and use other procedural legal methods to protect the interests of the child in dependency proceedings.<sup>24</sup>

This Note takes a moderate, hybrid approach that requires an attorney for all children in dependency proceedings, with the additional requirement that the attorney *articulate* the child’s wishes. This middle ground allows the states to determine whether to require that the attorney advocate for the best interests or wishes of the child should a conflict arise between the expressed interests of the child and the child’s “best interests,” and to determine whether secondary counsel needs to be appointed to represent the other position, or whether it

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<sup>20</sup> *Id.*

<sup>21</sup> See generally FIRST STAR & THE CHILDREN’S ADVOCACY INST., A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (2d ed. 2009) (discussing how some states require counsel to advocate for a child’s wishes, while other states do not).

<sup>22</sup> See, e.g., Taylor, *supra* note 11, at 607, 623 (discussing the lack of a national mandate for the realization of CAPTA goals).

<sup>23</sup> See, e.g., Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 739–43 (2006) (discussing alternatives to the use of attorneys and the justice system, including family conferences and mediation).

<sup>24</sup> See REARDON & NOBLET, *supra* note 7, at 121–22.

should be at the discretion of the judge. The benefit of this proposal is that it would establish a threshold requirement that the child's opinion be heard by the Court, thereby ensuring at least some level of participation on the part of the child and providing an opportunity for the child's wishes to at least be expressed prior to any decision affecting her care.

In light of the debate over whether a child should have an attorney and, if so, whether the child's attorney should advocate for the child's wishes—or what he, the attorney, believes to be in the best interest of the child—the following Section discusses the current state of the law and how this affects the rights of children to be afforded legal representation.

#### *B. CAPTA and the Current State of the Law*

As the law now stands, not every child is entitled to an attorney, and states vary as to whether any attorney must articulate or advocate for the child's wishes.<sup>25</sup> There is one major piece of federal law at issue in this debate and countless state statutes confounding the rights of these vulnerable children.<sup>26</sup>

CAPTA, initially enacted in 1974,<sup>27</sup> is the federal law setting forth minimum standards that states must employ in child abuse and neglect proceedings in order to receive federal grants.<sup>28</sup> CAPTA requires that states provide children in dependency proceedings with a GAL,<sup>29</sup> but does not require that this individual be legally trained,<sup>30</sup> nor does it require that the children have the rights of a party during the proceedings.<sup>31</sup> Under the current version of the Act, the language indicates

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<sup>25</sup> See *FIRST STAR & THE CHILDREN'S ADVOCACY INST.*, *supra* note 21, at 8.

<sup>26</sup> See *generally id.* (discussing CAPTA).

<sup>27</sup> See Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended in scattered sections of 42 U.S.C.).

<sup>28</sup> 42 U.S.C. § 5106a (2006).

<sup>29</sup> A GAL is charged with representing the best interests of individuals with diminished capacity. In the case of dependency proceedings, the GAL is the representative charged with stating what, in her belief, is in the best interests of the child. See *id.* § 5106a(b)(2)(A)(xiii).

<sup>30</sup> See *id.* (requiring “an assurance . . . that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes . . . provisions and procedures *requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child . . .*” (emphasis added)).

<sup>31</sup> See *id.*; *FIRST STAR & THE CHILDREN'S ADVOCACY INST.*, *supra* note 21, at 10.

that the representative *may* be an attorney, but many states have not opted to require this.<sup>32</sup> CAPTA makes clear that it is the role of this representative to understand the situation and make recommendations to the court, but the statute does not provide guidance on what to do when an attorney is serving in this role and the child has asked that she advocate for something other than what the attorney considers to be in the child's best interest.<sup>33</sup> In practice, this means that, from state to state, children receive vastly different levels of protection.<sup>34</sup> While the majority of states do provide counsel for children in abuse and neglect proceedings, nineteen states do not.<sup>35</sup> This Note argues that the representative *must* be an attorney and that part of the attorney's role is to articulate the child's wishes.

## II. CHILDREN'S CONSTITUTIONAL RIGHTS

Children have a right, protected by the Fourteenth Amendment, to life and liberty.<sup>36</sup> This Note argues that these interests are implicated whenever the justice system intervenes in decisionmaking about custody and parental rights. Many in the field have argued that lack of counsel violates children's right to due process under the Fourteenth Amendment.<sup>37</sup> This Part explores how the constitutional rights of children are implicated in dependency proceedings, juvenile delinquency cases, and custody proceedings. Each type of proceeding is addressed in turn.

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<sup>32</sup> See FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21, at 16–23 (finding that only thirty-one states, plus the District of Columbia, require independent legal representation for all children in dependency proceedings).

<sup>33</sup> See 42 U.S.C. § 5106a.

<sup>34</sup> See *generally* FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21 (reviewing and comparing laws in all fifty states and the District of Columbia regarding the provision of attorneys to children in dependency cases).

<sup>35</sup> The thirty-two states mandating legal representation for all children in dependency proceedings are: Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. See *id.* at 22–23.

<sup>36</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>37</sup> See, e.g., Eric Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 683 (2006) (“[T]he risk of erroneous decisions in dependency cases is so high that due process requires providing counsel for *children*.”).



### A. *Dependency Proceedings*

All citizens are entitled to due process under the Fourteenth Amendment.<sup>38</sup> The Supreme Court has found that the Due Process Clause guarantees a penumbra of rights not specifically articulated in the Constitution, but necessary to make liberty meaningful.<sup>39</sup> As citizens, children are also entitled to rights under the Constitution, although whether they have a constitutional right to counsel in dependency proceedings is an issue yet undecided by the Supreme Court.<sup>40</sup>

Other courts, such as the United States District Court for the Northern District of Georgia, in *Kenny A. ex rel. Winn v. Perdue*,<sup>41</sup> have begun to tackle the issue of client-directed representation for children in dependency proceedings.<sup>42</sup> In *Kenny A.*, a class action suit brought on behalf of the children of Georgia, the plaintiffs sought prospective relief for children in deprivation and termination of parental rights (“TPR”) proceedings, claiming that they were entitled to counsel during these hearings.<sup>43</sup> The court considered “whether plaintiff foster children have liberty or property interests at stake in deprivation and TPR proceedings, and, if so, what process is due when those interests are threatened.”<sup>44</sup> The court found that liberty interests are at stake in dependency proceedings.<sup>45</sup> Additionally, the court found that children have a due process right and that this right was violated in this case.<sup>46</sup> The court concluded that, given this fundamental liberty interest, all children in the state of Georgia are entitled to counsel in TPR and deprivation proceedings.<sup>47</sup>

The court looked to both the U.S. and Georgia constitutions, as well as Georgia statutes, and found:

[A] child’s liberty interests continue to be at stake even after the child is placed in state custody. At that point, a “special relationship” is created that gives rise to rights to reasonably

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<sup>38</sup> See U.S. CONST. amend. XIV, § 1.

<sup>39</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965).

<sup>40</sup> See MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT § 4.06(1) (2010) (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981)).

<sup>41</sup> *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

<sup>42</sup> See *infra* notes 69–70.

<sup>43</sup> *Kenny A.*, 356 F. Supp. 2d at 1355.

<sup>44</sup> *Id.* at 1360.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1360–62.

<sup>47</sup> *Id.* at 1358–62 (noting that both the Due Process Clause and article I, section 1, paragraph 1 of the Georgia Constitution guaranteed “a right to counsel for children in deprivation cases and TPR proceedings”).

safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm. Thus, a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of hearings and review proceedings that occur as part of a deprivation case once a child comes into state custody.<sup>48</sup>

Other courts have yet to rule on this specific issue.<sup>49</sup> As *Kenny A.* demonstrates, however, children's constitutional rights are implicated both during and after dependency proceedings.

### B. *Delinquency Proceedings*

The Northern District of Georgia looked to state law, as well as the U.S. Constitution, in determining that a liberty interest is at stake in dependency proceedings. Some have argued that children have a right to counsel in dependency proceedings by analogizing the liberty interest at stake in dependency proceedings to those recognized in delinquency proceedings, wherein the child *does* have a right to counsel.<sup>50</sup> Children in delinquency proceedings do have a constitutional right to due process, according to the Supreme Court, and are entitled to legal representation.<sup>51</sup> Delinquency proceedings differ from dependency proceedings because in delinquency proceedings, the child is accused of a criminal act, whereas in dependency proceedings, the caretaker's abilities to adequately care for the child are called into question.<sup>52</sup> The two types of proceedings, however, are closely linked in that children may be simultaneously before the courts for both dependency and delinquency proceedings.<sup>53</sup>

For the purposes of this Note, the analogy to delinquency is important insofar as it relates to the responsibility incurred by the state when a child is within its custody. Some argue that whenever the state gains custody over a child, regardless of the reason, the state forms a "special relationship" that triggers liberty interests.<sup>54</sup> For example, in delinquency proceedings, a child may be detained, thereby coming

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<sup>48</sup> *Id.* at 1360.

<sup>49</sup> As of publication, no federal cases addressing this issue were pending.

<sup>50</sup> See Taylor, *supra* note 11, at 612–13.

<sup>51</sup> *In re Gault*, 387 U.S. 1, 34–42 (1967).

<sup>52</sup> See Taylor, *supra* note 11, at 613.

<sup>53</sup> See Ann Reyes Robbins, *Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children*, 41 U. MICH. J.L. REFORM 243, 245–46 (2007) (noting the "growing scientific evidence of the connection between delinquent behavior and maltreatment"). There are many issues that arise for lawyers representing child clients in these dual capacities, but the issues pertaining to such conflicts are beyond the scope of this Note.

<sup>54</sup> See Taylor, *supra* note 11, at 608.

temporarily under the custody of the state. In dependency proceedings, as in juvenile delinquency proceedings, children are arguably temporarily within the custody of the state and should be entitled to *at least* the same protection and legal representation as alleged delinquents.<sup>55</sup>

There is caselaw, however, that indicates that an analogy between dependency and delinquency proceedings would not persuade the Court. For example, in *DeShaney v. Winnebago County Department of Social Services*,<sup>56</sup> a case involving a child, Joshua, whose father was abusing him,<sup>57</sup> the Supreme Court held that the Fourteenth Amendment did not protect private citizens from the actions of private actors.<sup>58</sup> In *DeShaney*, protective services became aware of the abuse and temporarily removed Joshua from his father's custody.<sup>59</sup> Joshua was later returned to his home, where his father beat him so badly that he was rendered severely retarded.<sup>60</sup> Although the dissent argued that, once the state offered protection, a constitutionally grounded duty was imposed,<sup>61</sup> the majority held that any duty imposed was negated once the child was returned to his home because no harm occurred greater than that which would have happened had the state not intervened.<sup>62</sup> The fact that the Court chose not to hold the state responsible for returning a child to a previous caretaker under extremely unsafe conditions indicates that the Supreme Court would likely be unwilling to stretch the Fourteenth Amendment to protect abused children who have temporarily been cared for by protective services.

On the other hand, *DeShaney* can be distinguished from situations where children are the subject of dependency proceedings because those children remain under the temporary protection of the state. The *DeShaney* case also produced dicta indicating that special obligations may be imposed through means such as tort law, even when no constitutional right is found.<sup>63</sup> Nevertheless, this case is an

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<sup>55</sup> See *id.* at 612–13.

<sup>56</sup> *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>57</sup> *Id.* at 191–92.

<sup>58</sup> *Id.* at 195.

<sup>59</sup> *Id.* at 192.

<sup>60</sup> *Id.* at 192–93.

<sup>61</sup> See *id.* at 207–08 (Brennan, J., dissenting).

<sup>62</sup> *Id.* at 201 (majority opinion) (“[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter.”).

<sup>63</sup> See *id.* at 202 (“A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not ‘all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.’”).

example of the Court's reluctance to articulate the full extent of children's constitutional rights. This is discussed further in Part III.

### C. Custody Proceedings

The issues raised in dependency proceedings are analogous to those in custody proceedings. Family law professor Linda Elrod has observed that the current trend in family law "has been to give children a greater role in custody determinations."<sup>64</sup> It seems strange that judges take into consideration the expressed wishes of children in custody battles (which determine parental rights in one form), but would not be similarly required to consider those wishes in a different form of parental rights determination, the TPR proceeding. The trend in custody court battles is for the judge to ascertain the child's preferences at an in camera interview.<sup>65</sup> Under this Note's proposal, this would be one option that states could adopt to satisfy the requirement of ensuring that the attorney articulates—even if they are not required to advocate for—the child's wishes.

## III. ALTERNATIVE AVENUES ARE INADEQUATE

In this exploration of children's rights, one obvious question is: why a federal statute? Although there are several reasonable avenues, many of which are being pursued by various advocacy groups,<sup>66</sup> amending CAPTA is the best alternative. This Part explores why the courts, state law, legal institutions, and international law are all poor alternatives to the creation of federal legislation granting children legal representation in dependency proceedings.

### A. The Supreme Court

Recently, cases across the country, including a class action suit in Oklahoma,<sup>67</sup> the aforementioned District Court decision in Georgia,<sup>68</sup>

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<sup>64</sup> LINDA HENRY ELROD, FAMILY LAW AND PRACTICE § 32.06(5)(e) (2010).

<sup>65</sup> *Id.* § 32.06(5)(e)(ii).

<sup>66</sup> See generally NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 12 (summarizing various models for the legal representation of children).

<sup>67</sup> Ginnie Graham, *Judge Grants Class-Action Status to DHS Lawsuit*, TULSA WORLD, May 6, 2009, at A1 (citing a federal judge's ruling that approved a class action designation in a lawsuit alleging mistreatment of children in state custody).

<sup>68</sup> See *Kenny A. ex rel. Winn v. Perdue*, No. 02-CV1686-MHS (N.D. Ga. May 19, 2009) (order requiring not only that all plaintiff class member children in dependency proceedings be provided with counsel, but that counsel be client-directed and advocate for the expressed wishes of the child); FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21, at 8 (indicating that thirty-three percent of states enacted new legislation in the area of children's rights in dependency proceedings since 2007).

and a case before the Supreme Court of North Carolina,<sup>69</sup> have dealt with the issue of a child's right to counsel in dependency proceedings and, increasingly, demonstrate a recognition of the need to address the specific rights of these vulnerable children. While both the courts and the states are moving towards recognizing these rights,<sup>70</sup> we cannot wait for the ruling of the Supreme Court.

As mentioned briefly above, the Supreme Court has been hesitant to articulate the scope of children's rights to legal counsel in dependency proceedings.<sup>71</sup> An important case demonstrating this is *Lassiter v. Department of Social Services*.<sup>72</sup> *Lassiter* involved an indigent mother who was accused of neglecting her child.<sup>73</sup> She argued that, because she was indigent, she should have been appointed an attorney during the TPR proceedings against her.<sup>74</sup> The Court held, however, that due process did not entitle her to such an appointment.<sup>75</sup> If a due process right to counsel does not exist for the parents in these proceedings, it seems unlikely that the Court would apply the same reasoning and then find that the *child* victim in such cases is entitled to counsel.<sup>76</sup>

Yet, a central tenet of the holding in *Lassiter* is premised on the idea that the mother was not entitled to an attorney *because her physical liberty was not threatened*.<sup>77</sup> Unlike the parents involved in dependency proceedings, the child is facing a threat of deprivation of physical liberty. Dependency proceedings can result in the child's return to her home, or she may find herself in an institution, group or foster home, or the home of a distant relative. It is possible that the Court would consider such a result as a threat to the child's physical liberty; however, it would still require a stretch to apply this reasoning to the children in these cases, because although their liberty is threatened, children are often not considered full parties to the proceedings.<sup>78</sup>

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<sup>69</sup> See *In re J.G.*, 652 S.E.2d 266, 275 (N.C. App. 2007) (narrowing a ruling on states' rights to determine the use of Social Security funds belonging to children in foster care).

<sup>70</sup> See, e.g., *Kenny A.*, No. 02-CV1686-MHS.

<sup>71</sup> See *supra* Part II.

<sup>72</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Id.* at 24.

<sup>75</sup> *Id.* at 24–33.

<sup>76</sup> See DALE ET AL., *supra* note 40, § 1.

<sup>77</sup> See *Lassiter*, 452 U.S. at 25 (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all other elements in the due process decision must be measured.”).

<sup>78</sup> The determination as to whether a child is a party to a dependency proceeding varies

In *In re Gault*, the Supreme Court held that children in juvenile delinquency proceedings have a constitutional right to counsel under the Due Process Clause of the Fourteenth Amendment.<sup>79</sup> As discussed previously,<sup>80</sup> delinquency proceedings are different from dependency proceedings. The results, however—institutionalization or removal from the home—can be very much the same. It is possible that the Court would recognize this parallel, as many, though not nearly enough, states have. The language from *Lassiter*, however, indicates that this may not be the case.<sup>81</sup>

In *Lassiter*, the Court stated that the Due Process Clause of the Constitution requires only minimum standards to ensure basic fairness in judicial proceedings.<sup>82</sup> The Court went on to explain that “wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.”<sup>83</sup> Thus, even while refusing to find a constitutional right to counsel for the litigants in a dependency proceeding, the Court indicated that a state’s creation of such a standard might be the right thing to do. Unfortunately, it is unlikely that the courts would find a constitutional right to counsel for children in states where the child is not considered a full party to the proceeding.

The Court in *Lassiter* concluded that a determination of the extent of an individual’s constitutional right to counsel should be made on a case-by-case basis.<sup>84</sup> In making the determination, one must apply the three-part test delineated in *Mathews v. Eldridge*.<sup>85</sup> The three factors to consider in determining the “specific dictates of due process” in a given scenario are: “[f]irst, 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 . . . .”<sup>86</sup>

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from state to state. For a thorough review of this topic, see generally FIRST STAR & THE CHILDREN’S ADVOCACY INST., *supra* note 21.

<sup>79</sup> See *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>80</sup> See *supra* Part II.

<sup>81</sup> See *Lassiter*, 452 U.S. at 31–32 (avoiding the expansion of the Fourteenth Amendment to include a right to counsel for indigent parents in dependency proceedings, preferring instead to leave such determinations to trial courts on a case-by-case basis).

<sup>82</sup> See *id.* at 33.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 32.

<sup>85</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>86</sup> *Id.*

The court in *Kenny A.* employed the *Mathews* analysis and held that all children in deprivation and TPR proceedings have a right to counsel.<sup>87</sup> While this remains a positive development in family law, the children in other states' proceedings bear the costs while they wait for their states to apply this test or for the Supreme Court to deem this a constitutional right. With so much uncertainty in the law, Congress should clarify and codify the appropriate standard.

*B. Waiting on the States*

Great strides have been made in many jurisdictions throughout the United States. First Star, a nonprofit organization dedicated to children's rights that publishes a report card grading states on their protection of children's rights in dependency proceedings,<sup>88</sup> noted that thirty-three percent of states adopted new legislation related to the legal representation of children during the period between their initial report in 2007 and the 2009 report.<sup>89</sup> Still, approximately thirty percent of states earned grades of D or F.<sup>90</sup> While legislative progress is commendable and should be encouraged, the inescapable truth is that the states are slow to act without incentives, and the current state of the law leaves many children with very little protection. These children deserve equal protection under the law regardless of where they happen to be living when their parents abuse them.

While individual pieces of legislation may be easier to move through a state legislature, granting all children a basic right to be heard will take much longer if one is forced to rely on each state to pass its own legislation. The concern that children receive vastly different rights depending on where in the country they happen to be victimized cannot be properly addressed in this fashion. Only through the enactment of a national standard of rights can these children be assured that, at a minimum, their voices will be heard.

Federal legislation also provides clear guidance for attorneys in the field. The proposed legislation provides a clear rule defining the responsibility of the attorney, in every case, to articulate the wishes of the child. Further, as discussed below, as states continue to progress, the proposed minimum guarantees would not impede individual states' efforts to increase and improve upon those rights.

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<sup>87</sup> See *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

<sup>88</sup> See FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21.

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.* at 9.

C. *The American Bar Association and Other Legal Institutions*<sup>91</sup>

First Star, the American Bar Association (“ABA”), and other organizations have proposed amending CAPTA for the current reauthorization<sup>92</sup> to require a client-directed advocate for all children in dependency proceedings.<sup>93</sup> These attempts to empower children have failed due to states’ concerns over costs and opponents’ concerns that this language does not incorporate the best interests of the children.<sup>94</sup> There is evidence, however, indicating that children can be provided with attorneys at minimal cost and that these children have “a significantly higher rate of exit to permanency than children not served by [legal services].”<sup>95</sup> Moreover, children have better outcomes and are more engaged when they feel they are listened to and included in the process.<sup>96</sup>

The ABA has also considered a model act that would govern the representation of children in abuse, neglect, and dependency proceedings;<sup>97</sup> however, the Act has not been approved by the ABA House of Delegates.<sup>98</sup> The ABA has yet to successfully pass the Act despite significant efforts, due in part to opposition related to the Act’s language, which strongly favors client-directed counsel.<sup>99</sup> Even if passed, the Act would not be binding. The Act would serve only as a suggestion to legislators; it would not guarantee that these rights would be provided equally—or at all—to the children involved in these cases.

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<sup>91</sup> For an excellent review of the subject of the representation of children in custody and visitation proceedings and the many efforts by the American Bar Association, the Uniform Law Commission, and the American Academy of Matrimonial Lawyers, see Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective* (New York Univ. Pub. Law & Theory, Working Paper No. 160, 2009), available at [http://lsr.nellco.org/nyu\\_plltwp/160](http://lsr.nellco.org/nyu_plltwp/160).

<sup>92</sup> Congress is currently debating amendments to CAPTA for the current reauthorization. See CAPTA Reauthorization Act of 2010, S. 3817, 111th Cong. (2010).

<sup>93</sup> See FIRST STAR & THE CHILDREN’S ADVOCACY INST., *supra* note 21, at 136; cf. NAT’L ASS’N OF COUNSEL FOR CHILDREN, *supra* note 66 (discussing various models of representation for the legal representation of children).

<sup>94</sup> E-mail from Amy Harfeld, former Executive Dir., First Star, to author (July 30, 2010) (on file with author).

<sup>95</sup> See ANDREW E. ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1 (2008), [http://www.chapinhall.org/sites/default/files/old\\_reports/428.pdf](http://www.chapinhall.org/sites/default/files/old_reports/428.pdf); see also Taylor, *supra* note 11, at 616 (discussing the possible offsetting of cost resulting from higher rates of permanency).

<sup>96</sup> See Buss, *supra* note 5, at 916.

<sup>97</sup> See ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (Proposed Official Draft 2009), available at [http://www.abanet.org/litigation/standards/docs/child\\_modelact.pdf](http://www.abanet.org/litigation/standards/docs/child_modelact.pdf).

<sup>98</sup> See FIRST STAR & THE CHILDREN’S ADVOCACY INST., *supra* note 21, at 136–37.

<sup>99</sup> Harfeld, *supra* note 94.



Thus, the activities of the ABA and other legal organizations, while commendable, do not do enough to quickly bring about the change that is required.

*D. The Role of International Law*

Because international law and international norms continue to gain credence in national jurisprudence,<sup>100</sup> it is important that this Note address the notion that international norms could be relied upon to establish the rights of children in the United States. Although great strides have been made, in particular with the work of the United Nations in drafting the Convention on the Rights of the Child ("CRC"),<sup>101</sup> the United States continues to remain outside the norms of the international community,<sup>102</sup> and is not likely to use international law to force a restructuring of domestic law in dependency proceedings at any point in the near future.<sup>103</sup>

The CRC provides for every child to be heard in dependency proceedings; specifically, Article 12 provides: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."<sup>104</sup> Yet it appears the drafters found that this was not clear enough to fully protect a child's right to be heard; thus, the second provision of Article 12 states that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."<sup>105</sup>

A similar international agreement, the African Charter on the Rights and Welfare of the Child, adopted by the Organisation of Afri-

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<sup>100</sup> Justice Kennedy is an excellent example of a member of the judiciary who uses international law in domestic jurisprudence. See JEFFREY TOOBIN, *THE NINE* 197–99 (2007).

<sup>101</sup> See Pitchal, *supra* note 9, at 258–59.

<sup>102</sup> 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, 967 (2006) (noting that, out of the 194 countries that have signed the Convention on the Rights of the Child, the United States is one of only two non-ratifying signatories to the Convention).

<sup>103</sup> *Id.* at 967 n.1 (noting that "[i]t might be many years before the United States ratifies the CRC; ratification of human rights treaties has typically been a long and difficult process in the United States").

<sup>104</sup> Convention on the Rights of the Child art. 12, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www2.ohchr.org/english/law/crc.htm>.

<sup>105</sup> *Id.*

can Unity, goes a step further, removing the option of allowing an “appropriate body” to present the views of the child.<sup>106</sup> One could argue that the near universal acceptance of the CRC, and the international trend towards ensuring greater respect for the rights of children, could indicate an international norm recognizing a child’s right to be heard in judicial proceedings. Similarly, a majority of countries with legislation complying with Article 12 do in fact opt to provide for children to be heard directly.<sup>107</sup>

In the twenty years since the CRC was first completed, the United States has failed to ratify it.<sup>108</sup> Given that the CRC will likely not be ratified anytime in the near future, it should not be relied upon as a way to incorporate children’s rights in dependency proceedings through the backdoor. According to Professor Jean Koh Peters, only thirty-nine of the fifty-six representation systems in place in the United States comply fully with Article 12’s requirement that the “child’s views be expressed freely.”<sup>109</sup> One of the additional benefits of this Note’s proposed language is that it would bring the United States in compliance with Article 12 for children in dependency proceedings.

#### IV. PROPOSED LANGUAGE

Having eliminated other alternative avenues as either too slow or inequitable, this Note proposes that the best solution—giving a voice to all children in dependency proceedings, regardless of their location in the country—lies in amending the language of CAPTA. A few simple changes to CAPTA can accomplish this goal.

The cost of inaction is too high not to act. In addition to the incalculable emotional cost, child abuse and neglect amount to economic costs in the United States of \$103.8 billion per year.<sup>110</sup> This Note pro-

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<sup>106</sup> See Peters, *supra* note 102, at 974–75.

<sup>107</sup> *Id.* at 968 (citing YALE LAW SCH., REPRESENTING CHILDREN WORLDWIDE: HOW CHILDREN’S VOICES ARE HEARD IN CHILD PROTECTIVE PROCEEDINGS (2005), <http://www.law.yale.edu/rcw/>). Moreover, Professor Peters claims that the “international community has nearly unanimously and repeatedly committed itself to assure the child the ability to express her views freely” during dependency proceedings. See *id.* at 967.

<sup>108</sup> *Id.* at 971. Groups such as the Campaign for U.S. Ratification of the CRC, which held a national symposium last year, have kept the CRC fresh in the political scene; yet the CRC has still not been ratified. See, e.g., THE CAMPAIGN FOR U.S. RATIFICATION OF THE CRC, <http://childrightscampaign.org/crcindex.php> (last visited Sept. 26, 2010).

<sup>109</sup> See Peters, *supra* note 102, at 968.

<sup>110</sup> See CHING-TUNG WANG & JOHN HOLTON, PREVENT CHILD ABUSE AM., TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES 2 (2007), <http://>

poses that Congress amend 42 U.S.C. § 5106a(b)(2)(xiii) to read as follows:

- (xiii) provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who ~~may~~ *must* be an attorney ~~or a court appointed special advocate who has received training appropriate to that role (or both)~~, shall be appointed to represent the child, in such proceedings—
  - (I) to obtain first-hand, a clear understanding of the situation and needs of the child; ~~and~~
  - (II) *to articulate the views of the child; and*
  - (III) to make recommendations to the court concerning the best interests of the child.<sup>111</sup>

This new language would accomplish three things. First, it would require that every child receive an attorney. Thus, abused children would no longer be punished for living in a particular state that does not provide for counsel, as opposed to one that does require legal representation. Second, it would require that every child's wishes be articulated to the judge in any dependency proceeding. Thus, abused children would receive at least the opportunity for a judge to know what their wishes are, and the judge would be able to make more informed decisions based on all of the facts. The language also provides an additional check on the attorney's power to determine what she believes to be in the best interest of the child. And third, it would allow states to choose whether to allow the attorney to serve a dual role or to appoint two attorneys for the child in cases of conflict. This proposal would protect state sovereignty while still setting an acceptable minimum standard that protects children. As states experiment with dual representation, best practices would arise and states could adopt those practices that work best for their citizens.

#### A. *States' Abilities to Experiment Will Not Be Threatened*

One reason for the patchwork of rights currently available to children is that this area of the law is currently within the purview of the states. The ability of the states to experiment is an essential component of federalism. This proposal, however, does not purport to take

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[www.preventchildabuse.org/about\\_us/media\\_releases/pcaa\\_pew\\_economic\\_impact\\_study\\_final.pdf](http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf).

<sup>111</sup> Additions in italics, deletions in strikethrough.

this ability from the states. This proposal sets up a minimum standard for respecting the rights of children in dependency proceedings. States have the option of refusing CAPTA funding if they do not wish to comply.<sup>112</sup> They remain entitled to disregard CAPTA altogether, or to provide greater rights to the citizens of their states and freely experiment with different legislation to provide unique methods for meeting the needs of those citizens.

The following examples, using imaginary states and child-victim Sam, illustrate some of the variations possible under this proposal. In Sunnyland, the state legislature wants to afford every child a zealous client-directed advocate. Sunnyland statutes, therefore, require that every child's wishes be advocated for by her attorney. In the case of a conflict, a second attorney would be appointed to advocate for the child's perceived best interests, and the judge, upon hearing all of the facts, would be the ultimate arbiter. Sunnyland is in compliance with the proposed CAPTA amendments.

In New Farmshire, due to a longstanding belief in the best interests model, the state legislature does not want to appoint additional counsel in the case of conflict between the child and her attorney. Thus, Sam receives one attorney who advocates zealously for her. This attorney, however, is required to ask Sam how she feels and whether she wants her attorney to advocate for termination of parental rights. Sam does not want that, but the attorney thinks it would be in her best interests. The attorney must tell the judge of this conflict. The judge would decide whether to follow Sam's wishes or whether her attorney is right. Either way, Sam knows her opinions have been considered and that she is not voiceless in this process. New Farmshire is in compliance with the proposed statute.

Flexas has adopted the same methodology as New Farmshire. In this case, Sam's mother was unable to care for Sam due to an abusive relationship. After protective services removed Sam from her home, Sam was involuntarily committed to an institution for the mentally ill.

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<sup>112</sup> Congress's authority to enact CAPTA and to create the proposed legislation is derived from its spending power. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . ."). Thus, CAPTA entices states into compliance by offering funding for state protective services with the caveat that the grants be used to achieve specific goals outlined in the statute. See 42 U.S.C. § 5106a(b)(2) (2006) (requiring that states certify assurances that all grant funding is used to achieve the stated purposes of the statute as delineated by specific procedural requirements). These goals include reporting and recording procedures, the provision of a GAL, and even provisions requiring a presumption in favor of termination of parental rights under certain circumstances. *Id.*

Sam's attorney must consult with Sam to the extent that Sam is able to form an opinion. Sam states a desire to return to her mother's care and complains of the environment at the institution. In addition to articulating Sam's wishes, the attorney also has the power to make motions on Sam's behalf to remove her to another institution, to appeal an initial decision based on new facts (for example, the fact that Sam's mother has completed parenting classes), and to conduct research and use experts to determine the best place for Sam. Flexas is also in compliance with the proposed language.

*B. When Cases Involve Multiple Siblings*

A question arises related to siblings' involvements in dependency proceedings and whether a single attorney can represent multiple children. The proposed amendment would not address this issue specifically for two reasons. First, it should remain up to the state or local judge to determine what works best in consideration of the number of attorneys in that state, the caseloads of those attorneys, and the similarity of the needs, wishes, and competencies of the children involved. Second, even if an attorney were to represent multiple siblings, the proposed requirement is met so long as the attorney articulates the expressed wishes of *each* child he represents.

*C. Age of Competence*

Minors are often considered to have diminished capacity to make legal decisions.<sup>113</sup> At a certain age, some children are neither mature enough nor do they possess enough self-awareness to formulate opinions. Yet, there will always be those, like Shalita, who are articulate at a tender age and whose insight is crucial to determining what is in their best interests. This raises the age-old question of favoring a bright-line rule versus a flexible standard.<sup>114</sup>

Many struggle with the issue of finding a reasonable standard for determining capacity.<sup>115</sup> Some would select a particular age, while others look to more individualized indicators.<sup>116</sup> Some estimate the age of competence to be between six and nine.<sup>117</sup> Others believe ca-

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<sup>113</sup> See *supra* text accompanying note 10.

<sup>114</sup> The issue of competency of minors has been examined thoroughly in several papers and will be discussed only in limited detail here. For an excellent treatment of this issue, see Buss, *supra* note 5, at 918–19.

<sup>115</sup> See, e.g., Guggenheim, *supra* note 4, at 77–78 (discussing the factors affecting whether a child should have legal representation).

<sup>116</sup> *Id.*

<sup>117</sup> See *id.* at 93 (discussing children under age seven).

capacity is achieved during the teenage years.<sup>118</sup> This Note argues that a workable standard can be crafted and that attorneys have the ability—indeed the duty—to determine whether their clients (regardless of age) are competent. Moreover, nearly every state adopts the relevant Model Rule of Professional Conduct,<sup>119</sup> which provides guidance to attorneys on this issue.<sup>120</sup> The comments to the Model Rules state that a child as young as five can be competent to articulate her wishes in some situations, but the Model Rules do not specify a cutoff age.<sup>121</sup> One of the difficulties that arises when a number is selected is the concern that children mature at different rates, and that some have mental disabilities that would alter the age at which they are likely to be competent.<sup>122</sup> Attorneys have the ability to determine competency, just as they do for their adult clients. Regardless, the proposed language is constructed to allow the attorney to merely articulate the client's wishes, which the judge may disregard if the judge believes they are not the best option for the child.

This issue of competency becomes more relevant where the client is determined to be too incompetent to consider the issues at hand or even be consulted on her wishes. An obvious example is that of infants. In such cases, under the proposed language, just as in any case under the Model Rules, the attorney would be instructed to act in what she determines to be the best interests of the child.

## V. HOW WILL IT IMPROVE OUTCOMES FOR CHILDREN?

Amending CAPTA is pointless unless there is a direct benefit to the children involved. The proposed legislation would benefit children in dependency proceedings in substantial ways: it would speed up the process; increase participation, and thereby connect the child with the results of the case; and provide an opportunity for judges to have a more complete picture of the facts of a particular case. Two important positive outcomes result from attorney interaction with children during dependency proceedings: higher rates of permanency and psychological benefits of feeling more invested in the result of the proceeding.

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<sup>118</sup> See, e.g., WASH. REV. CODE ANN. § 13.34.100(6) (“If the child requests legal counsel and is age twelve or older, or if the *guardian ad litem* or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child’s position.”).

<sup>119</sup> See *supra* note 13 and accompanying text.

<sup>120</sup> See FIRST STAR & THE CHILDREN’S ADVOCACY INST., *supra* note 21, at 25–133.

<sup>121</sup> See *supra* note 20 and accompanying text.

<sup>122</sup> See Buss, *supra* note 5, at 918.

### A. *Higher Rates of Permanency*

As stated previously, one of the fundamental goals of dependency law is to resolve these cases as expeditiously as possible.<sup>123</sup> One study in Florida has shown that children with legal representation have higher rates of permanency than those who are not guaranteed representation.<sup>124</sup> The study found that children with representation obtained permanency at rates up to 1.59 times higher than children without legal representation.<sup>125</sup> This means that children with representation were adopted, reunified with their families, or placed in long-term custody faster than those children languishing in the system without representation.<sup>126</sup> From California to Florida, courts recognize that expeditious resolution of dependency cases is fundamental.<sup>127</sup>

### B. *Psychological Benefits*

A second important benefit for children is that they tend to be more invested in the outcome if they feel that they have been listened to.<sup>128</sup> Citing Pew Commission reports, supplemented by personal anecdotes, Professor Erik Pitchal argues that children need to participate meaningfully in their court proceedings and that this participation benefits children, even when the child's wishes do not sway the judge.<sup>129</sup> The literature indicates "children are likely to be more committed to and satisfied with judicial outcomes if they believe the court heard and seriously considered their views."<sup>130</sup> By ensuring that every child has the opportunity to articulate her views, the proposed amendment would, at a minimum, increase the likelihood that a child feels she was heard and considered by the court. This helps to validate the

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<sup>123</sup> See *In re Melvin A.*, 82 Cal. Rptr. 2d 844, 847–48 (Ct. App. 2000).

<sup>124</sup> See ZINN & SLOWRIVER, *supra* note 95, at 1.

<sup>125</sup> *Id.* at 14.

<sup>126</sup> *Id.* at 14–15.

<sup>127</sup> See, e.g., *In re Melvin A.*, 82 Cal. Rptr. 2d at 847 ("This action by the court was inconsistent with the fundamental policy of dependency law which seeks to resolve cases expeditiously."); *In re Amendments to the Fla. Rules of Judicial Admin.*, 24 So. 3d 47, 52 (Fla. 2009) ("[T]his Court's adoption of these amendments are [sic] based on the recognition that for every day of delay on appeal, which is added to the length of the prior ongoing court proceedings, the future of the child is in limbo to his or her potential detriment.").

<sup>128</sup> See Buss, *supra* note 5, at 916.

<sup>129</sup> See Pitchal, *supra* note 9, at 243–47.

<sup>130</sup> Buss, *supra* note 5, at 916.

court's decision in the child's mind.<sup>131</sup> Participation in court proceedings has also been found to help a child's emotional recovery.<sup>132</sup>

There are many tangible and intangible benefits to providing children with legal representation in dependency proceedings. These children are more aware of their situations, are likely to feel an improved sense of self-esteem, and are likely to exit the system more quickly than their unrepresented peers.<sup>133</sup> What remains is to see just how these benefits apply in real-world situations. This application will be illustrated after the most oft-raised counterarguments are addressed.

## VI. COUNTERARGUMENTS

Now that the proposal is clear, several questions may arise as to the practical implications of this legislation. This Part addresses the likely counterarguments to this Note's proposal and offers explanations for why the weaknesses that do exist are reasonable, given the enormous potential benefit to the most vulnerable members of our society. This Part discusses concerns over whether participation is traumatizing for the child and whether the program would be too costly or impractical to implement based on the current workforce. Each argument is addressed separately and in turn.

### A. *Traumatized Children Are Incapable of Making Good Decisions*

The debate about what rights children can and should be afforded in cases of abuse and neglect is an extremely sensitive one. Some argue that children are already deeply traumatized as a result of the situation that brought them to the dependency proceeding in the first place.<sup>134</sup> It is difficult to imagine asking such a child to not only revisit that trauma, but to then ask her to consider it carefully, weigh the facts, and form an opinion about where she will spend potentially the rest of her childhood, with whom, and under what circumstances. While the sensitivity and emotional response that each individual feels on this topic will not go away, there are two important responses to these concerns. First, the fact of trauma cannot, and should not, preclude a victim of abuse or neglect from exercising her right to express her opinions. Silencing a child in this situation amounts, essentially, to revictimization. Second, the legal profession already has in place

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<sup>131</sup> See REARDON & NOBLET, *supra* note 7, at 120.

<sup>132</sup> See Jaclyn Jean Jenkins, Note, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 167–68 (2008).

<sup>133</sup> See ZINN & SLOWRIVER, *supra* note 95; Pitchal, *supra* note 9, at 247–50.

<sup>134</sup> See Jenkins, *supra* note 132, at 171.



many protections to ensure that vulnerable children are not placed at further risk.<sup>135</sup> Language already adopted by states incorporates these concerns without sacrificing the ethics or integrity of the attorney.<sup>136</sup> Further, in divorce proceedings and custody battles, there is arguably some trauma, and yet, parents and children are consulted to learn their desired or preferred outcome.

### B. Cost

During the country's most recent economic downturn, professionals witnessed a spike in cases of child abuse, suggesting a correlation between the two.<sup>137</sup> It bears repeating that child abuse and neglect cost the United States \$103.8 billion per year.<sup>138</sup> Successful experiments in Florida indicate that providing attorneys for children in abuse and neglect cases results in minimal additional expenditures, coupled with savings as a result of better outcomes, including a "significantly higher rate of exit to permanency."<sup>139</sup> The Florida study found that the overall cost of care was actually higher for children who did not have attorneys to represent them.<sup>140</sup> More research needs to be done in order to determine the exact cost of prolonged dependency proceedings to society.<sup>141</sup> In the end, however, cost cannot be allowed to become the weapon used to claw back the rights of children to be represented in dependency proceedings and to have their voices heard.

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<sup>135</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

<sup>136</sup> For example, Alaska's rules on abuse and neglect proceedings provide that children can be excluded from proceedings under limited circumstances, such as when it is determined that "attendance would be detrimental to the child." ALASKA CINA R. P. 3(b) (2010); see also FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21 (discussing various state laws that address concerns about further traumatizing children by involving them in dependency proceedings).

<sup>137</sup> See Lori Giovinco Harte, *Professionals See Increase in Child Abuse Due to Economic Recession*, EXAMINER.COM, Apr. 16, 2009, <http://www.examiner.com/x-903-NY-Education-Examiner-y2009m4d16-Professionals-see-increase-in-child-abuse-due-to-economic-recession>.

<sup>138</sup> See WANG & HOLTON, *supra* note 110, at 2.

<sup>139</sup> ZINN & SLOWRIVER, *supra* note 95, at 1.

<sup>140</sup> *Id.* at 24 ("[T]he overall estimated cost of care (both pre- and post-permanency) was higher for [children without attorneys to represent them] than for [children receiving legal representation as part of the study].").

<sup>141</sup> For example, a white paper out of Connecticut estimated the cost of providing an attorney for children in abuse and neglect proceedings at a mere thirty percent of the costs incurred in the Florida study. See Taylor, *supra* note 11, at 621–22.

### C. *Lack of Training or Qualified Attorneys*

One concern that faces any legislation that creates more work, and therefore more jobs, is the concern that there will not be a sufficient number of properly trained individuals to be able to fill those positions. As discussed below, states are already working to alleviate these concerns, and the existing language of CAPTA already speaks to some of them.

#### 1. *Caseload Standards*

The first concern, that there will not be enough attorneys to meet the demand, centers on the idea that these often low-paying jobs result in a minimal draw for attorneys. This in turn results in very high caseloads for those in this field.

It is true that caseload standards will dictate to some extent the quality of representation afforded each child. For example, in *Kenny A. ex rel. Winn v. Perdue*, the court highlighted the fact that the child-advocate attorneys in the county in question had caseloads far exceeding the recommended maximum of 100, which was “more than sufficient” to create a triable issue as to whether the children were, or were at risk of, receiving ineffective assistance of counsel.<sup>142</sup> Although there is a view that existing caseload levels are unconstitutionally high,<sup>143</sup> some states, like Arkansas, Massachusetts, New York, and Wyoming, already have statutory language in place addressing this issue.<sup>144</sup>

Reducing caseloads, however, requires funding, and lots of it. In addition to requiring that the state hire more attorneys, reducing caseloads could also mean that states must pay the attorneys less. As caseloads are reduced, more attorneys could be enticed away from this work into more lucrative positions. While it is possible that good-hearted attorneys would not forsake their clients for money, in some areas attorneys make so little per case that it would be unreasonable to expect them to live off of the income from such a limited caseload. While this will continue to be an area of ongoing debate for the foreseeable future, decisions regarding the substance of the representation

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<sup>142</sup> *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1362–63 (N.D. Ga. 2005).

<sup>143</sup> See Taylor, *supra* note 11, at 621–22.

<sup>144</sup> See *FIRST STAR & THE CHILDREN’S ADVOCACY INST.*, *supra* note 21. In New York, for example, a statute mandates that “the number of children represented at any given time by an attorney appointed pursuant to section 249 of the Family Court Act shall not exceed 150.” N.Y. COMP. CODES R. & REGS. tit. 22, § 127.5 (2008). In Arkansas, it is required that an attorney “shall not have more than 75 dependency-neglect cases, and a part-time attorney shall not have more than 25 dependency-neglect cases.” Ark. Sup. Ct. Adm. Order No. 15 § 2(n).

afforded children in dependency proceedings cannot depend on outside financial considerations. In setting the standard for the protection of children, one must determine what is right, and then allow the legislatures of the states to determine how best to meet those needs.

## 2. *Education and Training*

In addition to concerns regarding attorney caseloads, many fear that requiring attorneys for children in dependency proceedings will result in attorneys with no training representing these children.<sup>145</sup> In 2003, CAPTA was amended to include a training requirement for GALs.<sup>146</sup> The proposed language does not remove the current wording, which emphasizes the need for representatives to receive training *appropriate to the role*.<sup>147</sup> Currently, at least eleven states do not require any special training for those representing children in dependency proceedings.<sup>148</sup> Although these statistics raise valid concerns, such issues remain outside the scope of this Note. The added requirement that children in dependency proceedings be provided with attorneys would only change the class of individuals to be trained, but would not place an additional burden on states to provide training that they are not already required to provide.

### CONCLUSION: SHALITA'S STORY REVISITED

Currently, the law does not afford our nation's most vulnerable children with the basic protections due every citizen. This Note's moderate approach sets a minimum standard such that every child in a dependency proceeding at least has a voice in the proceedings affecting such crucial determinations as where they will go to school, with whom they will live, and whether they will be separated from their siblings. The approach also ensures that children have a representative who is not only familiar with the legal system, but also able to make motions and objections on their behalves. This would lead to more informed judges conducting more effective and efficient proceedings and would ensure at least a minimal level of participation in the proceedings on the part of the child. This is not a comprehensive

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<sup>145</sup> Cf. Taylor, *supra* note 11, at 620 (discussing the need for comprehensive training in order to ensure that children in dependency proceedings receive effective counsel).

<sup>146</sup> See Peters, *supra* note 102, at 998–99.

<sup>147</sup> See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006).

<sup>148</sup> FIRST STAR & THE CHILDREN'S ADVOCACY INST., *supra* note 21, at 32–127 (the eleven states that do not require training are Hawaii, Indiana, Iowa, Kentucky, Michigan, Minnesota, North Dakota, Pennsylvania, South Carolina, South Dakota, and Vermont).

solution, nor does it purport to be. Much more work is needed to ensure that best practices in one state are adopted by others and that Congress continues to provide funding to assist states in implementing these successful programs. This Note does not attempt to accomplish all of this. It purports simply to offer an interim solution to ensure that the voices of lonely young girls, like Shalita O'Neale, do not go unheard.

Had Shalita been assigned an attorney at age five, that attorney could have appealed the decision to place Shalita in her uncle's care. The attorney would have had several tools with which to accomplish this. In the first instance, the uncle may have been removed from the list of possible placements, based purely on Shalita's testimony. Failing that, her attorney could have asked for more evidence to be presented or a further investigation into Shalita's allegations before a decision was made. At a minimum, hearing Shalita's concerns would have given the judge pause. Even if the judge ruled to place Shalita in her uncle's care, her attorney would have had the power to initiate an appeal—something a GAL or volunteer could not do. Having an advocate listen to her would have given Shalita some confidence in the process and could have encouraged her to come to adults for help when she began facing abuse from her uncle. There is no guarantee that Shalita would have completely avoided the abuses she suffered, but Shalita would have had a voice—a say in her own destiny—and having been empowered to exercise her rights, she may very well have been able to avoid further abuse.

Congress should adopt the language proposed in this Note and amend CAPTA to provide attorneys for all children in dependency proceedings and to guarantee them, at a minimum, the right to be heard. Only after knowing what the child wants can judges determine what is in that child's best interests. Only then can we begin to provide a voice for the voiceless.